

SCHEDULE XIX

OFFICIAL OPINIONS.

(The opinions in this volume have been passed upon and approved by the Department in executive session.—B. F. LOONEY, Attorney General.)

OPINIONS CONSTRUING ANTI-NEPOTISM LAW.**ANTI-NEPOTISM—RELATIONSHIP BY AFFINITY—CONSTRUCTION OF LAWS.**

1. Article 381, Penal Code, 1911, construed.
2. Relationship by affinity includes only the relationship of husband to his wife's blood kindred or the relationship of the wife to the husband's blood kindred.
3. Persons related only by affinity to the husband are not related to the wife and vice versa persons related only by affinity to the wife are not related to the husband.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, FEBRUARY 16, 1914.

Hon. L. J. Truett, County Attorney, McKinney, Texas.

DEAR SIR: Under date of January 9, 1914, in a letter addressed to this Department, you state that G. E. Strother, who was county clerk of Collin county, died in December, 1913, during his term of office; that he left surviving him his wife, Mrs. Pearl Strother, and four children; that Mrs. Pearl Strother was appointed county clerk to fill the vacancy caused by the death of her husband and that she desires to appoint as deputy county clerk T. A. Parris, whose wife was the first cousin by blood of G. E. Strother, and you desire to know whether, in the opinion of this Department, such an appointment would be prohibited by Article 381, Penal Code, 1911.

Article 381 provides as follows:

"Subject to the exceptions set forth in Article 384 it shall hereafter be unlawful for any officer of this State or for any officer of any district, county, city, precinct, school district or other municipal subdivision of this State, or for any officer or member of any State, district, county, city, school district or other municipal board, or judge of any court created by or under authority of any general or special law of this State, to appoint or to vote for or to confirm the appointment to any office, position, clerkship, employment or duty of any person related within the second degree by affinity or within the third degree by consanguinity to the person so appointing, or so voting, or to any other member of any such board or court of which such person so appointing or voting may be a member, when the salary, fees, wages, pay or compensation of such appointee is to be paid for, directly or indirectly, out of or from public funds or fees of office, of any kind or character whatever."

In the event Mr. Parris should be appointed by Mrs. Strother, as the compensation to be paid him must come from the fees of office, there is but one question to determine for the solution of your inquiry, and that is: Is Mr. Parris related to Mrs. Strother, and if so, is the relation within the prohibited degree?

There are but two kinds of relationship known to the law—relationship by "consanguinity" and relationship by "affinity." If Mr. Parris is related in any manner to Mrs. Strother, it must be by affinity. Relationship by affinity properly means the tie which arises from marriage between the husband and the blood relatives of the wife and vice versa,

but there is no affinity between the blood relatives of the husband and the blood relatives of the wife. While Mr. Strother was living he was related to Mrs. Parris by consanguinity, or blood, within the second degree. He was likewise related to Mr. Parris by affinity within the second degree. Mrs. Strother was related only to Mrs. Parris by affinity within the second degree, but she sustained no relationship of any character to Mr. Parris, because her husband, Mr. Strother, was not related to Mr. Parris by consanguinity or blood. There seems to be two lines of decisions on this question of relationship by affinity. One line of authorities hold that persons related to the husband by affinity by reason of marriage to his blood relatives are likewise related to his wife by affinity, and vice versa that persons related to the wife by affinity by reason of marriage to her blood relatives are likewise related to her husband by affinity. One of the leading cases announcing this doctrine is that of *Foot vs. Morgan*, 1 Hill, p. 654.

In *Pollock vs. Wells*, 2 Barb. (C. H. Rep.), 331, it was also held that relationship by affinity may exist between the husband and one who is connected by marriage with a blood relative of the wife, thus where two men marry sisters, they become related to each other in the second degree by affinity, as their wives are related within the second degree by consanguinity.

The same doctrine was announced in the cases of *Foot vs. Wells*, 1 Hill, 654, and *Markham vs. Lee*, 1 Leon Rep., p. 89.

However, the great weight of authority from the text-book writers, as well as from the decisions of the courts of different jurisdictions, is against the idea of extending the relationship by affinity further than that that arises and exists by virtue of the marriage between the husband and wife's kindred by blood and between a wife and her husband's kindred by blood.

In the case of *O'Neal vs. State of Georgia*, 47 Ga., 229, it was held that a juror who married the widow of deceased's uncle was not related to deceased, and it was declared in that case that the consanguineous relations of relatives by affinity are not related at all; thus the sister of a man's wife is not related by affinity to that man's blood relatives. Relationship by affinity does not extend to the nearest relations of husband and wife, so as to create a mutual relation between them.

In *Spear vs. Robinson*, 29 Md., p. 545, it was said:

"Affinity means the relation contracted by marriage between a husband and his wife's kindred and between the wife and her husband's kindred in contradistinction from consanguinity or relation by blood. By the marriage one party thereto holds by affinity the same relation to the kindred of the other that the latter holds by consanguinity."

One of the leading cases on this question which draws the line of demarcation clearly and precisely, is the case of *Alfred Chinn vs. State of Ohio*, 11 L. R. A., 630. In that case the court had under consideration the question as to whether a husband was related by affinity to his wife's brother's wife. The court held that such relationship did not exist and in reaching this conclusion used the following language:

"The term 'affinity,' as used in determining the persons between whom marriage may be lawfully solemnized, has received in law, by its application and use, a definite signification; and we must assume that the Legislature, in enacting this section, used it in the same sense. It expresses the relationship which arises by marriage between one of the parties and the blood relations of the other, but it does not include those only related by affinity to the other. As sometimes stated, the *consanguinei* of the wife are the *affines* of the husband, and vice versa; but the *affines* of the wife are not those of the husband, nor are the *affines* of the husband those of the wife. 2 Steph. Com., 285. It is thus defined by Erskine in his Institutes, 1b, 6t, Sec. 8: 'Affinity is that tie which arises in consequence of marriage between one of the married pair and the blood relatives of the other; and the rule of computing its degrees is that the relations of the husband stand in the same degree of affinity to the wife in which they are related to the husband by consanguinity; which rule holds also *e converso*, in the case of the wife's relations. Thus, where one is brother by blood to the wife, he is brother-in-law, or by affinity, to the husband, but there is no affinity between the husband's brother and the wife's sister, which is called by the doctors *affinitas affinitatis*, because then the connection is formed, not between one of the spouses and the kinsmen of the other, but between the kinsmen of both. See also 1 Bouvier Law Dictionary, Affinity; and the same Brown Law Dictionary; 1 American and Eng. Ency. of Law, 315, and notes; 1 Bl. Com., 435 (Christian Note). In the note just cited it is said: 'Though a man is related to his wife's brother by affinity, he is not so to his wife's brother's wife, whom, if circumstances would admit, it would not be lawful for him to marry.'"

In the case of Farmers Loan & Trust Company vs. Iowa Water Company et al., 80 Fed. Rep., p. 467, it was held that persons who had married sisters were not related in any manner, and in the consideration of that question the court used this language:

"Counsel have termed the relationship between the district judge and the special master as that of brother-in-law, because they married sisters, but this is not correct, since the term 'brother-in-law' is thus defined: 'The brother of one's husband or wife; also one's sister's husband. Cent. Dict.; Webster's Dictionary. The phrase 'related by consanguinity' means related by blood,—the relationship which did not exist in the present case; while the phrase 'related by affinity' is the relationship which is contracted by marriage between the husband and the blood relations of the wife or between the wife and the blood relations of the husband."

The courts of our State follow the rule that relationship by affinity extends only to the relationship arising by marriage between a husband and the blood relatives of his wife and between the wife and the blood relatives of her husband. The husband sustains the same relation by affinity to the blood relatives of his wife as she sustains by consanguinity, and vice versa the wife sustains the same relation by affinity to the blood relatives of her husband as he sustains by consanguinity, but we know of no Texas case which holds that the wife is related to the persons to whom the husband is related only by affinity, or vice versa that the husband is related to the persons to whom the wife is related only by affinity. We do not believe a Texas authority can be found holding that relationship by affinity extends to and includes those related only by affinity to the other spouse.

In the case of Johnson vs. Richardson, 52 Texas, 481, this question is discussed by the court, and the court held in that case that the juror whose sister and niece were the wives of two of defendant's brothers was

not a disqualified juror; and in the case of *Schultze vs. McLeary*, 73 Texas, p. 92, it was held that the plaintiff, whose wife was a sister of the wife of the district judge, was not related to the judge by affinity in any degree.

In the case of *Texas & Pacific Railway Company vs. Elliott*, 54 S. W., 410, the question of the disqualification of a juror by reason of his relationship by affinity to plaintiff was one of the errors complained of on appeal, and the court, in disposing of the question, used this language:

"The only reversible error pointed out is embraced in appellant's seventh assignment, which reads: 'The court erred in refusing to grant the defendant a new trial because the juror Allen was related to the plaintiff within the third degree, for that said Allen married Abe Read's daughter and Abe Read is the father of the wife of said plaintiff.' The affidavit attached to the motion for a new trial showed that the juror Allen was the husband of the niece of the plaintiff's wife. The contention is that he was an incompetent juror by reason of his relationship to plaintiff. This is not believed to be true so far as plaintiff is personally concerned."

Applying the rule announced in the *Chinn* case above, which rule has been adopted and followed by the courts of a number of States, including our own, and which we believe to be in every respect correct, to the case under consideration, we reach the following conclusions:

1. Mr. G. E. Strother during his life time was related by consanguinity to Mrs. Parris.

2. He was related by affinity to Mr. Parris, the husband of Mrs. Parris.

3. Mrs. Strother, the wife of G. E. Strother, was related by affinity to Mrs. Parris, and this relationship between her and Mrs. Parris still continues after the death of Mr. Strother because she has issue by her husband, Mr. Strother, still living. The general rule is that the death of the spouse terminates relationship by affinity only in cases where no issue was left surviving, but such relationship continues after the death of the spouse if there be an issue of the marriage living.

Jaques vs. Commonwealth, 10 Gratton, 690.

Darmond et al vs. Darmond, 10 Ind. Rep., 191.

Miller vs. State, 97 Ga. Rep., 653.

Vannoy vs. Givens, 3 Zab., 210.

Cain vs. Ingham, 7 Cow., 478.

Carmon vs. Newell, 1 Denio's, p. 27.

4. Mrs. Strother has never and does not now sustain any relationship to Mr. Parris—Mr. Parris not having been a blood relative of Mr. Strother.

You are therefore advised that in the opinion of this Department, no law would be violated should Mrs. Strother, the county clerk of Collin county, appoint Mr. Parris as one of her deputies.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

ANTI-NEPOTISM LAW—WHEN WIFE OF TAX ASSESSOR ASSISTS HIM
IN OFFICE.

If tax assessor does not appoint his wife to a position, clerkship, employment or duty, and she does not receive any fee, salary, wages, pay or compensation, directly or indirectly, from public funds or fees of office, but she merely assists him in his office work, it would not be a violation of law.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 24, 1914.

Hon. John T. Banks, County Attorney, Mason, Texas.

DEAR SIR: Under date of January 21, 1914, we have the following inquiry from you:

"The tax assessor of this county has asked me whether or not he will be violating the provisions of the law defining and prohibiting nepotism by having his wife do clerical work for him in the office. He does not appoint her deputy or pay her any salary or other compensation whatever for this work, but will simply have her assist him in doing such work as preparing the tax rolls, and doing such other clerical work as she may assist him in doing. She, of course, would not make assessments, or do in general such work as a deputy would do."

You desire to know whether under this state of facts the tax assessor of your county would be guilty of violating the provisions of the Anti-nepotism Law. Article 381 of the Penal Code (1911) is as follows:

"Subject to the exceptions set forth in Article 384 (which exception refers to notaries public), it shall hereafter be unlawful for any officer of this State or for any officer of any district, county, city, precinct, school district or other municipal subdivision of this State, or for any officer or member of any State, district, county, city, school district, or other municipal board or judge of any court created by, or under authority of, any general or special law of this State, to appoint or to vote for or to confirm the appointment to any office, position, clerkship, employment or duty of any person related within the second degree by affinity or within the third degree by consanguinity to the person so appointing or so voting or to any other member of such board or court, of which such person so appointing or voting may be a member, when the salary, wages, pay or compensation of such appointee is to be paid for directly or indirectly out of or from public funds or fees of office of any kind or character whatever."

You will observe that under the provisions of this statute the officer must appoint, vote for, or confirm the appointment of some person related to him within the second degree by affinity or within the third degree by consanguinity to an office, position, clerkship, employment or duty and that such appointee shall receive fees, salary, wages or compensation, directly or indirectly, from the public funds or fees of office before such officer could be adjudged guilty of a violation of its terms.

From the facts stated in your letter, the tax assessor of your county has not appointed his wife to any position, clerkship, employment or duty, nor is she receiving any fees, salary, wages, pay or compensation, directly or indirectly, from the public funds or fees of office.

Such being the facts, you are respectfully advised that, in the opinion

of this Department, the tax assessor would not violate the law in permitting his wife to render the services, as stated in your letter.

Yours very truly,
C. A. SWEETON,
Assistant Attorney General.

ANTI-NEPOTISM—SCHOOL TRUSTEE.

Violation of Anti-nepotism Law for the board of trustees to elect teacher who is first cousin of the wife of one of the trustees.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JUNE 19, 1913.

Mr. S. E. Reed, School Trustee, Palestine, Texas.

DEAR SIR: We have your favor of June 18th reading as follows:

"In our schools here there has recently been elected as trustee one whose wife has a first cousin as a teacher in the school.

"Will it be legal for him to serve on the board and vote for her election?"

Replying thereto, we beg to say that under the provisions of Article 381, Penal Code, 1911, it would be a violation of the law and subject members of the board of trustees to the penalty prescribed in Article 386 for such trustees to elect a teacher who was related to any one of the members of the board within the second degree by affinity, or within the third degree by consanguinity.

The wife of the trustee in this case is related to the teacher by consanguinity within the second degree, each of them being two degrees removed from the common ancestor which establishes the relationship. Therefore the trustee would be related to the teacher within two degrees by affinity which would bring the case within the inhibition of Article 381 above referred to.

Article 381 not only prohibits the relative from voting for the teacher, but it also prohibits any other member of the board from so voting.

You are therefore advised that it would be a violation of the law in the case submitted by you for the relative who is a member of the board, and also all other members of the board associated with him, to vote for such teacher, the teacher being related to one of the trustees within the inhibited two degrees by affinity.

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

ANTI-NEPOTISM LAW.

It would not be a violation of the Anti-Nepotism Law for a sister of the county judge, who is an insurance agent, to write a policy of insurance for the county.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MAY 7, 1914.

Hon. Carroll E. Florence, County Attorney, Gilmer, Texas.

DEAR SIR: The Department is in receipt of your communication of recent date, in which you propound the question of whether or not it would be a violation of the Anti-nepotism Law, on the part of the county judge, for an agent of an insurance company, who is a sister of the county judge, to renew a policy that was written before the present county judge was installed into office.

Replying to your inquiry, we beg to advise that in our opinion such a transaction could not be held to be a violation of Article 381, known as the Anti-nepotism statute, for the reason that under this phase of the statute there must have been an appointment to some employment or duty that the person so employed should perform on the part of or on behalf of the county, to be paid therefor by funds of the county. An insurance agent, in the ordinary transaction of the insurance business, does not become the agent of the insured, but remains the agent of the company represented by him or her. Of course, there are transactions between the insured and the agent of the company, whereby the agent of the company may become the agent of the insured, but this status arises, for illustration, where the company represented by the agent for some reason declines the risk offered and the agent agrees with the insured to procure insurance from a company not represented by the agent. Under such a state of facts, the insurance agent becomes the agent of the insured and a transaction of this kind, in our opinion, would be prohibited by the Anti-nepotism Law. In a case, however, where the insurance agent writes a policy for the county in a company represented by the agent, then the agent is representing the company and is in no sense the agent of the county or is the agent performing any duty or accepting employment from the county, but is simply representing the company as its agent.

The fact that the policy in question is a renewal, would not, in our opinion, if the original transaction was a violation of the law, cause a different construction, for the reason that a renewal of an insurance policy is a separate and distinct transaction, a new policy being written and a new premium paid; nor would the fact that the law fixes the premium cause the rule to be different. This does not have a bearing upon the Anti-nepotism statute, but relates more particularly to the statute prohibiting county officials from becoming interested in any contract entered into by the county.

You are, therefore, advised that in our opinion it would not be a

violation of law for a sister of the county judge, who is an agent of an insurance company, to write a policy of insurance for the county.

With respect, I am,

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

SHERIFFS—DEPUTIES—ANTI-NEPOTISM.

Sheriff can not appoint special deputy to be paid by individual for service for that individual, and if he could, it would be a violation of the Anti-nepotism Law to appoint his brother to such position. (Revised Statutes, Art. 7125; Penal Code, Art. 381.)

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MAY 26, 1913.

Mr. S. H. Truitt, Sheriff, Center, Texas.

DEAR SIR: We have your favor in which you submit statement and ask the question as follows:

"The Pickering Lumber Co., in the operation of its mill in this county expects to use a salaried deputy sheriff, and will, I understand, want me to furnish them a good man, whose salary will be paid by the company.

"My brother would like to have the position, and I will thank you to give me your construction of Article 1013k and the following articles of the Penal Code defining *nepotism*."

Replying thereto, we beg to say that in our opinion our laws do not contemplate the appointment by sheriffs of a deputy whose sole duty it shall be to guard the property of any particular individual or corporation and whose salary should be paid by such individual or corporation. The contemplation of our law is that all officers shall be public officers and shall serve the public in the capacity in which they were appointed, and shall not owe any special allegiance to any particular person, firm, corporation or industry, but that all officers shall be at all times free to exercise the functions of their office for the protection and for the benefit of all of the people of the county or district for which they are chosen, and that their compensation shall be paid from the public funds, contributed to by all of the people subject to taxation.

Under Article 7125, Revised Statutes, the sheriff is limited in the number of deputies he may appoint, and this limitation goes to the extent that deputies in the justice precinct in which the county seat is located shall not exceed three in number, and should you appoint one deputy for the use of the lumber company, then you could not appoint but two others in that precinct and you would thereby deprive the people of that precinct of the service of one deputy in the event three should be needed. In precincts outside of the one in which the county seat is located only one deputy is allowed, and should you appoint your deputy for the special use of the lumber company, if it is located in

an outside precinct, then you would deprive the people of that precinct of the use of a deputy sheriff in the event one was needed.

You are therefore advised that in the opinion of this Department you would have no authority to appoint a deputy sheriff whose sole duty it was to guard the property of a lumber company and be paid the salary by the lumber company.

As to the appointment of your brother, to such position, we beg to say that we are of the opinion that in the event it could be held under the law that you would have the right to make the appointment of a special deputy sheriff as above discussed, then you would not have the right to appoint your brother to such a position as he is related to you within the inhibited third degree by consanguinity as set out in Article 381 of the Penal Code of this State. The policy of the law of this State is to prevent the public official from putting his kins people within certain degrees into office. It could not be contended that the special deputy above discussed would not be a public officer, and while his salary or compensation would not come directly from the funds of the county, yet at the same time it would deprive the county of an officer to which the people are entitled, and in the contemplation of the law his fees should be paid by the county.

We are therefore of the opinion that you would have no authority under Article 381, Penal Code, to appoint your brother a special deputy under the circumstances set out in your letter, even though you had the authority to appoint such special deputy.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

ANTI-NEPOTISM LAW—OFFICERS.

Unlawful for trustees to employ a teacher related within the second degree by affinity.

Unlawful for board to purchase supplies from corporation in which member of board is stockholder.

Statutes construed: Articles 381 and 376, Penal Code.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JUNE 4, 1913.

Mr. J. E. Hickman, Secretary School Board, Dublin, Texas.

DEAR SIR: This Department has your favor in which you propound the following questions:

"First. The father of an applicant for a position as teacher in our school was an half brother to the mother of the wife of one of the trustees; would it be lawful for the board to elect that applicant to the position?"

"Second. Would it be lawful for the board to employ a brother-in-law of one of the trustees to audit the books of the treasurer of the school?"

"Third. Is it lawful for the board to purchase supplies for the school from a corporation in which a member of the board is a stockholder?"

We will reply thereto in order.

First. We beg to say that the wife of the trustee and the teacher would be related to each other within the second degree by consanguinity and therefore the trustee would be related to the teacher within the second degree by affinity, the wife and the teacher being each two degrees removed from the common ancestor which establishes the degree of relationship between the two. The degree of relationship being established, then Article 391, Penal Code, would prohibit the trustee or any member of the school board from voting for such teacher, and to so do would subject the trustee to the penalties prescribed in Article 386, Penal Code.

Second. The same rule as laid down above would apply in answer to your second question, as the law covers employment as well as appointment to office or position, and a violation of the law in this respect would also subject the trustees so voting for such employment to the penalties prescribed in Article 386, Penal Code.

Third. We beg to advise that in the opinion of this Department, it would be a violation of Article 376, Penal Code, on the part of a member of a school board holding stock in a corporation, for that corporation to sell to the school board supplies for the school. The school trustee is an officer of the county within the meaning of this law. It is true that a corporation has a separate and distinct identity from that of the stockholders therein, but any consideration or emolument or advantage derived by such corporation would inure to the benefit of the stockholders of such corporation, and the sale of supplies by the corporation in which the trustee owns stock would therefore violate that provision of Article 376 as above set out, where it prohibits an officer from being interested in the sale of anything made for, or on account of the county, and from receiving any money or property, or any emolument or advantage whatsoever in consideration of such purchase or sale. The trustee might own a very small percentage of the stock of the corporation, and might have no voice in the management of its affairs, yet on the other hand, it might be that he owned practically all of the stock and might have entire charge of the business and affairs of such corporation, in which latter event it could not reasonably be said that the trustee was not dealing directly with himself in the sale of supplies to the school board. We know of no rule whereby we could measure the interest of the stockholders in the corporation, nor the degrees of management thereof, that would leave him without the law and not subject him to the penalty provided therein, and we think it clear that the correct rule would be that the law intended to prohibit transactions between public officers as such, and themselves as private parties or holders of stock in corporations.

You are therefore advised that in the opinion of this Department it would be a violation of law on the part of school trustees holding stock in a corporation for that corporation to make a sale of supplies to the board of school trustees of which the stockholder was a member.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

COUNTY JUDGE—DISQUALIFICATION.

Relation within third degree by affinity disqualifies county judge in guardianship proceedings.

Constitution of Texas, Art. 5, Sec. 11.
Art. 1736, R. S., 1911.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JUNE 30, 1913.

Hon. A. G. Reid, County Attorney, Woodville, Texas.

DEAR SIR: We have your letter of June 27th, reading as follows:

"My wife's second cousin has filed in my court an application for letters of guardianship of his minor children. Am I disqualified to make the appointment prayed for in said application?"

Replying thereto, beg to say that Section 11, of Article 5, of the Constitution, in part, reads as follows:

"No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, *within such a degree as may be prescribed by law*, or when he shall have been counsel in the case."

Exercising the authority conferred by the above section of the Constitution, the Legislature has enacted Article 1736, Revised Statutes, 1911, reading as follows:

"No judge of the county court shall sit in any case wherein he may be interested or where he shall have been of counsel or where either of the parties may be connected with him by affinity or consanguinity within the third degree."

The question of disqualification of a county judge by reason of relationship in a probate proceeding was under discussion in the case of *Jirow vs. Jirow*, 136 S. W., 493, in which case it was held "* * * that a judge who is related to the purchaser at a guardian's sale is disqualified to pass upon the report of sale, and an order made by such judge confirming the sale of the property is void."

The above case also holds that a judgment rendered by a judge related to a party to the suit within the third degree is void, and cites numerous authorities upon that proposition.

That the word "case," as used in the Constitution and statute under discussion, comprehends a probate proceeding, needs no discussion, since a guardian may only be appointed upon notice and hearing and by a decree of the court is a judicial proceeding in court, or a cause pending therein, the word "cause" being synonymous with "case." We will, however, cite authorities to support the proposition.

Ornsby vs. Webb, 134 U. S., 47.

In Re McGarland's Estate, 26 Pac., 185.

Words and Phrases, Vol. 1, page 985, et seq.

Having determined that you would be disqualified to sit as judge in a proceeding pending upon an application for letters of guardianship filed by a party related to you within the third degree by affinity or con-

sanguinity, the question then arises, is your wife's second cousin, who files the application, related to you within the inhibited third degree?

The common law rule of computing relationship prevails in this State; that is, to arrive at the degree of relation between parties in collateral lines, we count downward from the common ancestor to the party in question who is the more remote, who, in this case, would be the second cousin, she being three degrees distant which would establish the relationship between your wife and the applicant to be that of the third degree by consanguinity. *Page vs. State*, 22 Texas App., 557.

It therefore follows that you would be related to the applicant in the third degree by affinity and consequently disqualified to sit in a probate proceeding wherein the relative aforesaid was applicant for appointment as guardian.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

ANTI-NEPOTISM LAW—SCHOOL TEACHER—CONSTRUCTION OF LAW.

If the uncle of a teacher married the trustee's sister, the law would not inhibit the election of the teacher by the board; but if the trustee married the uncle's sister, then the law would prohibit his election by the board.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MAY 13, 1913.

Hon. H. R. Wilson, County Attorney, Denton, Texas.

DEAR SIR: We have your favor of May the 10th as follows:

"Under the Anti-nepotism Statute, passed by the Thirty-first Legislature (Acts of 1909, page 85), may a nephew be appointed teacher of a school, one of the trustees thereof being a brother-in-law of the nephew's uncle?

"In First Word and Phrases, Title 'Affinity,' at pages 246-247, it is said that there is no affinity between the blood relatives of the husband and the blood relatives of the wife. In the matter above, I do not know whether the uncle married the trustee's sister, or whether the trustee married the uncle's sister."

Replying thereto, we beg to say that there is no affinity between the blood relation of the husband and the blood relation of the wife, neither is there affinity between those related by affinity to the wife and those related by affinity to the husband.

Authorities cited by you: also, *Schultz vs. McLeary*, 73 Texas, 92; *T. & P. Ry. Co. vs. Elliott*, 22 T. C. A., 31, 54 S. W., 410.

Under the facts stated by you, the teacher, if related at all to the trustee, is related to him in the second degree by affinity. The teacher (or nephew) being removed two degrees from the common ancestors and being the more remote of the two would establish the degree. You state that you do not know whether the uncle married the trustee's sister or whether the trustee married the uncle's sister, and, upon this point,

would depend the relationship existing between the trustee and the teacher. If the uncle married the trustee's sister, then the uncle would be related to the trustee in the first degree by affinity, and, while the wife of the uncle would be related to the nephew (or teacher) in the second degree by affinity, still, her brothers and sisters would not be so related, and her brother, who is the trustee, would not be related by affinity to the teacher. In other words, the affinity is between the wife and the relation of the husband and not between her relation and his. On the other hand, if the trustee married the uncle's sister, then the trustee's wife is the aunt of the nephew and related to him in the second degree, and consequently, the trustee is the uncle of the teacher by marriage, and, therefore, related to him by affinity in the second degree.

Article 381 of the Penal Code prohibits not only the trustee who is related within the second degree by affinity from voting for a person so related but also prohibits the other members of the board from voting for such person.

You are, therefore, advised that, in the opinion of this Department, if the uncle of the teacher married the trustee's sister, the law would not inhibit the election of the teacher by the board of trustees, but if the trustee married the uncle's sister, or aunt of the teacher, then the law would prohibit his election by the board.

Trusting that the above is clear, I am,

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

ANTI-NEPOTISM LAW—SCHOOL TRUSTEE—SCHOOL TEACHER.

It is a violation of the law for a sister-in-law of a school trustee to hold a position as teacher.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, APRIL 30, 1913.

Mr. C. R. Langston, Treasurer Board of Trustees, Garrison, Texas.

DEAR SIR: You submit the following question: Can the sister-in-law of a member of the board of trustees of an independent school district hold a position on the staff of teachers while such trustee is in office, or will it be necessary for such trustee to resign in order for her to hold such position as teacher?

Replying thereto, beg to say that it would be a violation of the Anti-nepotism Law for a member of the board of trustees to vote for the appointment of his sister-in-law as a teacher, and it would be a violation of the law for any other member of the board of trustees to vote for a lady as teacher who was the sister-in-law of another member of the board of trustees. This plainly appears from Article 381 of the Revised Penal Code, which prohibits, among other things, a member of a school dis-

trict board from appointing, voting or confirming the appointment to any position or employment of any person related within the second degree by affinity or in the third degree by consanguinity.

The sister-in-law of one member of the board being related to him by affinity within the second degree, the law would prohibit the relative and other members of the board from voting for such applicant, and it would be necessary for such trustee to resign before the election of teachers in order that her election might be valid.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

ANTI-TRUST OPINIONS.**CORPORATIONS—COMBINATIONS AND TRUSTS—INTERLOCKING DIRECTORATES.**

There is no statute in this State prohibiting interlocking directorates. However, the anti-trust statute defining monopoly prohibits the combination or consolidation of two or more corporations when the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing or where such common management or control tends to create a trust as defined in the statute dealing with this subject.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 19, 1914.

Hon. F. C. Weinert, Secretary of State, Capitol.

DEAR SIR: A few days since you referred to this Department charters of the Brushy Gin Company, Camp Creek Gin Company, Peoples Gin Company, and the Woods Gin Company, which had been tendered to you for filing, with a request that this Department advise you whether these gin companies, if their charters should be filed, could lawfully pursue their business. Your inquiry was made for the reason that the tendered charters show that all of the above named gin plants are owned by the same stockholders and will be managed by the same board of directors. In other words, the four gin plants, if their charters be filed, will have a common board of directors.

Replying thereto beg to advise you that there is no law in Texas that prohibits interlocking directorates. However, Subdivision 1 of our anti-trust statute, defining monopoly, provides as follows:

"A monopoly is a combination or consolidation of two or more corporations when effected in the following method: When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing or where such common management or control tends to create a trust as defined in the first section of the anti-trust statutes."

A trust, as defined in the first section of the statute covering that question, is a combination of capital, skill or acts by two or more persons, firms, corporations, or associations of persons for any or all of the following purposes: 1. To create or which may tend to create or carry out restrictions in trade or commerce. 2. To fix, maintain, increase or reduce the price of merchandise, produce or commodities. 3. To prevent or lessen competition in the manufacture, making, sale or purchase of merchandise, produce or commodities. 4. To fix or maintain any standard or figure whereby the price of an article or commodity or merchandise, produce or commerce, shall be in any manner affected, controlled or established. 5. To make, enter into, maintain, execute

or carry out any contract or agreement by which the parties thereto bind or have bound themselves not to sell or dispose of any article or commodity or to make any contract that shall preclude a free and unrestricted competition among themselves or others in the sale or transportation of merchandise, produce or commodities. 6. To regulate, fix or limit the output of any article or commodity which may be manufactured, mined, produced or sold. 7. To abstain from engaging in or continuing business, or from the purchase or sale of merchandise, produce or commodities partially or entirely within the State of Texas or any portion thereof.

If, then, the direction of the affairs of two or more corporations is brought under the same management or control and such common management or control tends to bring about any or all of the conditions set out in Subdivisions 1 to 7, inclusive, of the statute above quoted, a violation of the monopoly section of the statute would be shown.

A combination is an essential element to constitute a trust. There must be a combination as the basis for any trust under the law of our State. It is necessary that there exist a union or an association of the capital, skill or acts of two or more persons, corporations or associations of persons in order to establish a trust, and when such united agencies, which might have been otherwise independent and competing, are brought into co-operation for the accomplishment of one or more of the purposes denounced by the statute, a trust exists in contemplation of the statute. In the case of a monopoly the statute defines how this combination may be brought about. If two or more corporations be brought under a common management and the purpose of said common management is to create a trust, or if the tendency of such common management is to create a trust, the offense is complete.

Applying these principles to the question in hand, we have the following result: Four corporations chartered for the purpose of doing a ginning business, have a common board of directors. These directors manage and direct the affairs of each corporation. The gins are all located within a few miles of each other. These plants, if independent, would compete actively with each other in the business that each may lawfully pursue under the statute; but where all these plants are directed, managed and controlled by the same directing power, is there any hope or expectation that competition may exist among them? We think not. It would be hard to imagine any condition that would cause these gins under such circumstances to become competitors in the territory covered by them. The law was designed to create or stimulate competition and not to prevent, lessen or stifle it. The law did not intend to regulate restrictions in trade, but to prohibit such restrictions entirely. It is no answer to the proposition to say that the four gin plants are owned by the same stockholders and that therefore they could not be expected to compete with themselves. These plants, when their charters were filed, will be separate and distinct legal entities, just as much so as if they had no common stockholders. The law so regards them. If these four corporations can be managed and directed

by the same board of directors, then we would have to go a step further to assert that every gin in Rockwall county could be incorporated and run and controlled by a common board; thus creating and bringing about an absolute and complete monopoly in that line of business in that county.

It may not have been the purpose of the incorporators to prevent or lessen competition or to bring about any of the purposes denounced by the statute by incorporating these gins and placing them under the same management; but the question to determine is, will such common direction and management tend to lessen competition in the business these corporations can legitimately engage in, or will such common management tend to bring about any of the conditions denounced by the statute? If so, the law would be violated and each company would be subject to the penalties prescribed by the statute.

In our opinion such a common management would at least tend to lessen competition, and for that reason we think these companies, if their charters should be filed, would be open to a successful prosecution by the State for a violation of the provisions of Subdivision 1, Article 7797, Revised Statutes of 1911.

We herewith return you the charters.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

ANTI-TRUST—LUMBER DEALERS.

1. An agreement among wholesale lumber dealers not to sell retail lumber dealers who may be indebted to any member or members of the association is in violation of Subdivision 1, Article 7798, Revised Statutes, 1911.

2. There is nothing in the anti-trust statutes that would prohibit wholesale lumber dealers from jointly employing a man for the purpose of ascertaining and determining the financial standing and ability of their customers; and a wholesale merchant, acting in an independent way, may make use of such information according to his desires, but he can not act in pursuance of an agreement or understanding made with the members of his association.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MARCH 23, 1914.

Hon. John B. McNamara, County Attorney, Waco, Texas.

DEAR SIR: Under date of March 14th we have the following communication from you:

"A wholesale dealer of this city has submitted to me for the purpose of having me advise him as to whether or not there is anything in the plan outlined below violative of the anti-trust laws of Texas.

"The plan is as follows: Various wholesale lumber dealers throughout the State desire to form an association similar to the many retail organizations throughout the cities of Texas. The various wholesalers, on the first of each month or at other times, would forward to the secretary of the proposed association a list of all accounts, both good and bad, showing the total amount of indebtedness of each account, how much past due, etc. This information will be condensed and a statement issued and sent to every subscriber of the

proposed association, showing the total amount of indebtedness of each retail dealer in the State, or of those who do business with the various wholesale houses, who are affiliated with the proposed association. Every account will be correctly shown and no especial attention will be called to bad accounts, neither will any recommendation be made to the method or manner of handling such accounts, the purpose being to show to each wholesaler who is a member of or subscriber to the association the true condition of each retailer by the various monthly statements, leaving each individual wholesaler to determine what action they deem proper to take. I am unable to find any law that would prohibit the formation of such an organization to pursue the plan above outlined, but, in view of the fact that this association will operate throughout the State, I do not feel at liberty to render an opinion without first obtaining your views."

Replying thereto, beg to advise that Subdivision 1, Article 7798, Revised Statutes, 1911, defines a conspiracy against trade as follows:

"Where any two or more persons, firms, corporations or associations of persons, who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity, either or any of such acts shall constitute a conspiracy in restraint of trade."

If wholesale lumber dealers should agree directly or indirectly not to sell to retail lumber dealers who may be indebted to any member or members of their association in any amount, such an agreement would come directly within the prohibitions of the above quoted statute.

There is nothing in the law to compel a wholesale lumber dealer to sell his goods and wares to any one. Acting independently, he may sell or refuse to sell to whomsoever he may choose, but when he makes an agreement or in any way comes to an understanding with others engaged in a similar line of business that he will not sell to any particular person or persons under any circumstances, we think he would by so doing unquestionably violate the law.

A combination, agreement or understanding between two or more persons, firms, corporations or associations of persons for the purpose of doing any or all of the things denounced by the anti-trust statutes is the thing the law has undertaken to prevent and prohibit.

Upon the surface of the statement made by you it does not appear that the wholesalers have any agreement not to sell to any retail merchants who may be indebted to any member or members of the association, but if it can be shown by positive evidence or by circumstances that the members of the association have an understanding that they will not sell to any retail merchant who may be due any member of said association any amount, an offense against the anti-trust statutes would be established. Such an agreement or understanding would have to be proved in order to make out a case, but the agreement or understanding may be shown by direct testimony or by circumstances.

The fact that wholesale merchants jointly employ a person to ascertain the financial standing and ability of their customers does not within itself offend the law. This may be done legally, and each wholesale merchant, in an independent way, may act upon the information thus

derived in any manner he may think proper, but he can not act in pursuance of an agreement or understanding had with the other members of the association without violating this statute.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

ANTI-TRUST LAW—PERPETUITIES AND MONOPOLIES—BILL OF RIGHTS.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 26, 1913.

Senator John G. Willacy, Senate Chamber, Capitol.

DEAR SIR: You transmitted to this Department Senate Bill No. 334, with request that we advise you whether or not the things contemplated by this bill can be accomplished, as is sought to be done, without running counter to the Constitution of this State and without impairing the Anti-Trust Law.

In reply, beg to say that if this bill becomes a law, the Corpus Christi Ice and Electric Company (which we assume is a corporation, chartered for the purpose as indicated by its name) will be authorized to purchase, acquire, own and operate all the physical property, franchise and good will, owned and held by the People's Light Company (which we assume is also a corporation, chartered for the purpose as indicated by its name); also to purchase and own all and singular the physical property, real and personal, choses in action, and franchises belonging to any individual, person or persons, used or to be used by him or them as an electric light and power plant in said city (Corpus Christi) and also the franchise or franchises of any corporation or individual, person or persons, granted by the city of Corpus Christi to operate a street car line or system in the streets and thoroughfares of said city and in territory adjacent thereto, as well as said car lines and the real estate and physical property of such corporation, person or persons who may own or use the same in connection with, or incident to, a street car line or system in said city of Corpus Christi, Texas.

It is the opinion of this Department that this proposed act conflicts with several provisions of the Constitution and if enacted, would be absolutely void, for the following reasons:

Section 26 of the Bill of Rights reads as follows:

"Perpetuities and monopolies are contrary to the genius of a free government and shall never be allowed; * * *"

"Monopoly," as defined and prohibited in our Anti-Trust Law (Art. 7797, Acts 1911), in part, reads as follows:

"Where any corporation acquires the shares or certificates of stock or bonds, franchises or other rights, or the physical properties or any part thereof, of

any other corporation or corporations for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition was accomplished directly or through the instrumentality of trustees or otherwise."

Now applying this definition of a monopoly to the purposes of the bill, as quoted above, it becomes apparent that this bill would constitute this company a monopoly within the meaning of this law and would permit it to do and accomplish things and results in Corpus Christi that no other electric light company in the State of Texas could do without incurring the severe penalties of our Anti-Trust Law.

Section 3 of the Bill of Rights reads:

"All free men when they form a social compact have equal rights and no man, or set of men, is entitled to exclusive separate public emoluments or privileges, but in consideration of public services."

It is a fundamental principle of legislation that the laws established shall be equal and uniform, that is to say, that they are not to be varied in particular cases, but there shall be one rule for all. This is the maxim of constitutional law generally the country over and is the meaning of the provision of the Bill of Rights just quoted. Special privileges are always obnoxious and as a rule of construction are to be leaned against as probably not contemplated or designed. This is the rule of construction where there is a doubt, but in the case under consideration we need no rules of construction, as this bill would be so clearly unconstitutional and obnoxious to the provisions of the Constitution quoted, to argue the question would tend to confuse the question instead of making it plainer.

The proposed Act is unconstitutional for the further reason that it attempts by a special act to create, in legal effect, a corporation with powers unknown to the general law.

Section 1, of Article 12, of the Constitution provides:

"No private corporation shall be created, except by general law."

That is to say, private corporations organized in this State must be chartered under the provisions of the general laws already in existence and can not be chartered by a special act of the Legislature applicable alone to the particular corporation being formed.

There is no provision of the general law of this State that permits an electric light company to be formed, among other purposes, to own and operate a street railway. Subdivision 21, of Article 1121, Acts of 1911, authorizes the formation of companies to operate street railways, etc., that use electricity as the motive power, to supply and sell electric light and power to the public and municipalities; but there is no provision of the law that permits an electric light company to own and operate a street railway. If the act in question should become a law, it will permit the Corpus Christi Ice and Electric Company, among other things, to own and operate a street railway, thus adding an additional purpose, and in fact, creating a new corporation with new purposes

and powers by a special act in contravention of the general laws of this State and directly in the face of the provision of the Constitution above quoted.

It is therefore the opinion of this Department, for the reasons above stated, and probably others that could be mentioned, the act in question is directly in the face of the several provisions of the Constitution quoted and that the evident purposes of the bill can not be constitutionally accomplished.

Yours very truly,
B. F. LOONEY,
Attorney General.

CONSTRUCTION OF LAWS—TELEPHONE COMPANIES—NEWSPAPERS.

1. A mere discrimination in favor of one customer is not unlawful unless it amounts to an unjust discrimination.
2. Telephone companies can give a special rate to publishers of newspapers based upon the peculiar nature of the service as well as upon the semi-public use to be made of the service.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MARCH 28, 1914.

Hon. John E. Shelton, County Attorney Travis County, Austin, Texas.

DEAR SIR: Under date of the 27th inst. you propound to this Department the following questions:

"1. Is it within the power of a telephone company acting separate and apart from all other telephone companies to classify as newspaper service a service used by newspapers for gathering news alone? That service to be a deferred service.

You will understand that the "deferred" service will give way to all full paid service, and that full paid service is to be given precedence over the deferred newspaper service.

2. Should a telephone company acting individually be able to classify the news-gathering service? Is it within the power of a telephone company to grant to all newspapers, under similar conditions and for similar service, a special newspaper rate without violating the provisions of the Anti-Pass or Anti-Trust Laws?

3. Should a telephone company have authority to grant these special rates to newspapers for a news-gathering service, would it necessarily devolve upon the telephone company to grant this same rate to all persons demanding it, unless it could be shown that the persons requesting the rates were gathering information for publication in the columns of a newspaper for the public good?

4. Is the fact that communications over the long distance telephone lines are to be published in newspapers such a fact, condition or circumstance as will, under the law, justify telephone companies to allow such communication to be transmitted at a less or lower rate than communications from other persons are charged, when such communications from other persons are transmitted at the same time and under the same circumstances, except that they are not for publication, and except that the communications for newspaper publication are subject to being "deferred" until full-rate business is disposed of?

5. Would the fact that the telephone companies give special rates to deferred service to newspapers, on matter to be published, require them to give similar rates to others for deferred service?"

I believe a liberal interpretation of the two former communications received by you from this Department on the subject of your inquiries, one written by Mr. Sweeton and the other by Mr. Nickels, will answer your questions. However, the answering of your questions will afford an opportunity to develop the meaning of the former letters, and I therefore answer them as follows:

Your first question should be answered in the affirmative.

Your second question should be answered in the affirmative.

Your third question in the negative.

Your fourth question should be answered in the affirmative.

Your fifth question in the negative.

In explanation of the above will say that your inquiries involve the construction of Article 1535, Penal Code, which reads as follows:

"No company, subject to the provisions of this chapter, shall, directly or indirectly, by any special rate, rebate, draw-back, or other device or exchange, demand, charge or collect or receive from any person, firm, association of persons or corporation a greater or less or different compensation for any service rendered, or to be rendered, in the transportation of passengers, property or messages, than it charges, demands, collects or receives from any other person, firm, association of persons or corporation for doing for him, them or it, a like service, if the transportation or transmission is a like kind of traffic or service under substantially similar circumstances and conditions; and any such company violating these provisions shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the State of Texas a penalty of five thousand dollars."

This statute seems to contemplate that there may be difference in service and service under dissimilar circumstances, either of which would justify a greater, less or different compensation, as the case may be.

The essence of a discrimination is to charge one a greater or more onerous compensation than is exacted from another for a like service under substantially similar circumstances and conditions.

Hence, as there may be a difference in service and also a difference in circumstances and conditions of service, a telephone company may properly make reasonable classifications and fix a rate applicable to all alike who fall within each class.

The Legislature did not attempt the classification of service; therefore this is to be controlled by the common law and is left to the companies, to be performed, however, in a reasonable way, that is, the classification must not be arbitrary and without reason or as a subterfuge in order to violate the law, which forbids discrimination.

We know of no reason why a special rate could not be given the publishers of newspapers based upon the peculiar nature of the service as well as upon the semi-public use to be made of the service.

The Legislature has exempted publishers of newspapers from jury service (Art. 5118, Acts of 1911), because of the semi-public nature of the business; that is to say, in the gathering and dissemination of intelligence, publishers of newspapers are serving the public in a distinctive way aside from the purely personal nature of the business. As a compensation for the public nature of this service, and in order that the

efforts of news gatherers and publishers may not be interrupted, this special classification and privilege is conferred.

If the Legislature had gone further and classified the different kinds of service to be rendered by these companies by defining all services, respectively, that could be classed as coming under substantially similar circumstances and conditions, the question presented would be as to the reasonableness of the classification in order to relieve the legislation from the imputation of being class legislation. On this point our Supreme Court in the case of *Texas Company vs. Stephens*, 100 Texas, 628, 103 S. W., 481, among other things, said:

"The courts, under the provisions relied on, can only interfere when it is made clearly to appear that an attempted classification has no reasonable basis in the nature of the business classified, and that the law operates unequally upon subjects between which there is no real difference to justify the separate treatment of them undertaken by the Legislature."

In applying common law rules to questions of discrimination by common carriers our courts have held to the doctrine that carriers must treat the public with fairness and equality, that they must observe the strictest impartiality in the conduct of their business by withholding all privileges and preferences from one customer which are denied to all others, but this rule is subject to the qualifications that when a freight rate is reasonable for all customers, contracts for a less rate may be made in special cases when the discrimination is reasonable and just, but the discrimination must not subject others to an unreasonable disadvantage nor must it be made to give one individual a preference to the disadvantage of another, or to give preference and advantage to one locality to the prejudice of another locality, and a mere discrimination in favor of one customer is not unlawful unless it amounts to an unjust discrimination. *H. & T. C. Ry. Co. vs. Rust*, 58 Texas, 98; *Railroad Commission vs. Weld*, 96 Texas, 394.

In the *Rust* case, *supra* (58 Texas, 110), among other things, the court used the following language:

"As to what shall constitute improper discrimination is not defined, nor attempted to be defined; it is a question of law and fact in the given case; and whether the discrimination be or not unlawful, must be ascertained by applying to the facts of the case the principles of the common law to the general policy of our statutory law governing carriers and railroads."

Further discussing the case the court says:

"And, if, although the plaintiffs were not required to pay a higher rate than were the public generally, yet if the defendant had allowed to certain particular persons, or merchants in a certain particular locality, more advantageous terms than had been given to the public generally, or to the plaintiffs, it ought to have been submitted as an issue of fact for the jury to determine, whether (under appropriate instructions applicable to the subject), under all the evidence applicable to the question, such preference so given was a fair and legitimate one; one justified by the common law rule forbidding the carrier to give to one special privileges which it denies to another, but which at the same time does not exclude as forbidden contracts for transportation at a less rate in special cases, where, under the circumstances, the discrimination appears reasonable."

It is our opinion, therefore, that telephone companies by observing the rules above discussed could give to publishers of newspapers a classification to themselves with special rate for deferred service for the purpose of gathering intelligence to be published for the reading public.

Yours very truly,

B. F. LOONEY,
Attorney General.

OPINIONS CONSTRUING ANTI-PASS LAW.

ANTI-PASS LAW—POLICEMEN.

Railway company would not have authority to issue an annual pass to policeman, but would have the right to issue free transportation for the purpose of making a trip in the performance of public duty.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 24, 1913.

Mr. W. F. Wilson, Stephenville, Texas.

DEAR SIR: Replying to your inquiry of February the 15th, 1913, we beg to advise you that Section 2 of the Anti-Pass Law contains the following provision:

"Chiefs of police or city marshals, whether elective or appointive, are exempt from the general provision of the law prohibiting railroads, etc., from issuing free transportation to certain public officials. Any bona fide policeman or fireman in the service of any city or town in Texas may have the right to ride upon free transportation furnished by any steam railroad company, or other lines of public transportation, when such policeman or fireman is in the discharge of his public duties; but this provision shall not be construed so as to apply to men holding commissions as special policemen or firemen."

The statute nowhere authorizes the issuance of free transportation to assistant chiefs of police. However, if you hold a regular commission as a policeman of your city, we think you would be entitled to free transportation when in the discharge of your public duty as such officer, but if you only hold commission as a special officer, you would not have the right to such free transportation.

We do not believe the railway companies would have authority to issue you what is known as an annual pass, even though you hold a regular commission as policeman, but if you hold such commission and you desire to make a trip in the performance of your public duty, then such railway companies would have the right to issue you free transportation for such purpose.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

ANTI-PASS LAW—RAILROADS—MINISTERS.

Minister who is manager of an orphans' home may be granted reduced rates, but not free passes.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 24, 1913.

Hon. W. D. Williams, Railroad Commissioner, Capitol.

DEAR SIR: Your communication to this Department of date Feb-

ruary 21, 1913, involves the proposition as to whether or not a minister who is the manager of an orphans' home, and the wards of such home, is entitled to free transportation under the Anti-Pass Law.

The Anti-Pass Law only authorizes a railroad company to grant to ministers of religion reduced rates of one-half fare, and trip passes to the indigent poor when application therefor is made by any religious or charitable organization; in other words, under the facts stated in the letter enclosed by you, the inmates of the orphans' home, if indigent poor, may be granted trip passes upon application from the authorities in charge of the home, and the manager of the home, who is a minister of religion, may be granted reduced rates, but not free passes.

Yours very truly,

LUTHER NICKELS,
Assistant Attorney General.

TELEPHONE COMPANIES—SPECIAL RATES—DISCRIMINATION.

A telephone company may make special rates to persons having more than one telephone in their houses, provided they make such rates to the general public.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MAY 21, 1913.

Mr. E. M. Webb, Manager Chillicothe Telephone Company, Chillicothe, Texas.

DEAR SIR: Your communication of May 16th addressed to the Railroad Commission, has been referred to this Department for answer. Your communication reads as follows:

"Under the Anti-Pass Law, is it possible for us to make reduction in telephone rates to parties who have two or more telephones in same house but different numbers on our switchboard?"

"It is our desire to extend every courtesy to our customers, but wish to keep within the bounds of the law."

Replying thereto, we beg to say that Article 1532 of the Penal Code prohibits telephone companies from granting free passage, that is to say granting free service to any person other than those set out in the statute.

Under Article 1535, Penal Code, it is provided that:

"No company, subject to the provisions of this chapter, shall, directly or indirectly, by any special rate, rebate, draw-back, or other device or exchange, demand, charge or collect or receive from any person, firm, association of persons or corporation a greater or less or different compensation for any service rendered, or to be rendered, in the transportation of passengers, property or messages, than it charges, demands, collects or receives from any other person, firm, association of persons or corporation for doing for him, them or it, a like service, if the transportation or transmission is a like kind of traffic or service under substantially similar circumstances and conditions; and any such company violating these provisions shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the State of Texas a penalty of five thousand dollars."

The above statute is intended to prevent discrimination by the companies set out in said chapter and to prevent them from giving service to any person, firm or association or corporation at a different rate of compensation than it demands or collects from any other person, firm, association or corporation.

And your company would have no right to make a reduction to parties having two telephones in the same house unless you granted such reduction to all parties under similar conditions, and should you grant such reduction to one party and not grant the same to all parties under like conditions, you would be guilty of discrimination and subject to penalty prescribed in the above article. However, if you, in good faith establish a uniform rate to be charged parties using two telephones, or for any number of telephones, and consistently adhere to such rates, applying same to the public in general, it would not be a violation of the provisions of the above article, but the slightest deviation from the above rule would subject you to the penalties of the law.

We see no reason why you could not safely adopt rates on any number of telephones furnished to the same party, but as above stated, when you establish such rates, same must be strictly adhered to in every instance.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OPINIONS RELATING TO BOND MATTERS.**HARBIN INDEPENDENT SCHOOL DISTRICT—CHANGING BOUNDS OF
DISTRICT—COMMISSIONERS COURT—BONDS.**

An order to exclude territory from an independent school district that had issued and sold bonds would be violative of Article 2866, Revised Statutes.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 17, 1913.

Hon. A. P. Young, County Judge, Stephenville, Texas.

DEAR SIR: This Department is in receipt of your letter of March 13th, in which you state that after the creation of the Harbin Independent School District in your county, a petition was presented to the commissioners court by the owners of certain land in said district, requesting that the bounds of the district be so changed by the commissioners court as to exclude said lands from the district, and that said petition was acted on favorably by the commissioners court, and the signers of said petition were requested to prepare and file with the commissioners court field notes of the lands to be excluded from the district; that the only order made by the court was a memorandum to the effect that the petition had been granted and no order was entered on the minutes showing that the petition was granted and no formal order was made changing the bounds of the district so as to exclude from it the territory described in the petition and in the field notes, which were later furnished by the owners of said territory. You state that thereafter a bond election was held and that the record of said bond election was sent to this Department and by it approved, said record showing the bounds of the district as originally created and containing nothing to show that the territory in question had been excluded from the district. You desire to know:

First. Whether the commissioners court can enter an order, *nunc pro tunc*, changing the bounds of the district as of the date on which the informal order was entered, so as to exclude the territory in question from the district?

It is the opinion of this Department that such order can not be entered. There would be no objection to the entry of such order if the rights of a third party had not intervened. We refer to the rights of the purchasers of the bonds. The bonds were issued and sold on a record which showed that the territory in question was a part of the district. The purchasers of the bonds had a right to rely upon the record as made and as presented to and approved by the Attorney General. This being the case, the effect of an order entered now, *nunc pro tunc*, would be to violate that part of Article 2866 of the Revised Statutes, which reads as follows:

"And provided further that no change shall be made that would reduce the total value of taxable property in any independent district against which there are outstanding bonds legally issued."

The effect of the record on which your bond issue was based was to fix the liability for the bonds against all the territory included in the district as originally created.

Both your second and third questions are answered by our answer to the first question above, that is, that the territory can not now be transferred out of the Harbin District, for the reason that the bonds are outstanding against the whole territory in the district.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

COUNTY JUDGE—SALE OF BONDS—COMMISSIONERS COURT—PUBLIC HOSPITAL.

No compensation in law allowed the county judge to charge the county a commission when he is the procuring cause of the sale of bonds. Such contract between commissioners court and county judge would be void. The commissioners court would not have authority to appropriate \$2000 to be expended, together with a like sum to be furnished by the city of Fort Worth, for the erection of a public hospital.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MARCH 1, 1913.

Hon. John W. Baskin, County Attorney, Fort Worth, Texas.

DEAR SIR: You propound to this Department the following question:

"Is the county judge of Tarrant county, who was the procuring cause of the sale of \$1,600,000 worth of road and bridge bonds, entitled to charge the county a commission for the sale of these bonds?"

In reply to this question you are advised that it is the opinion of this Department that the county judge would not be entitled to commission for the sale of these bonds for two reasons:

1. There is no compensation in law allowed the county judge for such service as this rendered.

2. If the commissioners court had contracted to pay him to sell these bonds, the contract would be void for the reason they would be violative of his oath which was contained in Article 2239, Revised Statutes, 1911, a part of which is the following:

"He will not be directly or indirectly interested in any contract with or claim against the county in which he resides, except such warrants as may issue to him as fees of office."

And the fact, as stated above, that the fees of office do not allow him a commission on the sale of bonds would preclude a legal issue of warrants for the collection of the commission.

The county judge is also allowed an ex officio salary in Article 3852, Revised Statutes of 1911, which is for: presiding over the commissioners court, ordering elections and making returns thereof, hearing and determining civil cases, *and transacting all other official business not otherwise provided for.*

We are therefore clearly of the opinion that the county judge could not charge a commission for the sale of these bonds.

You also propound to this Department, in a separate letter, another interrogatory which is as follows:

"Would the commissioners court have authority to appropriate \$2000 to be expended, together with a like sum to be furnished by the city of Fort Worth, for the purchase of a site within the city limits for the erection of a public hospital and in the erection of a suitable building for a public hospital, and to equip the same when completed; said project to call for a yearly amount to be expended in the maintenance of said hospital after its erection?"

In answer to this inquiry we advise you that in the opinion of this Department your commissioners court would not have authority to expend any of the county's money in the manner embraced in this question. All matters of public improvement carrying with it appropriations contemplating considerable sums of money are very properly the concern of the voters themselves, and it would be unlawful to defer any funds raised for other purposes into this channel. That is to say, when the taxes of your county are levied, you levy certain amounts for road and bridge purposes, for courthouse purposes, for general purposes, the contemplation of the law being that this is for the necessary maintenance of these various enterprises, and does not carry with it the idea of a permanent improvement which would call for a continuous expenditure of money. All such matters should be submitted to the voters of the county for their rejection or approval. Certainly the people of Tarrant county would have a right to determine by their votes whether or not they desired to go into partnership with the city of Fort Worth for the maintenance of a public hospital.

We are further of the opinion in this connection that even if the voters should authorize the expenditure of the county's money in this manner, still, it would be necessary for the entire title of the property to be taken in the county, for the general policy of the law would oppose the expenditure of the people's money under joint arrangements between the city and the county.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

BONDS—CITY OF AMARILLO.

City of Amarillo has no power to appropriate money derived from tax for current expenses to payment of interest and sinking fund on bonds issued for funding the outstanding indebtedness of city incurred for current expenses.

Nor can it use a portion of 15-cent levy for street improvements to pay interest and create sinking fund on bonds theretofore issued.
Constitution of Texas, Art. 8, Sec. 9.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, APRIL 30, 1913.

Hon. W. E. Gee, Mayor, Amarillo, Texas.

DEAR SIR: We are in receipt of your favor of recent date, in which you say:

"Our city, which is incorporated under the General Laws of the State, will probably desire to issue funding bonds in the near future to cover an outstanding floating indebtedness incurred for the current expenses of the city.

"Our present bonded indebtedness incurred for permanent improvements made by the city is now barely taken care of by a tax levy of 25 cents on the \$100 valuation; but the city has not taken any of the 15 cents allowed to be levied for street improvements for paying interest and sinking fund on outstanding bonds of the city.

"Now, what we desire to have a ruling on is this: Can the city use a portion of the 15-cent levy allowed for street improvements and pay interest and create a sinking fund for its street improvement bonds, and then take any portion of the levy of 25 cents for other bonds and apply it to pay interest and create a sinking fund for taking care of the funding bonds? If not, can the city apply a portion of the levy for general purposes to the payment of interest and the creation of a sinking fund to take care of the funding bonds?"

The first question propounded in paragraph three of your letter we will answer later in this opinion.

The second question propounded in said paragraph three has, we think, been answered in the case of Cass County vs. Wilbarger County, 60 S. W., p. 988. This is a decision by the Court of Civil Appeals, Second District, at Fort Worth, and in which writ of error was denied by the Supreme Court. Said case involved a construction of an act of the Legislature of this State "authorizing counties to fund their indebtedness and provide means to pay same," enacted in 1889. Under said act the county commissioners court of Wilbarger county made and entered its order providing for the issuance of bonds to cover the outstanding indebtedness of the county incurred prior thereto for "current expenses," which indebtedness was represented by valid county warrants, duly registered, the order providing for the levy of a tax of five cents out of the twenty-five cent tax authorized by Article 8, Section 9, of the Constitution for "county purposes," to pay the interest and sinking fund on said bonds.

The invalidity of the bonds was urged, alleging that the commissioners court of Wilbarger county had no power to make the tax levy of five cents, to pay them, because it was not a levy for "county purposes," and was an attempt to limit future commissioners courts to an annual levy for "county purposes" of only twenty cents instead of twenty-five cents as provided by said Article 8, Section 9, of the Constitution. The court said:

"In view of the proviso above (in the act)—that the act was to be considered as authorizing the levy of any tax in excess of what was authorized by

the Constitution and laws then in force—the inference seems to be a material, if not an irresistible, one that the Legislature contemplated that the power to make the tax levy required by that act was included within the authorized power to levy a tax for ‘county purposes,’ and especially so since the debts to be funded were already payable out of taxes derivable from that source. * * * Doubtless the Legislature took the view that, if registered warrants were so payable, it was competent to raise the money to pay the bonds issued to fund them in the same way.”

It is true that there are a line of cases in this State which hold that the current expenses of a city government for each year are a first charge on its general revenues for that year, and that a city council is without power to pledge its future current revenues to the payment of interest and sinking fund on its bonded indebtedness. See *City of Sherman vs. Langham*, 92 Texas, 13, 40 S. W., 140; *McNeal vs. City of Waco*, 89 Texas, 83, 33 S. W., 322; *Citizens Bank vs. City of Terrell*, 78 Texas, 460, 14 S. W., 1003; but in distinguishing these cases, in the first case above mentioned the court observes that these cases do not seem to be altogether in point, and can hardly be quoted as authority upon the constitutional question to be determined in that case, that is, the power of the county to appropriate a portion of the “current revenues” of the county to pay interest and create sinking fund for the bonds, and says:

“Evidently the Legislature in enacting the law of 1889 for the benefit of counties in this State which were burdened with overdue indebtedness, and which were not able to provide at the same time for the payment of such debt and current expenses, must have contemplated, as already seen, that relief was to come from the issuance of bonds payable out of a fund to be raised by taxation in some such manner as was attempted by Wilbarger county. The object in view was a good one. Unless the act was clearly unconstitutional, it ought to be upheld; for to invalidate the bonds in question would be equivalent to invalidating the law itself. The debts which the bonds were issued to pay were valid means created from year to year for ‘current expenses’ of the county, and were within the spirit as well as letter of the Constitution, providing for a tax of 25 cents for ‘county purposes.’ * * * Seeing that many counties were unable to make suitable provision for both overdue and current expenses of municipal government in the usual way, and that by the issuance of bonds to cover the overdue debts of a portion of the constitutional taxing power might reasonably be exercised for a series of years to pay off the bonds without serious inconvenience to the counties in the discharge of their current expense obligations, the Legislature saw fit to confer upon the commissioners courts of counties so situated the power of issuing such bonds and of making a suitable levy of taxes for their payment; and we think the law should be sustained. If the levy in question had been made to pay the original warrants which were a charge upon the current revenues, and were paid substantially out of the proceeds of the bonds, the Constitution would not have been violated, and we see no good reason why a different construction should be adopted merely because the form of the county’s obligation was changed.”

As will be noted, the court in the above case held that a portion of the “current expense” fund of the county might be used to provide interest and sinking fund on the bonds authorized to fund the indebtedness of the county incurred for general county purposes; and the question presented by you is not distinguishable from that in the case above quoted from.

It is therefore our opinion, based upon the above authority, that your

city would have power to appropriate so much of the tax levied for current expenses of your city to the payment of interest and sinking fund on the bonds issued for the purpose of funding the outstanding indebtedness of the city incurred for current expenses, as is necessary for that purpose.

Coming back to the first question propounded in the third paragraph of your letter, as to whether or not your city can use a portion of the fifteen-cent levy allowed for street improvement to pay interest and create a sinking fund for street improvement bonds heretofore issued, the tax for which has been levied and is being collected out of the appropriation of twenty-five cents, beg to say that it is our opinion that this can not be done. The object and purpose of the Constitution and statutes granting authority to counties, cities and towns to levy an additional tax of fifteen cents for roads, bridges and streets was because of the fact that the twenty-five cents theretofore authorized had proven to be insufficient for the needs, and the fifteen-cent tax was authorized for the purpose therein provided, and that alone; and to permit them now to appropriate the additional fifteen cents authorized by the Constitution, and for which bonds may be issued under Act of 1909, to pay interest and sinking fund on bonds issued by such cities and towns prior to the time that such tax was available, would be to defeat the purpose of the Constitution and statutes.

We therefore advise you that your city may fund its outstanding indebtedness by issuing bonds and providing for their payment out of the appropriation of so much of the tax of twenty-five cents for "general purposes," as may be necessary for that purpose, but that you may not appropriate any part of the tax allowed for streets for such purpose.

Yours very truly,

W. M. HARRIS,
Assistant Attorney General.

INDEPENDENT SCHOOL DISTRICTS—TAXATION—BONDS.

Board of trustees may fix time for levy and collection of taxes.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, OCTOBER 4, 1913.

Hon. J. E. Fuchs, New Braunfels, Texas.

MY DEAR SIR: We are in receipt of your favor of the 20th ult., in which you say:

"In regard to the \$14,000 bonds of the New Braunfels Independent School District which will be dated October 1, 1913, and the record of which you approved September 16th, numerous influential parties have declared that they would not pay this year the additional 5 cents on the \$100 valuation levied for this year. Now, in order to avoid any opposition when the collector of this district goes out to collect these taxes, the board of trustees of this district has requested me to write you for a written opinion to the effect that

these taxes can be collected and must be paid for this year. The board wishes to publish this in the local papers."

Replying thereto, beg to say that the Revised Statutes, 1911, Article 2853, vests in the board of trustees of independent school districts all the powers, rights and duties in regard to the establishment and maintenance of free schools, including the *powers and manner of taxation* for free school purposes that are conferred by the laws of this State upon the council or board of aldermen of incorporated cities and towns.

Article 2861 provides that in the enforced collection of taxes, the board of trustees shall perform the duties which now devolve in such a case upon the city council of an incorporated city or town, and that the county attorney shall perform the duties imposed in such a case upon the city attorney.

By a reference to the provisions of the statutes with reference to the assessment and collection of taxes by cities and towns by which therefore the board of trustees of an independent school district must be governed in the assessment and collection of taxes, we find that by Article 938 it is provided that the city council shall have full power to provide for the prompt collection of all taxes assessed, levied and imposed and shall have authority to sell property, real and personal, for taxes, and shall make all such rules and regulations, and ordain and pass all ordinances as they may deem necessary to the levying, laying, imposing, assessing and collecting of any of the taxes in that chapter provided.

Article 939 provides that the city council shall have power to regulate the manner and mode of making out tax lists or inventories and appraisements of property therein, and to prescribe *how and when* property shall be rendered, *and fix the duties and define the powers of the assessor and collector*, and adopt such measures as they may deem advisable to secure the assessment of all property within the limits of the city, and collect the taxes thereupon, and that the city council may by ordinance provide that any person having property subject to taxation and neglecting to render same for taxation, shall be liable to fine and imprisonment.

Article 941 prescribes the duties of the city assessor and collector and further provides that he shall perform such other duties, and in such manner and according to such rules and regulations as the city council may prescribe.

Although you do not state in your letter, we presume that the objection the taxpayers have to the payment of the extra five cents levied for additional school building bonds, is because it was levied subsequent to the usual and customary time for the levying of taxes.

It will be noticed by a reference to the statutes above quoted from that the city council may, by ordinance, fix the time for the assessment and collection of taxes. The city council may fix its own fiscal year and may make all necessary rules and regulations to secure the rendition of property and to enforce the collection of taxes due thereon

and this necessarily includes the authority to fix the time for the levying and collection of taxes.

We, therefore, beg to advise you that, in our opinion, the board of trustees of your independent school district would have the authority to levy, assess and collect for the year 1913 the five-cent tax necessary to provide interest and sinking fund for the bonds voted by your district and to be dated October 1, 1913. The board of trustees would have the authority to order the assessor to make up the rolls of the district and extend thereon the levy of the five-cent tax and would have authority to prescribe the time within which the payment of such taxes should be made, and in case of delinquency, the board should present a list of such delinquents to the county attorney of the county and request that suit be instituted for the taxes due. The valuations of property in the district for the year 1913 have been equalized and there could be no legal objection to extending the tax upon the rolls of the district.

Trusting that we have answered your question to your satisfaction, we are,

Yours very truly,

W. M. HARRIS,
Assistant Attorney General.

CONSTITUTIONAL CONSTRUCTION—MUNICIPAL BONDS—SINKING FUND
—CITIES AND TOWNS—TAXATION.

Sinking fund can not be diverted and placed to credit of general fund. Cities and towns incorporated under general law, regardless of population, can not levy taxes in excess of the taxes authorized by Article 8, Section 9, of the Constitution.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 2, 1913.

Mr. E. T. Miller, City Attorney, Amarillo, Texas.

DEAR SIR: We are in receipt of your favor of the 18th wherein you state that Amarillo is operating under the general law and has a bonded indebtedness of \$250,000; that the taxable values in the town have increased, thereby increasing your sinking fund to a great deal more than is necessary to take care of the bonded indebtedness, and you desire to know if you can take the overplus out of the sinking fund and place it in the general fund.

In reply to the above question, we beg to say that you can not do this. See Articles 700 and 701, Revised Statutes, 1911. However, there is no provision against the city council reducing the tax to an amount sufficient only to produce the required interest and sinking fund for the outstanding bonds.

The second paragraph of your letter reads as follows:

"Also, under the general laws, regulating cities and towns, it provides that a city or town having ten thousand inhabitants may make a tax levy of \$1.50. I would like to get a construction from you as to whether or not the same is

based on the last United States census, or upon the census taken by the council at any time it may see fit."

In reply thereto, beg to say it is our opinion that a city incorporated under the general law, whether it has a population of one thousand or fifteen thousand, can have only the taxing power authorized by Article 8, Section 9, of the Constitution, and Articles 882 and 925, Revised Statutes, 1911, and the articles of the statutes referred to by you, to the extent that it authorizes taxes in excess of that authorized by Article 8, Section 9, of the Constitution, is unconstitutional.

Under amendment of Article 11, Section 5, of the Constitution, a special chartered city could levy taxes to the extent of \$2.50 on the \$100 valuation of property within its limits, if so authorized in its charter.

With reference to the mode of determining the population of your city, beg to say that the council may determine this fact in any manner satisfactory to itself. It may appoint a census officer for the purpose of taking the census of the city.

Yours very truly,

W. M. HARRIS,
Assistant Attorney General.

MUNICIPAL BONDS—NAVIGATION DISTRICTS—FEES OF OFFICERS.

Where no compensation is fixed by statute for services of public officers, such services are gratuitous.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MARCH 26, 1913.

Hon: E. L. Bruce, House of Representatives, Capitol.

MY DEAR SIR: This Department is in receipt of your favor of the 24th inst., in which you ask the following questions:

"1. When the proceeds of the bonds issued by a navigation district is entirely exhausted, is the commissioners court authorized to increase the tax levy so as to provide for the payment of the following: Compensation for the assessor for assessing the taxes; commission to collectors for collecting the taxes; commission to treasurer for holding the funds; payment of the salaries of the members of the board; payment of compensation of employes of the board; payment of expenses of the board?

"2. In the Orange county navigation district the proceeds of the bonds have been entirely exhausted in providing the improvements contemplated by the issue, the entire amount having been used for the purpose in a manner which was and is entirely satisfactory to all concerned, and no further improvements are necessary, there being no money in the construction and maintenance fund, and the levy being only exactly enough to pay the interest and create a sinking fund, where is the money to come from to pay, during the next thirty-seven years that the bonds are outstanding, the commissions and expenses above mentioned?

"3. Is the commissioners court authorized to increase the sinking fund levy sufficiently to cover above commissions, salaries and expenses, and to transfer such additional amount collected thereunder to the construction and mainte-

nance fund, or to make a separate levy for such purposes? If the sinking fund of such bond issue should have at any time more than enough money in it to pay the interest as it matures, and more than enough laid aside in it to cover the existing pro rata of the redemption fund, is the commissioners court then authorized to transfer such excess to the construction and maintenance fund?"

After a hurried investigation of the law on the questions propounded in your letter we make the following observations:

Article 5981, Revised Statutes, 1911, provides that all expenses incurred in connection with the creation, establishment and maintenance of such districts shall be paid out of "the construction and maintenance fund"; which fund shall consist of all moneys received from the sale of bonds and all other amounts received from whatever source, except the tax collections applied to the sinking fund and payment of interest on the navigation bonds, etc.

Article 5982, Revised Statutes, 1911, reads as follows:

"Whenever any such navigation district bonds shall have been voted, the commissioners court shall levy and cause to be assessed and collected improvement taxes upon all property within said navigation district, whether real, personal or mixed or otherwise, and sufficient in amount to pay the interest on such bonds, together with an additional amount to be annually placed in a sinking fund sufficient to discharge and redeem said bonds at their maturity."

Articles 700 and 701, Revised Statutes, 1911, we construe to prohibit the county treasurer from honoring any draft upon such interest and sinking fund except for the purpose of paying the interest on such bonds, or for redeeming the same, or for investment in such securities as are provided by law, under penalty of not less than \$500 nor more than \$1000, and in addition thereto, liable for the amount of said fund diverted.

Replying therefore to your several questions, beg to say that the commissioners court would have no authority to increase the tax levy for payment of interest and sinking fund for the purpose of paying fees or salaries of officers of the county or the district; and there is nowhere in the present Navigation District Law that we can find any other provision authorizing the collection of taxes by the officers of such district or by the county officers.

It is a well settled rule of law in all of the States of this Union, including our own State, that the rendition of the services of a public officer is deemed to be gratuitous, unless a compensation is fixed thereto by statute.

Hallman vs. Campbell, 57 Texas, 54.

State vs. Prewer, 59 Ala., 130.

White vs. Lavant, 78 Me., 568.

Perry vs. Cheyboygan, 55 Mich., 230.

Wortham vs. Grayson County Court, 13 Ky., 53.

And the above rule applies, whether compensation is claimed as salary, fees or otherwise.

Martin vs. Cullum, 28 Ala., 670.

Kahn vs. Locke, 75 Ala., 332.

Tenn. R. R. Co. vs. Ry. Co., 81 Ala., 94.
 Hicks vs. Moore, 2 Ga., 240.
 Price vs. Cutts, 29 Ga., 142.
 Taylor vs. County Commissioners, 110 Ind., 462.
 Wood vs. County Commissioners, 123 Ind., 270.
 Pawcett vs. Eberle, 58 Ia., 544.
 Palo Alto County vs. Burlingame, 71 Ia., 201.
 Myers vs. Marshall County, 56 Miss., 344.
 Gammon vs. Lafayette County, 76 Mo., 675.
 Burnham vs. Bank, 5 N. H., 446.
 Ex parte Minier, 2 Hill (N. Y.), 411.
 Crofut vs. Brandt, 58 N. Y., 106.

A further observation is that said act, in Article 5960, expressly provides as follows:

“The duties and powers herein conferred upon the county judge and members of the commissioners court, and upon the mayor and aldermen or commissioners of cities, and upon the county clerk and other officers, are made a part of the legal duty of said officers, which they shall render and perform without additional compensation, unless otherwise provided for herein.”

Article 5984 prescribes the duties of the county tax assessor in connection with the assessment of taxes for such districts, and provides further that he “shall receive for such services such compensation as the said navigation district and canal commissioners shall deem proper.”

Article 5985 prescribes the duties of the tax collector, and provides that he “shall be allowed no more compensation for the collection of said taxes than he is now allowed for the collection of other taxes, same to be fixed by the navigation and canal commissioners.”

Article 5987 prescribes the duties of the county treasurer, and Article 5988 provides that he “shall be allowed such compensation for his services as may be determined by said commissioners (navigation and canal commissioner),” not exceeding the same per cent as is now allowed by the county for his services as county treasurer.

Article 5968 et seq. prescribes the duties of the navigation and canal commissioners, etc., and provides that they shall “receive for their services such compensation as may be fixed by the commissioners court and made of record.”

It will be seen therefore that while the Act provides the compensation that each of the above officers shall receive for their respective services, yet it provides no means of compensating them: and in the absence of an expressed provision for compensation in the Act, the services of such county officers—county assessor, collector and treasurer—will be deemed to be ex-officio services; and the failure of the Act to provide compensation for the navigation and canal commissioners, they, of course, will have to serve gratuitously.

Yours very truly,
 W. M. HARRIS,
 Assistant Attorney General.

MUNICIPAL BONDS—COMMISSIONS FOR SALE OF.

City commission, under the facts stated, will be authorized to order warrant upon the treasury for commission of sales agent in the sale of city of Fort Worth school building bonds.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 30, 1914.

*Hon. W. F. Doughty, State Superintendent of Public Instruction,
Capitol.*

DEAR SIR: We acknowledge receipt of your favor enclosing a communication from J. W. Cantwell, superintendent of Fort Worth public schools, in which he states:

"The board of commissioners of the city of Fort Worth have contracted and sold a \$175,000 bond issue for the building of public school buildings in this city, it being provided in the city charter that the board of commissioners should sell the bonds. The money has been recently deposited to the credit of the board of trustees above mentioned.

"It was agreed by certain members of the board and the finance commissioner that a charge of 1 per cent might be made by the sales agent. The president of our board raises the question as to whether he can lawfully pay this commission, and therefore requests an opinion. I am mailing you herewith a letter from Mr. Alexander, City Treasurer, which formally requests payment and explains the view taken by the Waggoner Bank & Trust Co., sales agent.

"Can the president of the school board lawfully sign the warrant and authorize the payment, is the question.

"The ground for withholding payment is found in the city charter, which provides that bonds shall be sold at not less than par and accrued interest.

"So far as I know, the board has no objections to paying it, and really desires to do so, if it is lawful."

And you desire our opinion upon the question therein propounded.

By reference to the city charter of the city of Fort Worth, Special Laws of 1909, page 298, Section 14, of Chapter 13 of said charter, provides:

"The board of commissioners of the city of Fort Worth shall have no discretion in fixing the rate at which taxes shall be assessed and levied each year for the benefit of public free schools, provided such rate does not exceed one-half of one per cent of the value of the property subject to taxation, but shall assess and levy the rate fixed annually by the board of trustees of the independent school district of the city of Fort Worth up to and including the rate of one-half of one per cent, as aforesaid, and it shall become the duty of the board of commissioners, upon the requisition of the board of trustees, to annually levy and collect said taxes as other taxes are levied and collected, and said tax when collected shall be placed at the disposal of said board of trustees, the amount collected for the support of the public free schools of Fort Worth, to be used for maintenance, support and use thereof."

Section 15, of Chapter 13, of said charter provides:

"It shall be the duty of the board of trustees of the independent school district of the city of Fort Worth to determine what amount of taxes, not exceeding one-half of one per cent, shall be necessary for support, maintenance and use of the public free schools of the city of Fort Worth for each current year, and the repair, erection and purchase of buildings, and on or before the date upon which the board of commissioners is required by this charter to levy general taxes, said board of trustees shall certify to the said board of commis-

sioners the rate of taxes to be levied for the school purposes, and it shall be the duty of said board of commissioners to levy said taxes."

So much of Section 15 of said charter as is pertinent to the question herein involved provides:

"Said board of trustees shall have the power to control, manage and govern said schools in all things and matters and order the payment of school funds for school purposes and shall have the power to elect a superintendent of the public schools of said city, and to select all teachers therefor and to fix the salaries thereof. Said board of trustees shall have the power to contract for the erection of school buildings and for adding to and repairing the same and to pay for the cost thereof out of the school funds under their control. *Provided, that the board of trustees shall not make any contract for the expenditure of money for any one year in excess of the revenue or income from taxes for said year, and the sale of bonds for school purposes as provided for in this act.*"

Section 19 provides:

"There may be issued by the board of commissioners of the city of Fort Worth bonds of such city in the aggregate not exceeding four hundred thousand dollars (\$400,000), during any period of four years, from and after the passage of this charter, for the purpose of increasing and improving the school facilities in said city, and for the purchase of lands therefor, the construction of buildings thereon, and the repair, reconstructing and renovation thereof, and the interest and sinking fund on all bonds which have been or are hereafter issued for school purposes shall be paid and provided out of the tax levied for school purposes as herein provided; such bonds, however, shall not be issued by said board of commissioners except upon request therefor by the board of trustees of the independent school district of the city of Fort Worth, but when such request shall have been made, then and thereupon it shall be the duty of said board of commissioners to provide for the issuance of same in such amounts and during such period, within the meaning of this section, not exceeding the total amount herein provided for, as may be required by said board of trustees of the independent school district of the city of Fort Worth. * * * *The proceeds of the sale of said bonds shall be deposited with the treasurer of the board of trustees of the independent school district of the city of Fort Worth, to be used by said last named board for the purposes for which said bonds were issued and allowed. All other provisions of this act relating to the issuance of bonds of the city of Fort Worth shall govern and apply as to the restrictions surrounding the issuance and sale of the bonds contemplated in this section.*"

We observe that by a provision of the charter of the city of Fort Worth the city treasurer is made the treasurer of the school board. It will be observed also that Section 14 above quoted provides that when the taxes levied for the support and maintenance of the public free schools are collected, they shall be placed with the city treasurer, and at the disposal of the board of trustees.

By Section 15, above quoted, the amount of tax necessary for the support, maintenance and use of the public free schools, and the repair, erection and purchase of school buildings, not to exceed fifty cents on the one hundred dollars valuation, is within the discretion of the board of trustees, and makes it the duty of the board of city commissioners to levy the tax upon the certification of the amount thereof by the board of trustees.

Section 16 above quoted provides for the disbursement of the school

funds from the treasury upon order of the board of trustees, and fixes a limitation upon the amount of expenditures, for the current year, providing that they shall *not make any contract for the expenditure of money for any one year in excess of the revenue or income from taxes for said year, etc.*

We observe that the charter of the city provides that all bonds shall be sold at not less than par, and therefore any expense incurred in the sale of the bonds can not be deducted from the face thereof; and since the board of trustees of the public schools of the city of Fort Worth are empowered to incur all necessary expenses in the support, maintenance and use of the public free schools, and the erection, repair and purchase of school buildings, not in excess of the revenue derived from taxes levied for that purpose for the particular year, would the board of trustees be authorized to contract with an agent to pay him one per cent for the sale of the bonds? In other words, is the payment to an agent of a commission for the sale of the bonds a legitimate expense for which the board would be authorized to order warrant upon the treasury, to be paid out of the fund placed at its disposal for the support, maintenance and use of the public free schools?

Before answering this question, we observe that by Section 20, of Chapter 6, and Section 19, of Chapter 13 of the city charter, that it is made the duty of the city commissioners of the city of Fort Worth to sell the school bonds and that the bonds shall not be sold for less than par. In our opinion the city commissioners are charged with the duty of selling the bonds and under the charter provisions could not sell them for less than par and accrued interest, and therefore without authority to deduct from the face of the bonds the expenses incurred in their sale; but we are also of the opinion that the city commissioners would have been authorized to contract to pay a reasonable compensation for their sale, such compensation to be paid out of the general fund of the city.

The board of trustees were without authority to enter into a contract with any one for the sale of the bonds, that duty devolving upon the city commission.

However, it is our opinion that if the city commission had knowledge of such contract between the board of trustees and the sales agent; acquiesced in its making and ratified it by a sale of the bonds to the purchaser or purchasers secured through the sales agent with whom the board of trustees contracted, and received the proceeds thereof into the city treasury, the city commission would be obligated to pay the sales agent the compensation stipulated in the contract out of the general or current funds of the city.

In the case of *Davis vs. City of San Antonio*, 160 S. W., 1161, recently decided by the Court of Civil Appeals at San Antonio, involving a contract for the payment of commissions for the sale of bonds of the city, it was held that, under the provision of the city charter of the city of San Antonio providing that bonds of the city shall not be sold for less than their par value, with accrued interest to date of payment

of the proceeds into the city treasury, the city was not precluded from contracting to pay necessary expenses incident to the issuance of bonds, including commissions for the sale thereof and fees of expert attorneys for an opinion as to their validity, out of the general fund. The court in said case, speaking through Chief Justice Fly, said:

"In 1907 a special law was passed amending the charter of the city of San Antonio, in which it was enacted: 'All bonds shall specify for what purpose they were issued and, when sold, shall net the city not less than their par value, with accrued interest to the date of payment of the proceeds into the city treasury, and the bonds may be negotiated in lots as the city may direct.' That provision of the charter is fully as stringent and comprehensive as the general law. The whole of the special law on the subject has not been quoted, however, for another alternative seems to be contemplated and that is the implied power granted the city council to contract to pay the contractor undertaking such public improvements who shall agree thereto in said bonds for the work to be performed. That provision, if executed, would place the money of the people at the mercy of contractors, who, to protect themselves, would enter bids that would form the basis for discounts amounting, not to 2, but, percentage, to 10 or even 20 per cent. Bids would be made for such sums for public improvements as that the bonds would not only not bring par and accrued interest, but would realize sums largely under par. The effect of the whole provision would be to prevent any expense being taken out of the proceeds of the bonds which must realize par value and accrued interest and thereby force the making of contracts in which the work performed would be paid for in bonds. This would undoubtedly be the result if the contention of appellee that expenses such as commissions or attorneys' fees can not be paid out of any fund whatsoever. Under that construction of the charter provision bonds could not be sold at all unless at a heavy premium and to make improvements the bonds would necessarily be used as the basis of compensation therefor. No such alternative should be forced upon any city.

"In order that the bonds should 'net the city not less than their par value, with accrued interest to the date of payment of the proceeds into the city treasury,' it is clear that no expenses can be deducted from that sum; not only commissions and attorneys' fees but any other expense connected with the issuance and sale of the bonds. This construction has been placed by some courts upon statutes not so drastic or exacting as the one in consideration. *State of Illinois vs. Delafield*, 8 Paige, 527; *Evans vs. Tillman* (S. C.), 17 S. E., 49; *Cone vs. Williamstown*, 156 Mass., 70; *Village of Fort Edwards vs. Fish*, 156 N. Y., 363.

"In the *Delafield* case cited it was said: 'The very idea of a sale of a bond, or draft, or other security for payment of money at par, is that it is to be sold dollar for dollar of the amount due and payable thereon. * * * Such is the popular or generally received meaning of the terms par or par value, and this was unquestionably the sense in which these terms were used by the Legislature of Illinois, in the statute under which the officers of the State were authorized to issue these bonds.'

"Speaking on the same subject, the Court of Appeals of New York, in the cited case of *Village of Fort Edwards vs. Fish*, held: 'The Legislature enacted that the bonds should not be disposed of by such commissioners at less than the par value thereof. * * * The first question presented for decision is, what is the meaning of the words par value, as thus used in the statute. Par means equal, and par value means a value equal to the face of the bonds. A sale of bonds at par is a sale at the rate of a dollar in money for a dollar in bonds. This is the accepted meaning of the term in the mercantile world, which the Legislature is presumed to have adopted in enacting the statute.' The provision of the charter is broader and more rigid than the statute of New York, to which that construction was applied, for it provides that 'the city shall net' par value and accrued interest. The word 'net' must mean clear of all charges, expenses, discounts, commissions or sums of any kind.

"In passing upon the powers of the commissioners of the village, the New York court held: 'The actual power was to borrow money by issuing and sell-

ing bonds at not less than par. The express power to issue bonds involved the implied power to pay for engraving, printing and the like. The express power to sell bonds doubtless carried with it the implied power to pay counsel for an opinion as to the validity of the bonds, as was done in this case, and possibly to pay a commission to brokers for selling the bonds. These expenses were incidental to the duty imposed, and fairly came within the scope of the main power.' Approving that case, the same court, in *Armstrong vs. Village of Fort Edward*, 159 N. Y., 315, held: 'Where there is an express grant of power to them it carries with it, by necessary implication, every other power needful and proper to the execution of the power expressly granted. The authority to sell water bonds, therefore, carries with it the authority to secure such reasonable and proper assistance as may be requisite to bring about an advantageous sale of the bonds. * * * Those having charge of the selling of bonds have the right to exercise their discretion in selecting the agencies by which they shall make disposition of them, but in the selection of such agencies it is their duty to exercise their best judgment in the interests of the public whom they serve. The selection, therefore, must be made in good faith and with a fixed purpose to further the interests of the constituency represented.'

'That was said in a case in which suit had been filed to recover commissions for selling bonds, and we think correctly states the law applicable to such cases.

'The opinion of the Supreme Court of Tennessee, in *Miller vs. Park City*, 150 S. W., 90, goes further and holds that the prohibition of the statute against sale of bonds at less than par was not violated by deducting an attorney's fee and other expenses incident to the sale, such as printing, lithographing the bonds, postage, etc. The court said: 'They were sold at par and accrued interest. One thousand dollars was deducted by agreement for counsel fees, and the remainder for printing bills and the like. It has been held in numerous cases that the deducting of such expenses when reasonable in amount and done in good faith does not violate the prohibition contained in the enabling act against a sale at less than par. It would seem that there should be no fair dispute over a deduction for expenses incident to printing the bonds and placing them upon the market, because the city could not reasonably expect a purchaser of its obligations until the obligation itself was cast into such form and published in such manner as the market would demand. It could not fairly be said to have bonds for sale until they were formulated so as to conform to the provisions of the enabling act and printed in accordance with the demands of the market. A like reason would include attorney's fees. It is well known that public securities are not readily marketable until their legality and validity have been approved by competent and reputable attorneys.'

'As in the Tennessee case so in this, there was no evidence of fraud or bad faith on the part of appellees, but there was an evident attempt to comply fully with every requirement of the law. As was said in that case: 'It is needless to say that if charges of this kind are sought to be made the cover for an actual sale at less than par, or if they are grossly unreasonable and attended by marks of bad faith, the court would not hesitate to declare such transaction fraudulent and void.'

'The cases cited, we think, declare the proper doctrine as to the sale of bonds by a public corporation, but under the peculiar reading of the charter which requires that the sale of the bonds 'shall net the city' the par value and accrued interest, we are not justified in going to the extent of holding that the expenses of putting the bonds upon the market can be deducted from the money received from the sale of the bonds. But, in order to execute the powers conferred upon the municipal government to sell bonds, some expenses must be incurred, and to hold that no expenses shall be incurred or paid out of the money realized from a sale of bonds, or any other fund, would be to prohibit the sale of bonds, unless they could be sold for a premium high enough to meet all expenses, which would amount to a prohibition of the sale unless sold at a premium.

'It can not, with reason, be contended that the special statute was intended to prevent any expenditure of money in the submission of the question of a bond issue, for the publication of notices of the election and of tickets, for the preparation of voting booths and remuneration of election officers, for the expenses incident to declaring the result and the printing of the bonds, and ob-

taining the approval of the Attorney General of the State. These expenses must necessarily be paid out of some public fund or the bonds can not issue. They are absolutely necessary expenditures of money and if they must be paid out of some fund, any other expense must be paid out of some fund. The expenses of the issuance and sale of the bonds, it is clear, can not be paid out of the money realized from their sale, unless a premium sufficient to meet the expenses is obtained, for that sale must net the city the principal and accrued interest to date of payment of the proceeds into the city treasury. * * *

But the expenses incident to and arising out of the submission of the proposition to issue bonds, the election, the printing of the bonds and their sale must necessarily be paid, and, as they can not come out of the special funds, they must be taken, if at all, out of the general fund kept for current expenses. If the expenses can not be obtained from the general fund, public improvements must cease, progress be thwarted and advanced civilized methods be abandoned. That the Legislature intended any such result will not be entertained. The Legislature, while protecting the money voted by the people and dedicated by them to certain specific purposes, could not have desired to impede the march of progress and prevent the improvements demanded by the civilization of the age in which we live. While restricting the use of the dedicated money, it was not designed to manacle municipal authorities, and cause all improvement and material progress to cease. The reasonable expenses absolutely necessary for the issuance and sale of bonds for public improvements must be paid and, if the special fund arising therefrom can not be touched, the money must come from some fund not set apart for a special purpose. The Legislature has not attempted to interfere with the power of the city council to use the general fund for what may be deemed by it to be legitimate, necessary, current expenses.

"As to what are necessary expenses in issuing and floating the bonds need not concern this court, because that question is not raised in the case, the sole contention being that certain items of expense can not be paid out of any fund belonging to the city; in other words, that the city government can under no circumstances pay a commission for the sale of bonds, nor attorney's fees. In Section 56 of the charter the city council is given the authority 'to create any office or agent deemed necessary for the good government and interest of the city,' and under numerous decisions the language is broad enough to authorize the employment of an agent to sell bonds or to pass upon their legality. *Abbott Mun. Corp.*, 708; *Franklin County vs. Layman* (Ill.), 33 N. E., 1094; *Connally vs. Beverly* (Mass.), 24 N. E., 404; *Carrigus vs. Howard County* (Ind.), 60 N. E., 948; *Harris vs. Gibbins* (Cal.), 46 Pac., 292; *Church vs. Hadley* (Mo.), L. R. A., 248, 145 S. W., 8; *Manitou vs. First Nat. Bank* (Colo.), 86 Pac., 75; *State vs. Land Co.* (Minn.), 78, N. W., 115; *Hunt vs. Fawcett* (Wash.), 36 Pac., 318. The charter giving the authority to employ agents, the necessity for such employment is a matter for the judgment of the city council, and such judgment can not be questioned, unless shown to be fraudulent and unreasonable. *Simrall vs. City of Covington* (Ky.), 29 S. W., 880. The authority to employ carries with it the authority to pay the agents.

* * *

"The necessity for the employment of agents to assist the city in the negotiations necessary in the sale of bonds must be addressed to the judgment and sound discretion of the city council, and some latitude must be extended to that discretion in the sale of bonds of such denominations as have been provided for by the people of San Antonio. The number of purchasers of bonds for so large an amount as nearly three and a half million dollars are necessarily few, and the greatest caution will be exercised by them in detecting irregularities in the issue of the bonds, or matters that may affect their validity, and they have the right to demand the opinions of attorneys of undoubted reputation who have devoted themselves to the consideration of such questions. It has been held that even where there had been no stipulation in the contract for the opinions of reputable attorneys as to legality of bonds that 'it is necessary in order to give effect to the intention of the parties to read into the contract an implied condition that the buyers should not be bound to take the bonds unless the proceedings of the city government had been conducted in substantial conformity with the laws, and proper records had been made, so that competent

lawyers of good reputation would be able to certify to the validity of the bonds.' *City of Great Falls vs. Theis*, 79 Fed. Rep., 943.

"Recurring to the position taken by this court that, under the provisions of the charter, the expenses attending the issuance and sale of bonds can not be paid out of the proceeds arising from the sale of the bonds, but that they can and must be paid out of the general fund, we find the position sustained by the Supreme Court in the case of *Dallas County vs. Land & Cattle Co.*, 95 Texas, 200, which is cited by appellant. In that case it was held that the gross proceeds of the sale of school lands by counties must be used for school purposes, and that no expenses of the sale can be deducted therefrom, but that all such expenses must be paid out of the general fund. The court, in construing the effect of the grant of lands to counties for school purposes, held: "This legislation tends to show that the policy was to preserve the entire lands and their entire proceeds intact as a permanent school fund for the use of the public schools of the county. The words "said lands," as used in Section 6, evidently mean all the lands. The provision embraces, as well, all lands that might thereafter be granted as well as those which had been previously acquired, and it would seem to have been contemplated that in case of future grants all the lands which were granted to a county should become its permanent special school fund, and that no part should be given for the expenses of locating and surveying them. In other words, it was intended that such expenses should be paid by the county from its general fund. If such was the intent as to the lands themselves, it is to be inferred that there was a like intention as to the proceeds, that the entire proceeds should be held and that the county should pay the expenses of a sale, if any, out of its own proper funds." So in this case the money arising from the sale of bonds for permanent public improvements at par with accrued interest is devoted by the statute to a special purpose, and no part of it can be diverted from that purpose, but the necessary expenses attendant upon the issuance and sale of the bonds must come from a fund not dedicated and set apart to a special purpose."

The court in that case concluded by saying that the council having been clothed with authority to sell the bonds, had the implied authority to incur any legitimate, reasonable expense necessary to execute its power, and that it was empowered to pay such expenses out of the general fund of the city.

We have quoted extensively from the opinion of the court for the reason that the question propounded by Mr. Cantwell is identical, in principle at least, with the one under discussion by the court in that case.

Our conclusion is that, if the contract entered into by and between the board of trustees and the sales agent provided for payment of his compensation out of funds other than the proceeds of the sale of the bonds, and the board of city commissioners had knowledge of and acquiesced in the making of such contract and ratified it by disposing of the bonds and receiving the proceeds thereof through the purchaser or purchasers secured through the sales agent, then the city commission would be authorized and obligated to draw its warrant upon the general fund of the city in favor of the sales agent and for the amount stipulated in the contract, and the board of trustees would be without authority to order warrant on any fund within its control.

Yours very truly,

W. M. HARRIS,
Assistant Attorney General.

BONDS—CITIES AND TOWNS—PUBLIC IMPROVEMENTS.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 8, 1913.

Hon. John Davenport, City Attorney, Granbury, Texas.

DEAR SIR: The Department is in receipt of your inquiry in which you state:

"The city of Granbury desires to issue bonds to raise money with which to erect a water, light and ice plant, and I must admit that I have failed to learn how from the statute. I would like to know just what steps we must take."

In reply will state that the purposes for which cities incorporated under the general law may issue bonds are stated in Articles 925, 879 and 882, Revised Statutes, 1911. So much of Article 925 as is pertinent to your inquiry reads:

"The city or town council of any city or town in this State, incorporated under the general law * * * may levy and collect an additional tax of 25 cents * * * for the purpose of construction, or the purchase of buildings, waterworks, sewers, and other permanent improvements," etc.

Article 882 in addition to the above specified purposes for which cities incorporated under the general law may issue bonds, provides for their issuance for street improvements.

Article 879 authorizes cities to issue bonds for waterworks and other purposes.

The above article expressly authorizes cities to issue bonds for waterworks purposes, but, in order for your city to issue bonds for the other purposes mentioned in your letter, that is, electric light and ice plant, the power must be embraced by the term "permanent public improvements."

We think there can be little doubt but that an electric light plant comes legitimately and necessarily within the term "public improvements," and such has been the holding of this Department in the past. However, it is our understanding that the power of such cities to issue bonds for such a purpose is now being litigated in a case which arose from Nacogdoches county and decided by the Court of Civil Appeals of the First District at Galveston some two weeks ago.

We think also that a city has not the power to issue bonds for the purpose of the construction of an ice plant. Such power is not given by express provision of the above articles, or any other articles of the statutes, nor can such purpose, we think, be embraced within the term "permanent public improvements." We can not conceive that an ice plant is a necessary incident in the business affairs of a city, or necessary to the performance of the governmental functions of a city.

We therefore advise you that it is our opinion that your city has not the power to issue bonds for the treble purpose mentioned in your letter, but may do so for the purpose of the "construction of a water and light plant," either in a single issue, or separate issues, these purposes having

a natural or necessary connection with each other. See *Kemp vs. Hazelhurst*, 80 Miss., 433. 31 So., 908.

However, in view of the above mentioned litigation, we would suggest that you await the decision of the Supreme Court in that case before taking any steps towards the issuance of bonds by your city. This case has not yet been reported nor have we a copy of the opinion of the Court of Civil Appeals.

The limitation of the taxing power of your city is likewise governed by the articles of the statute above mentioned, and when you are ready to proceed with the issuance of your bonds, your procedure should be governed by Articles 605 et seq., 880 et seq., and 2934.

Yours very truly,

W. M. HARRIS,
Assistant Attorney General.

MUNICIPALITIES—IMPROVEMENT DISTRICT BONDS.

It is the duty of the city treasurer to report the condition of the interest and sinking fund on district improvement bonds issued by a city.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, AUGUST 2, 1913.

Hon. W. P. Lane, Comptroller of Public Accounts, Capitol.

DEAR SIR: This Department is in receipt of your communication of July 25th, in which you state that there is a difference of opinion between your department and the city attorney of Greenville, Texas, as to the duty of the city treasurer to report certain bonds of the city of Greenville and the condition of the interest and sinking fund of each of said bonds; your contention being, as shown by your communications attached to your letter to this Department, that it is the duty of the city treasurer to so report upon said bonds; the contention of the city treasurer being, upon the advice of the city attorney of Greenville that the sidewalk improvement bonds are not bonds of the city but are merely assessments against the particular property in each district, and are, therefore, not to be accounted as making up any part of the indebtedness of the city, and consequently the laws impose no obligation upon the city treasurer to report said bonds to your department.

By the provision of Article 699, Revised Statutes of 1911, it is made the duty of the treasurer of such city to make an annual report to the Comptroller on the first day of August of each year showing the condition of the interest and sinking fund for each set of bonds of said city outstanding on the 30th day of June of each year, which said report shall be under oath, and giving the information detailed in six subdivisions of said article.

Whether or not it is the duty of the city treasurer of Greenville to report the condition of the interest and sinking fund upon the eleven

issues of sidewalk improvement bonds of such city depends upon whether or not they are obligations of the city of Greenville, and in order to determine this fact it will be necessary to review the various provisions of the city charter of Greenville relating to bond issues and the issuance of bonds for sidewalk improvements to cover the amount taxed against the property owners for such improvements. All of the provisions here referred to of the charter of such city will be found in an amendment to the charter of Greenville enacted by the Thirty-first Legislature, and being Chapter 89, of the Special Laws of such Legislature.

Article 3 of such charter as amended, dealing with the subject of taxation and setting out the specific rates which may be levied for the specific purposes, among other things, contains this provision:

"And may levy special tax in any improvement district, if any, and shall, if authorized, of not exceeding 85 cents on one hundred dollars cash valuation for sidewalks or pavements."

Thus we have an express limitation upon the rate of tax to be levied for such improvements. After enumerating certain bonds for which the tax may be levied to provide a sinking fund and pay the interest, the following provision is found in Section 1, of Article 3:

"No additional bonds shall ever be issued by the city of Greenville unless authorized by a vote of the property taxpayers of said city in accordance with the provisions of Chapter 3 of Title 25, Sayles' Revised Civil Statutes of Texas." (This clearly has reference to the supplement of Sayles' Civil Statutes.)

After setting out the procedure for the establishing of an improvement district, Article 10, Section 8, provides that the city council shall by resolution or otherwise determine how the costs of the same shall be paid, whether wholly by the owners of the real estate within such improvement district or in part by such owners and in part out of the general revenue of the city or other revenue that may be properly appropriated for that purpose.

Section 18, of Article 3, contains the following provision:

"The city of Greenville shall have the right at the election of the city council and subject to the provisions of this act, and without any vote of the qualified voters or taxpayers, except as provided in this act, to issue either street improvement district warrants or street improvement district bonds in payment for so much of the cost of work as may be chargeable against the owners of real estate within such improvement district or for the purpose of obtaining money to make such payment; and such warrants or bonds may be issued direct to the contractor in payment for the work or such warrants or bonds may be sold and the proceeds paid to the contractor in payment of the work. Whether bonds or warrants are issued, in either event no tax shall be levied for any one year on any real estate within such improvement district for the purpose of paying the same in whole or in part, or any interest thereon, or for the purpose of providing for interest and a sinking fund, which, including all other city taxes, shall exceed $2\frac{1}{2}$ per cent of the assessed value of such real estate; but for the purpose aforesaid, taxes, including all other city taxes, may be annually levied to an amount not exceeding $2\frac{1}{2}$ per cent of such assessed value, without any vote of the qualified voters or taxpayers except as provided in this act. When warrants or bonds are issued direct to the contractor

they shall be issued in such denominations as the contractor may in writing request."

Section 19, of Article 3, relating to the issuance of bonds reads as follows:

"Bonds authorized by this act to be issued shall be payable, principal and interest, at such time and place and shall bear such rate of interest as the city council may direct. They shall state the purpose for which they were issued, and the number of the improvement district on account of which they were issued, and the number of the improvement district on account of which they are issued. They shall not be issued until the amount chargeable against the real estate within such district shall be ascertained and shall not be issued in excess of such amount. Due provision shall be made to assess and collect annually upon and from the real estate within such improvement district a sufficient amount to pay the interest thereon and create a sinking fund of at least 2 per cent thereon."

The latter portion of Section 20, of Article 10, reads as follows:

"Due provision shall be made to assess and collect annually upon and from the real estate within such improvement district a sufficient amount to pay the principal and interest of said warrants. Such bonds or warrants shall be in such form as the city council may direct or approve, subject to the provisions of this act, and shall be signed by the mayor and attested by the city secretary and the seal of the said city, and shall be assignable, negotiable and collectible in all respect as other valid obligations of the city."

It is true that Section 26, of Article 10 states that the provisions of this act and charter limiting the bonded debt of the city of Greenville, shall not apply to street improvement district bonds or warrants issued under the provisions of this act, and such bonds or warrants shall not draw more than six per cent interest per annum, but as we view the entire act it is not a question of the amount of the bond issue but is a question of the limitation upon the amount of the taxes to be levied in that the total tax rate of the city of Greenville can not exceed two and one-half per cent, as is provided by Section 5, of Article 11, of the Constitution.

All of the provisions of the charter of Greenville taken together clearly indicate that it was the intention of the lawmakers that the bonds issued for the portion of the sidewalk improvements levied against the property owners should primarily be the debt of the city with the right upon the part of the city to assess and collect a sufficient amount from the abutting property owners to pay the interest and create a sinking fund sufficient to pay the bonds at maturity. This is manifest from the provisions of Section 1, of Article 3, wherein the tax rate for such purposes is limited. It becomes more apparent by the provisions of Section 18, of Chapter 10, wherein it is provided that no tax shall be levied for any one year for such purpose which, including all other city taxes, shall exceed two and one-half per cent of the assessed value of the real estate.

The theory that these bonds are the obligations of the city is further carried out by the provisions of Section 19, of Article 10, quoted above, wherein it is provided that the city council shall make due provision to

assess and collect annually a sufficient amount to pay the interest on such bonds and create a sinking fund of at least two per cent, a similar provision being incorporated in Section 20, in which section it is expressly provided that such bonds shall be signed by the mayor and attested by the city secretary and the seal of the city and shall be assignable, negotiable and collectible in all respects as other valid obligations of the city.

There is a distinction, of course, between a tax proper and an assessment against specific property which is recognized by all the courts of the country. A true assessment against specific property for improvement resulting in a benefit to that property should not be considered as a debt against the city but a debt against that particular property; but in the present case the charter of the city of Greenville by its terms does not levy an assessment but levies a tax provided for in the charter of a specific amount annually to create a sinking fund and pay the interest upon a bond issued in due form by the city authorities of Greenville at the direction of the city council. Our view of this matter is that bonds issued for sidewalk improvements are as much the obligation of the city of Greenville as bonds issued for any other purpose, although the payment of such bond as between the city and her people is confined to the taxes levied against certain specific property, but as between the city and the person holding the bond it is an obligation of the city without regard to the manner of raising revenue for the purpose of paying same; in other words, that the holder of the bond is not obliged to look to the parties owing the tax but must look directly to the city.

This question was under discussion in the case of the City of Beaumont vs. Masterson, 142 S. W., 984, and we quote from that case as follows:

"The debt was to be paid by the city, and not by the abutting property owners, so far as appellee is concerned. He has no claim against them, no enforceable demand, if they had paid not a dollar of the tax. He might have called upon appellant to enforce its demand for his benefit, but it would have been still the demand of the city. The city contracted with appellee that it would pay; the tax on abutting property owners was the fund provided out of which it was to pay. It is expressly provided by the charter that the taxes thus levied and collected should not be applied to any other purpose than paying for the cost of collection thereof and for the paying to be done. * * * It further appears that the city had the power to protect itself from the delinquency of abutting property owners. Appellee had none. The city had the power, and it was its duty, both under the terms of the ordinance and under the express provisions of the contract, to stop the paving in front of the property of any abutting owner, if he did not pay the tax. If this had been done, the city would not have been saddled with the debt for this much of the paving. It did not do this, but required appellee to do the paving. In such case it is neither equitable nor just that it should lay upon appellee any part of this burden, even to the extent of the loss of the interest after the debt was due."

The city has it in its power to have on hand at all times a sufficient amount to pay the interest on these outstanding obligations, and by the collection of the two per cent sinking fund to have a sufficient amount upon the maturity to discharge it, and if the city has neglected or

for any reason failed to collect such amount, then the obligation rests upon the city to pay such bonds.

These obligations being bonds of the city and the city liable thereon, we are of the opinion, and so advise you, that it is the duty of the city treasurer of Greenville to make report thereon as provided in Article 699, Revised Statutes of 1911.

We return herewith the correspondence sent us.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

COUNTIES—BRIDGE BONDS. .

One county can not create a district for the purpose of issuing bonds to assist another county in constructing a bridge over the Brazos river.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, APRIL 24, 1913.

Mr. W. G. Kingsbury, Morgan, Texas.

DEAR SIR: This Department is in receipt of your letter of April 19th, in which you say that your section of the county which borders upon the Brazos river running between your county and Johnson county, wishes to join with Johnson county in the construction of a bridge over the Brazos river, and you wish to know if you could lay off a district and vote bonds for the purpose of raising funds to build your portion of the bridge.

Replying thereto, we beg to say that Article 610, of the Revised Statutes of 1911, provides that the commissioners court of a county is authorized to issue bonds of said county for certain purposes, one of which is the purchasing or constructing of bridges for public purposes within the county, or across a stream which constitutes the boundary line of a county, said bonds to be issued, of course, only after a vote of the people for that purpose. This is the only provision of the law authorizing the issuance of bonds for bridge purposes, and it must be done by the commissioners court after an affirmative vote by the entire county.

Article 627 et seq. of the Acts of 1909, page 271, provide for the issuance of bonds by certain districts of the county, but these bonds can only be issued for construction and maintenance of public roads and does not authorize the issuance of bonds for the building of bridges.

You are, therefore, advised that in the opinion of this Department you could not create a district within a portion of the county for the purpose of issuing bonds for the erection of a bridge.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

ROAD BOND LAW—COMMISSIONERS COURT—SINKING FUND.

No law in this State, aside from Act of 1909, authorizing subdivisions of a county to issue road bonds; and no subdivision of a county, nor the commissioners court acting for it, can appropriate to its own use the taxes collected from such subdivision, etc.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 3, 1913.

Hon. A. S. Crisp, Member of the House of Representatives, Capitol.

MY DEAR SIR: We are in receipt of a letter from Mr. W. W. McVea, addressed to you, and by you referred to this Department for reply, a portion of which letter is as follows:

"At the last meeting of the Farmers' Institute, of which I am also secretary, I was requested to write you and request your support of an amendment to the road bond law, and ask you to draft a bill for same to the present Legislature for the placing of special taxes now levied by counties for road improvements and place same towards a bond issue in certain counties or political subdivisions of the same or in districts in said counties where bond issues are wanted without interference of said taxes in any other part of said county, and independent of county, provided that a majority of the voters of said district vote upon said bonds," etc.

^{12.} As we understand from this letter and from your verbal conversation with us, you desire to know whether or not a subdivision of the county can appropriate its part of the fifteen cent special road tax levied by counties for roads and bridges toward the payment of interest and sinking fund for a bond issue.

Beg to advise that it is our opinion that a subdivision of a county has not the power to appropriate any part of this fifteen cent tax towards a bond issue, for the reason that the law requires this tax to be levied only upon a vote of the people of the entire county, and this would preclude any authority in the subdivision of a county to do so. We find no authority in the Constitution or statutes authorizing a subdivision of the county to vote such tax without reference to and independent of the action of the voters of the entire county. It therefore follows that no bonds can be issued by such subdivision of the county.

We do not think that the funds derived from a special tax voted by the county can be apportioned among the several districts or commissioners' precincts of the county. In this connection we quote from Article 6949, Revised Statutes, 1911, as follows:

"The commissioners court shall see that the road and bridge fund of their county is judiciously and equitably expended on the roads and bridges of their county, and, as nearly as the condition and necessity of the roads will permit, it shall be expended in each county commissioner's precinct in proportion to the amount collected in such precinct."

Article 1439 reads as follows:

"The commissioners court shall have power to cause such other accounts to be kept creating other classes of funds as it may deem proper and require the scrip to be issued against the same and registered accordingly."

Neither of the above articles, we think, authorizes the commissioners

court to divide the road and bridge funds of the county among the several commissioners precincts. The article first above quoted was designed to enforce an equitable distribution of said funds, but in terms demands of the commissioners court that in their expenditure of the fund that they take into consideration the condition and necessity of the roads and bridges of the different precincts of the county. For instance, the condition of the roads and bridges of one precinct of the county might make it necessary to expend practically the entire amount of the road and bridge fund of the county in that precinct. To give effect to Article 6949 of the statute it would be useless to have the road and bridge fund divided up among the precincts, and then under Article 1440 the court be constantly transferring the funds from one precinct to another.

The latter article we do not think authorizes the commissioners court to divide the road and bridge funds of the county among the commissioners precincts or other subdivisions of the county, for the reason that, as above stated, if the road and bridge funds of the county were apportioned to the different commissioners precincts, the precinct where the expenditure of said fund is most needed would be confined to its apportionment, while the other precincts of the county would have a surplus of funds to their credit; nor would the commissioners court be authorized in case the fund of one precinct should be exhausted to issue scrip against such precinct and against its fund and thereby create a debt against that precinct, the payment of which would be postponed until such time as the fund for that particular precinct should be replenished by another apportionment of the road and bridge fund of the county, while at the same time the other commissioners precincts of the county would have an abundance of funds to their credit. The courts would not sanction such a course, but would require that the payment of a proper claim against the funds of such a district or precinct be paid out of the funds to the credit of the other precincts, notwithstanding the apportionment of the funds among the several precincts. See *Clarke & Courts vs. San Jacinto County*, 18 C. A., 204.

Since the tax can not be apportioned among the several precincts of the county, such precincts could have no power to issue bonds upon such tax, and furthermore there is no constitutional or statutory provision authorizing such a subdivision to issue bonds based upon such tax, and no county or subdivision thereof can issue bonds for a particular purpose unless expressly authorized to do so.

Again, the general road law, enacted in 1909, authorizing subdivisions of counties to levy taxes and to issue bonds was a legislative interpretation of former laws upon this subject, and precludes the idea that such power before existed in such subdivisions. In fact the emergency clause to said Act of 1909 contains the following provisions:

"The fact that there is no adequate law now on the statutes covering the issuance of bonds for road construction in political subdivisions of the various counties of the State, constitutes an emergency," etc.

We therefore beg to advise that in our opinion there is now no law in this State, aside from the Act of 1909, authorizing subdivisions of a county to issue road bonds; and that no subdivision of a county, nor the commissioners court acting for it, can appropriate to its own use the taxes collected from such subdivision, and therefore can not issue bonds based on the special tax of fifteen cents authorized by the Constitution and statute to be levied by vote of the entire county.

Trusting that the above satisfactorily answers your inquiry, we are,

Yours very truly,

W. M. HARRIS,
Assistant Attorney General.

BOARD OF TRUSTEES—BONDS—LOAN OF CURRENT FUND TO CITY.

Board of trustees would have no authority to take current funds and loan same to city to complete school building, when amount for which bonds were issued is insufficient to complete said building.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MARCH 18, 1913.

Hon. R. C. Briggs, Taylor, Texas.

DEAR SIR: This Department is in receipt of your favor of March 13, 1913, in which you state that the city of Taylor derived from the sale of bonds, issued for the purpose of erecting a public school building, funds which have been expended in the building and which are insufficient to complete the building, and the board of aldermen have called upon the school trustees for the loan of a sufficient amount of money to complete the building. You ask whether the school trustees have authority to take money out of the current funds and loan same to the city to complete the building.

You are advised that in the opinion of this Department the school trustees would be without authority to make such a loan of the funds in their hands raised by taxation for the maintenance of the schools. Of course it would be on the theory that this money would be returned to them and that it would be merely a loan, but there is no provision of the law which would authorize a loan of this character, these funds having been raised by taxation for an express purpose they can not be diverted from that purpose and used in any other manner. While it would seem that this was in furtherance of the purpose for which the funds were raised by taxation, yet at the same time, it is not an expenditure contemplated by the tax raising the funds. We therefore advise that in the opinion of this Department, the board of trustees would have no authority to make the loan you inquire about.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OPINIONS CONSTRUING DEPOSITORY LAW.

COUNTY DEPOSITORY--SCHOOL FUND--SHERIFF--FEES.

1. No trade can be made with depository whereby such depository would be relieved from paying interest.
2. In no event is an officer permitted to draw fees unless such fees are expressly allowed by statute.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 24, 1913.

Hon. James E. Howze, County Judge Concho County, Paint Rock, Texas.

DEAR SIR: We are in receipt of the following letter from you:

"1. Our school teachers have to wait for their salaries for several months on account of very little taxes being paid in before February the 1st, or else they have to discount their warrants. We have a proposition from our bank (which is now the county depository and will probably be again) to cash all school warrants promptly at par, provided the commissioners court will let them have the school money without interest. Please advise me if the court has the authority to do this? I understand, of course, that the county depository must also be the custodian of the common school funds.

"2. I am informed that it has heretofore been the practice of our commissioners court to pay telephone calls of the sheriff and his deputies, made in their efforts to apprehend criminals, and especially to pay for those calls made immediately after the commission of a crime, or supposed crime, in an effort to catch the supposed perpetrators before any warrant has issued. I take the position that the court is without warrant of law in allowing such accounts. Am I right or wrong in taking this position?"

In answer we beg to advise you: 1. The arrangement set out in your first question could not be regularly carried into effect. That is, you could not make a trade with the depository whereby such depository would be relieved from paying interest. The law which compels the county to designate depositories and receive bids for keeping the county money, also contemplates that the school money should be included with the rest of the county money, and should likewise draw interest even though you might decide that it would be worth more than the interest to have the teachers' vouchers paid in full, still the school fund would not be the beneficiary. In other words, the school teachers would be the beneficiary instead of the school children, and for this reason you would not be authorized to make such arrangement.

In answer to your second question, your commissioners court is without authority to pay telephone bills contracted by the sheriff and his deputies made in their efforts to apprehend criminals. The Fee Bill, or rather the law authorizing officers to collect fees, must be strictly construed, and in no event is an officer permitted to draw fees unless such fees are expressly allowed by the statute.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

SCHOOL FUND—LEGISLATURE—DEPOSITORY.

The Legislature is without authority to divert any part of the school fund and the interest on the school fund when placed in a depository for a part of such fund, and the Legislature can not authorize a city to appropriate and use the interest thus accumulated on such fund. Constructing Article 11, Section 4, of the local and special laws of Texas, Thirty-first Legislature, and Article 2454 et seq., and Section 5 of Article 7, and Section 7 of Article 8 of the Constitution.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, SEPTEMBER 24, 1913.

*Hon. W. F. Doughty, State Superintendent of Public Instruction,
Capitol.*

DEAR SIR: We have your communication of September 11, 1913, transmitting to this Department an inquiry from W. E. Hall, president of the school board, and J. F. Kimball, superintendent of the school board of Temple, Texas. The inquiry of these gentlemen, together with the statement of facts upon which the questions are based, is in their language as follows:

"Knowing that your Department will necessarily pass upon the following points later before sending the State apportionment of school funds to the independent school district of the city of Temple, we are instructed by the school board to submit to your consideration now the following facts and inquiries, in order that no complications may arise later in regard to our apportionment of State school funds.

"The city of Temple operates under special charter granted by the Thirtieth Legislature and found on page 388, etc., of special acts of the same. Article II, Section 4, page 437, provides for a city depository, but this was amended by a special act of the Thirty-first Legislature (see page 438, Special Acts of the Thirty-first Legislature), which provides, 'All school funds of said city from whatsoever source derived shall be considered a part of the city funds and subject to the provisions of this section,' and gives the procedure for selecting the said city depository. This special act was passed and went into effect later than the amended general depository law of independent school districts passed by the same Legislature.

"Last year the City National Bank was the city depository under the provisions of this amended charter. In 1913, when the city advertised for bids for a depository, there were none forthcoming, and the city advertised for bids a second time, again receiving none. The city being under necessity for providing funds for the operation of its affairs, the city council entered into a contract jointly with the City National Bank and the Temple State Bank for a loan of \$70,000 until March 1, 1914, issuing fourteen warrants to cover said sum of \$70,000 borrowed, which sum was apportioned to the various operating funds of the city, and the income of these various and respective city operating funds pledged for the repayment of the sum, the said two banks sharing alike in the loan. The city further agreed to deposit in said banks, in equal share, each to each, all its funds and moneys of every kind, including school funds, from whatsoever source received, receiving credit in interest on the daily balance on all such funds that might be so on deposit, the banks agreeing to honor and pay on demand all legal warrants drawn on the school fund (and on other funds), provided there is sufficient funds in hand to the credit of said fund.

"This, briefly, covers the contract of the city with the banks, a copy of which can be furnished for your inspection if necessary. We understand that the two banks stand ready to furnish such current funds as may be needed for the operation of the schools, pending the receipt of school revenues, and that they are willing and ready to give necessary bonds as may be required by the State for the protection of the school funds.

"In order to avoid the possibility of future complication or delay in the re-

ceipt of the State school funds, and to follow procedure that shall be mutually acceptable to all parties concerned, we beg to ask the following questions: Are said banks the depository of public school maintenance funds of the independent school district of the city of Temple to whom you will pay over the said apportionment of school funds, and in what sum and under what conditions bonds should be required of them for the protection of said school funds? If they are not the depository and custodians of said school funds, is the City National Bank still the depository under the terms and bond of its previous contract? If there is no depository, how, and by what procedure shall such depository of the school funds be designated? Kindly indicate in full the plan of procedure that should be followed in order that the depository and bond shall be in all points acceptable to the State in its allotment of the apportioned school funds."

We also have before us for our information ordinance of the city council of Temple adopting a contract with the City National Bank of Temple and the Temple State Bank relating to loan from said banks to the city of \$70,000.

Answering the questions propounded to us, we find it necessary to review the history of the available school fund and the methods of treating same under the laws of this State.

Section 5 of Article 7 of the Constitution of the State of Texas provides that "all the interest derivable from the principal of all bonds and other funds and the principal arising from the sale of lands belonging to the school fund which constitutes the permanent school fund, together with the taxes levied or authorized shall be the available school fund at which the Legislature may add not exceeding one per cent annually of the total value of the permanent school fund, such value to be ascertained by the board of education until otherwise provided by law, and the available school fund shall be applied annually to the support of the public free schools, and no law shall ever be enacted appropriating any part of the permanent available school fund to any other purpose whatever."

Chapter 9, Articles 2725 and 2726, Revised Civil Statutes, treats of the available public free school fund. The first article treats of all the funds that enter into and make up and constitute the available school fund which under its provisions shall be apportioned annually to the several counties of this State according to the scholastic population of each *for the support and maintenance of the public free schools*. The last article sets out that "besides other available school funds provided by the law, the proceeds of any leasing or renting of lands, heretofore granted by the State of Texas to the several counties thereof for educational purposes, shall be appropriated by the commissioners court of said counties in the same manner as is provided by law for the appropriation of the interest on bonds purchased with the proceeds of the sale of such lands; and the proceeds arising from the sale of timber on said lands, or any part thereof, shall be invested in like manner as the Constitution and law requires of proceeds of sales of such lands, and it shall be unlawful for the commissioners court of any county to apply said proceeds or any part thereof to any other purposes or to loan the same except as above required."

Section 7 of Article 8 of the Constitution 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 maner to divert from its purpose any special fund, or any part thereof."

Articles 2767, 2768, 2769, 2770, 2771, 2772 and 2773 treat of the duty of the treasurer of the school funds.

Outside of the provisions relating to the establishment of your city treasurer or depository contained in the Acts of 1907, as amended by the Acts of 1909, are the principal provisions of law relating to the subject we have in hand. The first conclusion after our investigation is that the school fund can not be diverted. We believe that this is elementary. From the beginning the lawmakers of this State have regarded the school fund as sacred and would not in any manner, directly or indirectly, permit nor countenance a diversion of this fund from the purpose originally intended.

Bearing upon this the courts have held that where a treasurer diverted or misused or for the time being appropriated to his own use and benefit any part of this fund he would be compelled to return not only the fund but interest on the same for the period of time covered by the diversion of same. See the case of Trustees of Laredo vs. Webb County, 64 S. W., 486, and Webb County vs. The Board of Trustees of Laredo, 65 S. W., 878. It follows therefore that the county treasurer, nor indeed any other officer, and not even the Legislature of the State, can legally divert nor authorize the diversion of any part of this fund.

This brings us to a discussion of Section 4 of Article 9 of the city charter of Temple, which sets out with some degree of particularity the method by which a depository should be selected for the city. It follows the language of the general statutes relating to the selection of a city depository in which it provides "the school fund of said city from whatsoever source derived shall be considered a part of the city funds and subject to the provisions of this section."

If the intent of the Legislature in writing this into the general depository law was to give the city any pecuniary benefit from the school fund the act of the Legislature in so doing would be unconstitutional and void for the reason that it could not divert nor authorize the diversion of this fund, but where an act is susceptible of two constructions, the one which would render it constitutional and the other would render the act unconstitutional, we would under the well known rule of construction follow and adopt the construction which would leave the act unconstitutional. We therefore conclude that in adopting this provision the Legislature intended to do a constitutional thing and when it said that the school fund of the city from whatsoever source derived shall be considered a part of the city funds and subject to the provisions of this section the Legislature meant that the school funds should be considered a part of the city funds for the purpose only of obtaining a depository for such funds and for no other purpose, and that the Legislature contemplated and indeed had in mind that the city in exercising the authority granted to it would exercise it in a constitu-

tional and legal way and that the city would under the provisions made for it act for the school fund in obtaining a depository and would give the school fund the full benefit and effect of the interest derivable from said fund and that the Legislature did not intend that any part of the interest or benefits to be derived from the investment of the school fund should be used or appropriated by the city. By giving the act this construction we hold this provision constitutional.

The courts have held that interest is a mere incident of the principal or is an integral part of the original debt and that where there has been an expressed contract to pay interest the sum due therefor is as much of the integral part of the debt as is the amount for the use of which the interest is contracted.

Davis vs. Harrington, 160 Mass., 278.

Southern Central R. Co. vs. Moravia, 61 Barb. (N. Y.), 180.

Wood vs. Smith, 23 Vt., 706.

Steward vs. Barnes, 153 U. S., 456.

We conclude from these authorities and from a careful reading of the legislative act authorizing the city of Temple to obtain a depository for the school fund that the school fund, together with the interest derivable therefrom, should be used for school purposes only and that the interest in view of the fact that the law has authorized a special contract for interest upon this fund is itself a part of the fund and comes under the prohibition in Section 7 of Article 8 of the Constitution, which prohibits the Legislature from in any manner diverting from its purpose any special fund that may or ought to come into the treasury, and the provisions of Article 5 of Section 7 of the Constitution, which says that no law shall ever be enacted appropriating any part of the permanent available school fund to any other purpose whatever, would prohibit the Legislature from enacting any law the effect of which would be to enable the city of Temple to use or become directly or indirectly the beneficiary of the school fund or the interest derivable therefrom.

In the case of Webb County vs. Board of Trustees, cited above, the court says: "If the petition had charged that the commissioners court had diverted this fund to strictly county purposes and that the county in its quasi corporate capacity had the benefit of such diversion we would have had a different question," which was equivalent to the court saying that if the county had the benefit of the diversion of the fund the court would have held that the fund should be reimbursed to the extent of the benefit derived by the diversion.

We will now notice the provisions of Section 4 of Article 11 of the city charter of Temple in which provision is made for the selection of a city depository. We note that no provision is made for executing and filing of bond. We further observe that said act makes provision not only for receiving sealed proposals for a rate of interest upon daily balances, but also calls for bids upon the rate of interest upon daily overdrafts. It is our opinion that in view of the fact that radical changes are made from the general law and that nowhere is any au-

thority given for obtaining bids for overdrafts, we are of the opinion that the article in the city charter which attempts to change the general law relating to the selection of a depository for school fund is unconstitutional. We do not understand that there is any authority in law to pass a special depository law changing and making different the provisions of the general law. It is true that special road laws make different laws than the general road law, but it must be understood that this is because of a special provision of the Constitution.

We therefore advise you that the city of Temple should comply with the general law relating to the selection of a city depository for the school funds.

You call our attention to the fact that last year the City National Bank was the depository under the provisions of the amended charter when the city advertised for bids, and you desire to know if the city council failed in designating and failed in its efforts to select a city depository when it entered into the contract with the two banks above mentioned, if the City National Bank is still the depository and would remain the depository until another depository was selected.

In view of the fact that the year for which the City National Bank was selected as depository had expired and there was no provision of law for them holding until their successor was selected, and the further reason that the city council had entered into a contract with the City National Bank which disclosed the fact that both the city council and the City National Bank has abandoned its original idea or original contract to act as the depository of the city of Temple, we conclude that the City National Bank of Temple is not now the legal depository. both parties to the contract having voluntarily abandoned the original contract or agreement. It can not now be held to be in force and effect. We therefore conclude that the city of Temple has no depository for the school fund of such city, and it would be the duty of the city council to proceed at once to advertise for bids for the school fund only. We say for the school fund only for the reason that we believe that the school fund together with the interest derivable from its investment must be kept separate from the other funds. The city council should advertise for bids for this fund alone because it would be almost impossible to combine it with any other fund and obtain a bid which would not impose on one or the other fund. It should be made clear to all bidders that they are becoming the depository of the school fund only. To be the depository of the school fund there should be attached to the bid no qualification or condition except those imposed in the statute.

The contract between the city of Temple and the two banks while it has been examined by us, we will not undertake to say just what its legal effect as between the city and the two banks would be, but will say that in so far as the contract attempts to and purports to deal with the school fund of the city of Temple it is without effect.

We therefore conclude and so advise you:

1. That the city of Temple in its contract with the City National

Bank of Temple and the Temple State Bank has failed to designate or constitute either of such institutions or both of them the depository for the school fund of the city of Temple.

2. That the City National Bank of Temple and the city of Temple both having abandoned the depository contract entered into at the time when such bank was selected as the city depository, said City National Bank is no longer the depository of the city of Temple.

3. There being no depository now for the school fund of the city of Temple it is necessary for the city council to advertise for bids and proceed at once to the selection of a depository for said school funds.

4. The bids for the school fund should have attached to them no condition or requirement other than those imposed by law and it would be illegal to require a bank which desires to be a depository to agree at the same time to loan the city a stipulated amount of money. For the school fund is entitled to the full benefit of the rate of interest it can obtain upon its funds unhampered by any other condition.

5. The effect of the act authorizing the selection of a depository for the school fund is to permit the city council to select a depository for such fund, but does not authorize the city council nor could the Legislature authorize the city council to so use the school fund as that the proceeds arising from the interest thereon would inure to the benefit of the city, but on the other hand the interest when it accrues becomes at once a part of the original fund, and it is beyond the power of the Legislature or any other agency to divert or use this interest for any other purpose than that for which the principal could be used. The interest therefore is an integral part of the principal.

6. The method you should pursue in the selection of a depository is to follow Article 2771 of the Revised Civil Statutes. As indicated in this opinion, the article in your city charter relating to the selection of a depository is in conflict with the Constitution, and it will therefore be necessary for you to comply with the general law upon this subject, and for your instruction we suggest that you read and comply with the provisions of Title 48, Chapter 12, Articles 2767 to 2773, Revised Statutes, in so far as it is applicable to the selection of your depository or treasury, and also Chapter 3, Title 44, relating to the selection of a city depository.

7. The contract submitted by you we return without expressing any opinion as to its legal effect so far as the city of Temple is concerned. What we have said applies only to the school fund and it has not been necessary for us to investigate and pass upon the legal effect of the contract you submit except in so far as the said contract relates to the school funds of the city of Temple.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

DEPOSITORY—SCHOOLS—CORPORATIONS.

1. A corporation, being a creature of the law, possesses only such powers as the charter confers either expressly or as an incident to its charter.

2. It is without the charter power of a mercantile company to become a bidder for the position of school depository; but the bond given by such company would be a valid and binding obligation.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, DECEMBER 9, 1913.

*Hon. W. F. Doughty, State Superintendent of Public Instruction,
Capitol.*

DEAR SIR: Under date of the 5th inst. you write this Department as follows:

"The school board of Tyler selected the Starr-Mayfield Company, a corporation, which was the best bidder for the school funds, as depository of school funds of Tyler Independent School District. This corporation executed and filed in this Department a bond in proper form and amount for the security of the school funds of the district. It is now contended that this concern is ineligible to serve as depository of school funds, because it is a concern incorporated to do a wholesale grocery business. For your information, we beg to say that the charter of this corporation, on file in the Department of State, recites that the purpose of the corporation is 'the doing of a wholesale grocery business, sale of goods, wares and merchandise and everything pertaining to the wholesale grocery business.' In this connection, we beg to say that Article 2771, Revised Statutes, 1911, states that the 'person or corporation' offering satisfactory bond and the best bid of interest on average daily balances of school funds shall be treasurer of school funds.

"Please advise us whether the Starr-Mayfield Company may serve legally as depository of school funds of the Independent School District of Tyler. If not, what course should the school board take in selecting a depository? Should the next best bidder be selected, or should the board advertise again for bids?

"Under the provisions of Article 2771, quoted above, may any responsible person or any corporation serve as treasurer or depository of school funds? If not, what persons, or associations of persons, if any, or what classes of corporations may serve in this capacity? May a company, or firm, or association of persons which is unincorporated, serve in this capacity? If a person, company or corporation which may not serve legally in this capacity is selected by the school board as treasurer or depository of school funds, and if it is unknown to this Department that said person, company or corporation is ineligible, would the bond submitted be binding, if properly executed?"

Replying to your questions, beg to say that it is our opinion that the Starr-Mayfield Company, a corporation chartered to do a wholesale grocery business with power to sell goods, wares and merchandise and everything pertaining to the wholesale grocery business, would not be authorized under its charter to bid for the position of treasurer or depository for the school district at Tyler.

The corporation in question is limited to the doing of those things and the assumption of such obligations with reference thereto, power to do which is expressly or impliedly granted by its charter. A corporation, being a creature of the law, possesses only such powers as the charter confers either expressly or as an incident to its existence. Article 1164 of the Revised Statutes of this State provides:

"No corporation, domestic or foreign, doing business in this State, shall em-

ploy or use its stock, means, assets, or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation or those permitted by law."

In the case of *Ry. Co. vs. Morris*, 67 Texas, 699, our Supreme Court said:

"The rule that a corporation has power to do only such acts as its charter, considered in relation with the general law authorizing it to do, applies to every class of corporation.

"The law requires articles of incorporation to be adopted, signed and filed in the office of the Secretary of State and these are required to give information on specified subjects, and, among others, to state the identical thing the contemplated corporation proposes to do.

"When the articles of incorporation have been filed and recorded, as herein provided, the persons named as corporators therein shall thereupon become and be deemed a body corporate and be authorized to proceed to carry into effect the objects set forth in such articles in accordance with the provisions of this title." (The latter quotation being from the Revised Statutes, as quoted in the opinion referred to.)

It can not be insisted that this corporation had express authority under its charter as a mercantile corporation to become a bidder for the position of treasurer or depository for a school district or to assume the obligations such position entails.

Has it the implied power to assume the obligations of such position?

In the case of *North Side Railway Company vs. Worthington*, 88 Texas, 562, our Supreme Court laid down the general rule for determining the implied powers of a corporation. Among other things, the court said:

"Corporations are the creatures of the law, and they can only exercise such powers as are granted by the law of their creation. In every express grant there is implied power to do whatever is necessary or reasonably appropriate to the exercise of the authority expressly conferred. The difficulty arises, in any particular case, whenever we attempt to determine whether the power of a corporation to do an act can be implied or not. The question has given rise to much litigious controversy and to much conflict of decision. It is not easy to lay down a rule by which the question may be determined, but the following, as announced by a well known text-writer, commends itself not only as being reasonable in itself, but also as being in accord with the great weight of authority:

"Whatever be a company's legitimate business, the company may foster it by all the usual means; but it may not go beyond this. It may not, under the pretext of fostering, entangle itself in proceedings with which it has no legitimate concern. In the next place, the courts have, however, determined that such means shall be direct, not indirect; i. e., that a company shall not enter into engagements as the rendering of assistance to other undertakings from which it anticipates a benefit to itself, not immediately, but immediately by reaction, as it were, from the success of the operations thus encouraged—all such proceedings inevitably tending to breaches of duty on part of the directors, to abandonment of its peculiar objects on part of the corporation.' *Green's Brice's Ultra Vires*, 88.

"In short, if the means be such as are usually resorted to and a direct method of accomplishing the purpose of the incorporation, they are within its powers; if they be unusual and tend in an indirect manner only to promote its interest, they are held to be ultra vires." (88 Texas, 568-569.)

It is not necessary in this connection to cite all the authorities that could be cited illustrating the nature of implied powers of a corporation, but they are to the effect and lay down the general rule that the implied

powers of a corporation are only such as are necessary to the direct and exclusive business of the corporation; that they are such as exist by virtue of the business of the corporation itself; that they are incidental powers which might afford a profit to the corporation, but they are limited to such powers as are necessary to the enjoyment of the privileges of the charter.

It may be said that this mercantile company has the right to borrow money and is fully authorized to borrow money in the necessary conduct of its business, and that this transaction in its last analysis is but the borrowing of the funds of this school district. This is true in a sense, but it can not be said in order to borrow money for its business that this company is impliedly authorized to assume the statutory obligations and fiduciary relation that the position of depository imposes. We are of the opinion, therefore, that it was without the charter power of this mercantile corporation to become a bidder for the position of depository, and that its act was ultra vires.

We are furthermore of opinion that the statute referred to by you (Article 2771, Acts of 1911), is not susceptible of a construction that would permit any others than a banking corporation, associations engaged in banking, or an individual person engaged in banking, to become a treasurer or depository of this school fund.

This statute was approved February 18, 1909, and is Section 154a of Chapter 12 of the Acts of that year, found at pages 17 to 22, Session Acts, and reads as follows:

"All school districts heretofore provided for by special act of the Legislature are hereby placed under the general laws relating to incorporated school districts, and all provisions of any and all such special acts in conflict with the general laws are hereby specifically repealed, except in so far as those acts relate to the boundaries established by the acts incorporating such districts. All incorporated districts having each fewer than 150 scholastics according to the latest census shall be governed in the administration of their schools by the laws which apply to common school districts and all funds of such districts shall be kept in the county treasury and paid out on order of the trustees approved by the county superintendent; provided, that the terms county treasurer and county treasury as used in all provisions of law relating to school funds shall hereafter be construed to mean the county depository, and in incorporated districts of more than 150 scholastics, whether they be cities which have assumed control of the school within their limits or corporations for school purposes only, the treasurer of the school funds shall be that person or corporation who offers satisfactory bond as provided by law and the best bid of interest on the average daily balances for the privilege of acting as such treasurer, and the State Department of Education shall be notified of the treasurers of the school funds in the respective counties and independent districts by the commissioners courts and presidents of school boards filing in said Department copies of the bonds of said depositories to cover school funds; provided, that no commission shall hereafter be paid for receiving and disbursing school funds."

It is a familiar rule of construction that all statutes enacted on the same subject constitute a code and are to be construed together. In examining the depository laws of this State, we find with reference to State funds none can become a depository of these except a bank or banking institution, that is, a national bank or a chartered State bank. Those eligible to become depositories of county and city funds must

be either a banking corporation, an association engaged in banking or an individual banker. The language of the article quoted above is somewhat indefinite, and, standing alone, might bear the construction that any person, whether engaged in banking or not, could become a successful bidder; but when the act takes its place in the general scheme that was being inaugurated, creating depositories for public funds, it must be construed in harmony with the spirit and purpose of the other statutes, and when so done the language used therein, in which it is provided that the commissioners courts and presidents of school boards shall file in the Department of Education copies of all bonds of "said depositories" to cover said school fund, becomes significant, in that it indicates that the treasurer of the school funds referred to in the preceding portion of the act means a "statutory depository."

One other reason why we believe the statute contemplates that the depository should be some corporation, partnership or individual engaged in the banking business is that the fiscal transactions of such counties, cities and school districts would be facilitated; the law contemplates a place of deposit where daily balances are kept as distinguished from a mere loan of money. For this further reason it is the opinion of this Department that this corporation could not legally become the depository for this school district.

The authorities of this school district should advertise for new bids and let the same to the incorporated or unincorporated banker that presents the highest and best bid.

Your last question is:

"If a person, company or corporation which may not serve legally in this capacity is selected by the school board as treasurer or depository of school funds, and if it is unknown to this Department that said person, company or corporation is ineligible, would the bond submitted be binding, if properly executed?"

We answer this question in the affirmative. The bond would be a valid and binding obligation although the corporation exceeded its charter powers in executing the same and although it is not an eligible bidder. The obligation was voluntarily assumed, upon which the funds belonging to the district were paid over.

Yours very truly,

B. F. LOONEY,

Attorney General.

COUNTY DEPOSITORY—"BANKING" DEFINED.

Held: H. Kempner, of Galveston, is an individual banker within the meaning of the depository law, and was a qualified bidder.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 15, 1913.

Hon. C. H. Theobald, County Attorney, Galveston, Texas.

DEAR SIR: In your letter of the 14th instant, you state that a

question has arisen with the commissioners court of Galveston county as to whether or not the firm of H. Kempner could properly be classed as an "individual banker" as contemplated by the County Depository Law, so as to be qualified as a bidder for the deposits for such county.

From the statements made by you, and also from the statement made by Mr. Seinsheimer, and from the affidavits and data presented, and from the personal conversation with you and Mr. Seinsheimer, I gather substantially the following:

H. Kempner, a cotton and banking firm, now managed by Mrs. E. Kempner, survivor of the community, is now and has been for a number of years engaged in business at Galveston as a cotton factor and is also engaged in banking, that is, if the facts involved constitute the business of banking.

They have held themselves out for years as doing a cotton and banking business; they keep money of others on deposit; they have deposits with banking houses in New York upon which they draw bills of exchange; they discount paper; employ the customary forms of stationary used by banks of discount and deposit; loan money; and the last statement made to Dunn and Bradstreet showed that they had individual deposits something near \$300,000; that said institution does not solicit local patronage, although they carry local accounts, they do not receive cash deposits, nor issue pass books, nor pay out money on checks as is ordinarily done; the business conducted is solicited from interior planters and cotton dealers and the deposits received, and their business in the nature of banking grows out of and is an adjunct to their business as cotton factors.

This firm was the successful bidder for the position of county depository for Galveston county, that is, the firm bid the largest rate of interest per annum upon the daily balances to the credit of the county. The question presented is whether H. Kempner was eligible to bid for these deposits, and the only ground of ineligibility suggested is whether or not the firm is an "individual banker" within the meaning of the County Depository Law.

We have two general classes of banks in this State: incorporated and unincorporated. Throughout the County Depository Law, those entitled to bid are referred to as "corporations, associations, or individual bankers." The Bank Guaranty Law, Article 558, reads as follows:

"It shall be the duty of private individuals or firms engaged in the banking business to use after the name, under which the business is conducted, the word, in parentheses, 'unincorporated,' and failure to comply with this article shall subject the offender to a penalty of \$100," etc.

Thus we see that unincorporated banks are referred to in the banking and in the depository laws as "individual banker," and "private individuals or firms engaged in the banking business," hence it would seem that these terms mean the same; that is, "individual banker" means the same as "private individuals engaged in the banking busi-

ness," and the only question to determine is whether or not the facts constitute H. Kempner a banker.

The term "banking" is rather broad and may consist in receiving deposits, loaning, borrowing, buying, and selling exchange, and other like acts, but it will hardly be insisted that in order to constitute the business of banking a person would have to engage in all of these departments of the business.

In fact, the law of this State authorizing the organization of banking corporations, provides for several groups, each with a limited scope; and thus we have indicated the tendency to contract rather than enlarge the banking proposition. The law provides for banks of deposit or discount, or both; it provides separately for bank and trust companies; again it provides for savings banks. Thus the doctrine is recognized that in order to be a banker, one does not have to pursue all the purposes that are usually comprehended within the term "banking."

Without prolonging this communication, will say that it is the opinion of this Department that H. Kempner is an individual banker within the meaning of this Depository Law and was a qualified bidder.

If we should be in error, however, and if this safely solvent firm should become insolvent, and the county should be forced to rely upon the bond for protection, still, under the circumstances mentioned, that is to say, under the circumstances under which the sureties proposed to execute the bond in question, it would certainly be a good common law obligation, and, so far as the law is concerned, would afford ample protection to the county.

Yours very truly,

B. F. LOONEY,

Attorney General.

COUNTY DEPOSITORY.

1. There shall be but one depository, and but one rate of interest on all the funds of the county.

2. In the event no bids are submitted, or in case no bid for the entire amount of the county funds shall be made, then the commissioners court would have authority to dispose of the funds and to accept several bids, etc.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS. JANUARY 17, 1913.

Hon. W. S. Shipp, County Judge, Belton, Texas.

DEAR SIR: In your communication to this Department, date of January the 15th, 1913, you say:

"Under the law governing the bidding for county depository for funds of the county and the amount of interest any bank, association, or individual banker desires to pay, would they be authorized, or would the county be authorized to accept the bid of any who bids a certain per cent on all funds except road and bridge funds, and a different per cent on such road and bridge funds of said county?"

"In other words, the bidders desire to bid on all funds at a stated per cent

on daily balances except road and bridge funds, and bid another per cent (stating it) on road and bridge funds, and give as their reason for doing so that a bond issue for roads and bridges might be voted of one, two or three hundred thousand, and would be paid out after its receipt, and the bank or individual banker, who is the depository, would thereby entail a loss, as they could not let the money out and get any returns on it, because it would have to remain in the depository to be paid out on the work of building the roads and bridges. Under the depository law, can they separate their bids as indicated?"

Article 2440, Revised Statutes, 1911, requires that the commissioners court shall call for bids for county depositories "for the funds of the county." Article 2441 provides that any banking corporation, association, or individual banker, desiring to bid, shall make his lowest offer, stipulating the rate of interest on the funds of the county. Article 2442 provides how the bid shall be open, the award made, the interest paid, etc., and requires the court "to select as the depository of all the funds of the county" the banking corporations, association, or individual banker, offering to pay the largest rate of interest per annum for said funds. The language of the above article clearly contemplates that but one bid shall be accepted and that there shall be but one depository for all the funds of the county. You will note that the singular and not the plural number is used with reference to the depository selected, with reference to the rate of interest, while the plural number is used in speaking of the money or funds to be deposited. This means that there shall be but *one* depository, and but *one* rate of interest on all the funds of the county.

Of course, under Article 2445, etc., in the event no bids are submitted, or in case no bid for the entire amount of the county funds shall be made, then in that event your court would be authorized to make a disposition of the funds and to accept several bids as indicated in your letter. *Worsham vs. Dyer*, 43 T. C. A., 43.

Yours very truly,

LUTHER NICKELS,
Assistant Attorney General.

ROAD IMPROVEMENT DISTRICTS—COUNTY DEPOSITORY FUNDS MUST BE
DEPOSITED THEREIN—COUNTY TREASURER—FEES.

1. All funds collected by virtue of county depository law must be deposited by the treasurer in the depository as county funds, and said treasurer is prohibited from depositing them elsewhere.
2. Fees of county treasurer limited to \$2000 per annum.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 26, 1913.

Hon. R. R. Lewis, County Attorney, Bay City, Texas.

DEAR SIR: In your favor of recent date you ask the following questions:

"First. Under the road law creating road improvement districts in Texas the law provides that the county treasurer of said county shall be custodian

of the funds collected by virtue of this law, and shall deposit the same with the county depository of funds, and I desire to know whether or not under the language of this statute can the treasurer deposit the funds in any other bank than that of the county depository; and, if not, would not the county depository have to pay the same rate of interest on this fund on daily balances as it now pays for the usual county funds?

"Second. I desire information as to whether or not under this special bond law, creating a special road district, and the county treasurer is treasurer or shall be treasurer of his said road districts, the county treasurer would be entitled to any commission on moneys received and paid out by him as said treasurer of said district; and, if so, would he be limited to the two thousand a year received by him as county treasurer; or, if he is entitled to the commissions as treasurer of his particular road district, would it be in addition to the constitutional limit of two thousand a year, and would he be entitled to the same commissions as treasurer of his road district as are now allowed by law as county treasurer; that is, two and one-half per cent commission?"

In answer to your first question, we beg to say that in our opinion Article 634, Revised Statutes, 1911, is mandatory and requires that all funds collected by virtue of Chapter 2, Title 18 (County Depository Law), be deposited by the treasurer in the depository as county funds, and he is prohibited by this article from depositing them elsewhere. By said article such funds, for the purposes of or management and custodianship of, are made county funds. By Article 2442, it is made the duty of the commissioners court to select a depository for all funds of the county, and when so selected all county funds should be placed therein without unnecessary delay; and it is further provided that the interest upon such county funds shall be computed upon the daily balances to the credit of such county, etc. Such funds being by the statute constituted "county funds" and therefore required to be deposited as other county funds in the depository of the county, such depository is required to account to the county for interest thereon, computed on the average daily balances.

Answering your second question, we beg to advise that the respective fees of the county treasurer are limited by Revised Statutes, 1911, Article 3875, to two thousand dollars. It is the opinion of this Department that the county treasurer can not collect or receive during any one year from all sources commissions in excess of the two thousand dollars prescribed in said article of the statute. The county treasurer would be entitled to commissions on moneys received and paid out by him as treasurer for a road district to the extent only that his commission would not exceed two thousand dollars. The Special Road Law of 1909 provides no compensation for the treasurer for the handling of the funds for a county or road district therein, but we think the sums received and paid out by him for such purpose thereto should be considered in the calculation of his commission, that is, two and one-half per cent for dispersing such funds to the order of the commissioners court.

Trusting that the above satisfactorily answers your inquiry, we are,
Yours very truly,

W. M. HARRIS,
Assistant Attorney General.

STATE DEPOSITORIES.

Where a State depository consolidates with another bank, and the affairs of the depository are liquidated, the bank with which consolidation is had does not become the depository, and the treasurer should advertise for new bids for the district.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JUNE 10, 1913.

Hon. J. M. Edwards, State Treasurer, Capitol.

DEAR SIR: This Department is in receipt of your communication of recent date enclosing a communication from the Victoria National Bank, successor to the First National Bank, which latter bank was State depository for that district, but which had been absorbed and consolidated with the Victoria National Bank.

You ask if after the consolidation the Victoria National Bank would succeed to the rights of the First National Bank under the depository contract, and be the depository for that district.

We note in the communication addressed to you by the vice-president of the Victoria National Bank that all of the assets of the First National Bank are now the property of the Victoria National Bank, which would include the bonds held by you as additional security, and that the Victoria National Bank has assumed all obligations of the First National Bank. We also note that the transfer was duly approved by the United States Government, and that the Victoria National Bank is now the depository, that no question was raised by the National government in such matters.

We are of the opinion that the designation of a depository under our State law is not a contract between the State and the bank in the sense that it is susceptible of being transferred. In other words, it is not such a contract as would be enforceable against the assignee of the depository and is a non-negotiable undertaking. By reason of acceptance of the bid of a depository there arise certain obligations on the part of the depository, and certain rights to which it is entitled that altogether might be called personal in their nature in that the acceptance of the bid and the designation of the depository is made upon an examination and approval by the Treasurer, Comptroller and the Attorney General, and before such an appointment could be transferred, if it could be done at all, such inspection and approval of the new institution would be necessary by such officials. The depository in this case has been absorbed by an entirely different institution, although the officers and managers of the new are the identical persons who managed the old institution, but the new institution is separate and distinct from the old, it has an identity of its own, and in so far as the State is concerned, is a stranger to the contract made for a depository. The old depository has by its voluntary act, placed itself in a position where it can not comply with the obligations rested upon it by the law, by reason of the acceptance of its bid, and we think in contemplation of the law, has forfeited the right to act as depository by its own act and rendered itself

incapable of carrying out its obligation to the State, and we think it should be your duty, and we so advise you, to advertise for a new depository under the provisions of Article 2435, Revised Statutes.

It is true that no doubt the new institution is stronger financially than the old; it is managed by the same gentlemen who conducted the affairs of the old institution, but as above stated, the institution to which was granted the rights of depository has passed out of existence and you have no authority to transfer to the new institution the funds of the State deposited in the old. The fact that the Secretary of the Treasury of the United States has authorized the transfer of government funds is not authority to the effect that you should pursue the same course, for the reason that the Secretary of the Treasury under the statutes of the United States has much greater latitude and discretion in the selection of depositories than you have under our State law. Government depositories are under the direction of and subject to such rules and regulations as may be prescribed by the treasury, but you are limited by the powers expressly conferred upon you by our State statute, and nowhere in this State statute are you authorized to approve the transfer of the depository from one institution to another.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

COUNTY DEPOSITORIES.

A depository is not required under the law to keep all of the county funds on hand. Bond executed by the depository stands in lieu of the fund.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS; JUNE 19, 1913.

Hon. J. P. Weatherby, County Judge, Fort Davis, Texas.

DEAR SIR: We have your communication of June 10th reading as follows:

"As the county depository at this place has resented the action of the commissioners court in checking up his quarterly report, and asking him to submit some statement showing authentically that he has the required amount of money on hand, claiming that the court has no such authority, I would like to inquire if Chapter 2, Revised Civil Statutes of 1911, Acts 1905, repeals Article 1450, Chapter 1, Civil Statutes, 1911, Acts 1897, pertaining to county finances."

Replying thereto, we beg to say that under the provisions of Chapter 2 of Title 44 establishing and providing for depositories for county funds the acceptance of the bond of the depository and the establishing of such depository, while the same does not expressly repeal Article 1450, Revised Statutes, 1911, yet at the same time, in our opinion, it destroys the force of such article. Article 1450 directs that the commissioners prior to the adjournment of each regular term of court, shall make affi-

davit as to the condition of the treasurer's account, and that they have fully inspected and counted same. Article 1449 provides that the court shall actually inspect and count all of the actual cash and assets in the hands of the treasurer, belonging to the county at the time of examination of the treasurer's report.

The creation of a depository and the acceptance of a bond from such depository is for the purpose of obtaining the interest to be paid by such depository, and it is clearly within the contemplation of the depository law that the banking institution contracting for the deposit of the county fund, shall be allowed the use of such funds in order that such institution may be able to pay the interest to the county under its contract and it was clearly not the contemplation of the Legislature enacting this law that the depository should keep the actual cash belonging to the county in its vaults at all times. If such was the case no bank would agree to pay any interest on such funds for the reason that it could not afford to pay from three to five per cent interest on money and allow that money to lie idle in its vaults. Under the law banks are only required to keep a certain per cent of their assets on hand in cash and during the time of the year that taxes are being collected in large sums, we doubt if there is a depository in the State that has within its vaults the actual cash in an amount equal to the deposit of the county.

The bond executed by the county depository stands in lieu of the actual cash. The commissioners court must look to the bond and not to the fact that the actual cash is on hand. If there is any question as to the solvency of your bond the commissioners court should at once demand a new bond from the depository.

We therefore advise you in the opinion of this Department, it is not necessary that a county depository should at all times keep on hand the actual cash in an amount equal to the deposits of the county.

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

CITY DEPOSITORIES.

Private individuals in the city or bankers outside of the city can not become city depositories.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JUNE 20, 1913.

Hon. Fred W. Turner, Alderman, Santa Anna, Texas.

DEAR SIR: We have your communication of recent date in which you desire to know if any one, other than a bank or banker, can bid for the city funds, and if the bid of a private individual or banker outside of the city could be awarded the contract and made city depository.

Replying thereto, we beg to quote you a portion of Article 2454, Revised Statutes, 1911, relating to city depositories, as follows:

"The city council of every city in the State of Texas incorporated under the general laws thereof, or incorporated under special charter, at its regular meeting in July of each year is authorized to receive sealed proposals for the custody of the city funds, from any banking corporation, association, or individual banker, doing business within the city, that may desire to be selected as the depository of the funds of the city. The school funds, from whatsoever source derived, of incorporated cities is part of the city funds, and is subject to the provisions of this chapter."

It will be noted from the reading of this article that only those banking corporations, associations or individual bankers doing business within the city may become such depository. It is clear that the statute does not contemplate private parties being awarded contract for the depository, and it is likewise clear from a reading of the statute that the bank to which the contract is awarded must be within the city. This further appears later on in said article, wherein this language is used: "Any banking corporation, association or individual banker, doing business in the city desiring to bid," etc. We think it clear, therefore, and so advise you, that a private individual within the city could not become the city depository, and that a bank doing business outside the city could not so become.

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

COUNTY DEPOSITORY.

Where bid accepted was for 3½ per cent interest, and the depository to par all scrip and the depository afterwards refuses to par county scrip, the contract being void, the commissioners court would have authority to so declare and advertise for a new depository.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, NOVEMBER 12, 1913.

Hon. T. H. Downs, County Attorney, San Augustine, Texas.

MY DEAR SIR: The Department is in receipt of your communication, reading as follows:

"I enclose herewith bid of the Commercial Guaranty State Bank to act as depository for the county of San Augustine; also enclose certified copy of the order of the commissioners court designating the Commercial Guaranty State Bank as the depository for San Augustine county.

"You will notice that a part of the consideration whereby the Commercial Guaranty State Bank was awarded the funds was that they should par all scrip. I understand from a former ruling of your Department that this was illegal, and should not have been taken into consideration in designating the depository.

"The above bank and depository have refused to par the scrip of this county.

"Please advise me if the commissioners court now has authority to cancel this contract with the above bank, and to advertise for a depository for the

funds of San Augustine county, and let the interest on the daily deposits be the sole consideration."

The copy of the bid of the Commercial Guaranty State Bank of San Augustine enclosed in your communication reads as follows:

"To the Honorable Commissioners Court of San Augustine County, Texas, February Term, A. D. 1913:

"The undersigned Commercial Guaranty State Bank, of San Augustine, Texas, makes application to become county depository for the county funds of San Augustine county, and if elected as such in consideration thereof makes the following bid:

"Will pay $3\frac{3}{4}$ per cent per annum on the average daily balances and par all scrip.

"COMMERCIAL GUARANTY STATE BANK,
"President, Felix A. Burrows,
"Cashier, J. W. Jennings."

The consideration to be paid by the bank for the contract securing the deposit of county funds was and is that the bank would pay three and three-fourths per cent per annum on the average daily balances and in addition thereto that the bank would cash all warrants drawn against the county funds, whether there was any credit to the funds at the time of the presentation of the warrants or not. It is a matter of common knowledge that it is not infrequently the case that during certain seasons of the year some, if not all, of the funds of the county are exhausted and there is no cash to the credit of such fund, and it therefore became a part of the consideration for the awarding of the depository that such bank would advance to the county funds sufficient to take up at their face value all warrants issued by the county against the funds in such depository, and it was in the contemplation of both parties to the contract that as a part of the consideration paid by the bank for securing of the depository it would advance funds to the county and therefore the county in effect is paying interest on its warrants in so far as the bank may cash the warrants when no funds are on hand to the credit of the county.

This Department has several times ruled that the commissioners court, as well as boards of school trustees, have no authority to pay interest on warrants, and this ruling is amply sustained by the case of the State vs. Wilson, 71 Texas, 291.

Your county having agreed to pay interest upon warrants, the effect is to make illegal that portion of the contract entered into whereby the depository of your funds was awarded to the Commercial Guaranty State Bank.

It is well established by the decisions of this State, as well as those of other States of the Union, that if any part of the consideration be illegal, then the entire contract is void.

Goodman vs. McGehee, 31 Texas, 255.

Kattwitz vs. Alexander, 34 Texas, 708.

Lane vs. Thomas, 37 Texas, 158.

Seeligson vs. Lewis, 65 Texas, 223.

Wegner vs. Biering, 65 Texas, 509.

Edwards Co. vs. Jennings, 89 Texas, 618.
 Reed vs. Brewer, 90 Texas, 144.
 Fuqua vs. Pabst Brewing Co., 90 Texas, 298.
 Sanger vs. Miller, 62 S. W., 425.
 City of Austin vs. McCall, 67 S. W., 292.

The case of Edwards County vs. Jennings, above cited, among other things, said:

"The rule is well settled upon principle and authority that a promise made upon several considerations, one of which is unlawful, no matter whether the illegality be a common law or by statute, is void." Citing a long list of authorities.

The case of Seeligson vs. Lewis, supra, quoted from First Parsons on Contracts, 457, says:

"If any part of the consideration is illegal, the whole consideration is void because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or an illegal promise, although he may have connected with this act or promise another which is legal."

The case of Fuqua vs. Pabst Brewing Company, above cited, holds:

"A portion of the stipulations of the contract being lawful and others unlawful, the taint of illegality affects and destroys the whole."

We are therefore of the opinion, and so advise you, that the illegality of a part of the consideration for the contract would render the entire contract void and the commissioners court would have authority to so declare and advertise for a new depository under the provisions of Article 2450, Revised Statutes, 1911.

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

TAX COLLECTOR—DEPOSITS.

It is the duty of the tax collector at the time he makes a deposit with the county depository to submit an itemized statement showing the amount deposited to each fund, including common school districts.

ATTORNEY GENERAL'S DEPARTMENT,
 AUSTIN, TEXAS, OCTOBER 22, 1913.

Hon. Luther A. Lawhon, County Attorney, Floresville, Texas.

DEAR SIR: In your communication of October 15th you desire an opinion from this Department as to whether or not it is the duty of the tax collector to furnish the county depository with itemized statement of all taxes collected for the several common school districts in the county, showing in such statement the amount for each fund when he makes a deposit with the depository.

We take it from your letter that the county collector when he makes

a deposit with the depository merely tenders a lump sum of money without directing the depository to which funds the same should be credited.

As your inquiry relates to common school districts, we will address our reply particularly to the funds due such districts.

By Section 52 of the printed school laws it is provided that the terms "county treasurer" and "county treasury," as used in all provisions of law relating to school funds shall hereafter be construed to mean the county depository, and by Section 58 of the same law it is provided that all treasurers receiving or having control of any school funds shall keep a full and separate itemized account with each of the different classes of school funds coming into his hands, etc. It, therefore, appears that the county depository is compelled, under the law, to keep a separate account with each of the various county funds of the county, which, of course, includes the funds of common school districts, being the available fund, the maintenance fund, and if bonds have been issued, the interest and sinking fund, and when moneys are collected for the credit of any of the funds and deposited with the depository, then the accounts for each fund must receive credit for such account. The tax collector of the county is the only person who can give this information, and we think it unquestionably his duty that when he makes a deposit of say \$10,000 with the county depository that he submit an itemized statement with such deposit showing the pro rata part of such \$10,000 as go to each particular fund for the credit of which it was collected, and that at the time of such deposit he take a receipt from the county depository showing the amount he has deposited to the credit of each fund.

Chapter 1, of Title 29, Revised Statutes of 1911 (providing for the keeping of a finance ledger by the county clerk), provides for the keeping of an account with all officers who collect money on behalf of the county.

Article 1407 of this chapter reads as follows:

"The accounts of the tax collector shall be kept as follows: A separate account shall be kept for each separate fund that may be upon the tax rolls; each account shall state the name of the collector, the character of the fund entered therein, and the year for which the same is assessed."

Article 1408 reads as follows:

"Whenever the tax rolls are ready for delivery to the tax collector, the court or officer having control of the same shall take from the collector a written receipt for same, specifying the amount therein assessed and due the county, stating separately the amount assessed to each fund, and shall deliver said receipt to the clerk of the county court, who shall charge the collector with the amount stated in said receipt in the proper account; and said amounts shall be treated as debts due the county by the collector."

The manner in which said collector may discharge his indebtedness to the county is set out in Article 1409 of the Revised Statutes, the fourth subdivision of such article, as above quoted, being that he may file the receipt of the county treasurer for the money paid into the

treasury. As the account against the collector is made up of the several items on the tax rolls for the various funds, then he must file with the county clerk a receipt showing money deposited to the credit of these funds, and unless at the time he makes the deposit with the county treasurer or depository he gives an itemized statement of the sums deposited, he could not obtain the receipt and therefore would not be in an attitude to discharge his indebtedness to the county in accordance with the above statute.

We are, therefore, of the opinion, and so advise you, that it is the duty of the tax collector at the time of making the deposit with the depository, to furnish an itemized statement showing the amount which is to be placed to the credit of the several funds for which such amount has been collected, whether it be the various county funds proper or for school district funds, maintenance, tax or interest and sinking funds.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

COUNTY DEPOSITORY—INTEREST—ROAD BONDS.

Interest paid by county depository on funds derived from sale of road bonds shall be paid into the county treasury and placed to credit of jury fund, or to such funds as the commissioners court may direct.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MAY 8, 1913.

Hon. R. V. Bell, County Judge, Gainesville, Texas.

DEAR SIR: You state that certain districts of your county have issued road bonds and that the proceeds thereof are now in your depository, and you wish to know if the interest paid by the depository on the proceeds of such bonds should go to the credit of the road district, or can the court put it in any fund it sees proper?

Replying thereto, we beg to say that under Article 2442 of the Revised Statutes, 1911, it is provided that the interest upon county funds shall be computed upon the daily balances to the credit of such county with such depository, and shall be payable to the county treasurer monthly, and shall be placed to the credit of the jury fund, or to such funds as the commissioners court may direct.

Within the contemplation of the depository law, funds of the character mentioned in your letter are county funds and when placed in the depository they draw interest as any other funds of the county. Under the depository law, the interest upon county funds becomes itself a county fund to be placed to the credit of the jury fund, or to such funds as the commissioners court may direct. The interest arising on the proceeds of the road bonds does not become a part of the road fund, but becomes a part of the county funds appropriated by the commission-

ers court, as indicated by the above statutes, and, unless some specific disposition should be made of such interest by the commissioners court, the same would go to the credit of the jury fund, but the commissioners court could direct that such interest be placed to the credit of any fund they might desire. Under this law, if the commissioners court saw fit, we think that they would have the right to direct that the interest arising on the proceeds of road bonds be credited to the road fund of that particular district, but, under the law, they are under no obligation to do so.

You are, therefore, advised that, in the opinion of this Department, the interest arising from the proceeds of road bonds while in the depository should be placed to the credit of the jury fund, unless otherwise ordered by the commissioners court.

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

COUNTY DEPOSITORY—SCHOOL FUNDS—CONSTRUCTION OF STATUTES.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 4, 1913.

Hon. Ney Sheridan, County Treasurer, Crockett, Texas.

DEAR SIR: In your communication to this Department, under date of January 28, 1913, you say:

"That you are the treasurer of the county funds and that the commission amounted to \$2000 last year; the interest on the county deposits was over \$3000 on the county funds; the bank pays interest on the school funds, same as the county and the commissioners court pays the bank \$250 for keeping its school books out of the interest on the school money; you then desire to know if it can be allowed for you to keep the school books, and, if so, would you have to give a special bond therefor?"

In reply to your interrogatories, we shall assume that the bank that is handling the funds is the county depository.

Article 2769, Revised Statutes, requires the depository to keep the accounts which means the school books. *Charlton vs. Cousins*, 124 S. W., 422. Prior to the adoption of the Acts of 1905 and 1909, it was the duty of the county treasurer to keep these accounts under the provision of Article 1505, and for this duty he was allowed no compensation for either except the general compensation allowed under the provision of Article 3873 et seq. for the receipt and disbursement of county funds. Under the law as it existed prior to these acts, therefore, the county treasurer was not entitled to receive, nor was the commissioners court authorized to pay any compensation for the keeping of the books, that being a general duty and being compensated for in the fees allowed for receipt and disbursement of the county funds.

Now as observed above, the Acts of 1905 and 1909 simply substituted

the county depository for the county treasurer with reference to the performance of these duties. The keeping of books and accounts are merely incidental to the deposit of the funds. Provisions of these statutes authorizing the deposit of the funds in county depositories may be taken as a statement of the terms upon which the deposit might be made, which terms are accepted in the assumption of the relation between the county and the depository. They are such terms only as look to the proper disbursement of and the accounting for the moneys deposited such as a bank might make with any other depositor.

Charlton vs. Cousins, 124 S. W., 423.

We hold therefore that it is the duty of the depository to keep the books and accounts and that it is not entitled to receive any compensation for this service, the service in this respect having been agreed to be performed by the depository as a condition and inducement for the acceptance of its bid.

Yours very truly,
LUTHER NICKELS,
Assistant Attorney General.

DEPOSITORY—CITY FUNDS—INDEPENDENT SCHOOL DISTRICT.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, FEBRUARY 17, 1913.

Mr. J. H. Latham, President Dublin Independent School Board, Dublin, Texas.

DEAR SIR: In your letter to this Department of date, February 3, 1913, you say:

"In our Dublin Independent School, last fall, we advertised for bids on our daily balances, and let the money to the highest bidder, and the treasurer made bond, which was approved by the trustees for \$25,000; we thought was all the bond we would need at that time. Since that time we have had \$44,000 bonds approved, and are selling them, and the treasurer does not want to accept the money for these bonds, as they claim it would be a big loss to them, as they could not use this amount of money, and say we have no right to try and force this on them. Please advise me as president of the Dublin School Board what we should do in this case. They also claim that in the building that it will require so much bookkeeping that it will make this unreasonable.

"Have we any way of requiring the treasurer to accept the money for these bonds? They say they will carry out the first contract made with the trustees—money coming from all purposes except from the sale of bonds for new building."

You did not say, nor do the facts stated by you disclose, that you are operating under Chapter 3, Title 44 of the Revised Statutes of 1911, but we assume this to be a fact.

Article 2454 of the Revised Statutes of 1911 empowers the city council to receive bids from any depository of the city for the custody of the city funds. "The school funds, from whatever source derived, of incorpo-

rated cities is part of the city funds and is subject to the provision of this chapter."

Article 2455 of the Revised Statutes of 1911 authorizes the selection as a depository of the funds the bank or bankers offering to pay the city the largest amount for such privileges, and Article 2556 requires all the funds to be transferred to the depository and requires all funds thereafter received to be placed in the depository and lays the penalties upon the treasurer for failure to do this.

Hence, if there has been a depository selected under these provisions of law for the city funds, then it is the duty of the depository to accept all school funds from whatsoever source arising, and to pay thereon the rate of interest, etc., stipulated in the bid therefor which was accepted. If the depository should refuse to receive any of these funds it will be liable for the interest on payment so stipulated, nevertheless, and this can be recovered from the depository under the bonds required by Article 2455.

Yours very truly,
LUTHER NICKELS,
Assistant Attorney General.

COUNTY DEPOSITORY—COUNTY COMMISSIONER.

A bank having as director one of the county commissioners is not eligible to bid for or become custodian of the county funds.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, FEBRUARY 3, 1913.

Mr. Richard P. Head, Balmorhea, Texas.

DEAR SIR: In your letter of January 30th, you present to this Department the following question:

"In receiving bids for the county funds, would it be legal for the county commissioner, who was also a director in a bank bidding for the funds, to be absent from the meeting of the commissioners, or to be present and not vote for his bank? Would not the fact that he is a commissioner prevent his bank from being eligible to become the custodian of the county funds, whether he be present at the meeting or not? Is there any possible manner in which this could be evaded?"

In reply to your several questions, we beg to say that there is no possible manner by which the provisions of the law, to which we have heretofore called your attention, can be evaded. A bank having as director one of the county commissioners, is simply not eligible to bid for or become the custodian of the county funds, and if it were to do so and the commissioners court awarded the funds to such a bank, it would be a violation of law and the parties subject to prosecution.

Yours very respectfully,
C. M. CURETON,
First Assistant Attorney General.

CONSTRUCTION OF LAWS—COUNTY DEPOSITORY.

There can be but one depository, and any bank, when bidding for the funds of the county to become the county depository, must make its bid cover all funds from whatever source.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 8, 1913.

Mr. Louis H. Jones, County Attorney, Burnet, Texas.

DEAR SIR: In your letter of February 6th, you ask us whether or not a bid by a bank to become the depository of the county funds, made only upon the county funds and not the school funds, would be legal. In reply to this question, we beg to say that it is the opinion of this Department that such a bid would not be a legal bid, and that your commissioners court would not be authorized to accept the same.

It is very clear from a consideration of various provisions of Title 44, Chapter 2, that there can be but one county depository. Article 2444, among other things, provides:

"And, thereupon, it shall be the duty of the county treasurer of said county, immediately upon the making of such order, to transfer to said depository all the funds belonging to said county, and immediately upon the receipt of any money thereafter to deposit the same with said depository to the credit of said county; and, for each and every failure to make such deposit, the county treasurer shall be liable to said depository for 10 per cent upon the amount not so deposited, to be recovered by civil action against such treasurer and the sureties of his official bond in any court of competent jurisdiction in the county."

It will be noted by a consideration of this article that all the funds from whatever source must be placed in a county depository, and certainly a bid on any less than all the funds would not be a legal bid, and the commissioners court would have no authority to accept the same.

We can readily understand why a bank would desire to bid for the county funds and not for the school funds, because, of course, the profits on the latter are probably not commensurate with the trouble of carrying an active account of that character. But when a bank becomes a county depository, it has received a special privilege to which it is not entitled only upon consideration of public service (State Constitution, Article 1, Section 3). And when it undertakes to receive the benefit of such privileges, it must also, at the same time, undertake to carry the burdens imposed.

Article 2446 does not apply where a regular county depository has been selected. Article 2445 makes provisions for the selection of a county depository where no bids are offered, as provided in other articles of the statute.

This ruling, that there can be but one regular county depository, and that such depository is entitled to receive all the funds, and that the county is entitled to receive interest on all the funds, etc., is in direct harmony with a previous ruling of this Department, and particularly of the opinion of the Hon. Wm. E. Hawkins rendered on De-

ember 23, 1909, when he was Assistant Attorney General, which opinion you will find on pages 194 to 197 of the "Reports and Opinions of Attorney General, 1908-1910."

Yours very truly,
C. M. CURETON,
First Assistant Attorney General.

COUNTY DEPOSITORY—COUNTY JUDGE—STOCKHOLDERS.

Bank can not become county depository when county judge is stockholder therein.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, FEBRUARY 3, 1913.

Hon. A. M. Turney, County Judge, Abilene, Texas.

DEAR SIR: Inasmuch as you are a stockholder of the bank at Alpine, the commissioners court will not be authorized by law to accept the bid of such bank as county depository, your position as county judge being inconsistent with any authority upon your part to accept such a bid, nor would non-action upon your part, or non-participation upon your part, with the commissioners court in reference to this matter relieve the situation of its vice or make legal the action of the court.

Under no circumstances, so long as you are county judge and at the same time a stockholder in the bank, can the commissioners court name the bank as county depository.

We enclose you an opinion of this Department previously rendered on a similar question for your information.

Yours very truly,
C. M. CURETON,
First Assistant Attorney General.

OPINIONS CONSTRUING ELECTION LAWS.**ELECTION—DEMOCRATIC EXECUTIVE COMMITTEE—SPECIAL ELECTION
—CANDIDATE FOR REPRESENTATIVE.**

If the Democratic party should make nominations, the law required that it must be done by special primary, and the executive committee is powerless to make the nomination.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, FEBRUARY 25, 1913.

Hon. George L. Huffman, County Judge, Marshall, Texas.

DEAR SIR: In your communication to us of the 22nd inst. you state to us that the Democratic Executive Committee of the 126th Representative District has refused to call a primary for the purpose of nominating a candidate for Representative for your special election on March 10th, and ask this Department whether or not you could print the names of all applicants on tickets to be furnished for that purpose.

We beg to advise you that in the opinion of this Department the matter stands in this shape: All political parties have refused to make nominations for the office in the regular manner provided for them. If the Democratic party should make nominations the law require that it must be done by special primary, and that the Executive Committee is powerless to make the nomination. Article 3164, Revised Statutes, 1911, provides a manner in which non-partisan or independent candidates can have their names printed upon the ballot, and Article 3166 prescribes the oath that is necessary to be made.

We think that a simple way to solve the question would be for each person who desires to make the race obtain three per cent of the vote at the last presidential election, which would require that his name be printed upon the ballot. Of course, if no person takes any legal steps to have their names printed on the ballot, we know of no law which would prevent you from printing the names of all candidates upon a ballot to be used that day, although this would not be in strict legal compliance with the statutes, but no person would be in a position to complain. That is, no candidate would not be in a position to complain. This would not be true, however, if any candidate should qualify, for he could have the names of all who did not comply stricken from the ballot.

The person receiving the highest number of votes on the day of election, whether his name is printed or written on the ballot, would be declared duly elected to the office.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

ELECTIONS—NOMINATIONS—PROCURING SIGNERS TO PETITIONS.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, FEBRUARY 21, 1913.

Hon. J. P. Ellis, Lockhart, Texas.

DEAR SIR: Article 3086, Revised Statutes of 1911, requires nominations to be made to fill vacancies at special elections by primary vote, and prohibits, in the same article, executive committees from making the nomination. This prohibition is also made in Article 3073, Revised Statutes of 1911.

In case no primary is held to make nominations, any person desiring to make the race can comply with Articles 3164, 3165, 3166 and 3167 of the Revised Statutes of 1911, by getting signers to his application by five per cent of the entire vote cast in any such district at the last preceding general election, and also by making the affidavit required in Article 3166.

In case no person applies to have their names printed upon the ticket, we know of no law that would prohibit the committee from printing the names of any persons they desire upon the ticket. The person receiving the highest vote from the date of election, whether his name is printed on the ticket or not, would be the duly elected officer.

Yours very truly,
W. A. KEELING,
Assistant Attorney General.

VOTER—QUALIFICATIONS OF—CONSTRUCTION OF STATUTE.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 16, 1913.

Mr. R. L. Penney, San Gabriel, Texas.

DEAR SIR: In answer to yours of the 11th inst. you are advised that to be a qualified voter in your stock law election the person offering to vote must be a qualified voter under the general election law, that is, must be twenty-one years of age, must have a poll tax or exemption certificate, if subject to one, must have lived in the State twelve months and the county six months next preceding the election, and vote in the precinct in which he lives; and in addition thereto Article 7217, Revised Statutes, 1911, requires that "no person shall vote at any election, under the provisions of this chapter, unless he be a freeholder." See also latter part of Article 2939, Revised Statutes, 1911.

Yours very truly,
W. A. KEELING,
Assistant Attorney General.

ELECTIONS—OFFICIAL BALLOT—INDEPENDENT CANDIDATES.

The official ballot means those persons who have complied with the law by either certifying their names as the regular nominees or else have complied with the law relating to independent candidates.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 2, 1913.

Hon. T. H. Briggs, Mayor, Gilmer, Texas.

DEAR SIR: You enclosed to this Department a copy of an official ballot prepared by you, together with the following letter:

"We hereby make up and file this as the official ticket for the election of three aldermen, for April 1, 1913.

T. H. BRIGGS, Mayor.

Attest: J. M. MARSHALL, City Secretary.
B. D. Futrell, vice R. B. Nelson.
T. E. Smith, vice W. A. Roberts.
J. H. (Buck) Childress, vice H. P. McGaughy."

"I desire an opinion of the following statement of facts as mayor of the city: I went around yesterday and procured the consent of three gentlemen to let me put their names on the ticket to vote on as aldermen of the city, as three of the aldermen's time expires today. I made up an official ballot, which I herewith enclose, and turned over to the manager of the election. I find this morning that some parties here, without authority or notice to me, have gotten up a ticket and turned it over to the manager of the election, consisting of the names of three other men to vote upon. There was no nominating convention or anything of the kind.

"Now I desire to know if the ballot should be counted as unofficial ballot in the absence of any nomination of any parties. These tickets *does* not propose to be gotten up as citizen tickets or anything else. Please let me know if all tickets should be counted, or should the tickets only be counted which are voted by the official ballot. These clandestine tickets did not reach the polls until about 10 o'clock."

Replying to your inquiry, we advise you that Article 3168, Revised Statutes, 1911, provides a method for independent candidates getting their names on the official ballot, and is as follows:

"Independent candidates for office at a county, city, or town election may have their names printed upon the official ballot on application to the county judge, if for a county office, or to the mayor, if for a city or town office, such application to be in the same form and subject to the same requirements herein prescribed for applications to be made to the Secretary of State in case of State or district independent nominations, provided that a petition of 5 per cent of the entire vote cast in such county, city or town at the last general election shall be required for such nomination."

It appears from your letter that no nominations were made in your city by any political party; that being true, those candidates desiring their names printed upon the official ballot should comply with the above article. If, however, nominations were made, the names of the regular nominees should be certified to you after the method provided in Article 3170, Revised Statutes of 1911, which we do not deem is necessary to copy here.

The official ballot you enclosed us is defective, in that same does not comply with Article 2965, Revised Statutes of 1911, which requires

that only the words "official ballot" shall be printed at the top of the ticket, under which follow the names of the candidates for office, designating the office to which they aspire. The ticket you enclose should properly read as follows:

"OFFICIAL BALLOT.
Independent Ticket.
For Aldermen.
(3 to be elected.)
B. D. FUTRELL
T. E. SMITH
J. H. (BUCK) CHILDRESS."

You state in your letter that you went around and procured the consent of the parties' names to become candidates and then printed their names upon the official ballot. This would not be legal, for the reason that the candidates, in order to have their names printed upon the official ballot, must present a petition signed by five per cent of the entire vote cast in your city at the last general election. If no candidate in the city complies with this requirement, then no name should be printed on the official ballot, and you should use simply a ballot upon which is printed the words "official ballot," the rest of it left in blank where each individual voter can write the name of his choice for that office. If no person has complied with the law in getting his name on the official ballot, clearly then you will have no authority to print any person's name on the official ballot. The official ballot means those persons who have complied with the law by either certifying their names as the regular nominees or else have complied with the law relating to independent candidates.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

ELECTIONS—"PEOPLE'S PARTY" AT CORPUS CHRISTI HELD TO BE
LEGALLY ORGANIZED—CONSTRUCTION OF LAWS.

The law must be liberally construed in favor of honest and fair elections.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 13, 1913.

Hon. Roy Miller, City Commissioner, Corpus Christi, Texas.

DEAR SIR: In your communication to this Department, of date March 10, 1913, you propound an interrogatory imbraced in the following statement:

"Not more than thirty days before the day set by law for the city election for the city of Corpus Christi under the law a mass meeting of those opposed to the present city administration of the last two years was held in a public hall of this city. There were in attendance a large number of the qualified

voters from all sections of the city who were in sympathy with the movement. Every ward of the city was represented. In this meeting it was determined that those present would organize themselves into a party. Upon motion duly seconded and carried the party was organized under the name of the 'People's Party.' Upon motion made, seconded, and carried an executive committee composed of five members, one from each ward in the city, was elected. This executive committee thereon made and determined that the party should make nominations for city officers and that the members of the party then present should resolve themselves into a convention of said party for the purpose of making these nominations. Pursuant to this act of the executive committee those present organized the convention for said party, presided over by a chairman duly elected. A committee of nominations was then appointed, who suggested the names of candidates for the city officers.

"This report was accepted by the convention, and those named were declared by the chairman to be the nominees of the party to the offices named. A committee was appointed to draft a platform to be submitted at a later meeting. Minutes of the convention were kept by a secretary duly elected. The nominations made were for the offices of mayor and commissioner."

You desire to know if a party organized in this manner and nominations made in the manner stated meets the requirements of the Terrell Election Law and if you would be entitled to have your ticket printed under the name of the party, "The People's Party" and further, would this party be entitled to supervisors at the polls upon application and appointment made by the chairman of the executive committee thereof. You inclose a copy of Article 5 of your city charter and also Section 2, relating to elections, and desire to know if these articles which provide for general supervision of the election by your mayor and commissioners would in any manner prevent the operation of the Terrell Election Law or if there was any conflict between these provisions and the Terrell Election Law involved in the question propounded.

In reply to your question we beg to advise you that from a careful reading of the Terrell Election Law, we find that it is not very clear in regard to the manner of the organization of a political party. In fact it does not attempt to set out any particular requisites of a political party except that there must be an organization, chairman, executive committee, etc. We believe that from a careful reading of the whole act that it is the intention of the same to permit a political party in a city or town to make nominations in a manner other than by holding a primary. In the latter part of Section 105 of the Terrell Election Law we note this language:

"Nominations of party candidates for offices to be filled in a city or town shall be made not less than ten days prior to the city or town election at which they are to be chosen, in such manner as the party executive committee for such city or town shall direct, and all laws prescribing the method of conducting county primary elections shall apply to them."

We do not believe that the above language is susceptible to any other meaning than that a political party in a city or town may choose its candidates in such manner as its executive committee may direct. If the executive committee should direct that nominations be made in the manner in which the nominations were made in the city of Corpus Christi we see no reason why such party would not have the right to

have their tickets printed under the heading of the name of the party.

If this section does not mean this we are at a loss to know what the Legislature meant by adding the words "may choose in such manner as the party executive committee for such city or town shall direct its nominees."

We are aware of the fact that Article 128a of the Terrell Election Law contains language which if taken alone and not construed with the entire act would seem to indicate that it would be mandatory for every party to make its nominations by primaries. From this article we take the following language:

"There shall be held, at least thirty days prior to the regular election, an election at which there may be nominated by each political party officers to be selected at the next city election, and at which said election there shall be selected the executive committee for said city or town."

This Department, however, has uniformly construed this article to apply only to those political parties in cities which have county organizations. If we construe this Section, 128a, and Section 105 so as to give both a meaning we would be driven to adopt the rule of construction which would, if possible, leave both with a meaning or leave both in effect. We are, therefore, constrained to say that Section 105 recognizes the right of a party to exist only in a city or town, and we see no reason why the political party may not exist and make no effort to extend beyond and to control of affairs other than the city or town in which such party exist.

Political questions arise and must be settled which do not effect other territory than the city, yet, nevertheless, it is a political question and we think that the Legislature intended by the language used in the section above referred to make it possible for a political party, if in fact, it was a general political party, to make its nominations in such manner as the executive committee should determine.

Now this brings us to the further question, did the manner selected for the organization of "The People's Party" in the city of Corpus Christi meet the requirements of the election law. We think that it does from the statement of facts embraced in this inquiry it appears that a very substantial effort was made to organize a new political party in that a call was made, and, while it does not appear definitely none participated except those qualified in the mass meeting, yet, we will presume that such mass meeting was participated in only by qualified voters, and, in absence of any showing to the contrary, it is always presumed that such things are regular. In other words, we think that it is a proper rule of construction in such matters to presume that the intention of all parties are honest and that those things that were necessary to be done were done and, in absence of any showing to the contrary, we assume that the organization was properly made by those competent to organize political parties. As observed before, in this opinion no rule is laid down by which a party may organize, and, in view of that fact, a liberal construction should be given to the act to permit any

bona fide organization of a new political party, we think, therefore, that the law has been substantially complied with and that the new party was properly organized and has a right to exist under the name of "The People's Party," and as such has a right to nominate candidates for city officers, which right it having exercised, we believe the nominees are regular and should have their names printed on the ballot under the heading "The People's Party," and it follows, therefore, that they would have a right to supervisors at each polling place.

Again the law must be liberally construed in favor of honest and fair elections, and, in order to avoid criticism, and in order to insure honest and fair conduct at elections, the law provides that supervisors may be named, and this rule should be most liberally construed for the gist and essence of the entire election law of this State is to have honest elections.

Yours very truly,
W. A. KEELING,
Assistant Attorney General.

ELECTIONS—SALOONS—REFERENDUM ELECTION IN SAN ANTONIO.

An election which requires the closing of saloons on election day must be an election which is authorized or required to be held by some legally constituted authority. The referendum election held in San Antonio on March 19, 1914, was not such an election as was authorized or required to be held either by the city charter of the city of San Antonio or the general laws of the State of Texas.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 18, 1914.

Hon. W. P. Lane, Comptroller of Public Accounts, Capitol.

DEAR SIR: You submit to this Department that in the city election at San Antonio which was held on the 19th day of March, 1914, the saloons in the city of San Antonio remained open and you desire to be advised if the election, such as was held in San Antonio on the date above mentioned, was an election in the contemplation of the law, which requires saloons to remain closed on election days. Submitted with your inquiry is a transcript of all the orders pertaining to said election, which transcript shows, first, that the mayor, in pursuance to an election promise, submitted to the qualified voters of the city of San Antonio a proposition as to whether or not a certain contract for the privilege of furnishing water for a period of ten years with the San Antonio Water Supply Company, a corporation, should be approved.

In reply to your inquiry, we beg to advise you that the laws of this State require that saloons shall remain closed on the day on which any election is held in this State. This law includes all character of elections, subject, however, to the limitation that the election which is held must be an election such as the law authorizes to be held. So far as the effect of this opinion is concerned, we do not consider that it would

be material whether or not the election would have any binding force whatever. If the election was held and it was an election which was authorized to be held and was held under the forms of law, saloons would have to remain closed while said election was being held. We have examined carefully the order for the election, the contract which was submitted to a vote of the people and all orders of the city council pertaining to said election, and have reached the conclusion under the authorities of this State that the election was not a legal election, in that it was not such an election as was authorized to be held. From a careful examination of the city charter of San Antonio we find that Section 58 and Section 101 are the only two sections which might in any event be said to be authority for the holding of this election. These sections are as follows:

"Section 58. To build, construct, contract to be constructed, or acquire any of the public utilities of the city, such as gas, water, telephone, street railway and electric plants, subways or underground conduit systems for electric light, power, telephone, telegraph, or other wires used for the purpose of transmitting an electric service, and such utilities and systems may be purchased and constructed by a payment in cash of 25 per cent of the price agreed upon, and the balance in annual installments, including interest, to be paid out of the revenues of such utility; and such works so constructed or purchased shall stand pledged for payment of the amount due thereon; provided, that no expenditure for such purpose shall be made unless the proposition for the acquisition or construction of the same is first submitted to a vote of the qualified property taxpayers, at an election to be held for the purpose of voting thereon, and a majority of such voters shall vote in favor of such proposition and the city council shall have the power to carry out all the terms of this section by ordinance.

"Section 101. Franchises for the use of the streets and public places of the city may be granted by the affirmative vote of eight aldermen, but no franchise or privilege for the use of any of the public streets or other public places of the city shall ever be granted for any but a strictly public purpose, and any grant of a franchise or privilege hereafter made for the use of any of the public streets or other public places within said city, where, from the nature of the case the use thereof would be private or only colorably public, or chiefly for private purposes, shall be absolutely void. Provided, that no ordinance granting a franchise shall become operative unless ratified by a majority vote of the qualified voters of the city, if within thirty days after the passage of such ordinance a petition signed by a number of qualified voters of not less than 10 per cent of the voters voting at the previous general city election shall be presented to the city council asking that said ordinance be submitted to a vote of the people. All such elections shall be held in accordance with the general laws governing such elections in said city."

It will be observed that Section 58 authorizes or requires to be submitted to the qualified voters propositions to build, construct, contract to be constructed, or acquire any of the public utilities of the city, such as water, gas, etc. The contract in question which was submitted to the voters of San Antonio was simply a contract to furnish water to the city of San Antonio for a specific period of time at a fixed compensation. This character of contract was not authorized nor required to be submitted to a vote of the people, although the mayor, as is expressed in his proclamation, asserted that his reason for submitting it to a vote of the people was because it was a campaign promise he

had made to them. There is no provision in the city charter of San Antonio nor in the general laws of this State which authorizes or requires contracts of this character to be submitted to a vote of the people. On the contrary, the city council is authorized to make such contracts. It is made their duty to make such contracts and the responsibility is fixed upon them. If in their wisdom they see fit to refer the matter to the people, this referendum vote would be upon their own initiative and would not be an election, such as the law authorizes.

Section 101 relates to the proposition of franchises for the use of streets and public places of the city which may be granted by a vote of eight aldermen, but a franchise for the use of the streets or other public places of the city shall never be granted for any but a strictly public purpose and any grant of a privilege or franchise thereafter made for the use of any of the public streets or public places within the city should be submitted to a vote. We do not believe that the contract in question is a franchise such as Section 101 deals with. The courts of this State are uniform in their holding that an election, such as requires that saloons be closed, must in law be elections which are authorized or required to be held. It is true, however, that the decisions also held that if the election is held under the form of law, it matters not if the election on account of some irregularity is absolutely void, still saloons would have to be closed on that day; but, in regard to the election in San Antonio we do not believe there was any authority in law for the election and that the election was voluntary; was neither required to be held, nor authorized to be held.

You are, therefore, advised that the saloons on this day were not required to be closed.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

ELECTIONS—ILLEGAL POLL TAX RECEIPTS—ELECTION OFFICERS.

Holders of poll tax receipts illegally procured are disqualified from participating in an election, even though the receipt upon its face shows to be regular. Where it is known to the election officers that a person has had his poll taxes paid by another in violation of law, such person should not be allowed to participate in any election in this State.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, APRIL 23, 1914.

Hon. John D. McNamara, County Attorney, Waco, Texas.

DEAR SIR: Your letter of April 18, 1914, contains the following question:

"In the town of Mart there are probably 80 or 100 persons holding poll tax receipts obtained by money paid by some agent to the tax collector. The persons holding these suspicious tax receipts did not apply in person to the tax

collector for them, but in some instances signed an order, and in others the record is not clear whether they affixed their marks or the person taking their orders did so, and in yet other instances those holding tax receipts claimed that they knew nothing about the manner in which they were obtained, they having given no order for them, but their receipts were presented to them by a man who had been very active in procuring orders for the payment of poll taxes. Are persons who have obtained their poll tax receipts under the conditions above narrated entitled to vote?"

In determining this question it will be necessary for us to review the various provisions of the law of this State relating to the payment of poll taxes and the relation of this payment to the right of the holder of same to vote in the elections of this State. Section 1 of Article 8 of the Constitution of this State, page 551, Harris' Constitution, authorizes the Legislature to impose a poll tax. In pursuance of this constitutional provision the Legislature provided in Article 2939, Revised Civil Statutes of 1911, as follows:

"And provided further that any voter who is subject to pay his poll tax under the laws of the State of Texas or ordinances of any city or town in this State shall have paid said tax before he offers to vote at any election in the State and holds a receipt showing the payment of his poll tax before the first day of February preceding such election."

Article 2942, Revised Statutes, 1911, levies the poll tax required by the Constitution upon "every male person between the ages of twenty-one and sixty who resided in this State on the first day of January preceding its levy, Indians not taxed, persons insane, blind, deaf and dumb, and those who have lost a hand or foot or persons mentally disabled excepted * * * and the person *when he pays it* shall be entitled to his poll tax receipt even if the other poll taxes are unpaid."

Article 2944 relates to the manner of the payment of the poll tax and is as follows:

"If the taxpayer does not reside in a city of 10,000 inhabitants or more his poll tax must either be paid by him in person or by someone duly authorized by him in writing to pay the same and to furnish the collector the information necessary to fill out the blanks in the poll tax receipt. Such authority and information must be signed by the party who owes the poll tax and must be deposited with the tax collector and filed and preserved by him."

Article 2947 (Id.) is as follows:

"No one shall knowingly give money to a citizen to pay his poll tax."

Article 2948 (Id.) is as follows:

"No one shall keep the poll tax receipt of another person in his possession or under his control, except in case specially authorized by law."

Other provisions relating to the manner of the payment of poll tax are interesting, but it is not necessary for the purpose of this opinion to quote them here.

In the case of *Solon vs. The State*, 54 T. C. R., 261, 114 S. W., 349, the Court of Criminal Appeals passed upon the validity of the poll tax law, Judge Ramsey writing the opinion in which the court expressly

held valid that provision of the law which prohibited one person from loaning or giving another money with which to pay his poll tax. Commenting upon the phrase of the opinion the court says:

"It was the intention of this act, which regulates in great detail both primary and general elections, to provide laws and establish a system which should throw all possible safeguards around elections, punish frauds, avoid corruption and guarantee a pure ballot and fair count, and it should be upheld by the court, if under the Constitution it can be done."

In giving to the question a proper consideration the court further observes:

"It is proper that we may consider the history of the times in construing current legislation. The law being considered applies not only to the elections authorized by law, but to those elections held somewhat under the direction of political parties. It is a fact known of all men that in the State at large and in most of the counties of the State a nomination by the dominant political party is equivalent to election. For all practical purposes it is the election, and the elections which are authorized to be held biennially in November merely ratify the selections named in the party primary in the July preceding. That man must have been blind indeed and heedless of events occurring all around him who does not know that in the old days in the cities, and the congested centers at least, that, in the absence of legal regulation, such elections were the prolific source of unfairness and corruption and the theater of the dominance of the worst elements of our population. Conditions became intolerable. Sinister interests and too frequently prodigal, but always purposeful expenditures of money by unscrupulous agencies, sought to control and sometimes did control elections, and the patriotic citizen saw corrupt and vicious influences dominate where, under proper safeguards, the will of the people, free and unpurchasable, would have controlled. The duty to protect the purity of the ballot box is broad and far-reaching. That was the overshadowing and controlling purpose of the Terrell Election Law. Everything else was but an incident to this dominant purpose and object. The purity of the ballot consists not alone in the right of the individual to vote but includes as well, and of necessity, the right of the public to have the election conducted in all things in such a manner as to assure the rule of the majority fairly expressed under the regulations prescribed by law. It follows, therefore, that the Legislature, in determining what is a proper regulation essential in securing the purity of the ballot, shall look as well to the counting and value of the ballot as to its mere casting, and shall look upon each ballot and the right to cast it not only with reference to the individual who deposits same, but to the aggregate of individuals whose rights are to be affected by the ballot cast as well as to the effect on our people, and their right to the due preservation of our free institutions. If one citizen, in the exercise of his right to vote, expresses thereby his honest and patriotic judgment he is, of course, subject to have that vote cancelled and its effect destroyed by the honest expression of a different opinion by another qualified elector, but that can not be regarded as a pure and fair ballot and an honest and fair election, in which, not citizenship but money casts the ballot, and the patriotic citizen finds his vote canceled by one who, for money consideration, has cast a ballot which he was either too indifferent or too shiftless himself to deposit. It follows, therefore, we think, that, in determining the validity of any regulations of the election franchise, the court should look, indeed must look, not only to the effect of such regulation upon the rights of the individual but upon its general result and effect in maintaining the freedom of our political institutions and the right of self-government.

"It has been uniformly held from the days of Marshall that even in respect to the National Congress that they may exercise such authority as is essential or necessary to carry into effect the power delegated to them. It is an axiom in mathematics, and it is true in law that things which are equal to the same thing are equal to each other. It would not be denied that the Legislature

could pass laws to prevent, for money or merchandise, the bribery of the elector and the corruption of the ballot. Whether such corruption or corrupt control finds expression in one form or another can, in law, or in fact, make little difference. The fact that such improper or corrupt control is indirect can not make its influence and effect less baleful or ruinous. It is another axiom of the law that you can not do indirectly what is forbidden to be done directly. It would not be contended that the law could not punish the shameless criminal who, with his vile money in hand, directly pays such money to the voter in consideration that he shall vote for a particular man or measure. But suppose in some contest that, instead of doing this, some sinister interest, in view of some election contest which is known to be pending, goes or sends 'unto the highways and by-ways' and compels by persuasion, or otherwise, the morally blind or otherwise halt to come in and say to them, 'I will lend you the money to pay your poll tax, and therefore the right to vote will be yours, without (to you) money and without price.' Could this course be one which the law could not either punish or prevent? Can avarice and selfish greed assemble the vote of the shiftless and the vicious elements of society, and by advances of money clothe them with the qualifications of electors, and the law be powerless and impotent? If these questions may be answered in the affirmative, then it seems to us the law in question is invalid, but we at the same time must recognize that, under our Constitution, we are powerless to protect society from the indirect but none the less powerful assaults of those whose interests may lead them to corrupt the source of all political power. We have seen that the right of suffrage is 'not included among the rights of property or person.' That 'it is not an absolute right but is altogether conventional. It is not a natural right of the citizen, but a franchise dependent upon law, by which it must be conferred to permit its exercise.' Therefore, we believe and hold that where, as in the statute before us, the law recognizes the constitutional right to vote, and is instituted for the purpose and to the end that such right may be safeguarded and also to protect the fairness of the election and the purity of the ballot, and where the rights of all those interested in the public good are recognized, under provision that they shall be fairly diligent in securing such right to vote and when every one is given a reasonable and fair opportunity to qualify himself to vote, a provision of the law that no other may by securing money to pay his poll tax, by loan from one who is advised of the purpose of such law, and who may presumably have an improper motive to make such advance and a sinister interest in qualifying such elector and where the effect of such transaction may be to corrupt the electorate and debase our elections does not as a matter of law, because in violation of our Constitutions, State or National, qualify and destroy such helpful and needed provision. On the contrary, such a provision, designed to prevent the prostitution of the ballot, the practical purchase of votes and voters and which if enforced will have that effect, is a reasonable and needed regulation of the privilege or right of the elective franchise, and the fact that uninterested or indifferent persons may lose their votes through their own negligence is no objection to such regulation."

We think there can be no doubt that the sole purpose in the Legislature requiring that a poll tax should be paid by the taxpayer either in person or by his duly constituted agent and in no other way was for the purification of the ballot. The object of the law in prohibiting one person from loaning or advancing to another money with which to pay his poll tax was for no other purpose except to purify the ballot and to keep out of the ballot box all those ballots which are influenced by money consideration. The courts of the county must judicially know that there is a large floating population of the State which has no real interest in the government but only serves as a tool in the hands of unscrupulous politicians who are willing to use them, and it is for the purpose of safeguarding the ballot box against this character of person

that the law was made requiring that a person should pay his own poll tax and making it a criminal offense for another to pay the poll tax of any person.

We are aware of the fact that the court has held in the case of *Austin vs. G., C. & S. F. Ry. Co.*, 45 Texas, 269, where registration was required as a prerequisite to voting that the fact that a person's name appeared upon the registration book was prima facie evidence that he was a qualified voter, and if his name so appeared there he should be permitted to vote. We are also aware of a decision of the Federal Circuit Court rendered in 1881 reported in Vol. 6 of the Federal Reporter, page 247, in which the court there held that the possession of a property tax receipt where a property tax was required, was prima facie evidence of the voter's right to participate in the election, but we are not willing to assent to the correctness of the doctrine laid down in these two cases for the reason that both the Constitution and laws of this State are now far more stringent than at the time these opinions were written. The evils sought to be corrected had become more prevalent and the legislation was directed at a specific evil and that evil was the participation in the elections of this State by a transient and irresponsible citizenship who did not have interest enough in governmental affairs to pay their own poll taxes, nor indeed would they have interest enough to take part in the elections of their own accord did they not do so at the instance of corrupt politicians.

To hold that it would be illegal for a person to pay the poll tax of another and at the same time permit such person whose poll tax had been paid to participate in the elections simply because the holding of the receipt would be prima facie evidence that he was a qualified voter would be it seems to render the law absurd, if not ridiculous. If such should be the holding, could not corrupt persons invade the country as it was done in this case (under your statement to this department), and pay the poll taxes of the very element of voters the law sought to exclude and thereby permit these voters to go into the election and debauch the ballot box by their illegal votes while the officers were looking for the unknown person who paid the poll taxes complained of. We do not think that such a construction should be given to the law. On the other hand we think the holders of such poll tax receipts should be refused the right to vote because they did not pay the poll tax in person or by agent, as the law requires they should. They have not complied with the requirements of the law in the payment of the poll taxes and should not be allowed to participate in the elections where this is known to the election officers. It can not be argued in favor of the rights of these persons to participate in an election that no person wields an influence over them and that they can vote as they please when they come to the ballot box. All experience teaches us that if there was not some expected profit to come to the person who has paid these poll taxes such person would not voluntarily hire agents and send them through the country spending thousands of dollars paying poll taxes of a certain class of citizenship. If we were to hold that a person who had thus procured his poll tax receipt in an illegal way was entitled to participate in an election simply because the poll tax receipt was

prima facie evidence that he was qualified, we would in so doing follow rather the shadow than the substance of the law. When a person presents himself at the ballot box and offers his vote and holds in his hands a receipt which is known to the election officers to have been fraudulently obtained, we believe that it is their duty under the law to refuse the ballot of such persons. We do not think that there is any duty incumbent upon the election officers to fill the ballot box with illegal and corrupt ballots even though it might be contended that a court could be resorted to later for the purpose of straightening out such ballots. If a person has not paid his poll tax in the legal and constitutional way and within the time prescribed by the laws of this State he is not a qualified voter and his ballot when tendered under such circumstances even though he held a poll tax receipt is illegal and should be refused.

Yours very truly,
 W. A. KEELING,
 Assistant Attorney General.

ELECTIONS—STATE SENATOR—VACANCY.

An election to fill a vacancy in the office of State Senator is to fill out the unexpired term of his predecessor.

ATTORNEY GENERAL'S DEPARTMENT,
 AUSTIN, TEXAS, MARCH 26, 1914.

Hon. James A. Harley, State Senator, Seguin, Texas.

DEAR SENATOR: Your two letters reached me in due course of mail but on account of a very heavy press of business I did not have the pleasure of answering your first as soon as I desired.

I have looked into the question you propounded, and am of the opinion that you, having been elected State Senator at a special election for that purpose, were elected to fill "the vacancy" of Senator Weinert which was to serve out the balance of his term and not merely to serve until the next election.

Section 13 of the Constitution of this State is as follows:

"When vacancies occur in either house, the Governor, or the person exercising the power of the Governor, shall issue writs of election to fill such vacancies; and should the Governor fail to issue a writ of election to fill any such vacancy within twenty days after it occurs, the returning officer of the district in which such vacancy may have happened shall be authorized to order an election for that purpose."

Section 27, of Article 16, Constitution of Texas (Harris'), provides "in all elections to fill vacancies of office in this State it shall be to fill the unexpired term only."

I note this distinction, that while some of the vacancies of public officers are to be filled by appointment such appointment holds good only until the next election, but where the Constitution itself provides that the people shall elect an officer their election qualified him to serve out the unexpired term of his predecessor.

You are therefore advised that in the opinion of this Department it would not be necessary for you to submit your name to the voters until the term for which you were elected expires by law.

Yours very truly,
W. A. KEELING,
Assistant Attorney General.

ELECTIONS—COUNTY EXECUTIVE COMMITTEE—STATE CANDIDATES.

A county executive committee which is required to convene on the third Monday in June for the purpose of placing the State candidates upon the ticket and determining the order in which the names appear shall have authority in case the list is not received on the third Monday to adjourn their meeting to a later date, when they can receive the list from the State Chairman. Construing Articles 3102 and 3106, Revised Civil Statutes, 1911.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JUNE 15, 1914.

*Hon. Walter Collins, Chairman State Democratic Executive Committee,
Hillsboro, Texas.*

DEAR SIR: You state that in accordance with your duties as State Chairman you certified to the county chairmen of the several counties in this State on the 13th day of June a list of all State officers, and in view of the fact that this list might not reach all of the county chairmen in time for the Monday meeting (June 15th) you desire to be advised as to whether or not the county chairmen would have the right to include the names of the candidates who had in due time certified to you their names.

We advise you that under Articles 3102 and 3106, which articles are cited by you, we are of the opinion that it would be proper for the county chairmen to include the names of all candidates certified by you even though the names were not received in time for the meeting of the executive committee on Monday, June 15th. While the law provides that the committee must meet on Monday, June 15th, it would be lawful if the committee for any reason, and particularly the reason that the list of certified candidates had not been received, could adjourn from day to day until all of the business proper to be transacted by the committee should be transacted.

While Article 3106 provides that the executive committee shall convene on the third Monday in June to determine the order in which the names of all candidates shall appear, it is not required that all of the business of the committee should be transacted on this day. They can stay continuously in session or can adjourn to a certain day when the list certified by you will have time to have arrived. After a candidate had properly certified his name and if all of the primary officials had been diligent in the discharge of their duties, but for lack of time and on account of the remoteness of certain places, the names of the candidates could not be received by the county chairmen in time to be placed upon the ballots. To hold that the candidates could not have their

names placed upon the official ballot and be voted upon at the primary election would be to allow the machinery of the primary election law to destroy its real purpose.

We do not think such a construction should be given to the law, and therefore advise you that the executive committee which is required to convene on Monday, June 15th, in all parts of the State, would have authority to have another meeting or to adjourn the same meeting to some other day when they will have received the list of names certified by you and properly place them upon the election tickets.

Yours truly,
W. A. KEELING,
Assistant Attorney General.

CONSTITUTIONAL CONSTRUCTION—CITY CHARTER—ELECTIONS.

Provision of city charter prescribing the qualification for voters in addition to those prescribed by the Constitution is a nullity.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JUNE 27, 1913.

Hon. George R. Gillette, City Attorney, San Antonio, Texas.

MY DEAR SIR: We are in receipt of your favor of the 24th instant, in which you say:

"The State Constitution, Section 3, Article 6, provides that, among qualified electors of the State and city 'in all elections to determine the expenditure of money or assumption of debt, only those shall be qualified to vote *who pay taxes on property in said city.*'

"The San Antonio city charter (Section 5) reads as follows: 'In elections in which property taxpayers only are allowed to vote under this charter, only those who are actual taxpayers and whose names appear on the last assessment roll of the city shall be deemed property taxpayers, but if the name of any person offering to vote, he being otherwise qualified, does not appear on said tax roll, and such person produces his property tax receipt of the preceding year and makes affidavit that he has paid the same, he shall be entitled to vote, but the word "sworn" shall be written on the back of his ballot and opposite his name on the poll list.'

"The question is, whether Section 5 of our charter is in conflict with Section 3, Article 6, of the Constitution; and, if so, then to what extent?"

In reply thereto, beg to say that the Constitution, in all elections to determine the expenditure of money or assumption of debt, has, by Article 6, Section 3, restricted the right to vote to property taxpayers, and the Legislature, in the charter of the city of San Antonio, has undertaken to define and say who or what shall constitute a property taxpaying voter and has defined that term to mean one who is an actual taxpayer in the city and whose name appears on the last assessment roll.

In the case of *Hendrick vs. Culberson*, 23 C. A., 409, 56 S. W., 616, the Court of Civil Appeals of this State, in construing an act of the Legislature of 1889, prohibiting the issuance of county bonds unless a

majority of the qualified voters of the county who are property taxpayers have voted for the same, held that the term "property taxpayer" meant one against whom a property tax *has been or could be assessed* for the year in which the voting occurred, and not merely one who owned property at the time of the election.

In the case of *Hillsman vs. Faison*, 56 S. W., 920, the Court of Civil Appeals, construing Article 3998, Revised Statutes, 1895, which provided that no person should vote at an election to levy a tax for school purposes, unless he is qualified under the Constitution and laws of the State and is a taxpayer in the district, held that a voter was qualified to vote, though his name did not appear on the last assessment rolls of the county preceding the election, provided he *owned property within the territory subject to taxation*.

In the case of *Clark vs. Willrich*, 146 S. W., 950, it was held that where an elector was possessed of property on the first day of January of the year in which he offered to vote, though he had not assessed said property for taxes, did not disqualify him as a voter at an election to determine whether a tax should be levied for school purposes.

In the case of *Hillsman vs. Faison*, *supra*, in construing Article 3942, Revised Statutes, 1895, relating to school district elections, and which provided that "all persons who are legally qualified voters in this State and of the county of their residence, and who are resident property taxpayers in said district, *as shown by the last assessment rolls of the county*, shall be entitled to vote in any such school district," held that the Legislature did not intend to require any additional qualification to entitle a person to vote at an election to determine whether or not a tax should be levied for school purposes, to those prescribed by the Constitution, Article 7, Section 3, which fixed as one of the qualifications of a voter that he should be a property taxpayer, and that the Legislature, by the language used in the statute "*as shown by the last assessment roll of said county*," only intended to designate a method of ascertaining who were property taxpayers of the district, the court saying:

"We think this is evident from the next succeeding article, which provides as follows: 'Any person may challenge a voter, but if the challenged party takes an oath that he is a qualified voter of the State and county, and that he is a resident property taxpayer in said district, he shall be entitled to vote.' Construing these two articles together, it is clear that it was not the intention of the Legislature to restrict the right to vote at such election to those only whose names appear on the last assessment rolls of the county; and, if the election in question in this case was controlled by these articles, we would hold that the mere fact that a voter's name did not appear upon the last rolls of the county would not disqualify him to vote at said election."

We think the construction placed upon the language in the statute above quoted a proper one and is applicable in this case; that the Legislature did not intend to prescribe a qualification in addition to that prescribed by Article 6, Section 3, of the Constitution, and the fact that a voter, otherwise qualified, but who failed to assess his property for the year in which he offers to vote, would not disqualify him to vote in elections in the city of San Antonio for that year.

We think the additional language used in Section 5 of the charter of the city of San Antonio requiring that, upon failure of the tax roll to disclose his assessment for that year, the production of his tax receipt showing that he had paid his taxes for the preceding year and to make affidavit that he had paid the same before entitling him to vote, is an additional requirement to that prescribed by the Constitution, Article 6, Section 3, and a requirement which the Legislature was without power to make and should be regarded as surplusage.

It is our opinion that any person who has resided within the State twelve months and in the city of San Antonio six months next preceding the date of the election, and who has paid his poll tax or secured certificate of exemption, where such certificate is required, prior to the first day of February, 1913, and who owned property in the city of San Antonio on June 1, 1913 (said date being the beginning of your city's fiscal year), would be entitled to vote in all city elections held in said city prior to February 1, 1914; the fact that the name of the party offering to vote does not appear on the last assessment roll nor the assessment roll for the current year will not disqualify him. If he owned property on June 1st, and is otherwise qualified, he would be entitled to vote.

Within the term "property taxpayers" is included all persons who pay taxes on property, both real and personal. Revised Statutes of Texas, 1911, Art. 7506.

Wooldridge vs. Page, 69 Tenn., 135.

Worth vs. Wright, 122 N. C., 335.

Durborrow vs. Durborrow, 72 Pac., 566.

State vs. Barr, 28 Mo. App., 84.

Winfree vs. Bagley, 9 S. E., 198.

Bank vs. Black, 29 N. E., 396.

Morris vs. Henderson, 37 Miss., 492.

Russell vs. Ralph, 10 N. W., 518.

However, the judges of election may adopt any reasonable mode or method of ascertaining the voter's right to participate in the election, and to that end may require the making of an affidavit, such as that enclosed by you, to the effect that his lawful name is as stated in the affidavit, that he owned property on June 1, 1913, within the city limits, etc.

Owing to the great pressure of work on the Department we have not been able to give your letter the consideration due it, but the above expresses our views, and trust that they satisfactorily answer the questions propounded by you.

Yours very truly,

W. M. HARRIS,
Assistant Attorney General.

SCHOOL TRUSTEES—ELECTION OF—TABULATING VOTE—COMMISSIONERS COURT.

The law nowhere lodges in any individual or set of individuals, whether acting personally or as a court, to render null and void the ballot of the people as fairly ascertained at an election fairly and duly held.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 22, 1913.

Hon. R. P. Edgar, County Superintendent of Public Instruction, Hamilton, Texas.

DEAR SIR: In your communication to this Department under date January 21, 1913, you say:

"Owing to the prejudice in this county against the county trustees, the vote last April for said trustees was very light, perhaps not more than 150 in the county. The commissioners court, on account of the light vote and sentiment in the county, failed to tabulate the vote or to declare any result of said election. Two members of the present commissioners court refused to have anything to do with the matter, but our newly-elected county judge is of the opinion that the present court could take the matter up yet and declare the result of said election and give me a board of education with which to carry on the educational work of the county. Please advise us about the matter, and greatly oblige."

Section 4 of Chapter 26 of the Acts of the Thirty-second Legislature declares that the general management and control of the high schools in each county of the State provided for in this act shall be vested in five county school trustees elected from the county at large at the time the trustees of the common school districts are elected, the first Saturday in April of each year. The order for their election to be made at the same time and by the same authority that orders the election of the trustees of the common school districts, etc.

It is our opinion that the returns of this election are contemplated to be made as the returns of the election of the trustees of the common school districts, as provided in Article 2820 of the Revised Statutes of 1911. This article provides that such return shall be made to the county clerk of the county where such election is held; he shall deliver the same to the commissioners court to be canvassed and the result declared as in cases of other elections, which commissioners court shall issue to the persons so elected their commissions as trustees.

Article 3030 of the Revised Statutes prescribes how and when the returns shall be opened and canvassed by the commissioners court and the results declared as follows:

"On the Monday next following the day of election and not before the county commissioners court shall open the election returns and estimate the results, recording the state of the polls within each precinct in a book to be kept for that purpose; provided, that in the event of a failure from any cause of the commissioners court to convene on the Monday following the election * * * the commissioners court to convene, then said court shall be convened for that purpose on the earliest day practicable thereafter."

The language of this article is mandatory only to the extent that the

commissioners court are prohibited from opening the returns and canvassing the result earlier than the Monday next following the day of election. This article clearly contemplates that from a failure or refusal of the commissioners court after that date to carry out the provisions of this article that it can be done at any subsequent time. It is inconceivable that the power should be lodged in any court or in any corps or set of men, or any other body or entity, under our laws, to render null and void the expression of the will of the people at an election duly held. The sovereign power rests in the body politic of the State or county or municipality, and when an election is held on any question and the voice of the people has been embodied in a ballot and an election fairly held, it is the duty of the officers of the county or municipality charged with canvassing and declaring the result to do so at the time fixed by law. But the law has nowhere lodged in any individual or set of individuals, whether acting personally or as a court, to render null and void the ballot of the people as fairly ascertained at an election fairly and duly held. It follows, therefore, that if the commissioners court has failed and refused to open the returns and declare the results of the election up to this time, nevertheless, the power rests there to do so at this later date.

You indicate that two of the present members of the court are still unwilling to go into this matter. It is not sufficient, however, to prevent the court from carrying out the plain provisions of the statute, because Article 2238 of the Revised Statutes of this State declares that any three members of said court, including the county judge, shall constitute a quorum for the transaction of any business except that of levying a county tax. If therefore there are two members of your court who are willing to go into it and the county judge is also willing, you have a quorum vested with full and plenary authority by the statutes of this State to open the returns and canvass the result.

Yours very truly,

LUTHER NICKELS,
Assistant Attorney General.

ELECTIONS—QUALIFIED VOTER—TAXATION.

A person otherwise qualified as a voter, who resides within a county, political subdivision or defined district, and who owned property in said county, district, etc., subject to taxation against him on January 1st next preceding the election, is entitled to vote at an election held under the provisions of Article 628, Revised Statutes of 1911.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, FEBRUARY 18, 1914.

Hon. J. S. Terry, County Attorney, Kaufman, Texas.

DEAR SIR: In your letter of February 12, 1914, you request an interpretation of the term "resident property taxpayers," as used in Section

52 of Article 3, of the Constitution, and of the term "resident property taxpaying voters," as used in Article 628, Revised Statutes of 1911.

The term "qualified voters who are property taxpayers of said county, town, etc.," as used in Article 605, Revised Statutes, 1911, was defined in the case of *Hendrick vs. Culberson*, 56 S. W., 616, as follows:

"A property taxpayer within the meaning of the act in question is one whose property rights were such on the 1st day of January of the year in which he offers to vote."

In this case the court declined to decide whether or not it was necessary for the person's name to be on the tax rolls.

The term "resident taxpayers in said district," as used in Article 3942, Revised Statutes, 1895, in the case of *Hillsman vs. Faison*, 57 S. W., 920, was held to mean "persons otherwise qualified, who owned property subject to taxation on January first of the year in which they offer to vote," and that such person was entitled to vote in such an election, although his name did not appear on the last assessment roll of the county preceding the election.

In the case of *Rhomberg vs. McLaren*, 2 Texas Civil Appeals Reports, 391, the term "property holding taxpaying voters," as used in Article 3733, Revised Statutes, 1879, was held to mean that it was not necessary that such person's name should appear on the assessment roll.

The term "resident property taxpayers in said district," as used in Section 61, etc., Chapter 12, Acts Regular Session 1909, means that a person who owns property subject to taxation in the district on January first next preceding the election, and if otherwise qualified, is entitled to vote in an election held under said statute. *Clarke vs. Willrich*, 146 S. W., 949.

In view of these opinions, we hold that a person who resides within the county or political subdivision or defined district and who owns property therein, which was subject to taxation against him on January first next preceding the election, is entitled to vote, if otherwise qualified, at an election held under the provisions of Article 628, Revised Statutes of 1911, whether he was assessed or not.

Yours very truly,

LUTHER NICKELS,
Assistant Attorney General.

ELECTION LAW—POLL TAX—EXEMPTIONS.

Party moving from city not requiring poll tax to city requiring same may vote without poll tax receipt.

Minor becoming of age in January must have exemption certificate.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JUNE 19, 1913.

Mr. F. D. Yeary, Election Supervisor, Kingsville, Texas.

DEAR SIR: We have your favor of June 14th in which you state that

Mr. A. paid his poll tax at Mexia, Texas, in October, 1912, came to Kingsville in November, 1912, that Mexia did not levy a city poll tax but Kingsville does. You wish to know if Mr. A. can vote in the coming election without a city poll tax.

You also ask if a minor becoming of age in January, 1913, can vote at your election on June 27, 1913, without an exemption or poll tax receipt.

Replying to your first question, we beg to say that the party referred to having resided at Mexia, Texas, on January, 1912, said city levying no poll tax for that year, was not subject to a city poll tax for the year 1912, and therefore could vote at your election on June 27th, if he is otherwise a qualified voter, which we take from your letter he is.

Answering your second question, we beg to say that there is a variance between Section 23 of the Terrell Election Law and Article 2954, Revised Statutes of 1911. The Revised Statutes of 1911 is supposed to be an exact and accurate codification of the existing valid acts of the Legislature. There is no question but that there is a very material difference between Section 23 of the Terrell Election Law and Article 2954, Revised Statutes, 1911. The Terrell Election Law was passed by the Twenty-ninth Legislature in 1905. We have searched diligently through the acts of the subsequent Legislatures and are unable to find any amendment to Section 23 of the Terrell Election Law as enacted by the Twenty-ninth Legislature.

You will note that the first clause of Article 2954, Revised Statutes, 1911, reads as follows:

"Every male person who will reach the age of twenty-one years after the first day of February and before the day of a following election at which he wishes to vote * * *"

In a footnote to this article the codifiers indicate that same is a copy of Section 23 of the Act of 1905. Referring to the Act of 1905 we beg to quote you the first clause of Section 23 as follows:

"Every male person who will be twenty-one years old on or before the day of an election and was not subject to a poll tax preceding the election at which he desires to vote, and who by reason of minority has not theretofore been subject to a poll tax but has or will become twenty-one years old on or before the date of any election * * *"

The above two articles each provide for the obtaining of an exemption certificate by a minor becoming of age before an election in order that he may vote. The variance between the article and the statute above quoted, is to the effect that under the statute it would not be necessary for a minor who becomes of age before the first day of February to obtain an exemption certificate, but under Section 23 of the Election Law, it would be necessary for him to obtain a certificate in order to vote. Section 23 of the Terrell Election Law was before the court in the case of *Savage vs. Umphries*, 118 S. W., 893, in which it was upheld by the court, and upon that opinion we advise you that a person becoming twenty-one years of age during the month of January, 1913.

would not be entitled to vote unless he had procured an exemption certificate prior to the first day of February, 1913. The case referred to is also authority for the proposition announced in the first part of this opinion.

The adoption of the Revised Statutes of 1911 by the Legislature does not make valid any repealed act of the Legislature brought forward therein, nor does it invalidate or repeal any of the acts of the Legislature that might have been omitted from the revision by the codifiers. *Berry vs. State*; *Robertson vs. State* and *Stevens vs. State* all decided by the Court of Criminal Appeals at the present term.

As above stated, we have been unable to find any amendment to Section 23 of the Terrell Election Law since its enactment in 1905, and we are at a loss to know where the codifiers found the language quoted above and inserted as a part of Article 2954. We are therefore of the opinion, and so advise you, that the provisions of Section 23 of the Terrell Election Law as enacted by the Twenty-ninth Legislature in 1905 are applicable to the present case, and that in order for a minor becoming twenty-one years of age during the month of January, 1913, to vote at your election to be held on June 27th, he must have procured an exemption certificate from the tax collector prior to the first day of February, 1913.

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

ELECTION—SCHOOL TRUSTEES.

Where the county judge fails to call a school trustee election, but on the day of election the voters assemble and in good faith elect officers and hold the election, the commissioners should canvass the result and declare the election.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 25, 1913.

Hon. Will H. Mayes, Lieutenant Governor, Brownwood, Texas.

DEAR SIR: This Department has for consideration a letter directed to you by Mr. J. C. Hunter of Van Horn, Texas, wherein he submits certain questions he desires you to get an expression on from this office. He states that for some reason the county judge of their county failed to order an election in their school district for school trustees, but that on April 5th, the day set by law for election of school trustees in common school districts, certain of the voters gathered at the polling place within the district, selected their election officers from among the voters and proceeded to hold an election; that while the voting strength of the district is about seventy, only fourteen votes were cast; that the election judges have made their returns to the commissioners court to be canvassed, but that the court has thus far refused to canvass the returns and it is agreed that the matter be submitted to this office to determine

the legality of the election held. You also ask would the newly elected officers be entitled to office, or could the county superintendent appoint trustees?

Replying thereto, we beg to say that it has been held in this State that where for any reason the county judge had failed to order an election and to appoint election officers, that the voters may gather at the polling place and select their own judges and officers of election and proceed with the election and that under certain conditions, which will be noted later, that the election will be valid and the officers elected thereat will be duly elected.

Terrell Election Law, Sec. 83.

Buchanan vs. Graham, 81 S. W., 1237.

The case of Buchanan vs. Graham was one involving the validity of election of school trustees where the county judge had failed to order an election or to appoint officers for the election. There were only two candidates for school trustee and they received every vote cast. The facts showed that the election was fairly held and no voter was denied the privilege of voting when he offered to do so. It was well known throughout the district that the election was being held; all parties who participated in any way in the election, did so in good faith and there is no evidence whatever to indicate that the result was not the expression of the will of the majority of the legal voters who would have voted at such an election even if the statutory call and notice had been made. The court, in that case, held as follows:

"We have had no difficulty in arriving at the conclusion that the election of appellees was not void. It is universally held, we believe, that the prime object to be attained in an election is to ascertain the expressed will of the electors participating in such election; and that, where such election is fairly and honestly held, and the will of the electors is readily ascertained therefrom, mere irregularities will not render the election void. See *Deaver vs. State* 66 S. W., 256, and authorities there cited. We are of the opinion that the appellees were fairly elected to the offices sued for and were entitled to discharge the duties of the same."

It will, therefore, be seen that the question of whether or not the parties elected at the election held in your district would, upon taking the oath of office, be entitled to act as trustees of your district, would depend upon a question of fact, and those facts are, as stated in the case above, that it was held in good faith, that no one entitled to vote was deprived of the privilege of voting and that the election expressed the will of the majority of the voters of the district, whether such majority voted or not. If the above facts exist, then those elected at the election held on April the 5th will be duly elected and entitled to enter upon their duties upon taking the oath of office. If they do not exist, the parties would not be duly elected and would not be entitled to the office.

The election being a general one and the time fixed by law all parties are chargeable with notice thereof. Under the facts stated, we are of the opinion those who received the votes at the election would be duly elected and entitled to the office, and it would be the duty of the commissioners court to canvass the returns and declare the result.

With reference to the appointment of trustees by the county superin-

tendent, we beg to say that under the present law, the county superintendent is not authorized to fill vacancies in the office of school trustee, but same shall be done by the commissioners court. (See Article 2821, Revised Statutes of 1911.) In the event no election had been held on April 5th, no vacancy would have existed in the office of school trustees in your district and the present incumbents would hold over until the next regular election.

Trusting that the above is a satisfactory answer to your enquiry, we are,

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

COUNTY SEAT—ELECTION.

It will require a two-thirds vote to locate first county seat of Real county, where the candidate is more than five miles from center of county; where it is within five miles, only a majority vote is necessary.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MAY 2, 1913.

Hon. A. M. Kennedy, Member of the House, Austin, Texas.

DEAR SIR: This Department is just in receipt of your communication of May 1, reading as follows:

"Representing the special commissioners appointed by the act of the Legislature to organize Real county, I desire to ask if, in the opinion of your Department, it will require a two-thirds vote to locate the first county seat when it is not within five miles of the geographical center. In this connection, it might be well to suggest that in this instance there will be two candidates, neither of which are within five miles of the geographical center. If such should be the case, would it require a two-thirds vote to locate it?"

Replying thereto we beg to say that there is a seeming conflict between Article 1387 and 1388 with reference to the establishment of county seats upon the organization of counties. The first article named, standing alone, would mean that the place receiving a majority of the votes cast would be the location of such county seat, without reference to the distance from the geographical center of the county. Nowhere in this article is the center of the county mentioned, but in Article 1388 it is provided that no county seat *first established* in a newly organized county shall be located at any point more than five miles from the geographical center of the county unless by two-thirds vote of all the electors voting on the subject in said county. All of Article 1387 down to the word "provided," in the third line from the bottom of the Article was enacted in 1879, while Article 1388 was an Act of 1881 and was therefore the last act, but this act did not contain any repealing clause, which leaves both acts, that of 1879 and that of 1881, valid. This identical question was before the Supreme Court in the case of State vs. Alcorn, and Chief Justice Stayton in that case reconciled the two articles and held that by *first established*, as now contained in 1388, is evidently meant the first

county seat established or located according to law in a county, and that this article has application to the location of county seats at points distant more than five miles from the center of the county, and it does not assume to provide for location within that distance of the center, but as to all such locations the former statute may and does control, and he thus gives effect to both the articles. See *State ex rel. vs. Alcorn*, 76 Texas, at pages 395 and 396.

We are therefore of the opinion, and so advise you, that upon the state of facts presented by your communication both of the candidates at the election to determine the county seat of Real county, being more than five miles from the geographical center of the county, before either could be duly selected it must receive two-thirds of the votes cast at the election upon the subject. But if a point within five miles of the geographical center of the county should become a candidate it would only require a majority vote to select such a point.

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

ELECTION—COMMON SCHOOL DISTRICT—RESIDENT PROPERTY TAX-
PAYERS—QUALIFIED VOTER.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, FEBRUARY 17, 1913.

Hon. F. M. Bralley, State Superintendent of Public Instruction, Capitol.

DEAR SIR: Under date of February 11th, you enclosed to this Department a letter from Honorable N. N. Rosenquest, county judge of Stephens county, requesting an opinion as to the length of time a resident property taxpayer must have resided in a common school district in order for him to be entitled to vote in a local maintenance tax election in said school district.

Article 2831 of the Revised Statutes of 1911 says that "all persons who are *legally qualified* voters of this State, and of the county of their residence, and who are resident property taxpayers in said district; shall be entitled to vote in such school district election."

The question then reverts to this form. Who are the *legally qualified* voters of this State, and of the county of their residence?

The answer to this interrogatory is found in Article 2939 of the Revised Statutes and in the following language, to wit:

"Every male person subject to none of the foregoing disqualifications (that is, idiots and lunatics, paupers, felons, soldiers, seamen) who shall have attained the age of twenty-one 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 he offers to vote, shall be deemed a qualified elector."

Specifically answering the question in Judge Rosenquest's letter, the voter must have resided in the common school district for at least six months next preceding the election.

Yours very truly,
LUTHER NICKELS,
Assistant Attorney General.

OPINIONS RELATING TO FEES OF OFFICERS--CONSTRUCTION OF THE FEE BILL.**FEES—COUNTY ATTORNEY.**

County attorney is entitled to fee of \$5.00 for services in examining trial for felony where there is an indictment returned. Code of Criminal Procedure, 1911, Article 1119.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MAY 23, 1913.

Hon. W. M. Hilliard, County Attorney, Caldwell, Texas.

DEAR SIR: In your letter of May 20th, addressed to this Department, you state that in October, 1912, a negro by the name of Levi Williams was charged by a complaint before a justice of the peace with the offense of murder; that an examining trial was held at which the testimony of the material witnesses was reduced to writing, signed and sworn to by said witnesses, and that the defendant was bound over by the said justice of the peace to await the action of the grand jury. You further state that the first grand jury meeting thereafter convened in November, 1912, and after investigating the cause, failed to return a bill of indictment against Williams, but that the next grand jury, which convened in May, 1913, investigated the case and returned a true bill against him for murder, that being the offense with which he was charged in the examining court and for which he was bound over to await the action of the grand jury.

You desire to know whether under the facts, you as county attorney would be entitled to the fee of \$5.00 for appearing and prosecuting the case before the examining court.

Article 1119, Code Criminal Procedure, 1911, which regulates the fees of a county attorney in such cases, provides:

"District and county attorneys for attending and prosecuting any felony case before an examining court shall be entitled to a fee of \$5.00, to be paid by the State for each case prosecuted by him before such court; provided, such fee shall not be paid except in cases where the testimony of the material witnesses to the transaction shall be reduced to writing, subscribed and sworn to by said witness.

"The fees mentioned in this article shall become due and payable only after the indictment of the defendant for the offense of which he was charged in the examining court, and upon an itemized account sworn to by the officers claiming such fees, approved by the judge of the district court."

One of the reasons for holding an examining trial is to get the evidence and reduce it to writing while the facts are fresh in the minds of the witnesses. When the testimony is thus taken and reduced to writing, it then becomes a matter of record, and in the event a witness who gives testimony before an examining court should die, or leave the State, his testimony given upon said examining trial can be introduced in evidence upon the final trial of the case by laying proper predicate for the introduction of same. The practice of holding examining trials

and getting the evidence of material witnesses, thus making it a matter of record, is to be in all things commended, and under the statute above quoted, the county attorney would be entitled to his fee for said services rendered after the indictment of the defendant by the grand jury for the offense of which he was charged in the examining court. The statute does not make it a condition precedent to collecting the fee that the first grand jury after the examining trial must indict, but the fee becomes due and payable after indictment of the defendant for the offense of which he was charged in the examining court, which indictment may be returned by the first grand jury convening after the holding of the examining trial, or by a subsequent grand jury.

It is, therefore, the opinion of this Department that under the facts stated in your letter, you are entitled to the examining trial fee of five dollars for attending and prosecuting the case of the State of Texas vs. Levi Williams before the examining court of your county.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

SHERIFF—EXPENSES—CONVEYING LUNATIC TO ASYLUM.

Sheriff not allowed mileage in conveying lunatics to asylum.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, APRIL 19, 1913.

Hon. C. C. House, County Attorney, Brady, Texas.

DEAR SIR: We have your favor of the 16th instant, reading as follows:

"Please inform me whether or not the sheriff pays the expenses of conveying a lunatic to the asylum. Is the sheriff allowed, going by railroad, 7½ or 12½ cents per mile, and does this constitute his total allowance? Who pays the railroad fare and hotel bill, etc., of the lunatic?"

Replying thereto, I beg to say that the statutes of this State do not allow mileage to a sheriff in conveying lunatics to the asylum. The only allowance to a sheriff in matters of this kind is set out in Article 145 of the Revised Statutes of 1911, which reads as follows:

"The expenses of conveying all public patients to the asylum shall be borne by the counties, respectively, from which they are sent; and said counties shall pay the same upon the sworn account of the officer or person performing such service, showing in detail the actual expenses incurred in the transportation."

You are, therefore, advised that only the actual and necessary expenses incurred by the sheriff would be a proper charge against the county. By "actual expenses incurred" would be such as railroad fare, hotel bills and such street car or carriage fares as would be necessary in going to and returning from the asylum. This, of course, would cover the expenses of both the sheriff and the patient within his charge. The

same should be paid by the county upon the sworn account of the officer conveying the patient.

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

COMMISSIONERS COURT—SUIT FOR INSURANCE ON COUNTY COURT
HOUSE—COUNTY ATTORNEY—ATTORNEY'S FEES.

1. In a suit for recovery of wind insurance policy on courthouse and a firm of lawyers representing commissioners affect a compromise, the county attorney, who had nothing to do with such suit, would be precluded from claiming his commission.

2. As to district and county clerk, see *State v. Norrell*, 53 Texas, 427.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 28, 1913.

Hon. Levi Walker, County Judge, Montague, Texas.

DEAR SIR: You write this Department that your commissioners court contracted with a firm of lawyers to bring a suit for your county for the recovery of a wind insurance policy on your courthouse, that such attorney bringing the suit recovered, by compromise, a certain sum of money which has been placed in your hands for the benefit of the county, you desire to know if the county attorney, who did not join in the suit and who had nothing to do with bringing or prosecuting same, would be entitled to a fee on commission.

Article 1193, Code of Criminal Procedure, 1911, allows the district or county attorney on all fines and forfeitures 10 per cent on money collected for the State or county upon *judgment recovered by him*, and the clerk of the court in which all judgments are rendered would be entitled to 5 per cent of such judgments when collected. In the case of the *State vs. Norrell*, 53 Texas, 427, this article is held not to apply to clerks in civil cases.

We are of the opinion, that under the statement of facts given us, the county attorney would not be entitled to a commission upon this judgment, for the fee terms of the article state that in order for him to be entitled to the commission, it must be upon judgments recovered by him. If he had nothing to do with the prosecution of this cause, and same was prosecuted by counsel hired by the commissioners court, we are clearly of the opinion that the county attorney would be precluded from claiming his commission.

As to the district clerk or county clerk, we think the case of the *State vs. Norrell*, cited above, disposes of this question adversely to him. The sheriff would be entitled to retain 5 per cent thereof if he collected the money for the State or county, but *only* in that event.

Very truly yours,
W. A. KEELING,
Assistant Attorney General.

COMMISSIONERS COURT—COUNTY CONVICTS—SHERIFF.

County commissioners have authority to board the county convicts independent of the sheriff, and the sheriff would not receive 40 cents per day as provided in the Acts of 1911, page 107.

ATTORNEY GENERAL'S, DEPARTMENT,

AUSTIN, TEXAS, AUGUST 8, 1913.

Hon. P. E. Rowe, County Judge, Livingston, Texas.

DEAR SIR: You state to this Department that your county has no work house, and that you employ your county convicts on the public roads and bridges under Article 6238, Revised Civil Statutes of 1911. You state that such convicts, in charge of a guard, and worked out during the day and at night are returned to the county jail and lodged there for safekeeping. You desire to know if the commissioners court would have the authority to board these county prisoners, whom you are working on the public road, at your own expense and in this way relieve the jailer of the duty of boarding them, and likewise relieve the county of the expense, or, rather, the obligation to pay the jailer a fee for boarding the prisoners.

Replying to this inquiry, we advise you that this Department is of the opinion that after a person has been convicted of crime and the judgment has become final and the prisoner confined to the county road gang in the contemplation of the Acts of 1911, Chapter 64, they are not to be regarded any longer as county prisoners; that is, prisoners in the sense that it is the duty of the sheriff to board them in the county jail. After they are turned over to the road gang to work out their fine and cost, they cease to be prisoners in the common sense of that term and their names should be stricken off of the jail register and transferred to the county convict register, and it would be entirely legal, and in fact a proper thing, for the commissioners court to provide its own method of boarding the convicts, for clearly the sheriff would not be chargeable with this duty after the convicts have been checked off his jail register on to the county convict register.

Article 6238 and Article 6239, Revised Statutes of 1911, shows that this was the idea of the lawmakers; Article 6238 providing that the county convicts shall be put to labor upon the public roads, bridges and other public work of the county, while Article 6239 provides that "when not at labor, county convicts may be confined in the county jail or work house, as may be most convenient, or as the regulations of the commissioners court may prescribe." This article provides that when the convicts are off duty they may be confined in the county jail. They are not, however, while in the county jail, prisoners in the sense that the Legislature provided extra compensation to sheriffs in the Session Acts of 1911, page 107. If the county boards the county convicts at their own expense, the sheriff would not be entitled to forty cents per day when the county convicts are locked in the county jail when off duty.

Very truly yours,

W. A. KEELING,
Assistant Attorney General.

COUNTY CLERKS—CHattel MORTGAGE—FILING COPY—FEES OF
CLERK, ETC.

If a copy of a chattel mortgage be presented to county clerk for filing instead of original instrument, he should carefully compare such copy with the original, and, if found to be correct copy, he should file same, provided original has been proven for record as law requires, etc.

Violation Anti-nepotism Law for road overseer to employ son of county commissioner.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MARCH 26, 1913.

Hon. H. E. Bell, County Attorney, Gatesville, Texas.

DEAR SIR: Under date of March 22, 1913, we have the following communication from you:

"I have two questions which I desire for you to give your opinion on.

"Article 5656, Revised Statutes, provides for the recording of a 'true copy' of a chattel mortgage. Does this article require the clerk to certify on the original that a true copy has been filed, and to certify on the copy that it is a true copy of the original, and would he violate the provisions of the fee bill by charging 50 cents for recording such copies? The county clerk has been requested to file copies of chattel mortgages, and return the original to the holder, without certificates of any kind on either copy or original. The party making his request tendering 25 cents as the fee, and threatening to hold him responsible for any loss if he should not accept the fee and file the copy as above.

"In the event the law requires the certificate of the clerk to be attached to either original or copy, is he not justified in charging 50 cents for making such certificates?

"Would the chattel mortgage be of any effect where an uncertified copy has been filed as is requested by the party referred to, as against persons having no other notice?

"The other question relates to the Nepotism Law. G. B. Smith, county commissioner, appointed Pruitt Morgan road overseer. Morgan has full authority as overseer or foreman of the road crew, and wishes to employ Smith's son as a laborer. I have advised Mr. Smith that this would be a violation of the law, but he has requested me to obtain your opinion on the matter. The commissioners court employs Morgan, and Morgan has full authority to employ whom he pleases. As the work is being done in Smith's beat, he is most directly in authority over Morgan. The question is, can a man employed by a county officer, in turn, employ a son of that officer?"

Replying to your first inquiry, it is the opinion of this Department, under the provisions of Article 5656, Revised Statutes, 1911, that if a copy of a chattel mortgage be presented to the county clerk for filing instead of original instrument, he should carefully compare such copy with the original, and if found to be a correct copy, he should file same, provided the original has been witnessed by two subscribing witnesses or acknowledged or proven for record and certified as required in case of other instruments for the purpose of being recorded. We think the clerk would be entitled to a fee of only twenty-five cents for filing such instrument, and of course he would be entitled to demand this fee of twenty-five cents before filing the same.

We do not think the law requires the clerk to place his certificate, either on the original or copy, before filing. When a copy is presented for filing and the clerk satisfies himself, by comparison, that said copy

is a true and correct copy of the original, and if the original has been witnessed by two subscribing witnesses, it then becomes the duty of the clerk to file same for a fee of twenty-five cents. If said original has not been witnessed by two subscribing witnesses, but has been acknowledged or proven for record and certified as required in case of other instruments for the purpose of being recorded, it would then become the duty of the clerk to file same for a fee of twenty-five cents. If a copy is found to be not a true and correct copy of the original; or if the original had not been subscribed by two witnesses, or acknowledged, or proven for record and certified, the clerk should decline to file same.

Replying to your second inquiry, beg to advise you that we concur in your opinion, that under the facts stated, it would be a violation of the Anti-nepotism Law for Mr. Morgan to employ Mr. Smith, the son of one of your county commissioners.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

COUNTY ATTORNEY—COUNTY JUDGE—CONVICT BOND—DISTRICT
ATTORNEY—FEES.

1. Where a party has been convicted in a criminal case, is hired out by the county judge and gives a convict bond, the county attorney, under Article 1193, Code of Criminal Procedure, is entitled to 10 per cent commissions on such judgment when collected.

2. In a district in which the district attorney is compensated on a salary or per diem basis, if the county attorney represents the district attorney in his absence and takes a plea of guilty to a misdemeanor, said county attorney would not be entitled to the fees and commissions, but it would be the duty of the district clerk in such a case to collect the attorney's fee and to send same, together with the commissions, to the State Treasurer.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 27, 1914.

Hon. A. L. Bevil, County Attorney, Kountze, Texas.

DEAR SIR: Under date of February 25th you propound to this Department the following inquiries:

"1. When the county attorney prosecutes a criminal case to judgment and the defendant makes a convict bond and the county judge collects said fine and costs according to the terms of said bond, is the county attorney entitled to a commission of 10 per cent of said fine under Article 1193, Code of Criminal Procedure?"

"2. Where defendant is indicted for assault with intent to murder and the evidence won't support the charge, the district attorney being absent, the county attorney representing the State waives the charge of assault with intent to murder and the defendant pleads guilty to an aggravated assault and pays his fine, is the county attorney entitled to his costs of ten dollars and the commission of ten per cent of said fine?"

Answering your inquiries in the order in which they appear, you are respectfully advised:

Article 1193, Code Criminal Procedure 1911, provides:

"The district or county attorney shall be entitled to ten per cent on all fines, forfeitures or moneys collected for the State or county, upon judgments recovered by him; and the clerk of the court in which such judgments are rendered shall be entitled to five per cent of the amount of said judgments to be paid out of the amount when collected."

It will be observed that the above quoted statute allows as compensation to the district or county attorney ten per cent on all fines, forfeitures or moneys collected for the State or county upon judgments recovered by him. If the county attorney prosecutes a criminal case to a judgment and this judgment is afterwards collected, unless there is some statute which prohibits him from getting the ten per cent commission, he would certainly be entitled to same under the terms of the above quoted statute. If the convicted parties are worked upon the public roads or county poor farm, the statute specifically provides that the officers in such cases shall not receive their commissions and shall only receive as their compensation one-half of their costs. No such provision, however, is made with respect to cases where the convicts have been hired out and have given what is known as a convict bond.

Article 6249, Revised Statutes, 1911, authorizes the hiring out of a person who may have been convicted of a misdemeanor and committed to jail in default of the payment of the fine and costs adjudged against him. Such a party may be hired out to any individual, company or corporation within the county of conviction, to remain in said county, and the proceeds of said hiring, when collected, shall be applied, first, to the payment of the costs, and, second, to the payment of the fine. There is no provision in the statute to the effect that the officers named in Article 1193, Code Criminal Procedure, should not receive their commissions in such a case. Evidently the judgment in such a case is a judgment recovered by the county attorney and the money collected on such judgment is money collected upon a judgment recovered by the county attorney, and by the plain provisions of Article 1193, above quoted, we believe the county attorney would be entitled to his ten per cent commission thereon. This, of course, is only in cases in which the county convicts have been hired out and given a convict bond. If the convicts have been worked on the public roads or in workhouses or county farms, Article 6247, Revised Statutes, 1911, provides for the compensation of the officers in such cases and it is specifically provided in said article that the commissions of officers shall not be paid.

2. If a party is indicted for assault with intent to murder and his case is pending in the district court in a district in which the district attorney is compensated on a salary or per diem basis, we do not believe the county attorney would be entitled to the fee and commissions in such case, in the event the person charged enters a plea of guilty or is convicted of an aggravated assault and pays a money fine. At the regular session of the Thirty-first Legislature the law fixing the compensation for district attorneys was amended and the effect of the amendment was to place all district attorneys in all judicial districts of the State

composed of two counties or more upon a salary basis. Such officer in such district is paid for his services at the rate of fifteen dollars per day, the maximum number of days in any one year for which he may be paid being 133, and no provision whatever is made in this statute to compensate county attorneys for representing the State in the absence of the district attorney or for assisting the district attorney in prosecuting cases in the district court. Before the enactment of this statute provision was made for compensating county attorneys for assisting in the prosecution of felony cases or for representing the State in felony trials in the absence of the district attorney. In such cases he received when assisting the district attorney one-half the fee allowed by law to the district attorney and when representing the State alone he received all the fee which was allowed by law to the district attorney. Since the enactment of the salary bill, however, there are no fees of any character allowed and paid to district attorneys, and no provision was made in said statute for compensating county attorneys for work performed in the district court. It is specifically provided in the act placing the district attorneys upon a salary or per diem basis that all fees in misdemeanor cases and commissions and fees heretofore allowed district attorneys under the provisions of law in districts composed of two or more counties, shall, when collected, be paid to the clerk of the district court, who shall pay over the same to the State Treasurer. In your case it was the duty of the district attorney to be present and represent the State in the trial of same. If he had been present and had tried the case getting a verdict against the party for an aggravated assault, or if he had settled the case upon an aggravated assault basis, it would have been the duty of the district clerk to have charged up the attorney's fee and to have collected the same, together with the commissions, and transmitted same to the State Treasurer. As the district attorney was not present and you represented the State in his absence, it would likewise be the duty of the district clerk to collect the attorney's fee and to send same together with the commissions to the State Treasurer, as there is no authority given by law for the district clerk to pay such fees to the county attorney.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

COMMISSIONERS COURT—COUNTY TREASURER COMMISSIONS.

1. The commissioners court of a county has no authority to fix a monthly salary as compensation for the county treasurer.
2. The county treasurer must be compensated by commissions on moneys received and paid by him.
3. The commissioners court of a county may fix the commissions of the county treasurer at any amount not to exceed the maximum fixed by statute.
4. The commissioners court of a county can reduce the commissions of the county treasurer during said treasurer's term of office, even though such reduc-

tion makes the annual compensation of the county treasurer less than two thousand dollars.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 22, 1914.

Hon. S. M. Adams, County Attorney, Nacogdoches, Texas.

DEAR SIR: It appears from your letter of February 25th, together with the letter of Mr. John C. Fall, county treasurer of your county, that the commissioners court of Nacogdoches county has by order fixed the compensation of the county treasurer at commissions on moneys received and paid out by him as follows: For receiving moneys $1\frac{1}{2}$ per cent and for paying out moneys $1\frac{1}{2}$ per cent, and that said commissions make a larger compensation for the office of county treasurer than the commissioners court thinks ought to be paid, and you desire to know whether the commissioners court has the authority to fix a stated monthly salary for the county treasurer, or whether the commissioners court has the authority to reduce the compensation of the treasurer less than the one and one-half per cent commissions on moneys received and paid out.

Replying thereto, you are respectfully advised that Article 3873, Revised Statutes, 1911, provides:

"The county treasurer shall receive commissions on the moneys received and paid out by him, said commissions to be fixed by order of the commissioners court, as follows: For receiving all moneys, other than school funds, for the county, not exceeding two and one-half per cent, and not exceeding two and one-half per cent for paying out the same; provided, however, he shall receive no commissions for receiving money from his predecessor nor for paying over money to his successor in office."

Article 3875, Revised Statutes, 1911, provides:

"The commissions allowed to any county treasurer shall not exceed two thousand dollars annually."

It is, therefore, seen that the only legal way in which a county treasurer may be compensated for his services is by payment to him of commissions on moneys received and paid out by him. Neither the Constitution nor the statute would permit such officer to be compensated on a salary basis. The commissioners court has the authority, however, to fix the commissions of said officer at any figure within the statutory limitations. If within the judgment of the commissioners court the one and one-half per cent commissions allowed the county treasurer is too much compensation for said officer, said court would have the authority to pass an order reducing his commissions. This has been the ruling of this Department for many years and the appellate courts of our State have also passed upon the question and have declared that the commissioners court has the authority to reduce commissions of a county treasurer by order properly made and entered upon the minutes of said court.

You are, therefore, respectfully advised that in our opinion, the commissioners court of your county would not have the authority to pay the county treasurer a salary for the services rendered by him, because by the terms of the statute his compensation must come from commissions on moneys received and paid out by him.

2. The commissioners court of your county has the authority to reduce the commissions of the county treasurer so that the compensation of said officer may be just, reasonable and commensurate with labor performed, even though such reduction would bring the annual compensation of such officer below two thousand dollars.

3. The order reducing the commissions of the county treasurer may be made by the commissioners court, after the election of said treasurer and during his term of office.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

SHERIFF—ALLOWANCE FOR BOARD OF PRISONERS—JAILER.

Sheriff entitled to not less than 40 cents nor more than 50 cents for board of prisoners. Sheriff must pay his own jailer.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, MAY 22, 1913.

Hon. George Willrich, County Judge, La Grange, Texas.

DEAR SIR: You desire to know what amount of board the commissioners court can allow the sheriff for prisoners while in jail.

We beg to advise you that the Acts of the Thirty-second Legislature, 1911, page 107, provide that the compensation shall not be less than 40 cents per day nor more than 50 cents. This act is the act which governs in this case. It is true that Article 1142 of the Code of Criminal Procedure provides that the amount shall not exceed 45 cents, but this act is superseded by the act referred to as will be shown on page 325, Section 4 of the act adopting the Penal Code which reads as follows:

"Nothing in this act shall be so construed or held to repeal, or in anywise affect, the validity of any law or act passed by this Legislature in its regular session."

You desire further to know if the commissioners court can allow your sheriff a jailer or turnkey.

We advise you that Article 1143, Code of Criminal Procedure, 1911 provides that the sheriff shall be allowed for each guard necessarily employed in the safe keeping of prisoners one dollar and fifty cents for each day; and there shall not be any allowance made for board of such guard, nor shall any allowance be made for jailer or turnkey, except in counties having fifty thousand population or more. This article means that the sheriff can with the consent of the commissioners court and county judge employ a guard for the safe keeping of the prisoners but this is only a temporary affair. If, for any reason, he considers his jail insecure he can employ one or more guards for the sole purpose of making the prisoners more secure in the jail. This act, however, does not contemplate that this guard shall do the duty of a jailer or turnkey. On

the contrary, that he shall do only the duty of guard for the jail. The sheriff has the authority to appoint a jailer, but the law contemplates that he should pay this jailer out of his own earnings and *not* from the public treasury.

Yours truly,
 W. A. KEELING,
 Assistant Attorney General.

FEES—SHERIFF—LAND SALES UNDER EXECUTION.

Sheriff's commission for making sale of land under execution. Should notify each defendant or his attorney of execution or order of sale. No fee allowed for sending out such notices.

ATTORNEY GENERAL'S DEPARTMENT,
 AUSTIN, TEXAS, APRIL 29, 1913.

Mr. Dee Davis, Sheriff, Sterling City, Texas.

DEAR SIR: In your letter of April the 21st, you desire to know how to calculate the amount of your commissions for making a sale of land under execution, the land being sold for \$1500.

We advise you in our opinion you are entitled to a commission of \$28 for making this sale. That is to say, you are allowed by the statutes 4 per cent on the first \$100; 3 per cent on the next \$200; 2 per cent on the next \$800; and 1 per cent on the balance.

An examination of the case of McLennan County vs. Grobes, 64 S. W., 861, will show that the Supreme Court, in calculating the amount of the sheriff's fees under a statute of almost similar language to Article 3864 of the Revised Statutes of 1911, gave the construction to the language which we have given it in calculating the commissions on the said \$1500.

You desire to know also whether you are required by law, under an execution, or order of sale, to sell real estate, to mail to each defendant a copy of the notice of sale.

Article 3757, of the Revised Statutes of 1911, provides that you shall give such written notice to the defendant or his attorney, and we construe this to mean to each defendant or to any attorney of each defendant. As to your fee for making and mailing such copy we are unable to find any provision in the law for the payment of a fee for this service. It follows, therefore, that you are not entitled to a fee for the performance of this duty. There are many duties required of public officials for the performance of which the law allows them no compensation.

Very truly yours,
 G. B. SMEDLEY,
 Assistant Attorney General.

COUNTY ATTORNEY'S FEE—DELINQUENT TAXES—CONSTRUCTION OF STATUTES.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MARCH 31, 1913.

Hon. William P. Blackburn, County Attorney, Clairemont, Texas.

DEAR SIR: In your letter of the 26th, you submit the following question to this Department:

"A. has five lots unimproved in Block B in the town of C., on which suit is filed for delinquent taxes. In taxing the county attorney's fees, should this be considered as one tract or five tracts?"

In reply, we call your attention to that part of Article 7691 of the Revised Statutes, which reads as follows:

"Provided, that where two or more unimproved city or town lots belonging to the same person and situated in the same city or town shall all be included in the same suits and costs, except those of advertising, which shall be twenty-five cents for every ten lots, or any number less than ten, taxed against them collectively, just as if they were one tract or lot." etc.

This clause has been constructed to mean that when two or more unimproved city lots belong to the same person and suit is filed for the collection of the delinquent taxes against said lots, they shall be treated as one tract for the purpose of taxing the costs, provided for in Article 7691. (See the case of Raht vs. State, 106 S. W., p. 900.)

We, therefore, answer you on the authority of this case, that in taxing the county attorney's fees, the five unimproved lots in Block B, owned by A, should be considered as one tract.

Very truly yours,

G. B. SMEDLEY,
Assistant Attorney General.

PROBATE MATTERS—COMMISSIONS—COUNTY JUDGE.

Where an estate is administered partly under one county judge and partly under another, the commissions should be divided equitably between the two judges in proportion to the work done by each.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, APRIL 22, 1913.

Mr. E. P. Walsh, Wichita Falls, Texas.

DEAR SIR: In your letter of April 19th, you request a construction of Article 3850 of the Revised Statutes of 1911, and desire to know whether the commissions allowed the county judge by said article are payable to the judge under whom the cash receipts of the estate were collected and expended, or to the judge by whom the final settlement of the account of the executor or administrator was approved.

This article allows the county judge a commission of one-half of one per cent upon the actual cash receipts of each executor, administrator

or guardian and provides for the payment of such commission "upon the approval of the exhibits and the final settlement of the account" of such executor, etc. We construe the phrase "upon the approval of the exhibits and the final settlement of the account" to refer to the time when the commission of the county judge shall be paid and not to specify to what judge such commissions shall be paid. It is our opinion that the commissions allowed by this article are intended as a compensation to the county judge for his assistance in the collection and expenditure of the money belonging to the estate. This being true, the commission fairly belongs to the county judge who has done the work, rather than to the county judge who merely approves the final account. In other words, it is our opinion that if the estate is administered partly under one judge and partly under another, the commissions allowed by the article should be divided equitably between the two judges in proportion to the work done by the judges, respectively, in connection with the management of the estate.

Very truly yours,
G. B. SMEDLEY,
Assistant Attorney General.

DISTRICT ATTORNEY—COMPENSATION, ETC.

Under Article 1081a, Code Criminal Procedure, the district attorney is not entitled to \$15 per day for the time consumed in going to and returning from the term of the district court, nor is he entitled to \$15 per day for the ten days spent in preparation for the trial of cases prior to the convening of his term of court; he can only draw from the State as compensation for his services \$15 per day for each and every day he attends the session of his district court.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, DECEMBER 10, 1913.

Hon. J. W. Sellers, District Attorney Sixty-ninth District, Hereford, Texas.

DEAR SIR: Under date of December 6th, in a letter addressed to this Department you state that you are district attorney of the Sixty-ninth District of Texas, a district composed of more than two counties. You further state that on account of the size of your district and the distance from your home to the county seat of the different counties composing your district it requires some time for you to make the trip to and from the different places where court is held, and you desire to know of this Department whether you would be entitled to charge the State at the rate of \$15 per day for the days consumed by you in going to and returning from the sessions of your courts. You also desire to know whether you would be entitled to charge the State at the rate of \$15 per day for the time consumed by you prior to the convening of your courts in the preparation of your cases for trial.

We believe that the language "for each day they attend the session of the district in their respective districts in the necessary discharge of

their official duty" conveys the idea that a term of court must be in session and that the district attorney must be in attendance upon such court before he would be entitled to receive the compensation prescribed in said statute.

It may be true that you do quite a good deal of work preparing your cases for trial prior to the convening of your courts, yet under the plain provision of the statute above quoted in order to have your account for services rendered approved and paid you must make affidavit that said services were rendered during a session of the district court of your district and this of course you could not do if, as a matter of fact, the court was not in session. It is clear to our minds that two things must be shown before the district attorney could lawfully claim the per diem provided for in said statute:

1. That a term of the district court was in session in some county in his judicial district.
2. That the district attorney was in attendance on said term of court in the performance of his duty.

We advise you, therefore, that in the opinion of this Department you would not be entitled to \$15 per day for the days consumed by you in going to and returning from the sessions of your district court, nor would you be entitled to \$15 per day for the time consumed by you prior to the convening of your courts in the preparation of cases for trial.

Yours truly,

C. A. SWEETON,
Assistant Attorney General.

COUNTY TREASURER—COMPENSATION.

Two thousand dollars is the maximum amount allowed by law for the office of county treasurer for one year.

If the duly elected county treasurer dies after having served nine months of the year and his successor is appointed to fill the unexpired term, the estate of the deceased treasurer would be entitled to only \$1500, although the commissions allowed by law during the life of the treasurer amounted to \$2000, and the successor would be entitled to \$500 for serving the balance of the fiscal year.

Revised Statutes, Articles 3873, 3875.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, AUGUST 16, 1913.

Hon. John T. Hyde, County Attorney Hopkins County, Sulphur Springs, Texas.

DEAR SIR: Under date of August 15, 1913, in an inquiry addressed to this Department, you state that Mr. H. G. York, who was the duly elected and qualified treasurer of Hopkins county, died a few days since, having served nine months of the fiscal year, 1912-1913; that another person has been appointed by the commissioners court of Hopkins county to fill out the unexpired term, and that the commissions allowed by law

for disbursing and receiving moneys up to the time of the death of Mr. York amounted to \$2000. You desire to know whether Mr. York as county treasurer earned before his death, and was therefore entitled at the time of his death to the \$2000 or only a pro rata part thereof.

Articles 3873 and 3874, Revised Statutes, 1911, provide for the compensation of the county treasurer and fix the maximum amounts of commissions on certain funds authorized to be paid such officer.

Article 3875 provides that the commissions allowed to any county treasurer shall not exceed \$2000 *annually*, that is, for each fiscal year the county treasurer is entitled to receive for his services \$2000 and no more, provided, of course, the commissions aggregate that amount. It is clear, therefore, that the \$2000 is provided for the office of county treasurer for one entire year and not for a fractional part thereof. If Mr. York had lived and had served the remainder of this fiscal year he would have been entitled to \$2000 and no more, but as he died after having served nine months of the year, even though the commissions allowed by law amounted to \$2000 during his nine months term of service, we do not think he had earned the year's compensation, and for that reason was not entitled at the time of his death to the entire year's compensation of \$2000. He would have had to have served twelve months to be entitled thereto. To hold that after having served only nine months of the year that he is entitled to the \$2000 would be to say that his successor who has been appointed to fill out the unexpired term must serve the remaining three months of the year for nothing. Such a construction would be manifestly unjust and out of harmony with the clear intent, purpose and spirit of the law.

We are therefore of the opinion, and so advise you, that as Mr. York served as county treasurer nine months of the year and Miss Grace James was appointed to fill out the unexpired term and will therefore serve three months of this fiscal year, under the provisions of the law the aggregate amount of fees both could jointly draw for their services for the entire year would be \$2000 and each would receive such an amount of the total as the length of time each served would bear to the entire year; that is, as Mr. York served nine months of the year, he was entitled at the time of his death to \$1500, and if he hadn't drawn this amount before his death his estate would now be entitled to the difference between \$1500 and the amount actually drawn by him before his death. Miss James, his successor, will be entitled to \$500 for serving the remainder of the fiscal year.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

DISTRICT CLERK—COMMISSION—JUDGMENT.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MARCH 6, 1913.

Hon. J. E. Bradley, County Attorney, Groesbeck, Texas.

DEAR SIR: Your communication to Mr. Looney of a week or two ago was placed on Mr. Sweeton's desk and he is now out of the city and has been away for sometime, and in view of the fact that we have a second communication this morning from Hon. S. M. Garrett, district clerk, enclosing a copy of your former letter to this Department, it has been thought best for me to give an immediate reply. Your letter to us is as follows:

"I brought suit against H. D. Adams et al. on breach of liquor dealer's bond, and recovered judgment for \$3000. The judgment was rendered in January, 1912, and at that time L. E. Eubanks was district clerk. Mr. Eubanks went out of office on the first day of December, 1912, and was succeeded in office by S. M. Garrett. The case against Adams et al. was appealed and the Supreme Court of Texas affirmed the case, after Eubanks was relieved from office and after Garrett had succeeded him. The mandate was filed in the office of district clerk while Garrett was in office, and the judgment thereby became final. Now the law allows a commission on judgments to the district clerk. Question: Who is entitled to the commission, Eubanks or Garrett?"

Replying to the above, we are of the opinion after having looked into the question very carefully that neither Mr. Garrett nor Mr. Eubanks are entitled to any commission on the \$3000 collected from the Adams' judgment. It will be seen that the article providing for the collection of this commission appears in the Code of Criminal Procedure, being Article 1193, and also Article 1194 of the same statutes provides for the collection of commissions. In other words, Title 16 of the Code of Criminal Procedure provides for the collection of commissions to certain officers. The fact that this appears in the Code of Criminal Procedure is of itself persuasive at any rate that the acts were intended by the Legislature to relate to judgments recovered which are in the nature of quasi criminal judgments. This direct question has been passed on by our courts in but one case, which was an early case, being the case of State vs. Norrell, 53 Texas, 427, but it appears that this case settled the matter and has since its rendition been accepted as the law of our State. In this case it was held that the district clerk already having been provided with fees by the civil statute, was not entitled to charge an additional fee or commission in a civil judgment brought upon a bond of a tax collector. In this case, as in the Adams case, the clerk ought to hold out 5 per cent commission under this same article and the court held that he was not entitled to the commission because same was a civil action and that the article adopted was intended to provide a commission upon the collection of criminal judgments.

Further construing this article, or rather Article 1194, we have a well considered case in McLennan County vs. Boggess, 137 S. W., 346, and 139 S. W., 105. This case held that a justice of the peace was not

entitled to 5 per cent collected upon judgments and also the sheriff entitled to 5 per cent, the court holding that the justice of the peace was not clerk of his own court and that the 5 per cent commission would only go to the officer making the collection.

It is, therefore, the opinion of this Department that no commission should be paid out of the Adams judgment to either Mr. Eubanks or Mr. Garrett.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

TAXES—FEES OF ASSESSOR.

The tax assessor would only be entitled to five cents for every poll tax assessed by him, and this sum must be paid by the State. The county would owe him nothing for assessing the county poll.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 8, 1913.

Hon. I. B. Simmons, County Judge, Liberty, Texas.

DEAR SIR: We have the following enquiry, date of January the sixth, from you:

"Under Article 3871 (page 801), Revised Civil Statutes, 1911, provision is made for the compensation of the assessor of taxes in each county. You will note that this article provided that 'for assessing the poll tax, five cents for each poll, which shall be paid by the State.'

"The county of Liberty levies a county poll tax of twenty-five cents which is assessed by the assessor.

"Will you kindly inform me whether or not the county will owe the assessor for assessing the county poll tax, and if so, will it be five cents for each poll, as in the case of assessing the State poll tax?"

We beg to say that your tax assessor would only be entitled to five cents for every poll tax assessed by him, and this sum must be paid by the State. The county would owe him nothing for assessing the county poll. The law contemplating and so providing in Article 3871, Revised Statutes, 1911, that the total compensation should be paid by the State.

A tax assessor, as well as other officers, entitled to collect fees, can only collect such fees as are entitled and expressly allowed by law, and in case of doubt, a bill should be constituted against the officer and in favor of the State. In this case, however, there is no doubt that five cents shall constitute full payment for issuing a poll tax, and this must be paid by the State.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

FEES—COUNTY TREASURER—CONSTRUCTION OF LAW.

“The commissions allowed to any county treasurer shall not exceed two thousand dollars annually.” Article 3875, Revised Statutes, 1911.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 10, 1913.

Hon. Yance Holleman, County Treasurer, Centerville, Texas.

DEAR SIR: We have your letter of January the third, propounding the following question to this Department:

“In the years 1911 and 1912, our county voted a bond issue for the sum of \$82,000 road bonds in five different road districts and the county commissioners and county judge, who were serving at the time, allowed me my regular commission of two and one-half per cent each way, and placed all my accounts on regular term of each court. Now, the new court orders me to pay back what the commissioners court allowed me, and I would like to have your ruling on same at once.”

To this letter we asked for the following information:

1. Did you have any contract with the commissioners court for your services as county treasurer?
2. Had you received any salary in addition to the two and one-half per cent commission?

To these questions we have your answer of January the seventh, 1913, in which you say you have received no salary from the county, other than the commissions allowed, and that you have no contract with the county other than the commissions allowed.

Answering your inquiry, we beg to call your attention to Article 3873, Revised Statutes, 1911, which reads as follows:

“The county treasurer shall receive commissions on the moneys received and paid out by him, said commissions to be fixed by order of the commissioners court as follows: For receiving all moneys, other than school funds, for the county, not exceeding two and one-half per cent, and not exceeding two and one-half per cent for paying out the same; provided, however, he shall receive no commissions for receiving money from his predecessor nor for paying over money to his successor in office.”

Article 3874, which it is not necessary to quote, also provides for commissions.

Article 3875 is as follows:

“The commissions allowed to any county treasurer shall not exceed two thousand dollars (\$2000) annually.”

In the opinion of this Department, your inquiry is answered in plain and explicit language in the above article. We do not believe that you would be entitled to retain any part of the commissions if the total commissions retained by you reached the sum of two thousand (\$2000) dollars.

In our opinion the law would require you to refund to the county all sums of money in excess of two thousand (\$2000) dollars per annum you have received as county treasurer of your county.

We have examined specially the road law of your county and the statute law of this State, and find no provisions anywhere that would permit you to retain more than two thousand (\$2000) dollars per annum.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

STENOGRAPHER'S FEE—DIVORCE CASES.

When a waiver is filed in a divorce case the defendant is in court for all purposes, and this proceeding having been selected a charge of \$3.00 should be made for the stenographer's fee.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 14, 1913.

Hon. R. P. Young, District Clerk, Paris, Texas.

DEAR SIR: Yours of the 9th inst., in which you desire to know if entering his appearance at a term of court, is an answer in contemplation of the stenographer's act providing a fee of \$3 in contested cases. We answer your inquiry in the affirmative.

The nature of a divorce case under our practice is such that upon the waiver being filed the entire case can be tried, a contest as to every fact had, etc. When the waiver is filed, in our opinion, the defendant is in court for all purposes, and that this proceeding having been selected, we think the charge of \$3 should be made for the stenographer's fee.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

TAX ASSESSOR—CLERICAL WORK, ETC.

1. Commissioners court must pay what may be due tax assessor for work already done, and they can only advance him money for clerical services already rendered.

2. The court must satisfy itself that the work has already been done, as they would not be authorized to advance more money than assessor had already earned.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 14, 1913.

Hon. Robert Lee Talley, Tax Assessor, Conroe, Texas.

DEAR SIR: You say to us in your letter of January 13th:

"I am tax assessor of this (Montgomery) county, and have been assessing since the first of January and desire the following information:

"Under Article 7583 Revised Statutes 1911, the commissioners court have the discretionary power to advance the tax assessor as much as \$100 per month. The county warrant for the tax assessor last year was \$1336.06; county warrant and order from the Comptroller was about \$2900."

In reply to the above, we believe that Article 7583, Revised Statutes, 1911, authorizes the commissioners to advance to the tax assessor; "such sums of money, to be paid monthly from the county treasury, as may be necessary to pay for clerical work, taking assessments and making out the tax rolls of the county, such sums so allowed to be deducted from the amount allowed to the assessor as compensation upon completion of said tax rolls; provided, the amount allowed the assessor by the commissioners court shall not exceed the compensation that may be due by the county to him for assessing.

The commissioners must pay what may be due you for work already done, and they can only advance you money for clerical services already rendered. The court must satisfy itself that the work has already been done as they would not be authorized to advance you more money than you have earned.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

JUSTICE OF THE PEACE—COSTS IN CRIMINAL CASES.

The fee bill which itemizes and provides for compensation by allowing certain fees for certain work, must be that the fee so allowed must only be collected when the work for which the fee is provided is actually done.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 28, 1913.

Hon. George O. Menefee, Justice of the Peace, Flatonia, Texas.

DEAR SIR: . You ask this Department to advise you if you, as justice of the peace, should tax as cost in a criminal case \$1.00 for arrest; \$1.00 for commitment; and \$1.00 for release; or a total of \$3.00 in case of a plea of guilty where no warrant of arrest has been served by the constable. You are advised that the fee bill which itemizes and provides for compensation by allowing certain fees for certain work, must be that the fee so allowed must only be collected when the work for which the fee is provided is *actually done*. In other words, a commitment and release should only be taxed as cost in a criminal case when a commitment, as a proper process, was issued out of the court and was served by committing the defendant into the county jail or other prison cell, and a release should only be charged when the commitment had been served and the defendant released.

When a person appears in court and voluntarily enters a plea of guilty, we think a charge of \$1.00 for arrest would be proper for the reason that the defendant, by his voluntary appearance, waives the service of this writ, and the law contemplates that he is in the arm of the law when he enters his plea of guilty, and for this reason the charge of \$1.00 upon a plea of guilty for arrest would be a proper charge, but if it is not necessary to commit the defendant to jail, and he is *not* so committed,

a charge of \$1.00 for commitment and \$1.00 for release would be improper.

Answering your further question, we are of the opinion that the mayor or recorder of the corporation court of your city which was incorporated under the city and town act would acquire the jurisdiction only conferred upon the recorder of a corporation court.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

SHERIFF—DEPUTY—FEES—SALARY—SCURRY COUNTY COMMISSIONERS
COURT—JAILER—GUARDS—CONSTRUCTION OF STATUTES.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 10, 1913.

Hon. C. B. Buchanan, County Judge, Snyder, Texas.

DEAR SIR: You propound to us the following interrogatories:

1. Is there any authority of law for the commissioners court of Scurry county to pay a salary out of the general fund of the county for a deputy sheriff?

2. What authority has the commissioners court of this county to pay the salary of a jailer?

3. Sometimes we have one prisoner in our county jail, sometimes two or three prisoners, but much of the time no prisoners at all. Kindly advise what authority said court has to employ a jailer for such situation as we have; kindly give statutory reference as to our authority to pay a jailer at all.

4. Has our court the authority to reimburse the sheriff in an actual case like this. The sheriff is out a considerable expense in effecting the arrest and bringing to jail a man charged with a crime, and the prosecution is thereby stopped.

Answering your interrogatories in the order in which you have asked them, our reply is as follows:

1. We advise you that there is absolutely no authority of law for the commissioners court of Scurry county to pay a salary out of the general fund of the county for a deputy sheriff. The sheriff or his deputies can not collect any fees except those specifically allowed him by statute. The fees of the deputy sheriff being fixed, conditioned upon the work he shall perform as deputy sheriff, and there being no provision of law whereby the commissioners court can pay him a salary, he must be held to the fees of his office.

2. Will say that there is no authority for the commissioners court of the county to pay a salary of a jailer. Article 52, Code of Criminal Procedure, provides that the sheriff may appoint a jailer, but no provision is therein made for this jailer to be paid by the commissioners court of the county. Article 49, Code of Criminal Procedure, provides that the sheriff shall be keeper of the jail, and responsible for the safe

keeping of all prisoners. Article 1143, Code of Criminal Procedure, provides that there shall not be any allowances made for the board of guards, nor shall any allowances be made for a jailer or turnkey, except in counties having a population of 50,000 or more. The case of *Gordon vs. The State*, Second Court of Appeals, 157, the court says:

"This provision and control would make it incumbent upon the sheriff to do or cause to be done at least all that is required of the jailer, by the articles above quoted; that is, to take charge of the jail and supply the want of the prisoners therein confined."

It follows therefore that a proper construction of these various articles, together with Article 1143, Code of Criminal Procedure, will preclude the commissioners court from allowing compensation for pay of jailers, even though they might be called guards. In our opinion, the article of the statute which provides that the jailer may appoint guards, carries with it only the idea that for any reason the jail should be insecure and it be necessary to meet an emergency like this, the court authorizes the sheriff to appoint guards to retain the prisoners until a more secure jail can be secured, and does not at all submit of a construction that would permit permanent guards whose duty it would be to wait on the prisoners.

3. The question is answered in the two above. We also advise you that your court has no authority to reimburse the sheriff for actual expenses in cases like the one you described. The sheriff must depend upon the fees allowed him by law for his compensation, and your court is without authority to supplement these fees, or to allow him any additional salary, or other compensation.

To sum the whole matter up, we must look to the statute for provisions for all compensation of officers. If we do not find in special terms provision for the fee of an officer, such officer can not claim compensation.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

FEEs—COUNTY TREASURER.

The commissions received by the county treasurer upon road and bridge funds shall form a part of the limit of \$2000 per annum allowed by law, and shall not be considered as separate and apart from said maximum amount.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MAY 15, 1913.

Hon. W. D. Davis, County Treasurer, Liberty, Texas.

DEAR SIR: You desire to know if the commission you receive for disbursement of the road and bridge fund, which has recently been levied and collected in the several commissioners precincts of your county, should be included in and computed against you with reference to the limit allowed you by law.

We advise you that Article 3874, Revised Civil Statutes of Texas, provides that the treasurers of the several counties shall be treasurers of the available public free school fund and also of the permanent county school fund for their respective counties. The treasurers of the several counties shall be allowed for receiving, and disbursing school funds, one-half of one per cent for receiving, and one-half of one per cent for disbursing, said commissions to be paid out of the available school fund of the county.

Article 3873 provides that the county treasurer shall receive commissions on the moneys received and paid out by him, said commissions to be fixed by order of the commissioners court, as follows: For receiving all moneys other than school funds for the county, not exceeding two and one-half per cent, and not exceeding two and one-half per cent for paying out the same, provided, however, he shall receive no commission for receiving moneys from his predecessor.

Article 5566 allows him one-half of one per cent for moneys derived from the sale of levy bonds.

Article 3608 allows him one-half of one per cent for moneys derived from the sale of drainage bonds.

Article 3875 provides that the commissions allowed to any county treasurer shall not exceed two thousand dollars annually.

You are therefore advised that it is the opinion of this Department that all commissions you receive from any source whatever, must be taken into consideration and form a part of your compensation, provided that the total amount that you receive shall never exceed two thousand dollars annually.

Yours truly,

W. A. KEELING,
Assistant Attorney General.

COUNTY TREASURER—COMMISSIONS.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 23, 1913.

Hon. Robert Lee Talley, County Treasurer, Conroe, Texas.

DEAR SIR: Replying to your recent inquiry relating to the compensation of county treasurers, we beg to advise you that it is the opinion of this Department that the commissioners courts have the authority to fix the commission of the county treasurer at any amount they desire, provided that such commission shall not exceed two and one-half per cent for receiving and two and one-half per cent for paying out the funds of the county. That is to say, they can make the per cent basis anything they desire, and would have authority to fix your compensation at one-half of one per cent if they see fit.

Article 3873, Revised Statutes, 1911, reads as follows:

"The county treasurer shall receive commissions on the moneys received and paid out by him, said commissions to be fixed by the order of the commissioners court as follows: For receiving all moneys other than school funds for the county not exceeding two and one-half per cent, and not exceeding two and one-half per cent for paying out same. Provided, however, that he shall receive no commissions for receiving moneys from his predecessor nor for paying over money to his successor in office."

Article 3875 reads as follows:

"The commissions allowed to any county treasurer shall not exceed \$2000 annually."

You are therefore advised that the commissioners court are within their proper and legitimate authority when they place your compensation at one-half of one per cent.

Yours very truly,
 W. A. KEELING,
 Assistant Attorney General.

FEES—COMMISSIONS—SCHOOL DISTRICTS—DRAINAGE DISTRICTS.

The commissions allowed the tax assessor for assessing property both in drainage districts and school districts must be included like other fees of office.

ATTORNEY GENERAL'S DEPARTMENT,
 AUSTIN, TEXAS, APRIL 1, 1913.

Hon. John M. Murch, County Auditor, Galveston, Texas.

DEAR SIR: You desire to know if the county tax assessor would be allowed to charge as commissions on school districts and drainage districts, and, further, if this commission, when so charged, should be treated as ex officio or additional compensation to other fees allowed him, or should commissions so charged be included in his general fees and accounted for by him in making reports.

We beg to advise you that Article 2862 of the Revised Statutes, 1911, provides that a tax assessor shall receive 1 per cent for assessing and collecting in independent school districts, and makes it his duty to do so; that is, to assess the property of the district when requested so to do by a majority of the board of trustees of such school district.

Article 2604 provides that the tax assessor shall receive such sum for assessing the property of drainage districts as the commissioners court may fix, provided, they shall not allow a less sum than is paid for such work in other assessments of the county which the assessor is required to make; but in both cases the commissions allowed the tax assessor for assessing the property both in drainage districts and school districts must be included like other fees of his office, must be charged against him, and must be figured against him, and the residue, after he reaches the maximum, must be paid into the treasury. Most assuredly, he could not treat this compensation as a side-issue and additional com-

pensation. He collects it in an official capacity by virtue of being an officer, and it is clear that the lawmakers intended that it should be treated as any other commissions received by him.

Yours very truly,
W. A. KEELING,
Assistant Attorney General.

DISTRICT CLERK—SHERIFF—JURY FEES AND DAMAGE FEES.

In cases where it is necessary to assess amount of damages to be entered into the judgment, clerk would be entitled to fifty cents for each case, except jury cases.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 3, 1913.

Hon. Dan Childress, District Clerk, Sweetwater, Texas.

DEAR SIR: You state that in looking over the district clerk's fee bill you note that it provides for a fifty cent jury fee to be taxed in each case for sheriff fees, and also provides for a fifty cent damage fee in all cases for the clerk. You say you would like to be advised as to whether or not these items should be collected in all civil non-jury cases.

Replying to this inquiry, you are advised that Article 3864 of the Revised Statutes of 1911, provides that the sheriff is entitled to fifty cents "for each case tried in the district or county court." We interpret this to mean for each case tried by a jury. We do this under the assumption that the law intended to compensate the sheriff. There being no service required of him under this clause in a non-jury case, we believe that same is only applicable to causes tried by jury.

Article 3855 provides that the clerk shall retain for assessing damages in each case not tried by a jury fifty cents. We believe that this article refers to the conditions which arise under Articles 1937, 1938 and 1939, Revised Statutes of the State, and in that character of cases where it is necessary to assess the amount of damages to be entered into the judgment, the clerk would be entitled to fifty cents for each case, except, of course, the jury cases.

Yours very truly,
W. A. KEELING,
Assistant Attorney General.

FEES—COUNTY ATTORNEY—DELINQUENT TAX CASE.

County attorney not entitled to fee in delinquent tax case until suit is brought.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MAY 31, 1913.

Hon. Gaylord Kline, County Attorney, Haskell, Texas.

DEAR SIR: You desire to know if the tax collector should collect

\$3.00 compensation for the county attorney on delinquent taxes where no suit had been instituted by the county attorney, and where he had brought no service in relation to any suit, and you cite to us the case of *Typer vs. Knudson*, 132 S. W., 850.

We advise you that in our opinion the language used in that opinion should not be interpreted to include the county attorney's fee, and in our opinion the county attorney does not earn his fee until suit is brought on the delinquent taxes. We are aware that an expression in the opinion would seem to indicate that the county attorney's fee should be taxed as cost also. We think the opinion only means the cost which has accrued should be taxed and collected, and does not mean unearned costs such as the county attorney's fee, because, as a matter of fact, the county attorney had earned no part of the fee, and we take it that the compensation was to be considered a pay for services to be performed, and until the service is performed the compensation would not be due.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

SHERIFF—COMMISSIONS.

Commissions for collecting money on execution to the sheriff from \$200 to \$1000, 2 per cent. Article 3864, Revised Statutes construed.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, AUGUST 23, 1913.

Hon. V. W. Taylor, County Attorney, Alice, Texas.

DEAR SIR: You submit to us Article 3864, Revised Statutes of 1911, relating to the commissions to the sheriff for collecting money on execution or order of sale. Your inquiry is as follows:

“Collecting money on execution or order of sale when the same is made by a sale, for the first \$100 or less, 4 per cent; for the second \$100, 3 per cent; for all sums over \$200 and not exceeding \$1000, 2 per cent; for all sums over \$1000, and not exceeding \$5000, 1 per cent; for all sums over \$5000, one-half of 1 per cent. * * *

“Collecting money on an execution or order of sale when the same is made by a sale, for the first \$100 or less, 4 per cent; for the second \$100, 3 per cent; for all sums over \$200, 2 per cent. When the money is collected by the sheriff without a sale, one-half of the above rates shall be allowed him.”

“You will note there is a contradiction by reading the statute as to what the fees of the sheriff shall be in collecting money over the sum of \$200. According to the last provision, he should receive 2 per cent; according to the first provision, he gets less than that amount.”

We advise you that from a careful inspection of the several statutes throwing light upon this question, we find the following to be the correct status of the law upon this question.

In the Session Acts of 1876 the Legislature provided for this item as follows:

"For making money on an execution or an order of sale when the same is made by a sale, for the first \$100, 4 per cent; for the second \$100, 3 per cent; for all sums over \$200, 2 per cent. When the money is made without a sale, one-half of said rate shall be allowed."

The Acts of 1879 re-enacted this provision in the following language:

"Collecting money on an execution or an order of sale when the same is made by a sale, for the first \$100 or less, 4 per cent; for all sums over \$200, 2 per cent; for the second \$100, 3 per cent. When the money is collected by the sheriff without a sale, one-half of the above rate shall be allowed him."

In 1897 the same item was enacted in the following language:

"Collecting money on an execution or order of sale when the same is made by a sale, for the first \$100 or less, 4 per cent; for the second \$100, 3 per cent; for all sums over \$200 and not exceeding \$1000, 2 per cent; for all sums over \$1000 and not exceeding \$5000, 1 per cent; for all sums over \$5000, $\frac{1}{2}$ of 1 per cent."

This is the last expression of the Legislature upon this subject, and leaves, as you suggest, a contradiction between the former acts of the Legislature and the last act, and the codifiers instead of leaving out the former act of the Legislature, brought same forward together with the last act of the Legislature. This presents the question for construction, there being clearly and unmistakably a contradiction between the two provisions. We must look to the repealing clause of the Acts of 1897 for a solution, which we find in Section 26:

"All laws or parts of laws in conflict with this act are hereby repealed."

This then will leave the last act of the Legislature in force, which provides that for all sums above \$200 and not exceeding \$1000 the sheriff should receive two per cent; for all sums over \$1000 and not exceeding \$5000, one per cent; for all sums over \$5000, one-half of one per cent.

We advise you that this is the proper sum for a sheriff to charge in collecting money on an execution or order of sale. The prior acts of the Legislature in conflict with this are repealed, even though the codifiers have brought the act forward and it has been re-enacted into the Acts of 1911.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

FEES—COUNTY CLERK.

County clerk is entitled to 10 cents per one hundred words for transcribing records in his department.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MAY 12, 1914.

Hon. Andrew King, County Attorney, Andrews, Texas.

DEAR SIR: You desire to be advised if the county clerk of your county would be entitled to receive ten cents per hundred words for

transcribing the index to the deed records into a new book, stating that the index is in a worn condition, and for its preservation it is necessary for same to be transcribed.

We advise you that the fee bill in the following language treats of this subject:

“Transcribing, comparing and verifying record books of his office, payable out of the county treasury upon warrants issued upon order of the commissioners court, for each one hundred words, 10 cents.”

If the commissioners court should think it advisable to transcribe the index into a new book they are authorized to order this done by the county clerk who must transcribe and verify the book, for which he will be entitled to charge ten cents per hundred words.

It is the duty of the county clerk to keep up the index without extra compensation, but of course he does not have to transcribe a worn-out record without compensation. If the indexing was simply behind or had been neglected your court would not be authorized to pay your county clerk anything for this service, but as stated, it would be authorized to pay him for making the new index, transcribing the old, and pay therefor.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

11111

FEEES—COUNTY CLERK—MARRIAGE LICENSE—AUTOMOBILE REGISTER.

The county clerk is entitled to a fee of \$1.00 for issuing and recording marriage license. He is entitled to a fee of 50 cents for registering and assigning numbers for automobile owners.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MAY 18, 1914.

Hon. A. L. Bevil, County Attorney, Kountze, Texas.

DEAR SIR: You desire to be advised if the county clerk of your county is entitled to one dollar and fifty cents for issuing and recording marriage license, and also whether he is entitled to a fee of one dollar for issuing automobile license. We advise you that the county clerk by express provisions of the statute is only entitled to one dollar for issuing and recording marriage licenses. See Article 3860, Revised Statutes, 1911. The exact language of the statute is as follows: “Issuing and recording marriage license, one dollar.”

This, therefore, is all the clerk can legally charge for this service.

You are further advised that the clerk is not entitled to a fee of one dollar for issuing automobile licenses. You quote this provision of the statute: “Issuing each license other than a marriage license where the law provides for him to issue such license, one dollar.” In the first place the service the county clerk performs in recording the number of an automobile and issuing a receipt therefor is not the issuance

of a license but aside from this the county clerk's compensation for this service is absolutely fixed by Article 814 in the following language: "The county clerk shall be paid such owner or owners a fee of fifty cents for each machine registered." The Legislature having attempted to provide compensation for the clerk as provided for him, all the compensation that can legally be collected by him for registering every automobile in a book to be kept for that purpose and assigning a number for the service he is required to perform and for which he receives fifty cents from the owner of the automobile.

Yours very truly,
W. A. KEELING,
Assistant Attorney General.

TAX COLLECTOR—COUNTY CLERK—CONSTRUCTION OF ARTICLES 7685,
7686, 7687, REVISED CIVIL STATUTES—DELINQUENT TAX ACT.

The tax collector and county clerk are each entitled to \$1.00 for performing the services required of them with reference to the compilation of the delinquent tax record. The tax collector alone is entitled to \$1.00 for the preparation and filing of the delinquent tax list, there being a distinction between the tax record and the tax list.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, SEPTEMBER 6, 1913.

Hon. N. W. Brooks, County Attorney, Tyler, Texas.

DEAR SIR: This Department is in receipt of your letter of August the 22d in which you propound to us several questions affecting the duties of the tax collector and the county clerk with reference to compiling the delinquent tax record and the delinquent tax list and the charges they shall be permitted to make for the services required of them. We acknowledge with many thanks the able brief you prepared on this subject. The questions you propound are as follows:

"1. Should the tax collector collect from a person paying delinquent taxes \$1.00 for each tract for each year for the county clerk, when in fact the clerk has not, for such year or years, recorded the delinquent list in the 'Delinquent Tax Record'?"

"2. Does the law make it the duty of the county clerk, when the 'delinquent tax record has heretofore been made up and recorded covering the period of time mentioned in Article 7686, to thereafter, each year, record the annual delinquent list made up by the tax collector on March 31st of each year, in this delinquent tax record'?"

"3. If the law does require such record to be made each year by the clerk, and former clerks have failed to do it since 1905, is the present clerk required now to so record the annual delinquent list for each of said years, and, if he does so, would he be entitled to have collected \$1.00 for himself on each tract for each of said years that he shall now record the list for, to the exclusion of the former county clerks with whom such lists were filed each year by the collector but not recorded by the clerk in said delinquent tax record?"

In answering these questions it will be necessary for us to first ascertain the duties required of the county clerk and tax collector under the delinquent tax law as amended in 1897. Article 7685, Revised Statutes,

makes provision for the compilation in book form of all the delinquent taxes upon lands, lots or parts of lots sold to the State for taxes since the first day of January, 1885. The Legislature, in dealing with this subject, provided that one delinquent tax record should be made which should embrace all of the taxes delinquent since 1885. Article 7685 provides that when this tax record is made it should embrace all of the data and information embraced in Article 7685, and shall be by the county clerk certified to the commissioners court for examination and correction, and the county clerk shall thereafter cause the same to be recorded in a book which book shall be labeled "Delinquent Tax Record of _____ county." It shall likewise be the duty of the county clerk to arrange this delinquent tax record numerically as to abstract numbers, and prepare an index showing the name of delinquents in alphabetical order.

Under Article 7691 it is provided that the county clerk for making out and recording the data of each delinquent assessment, and for certifying the same to the commissioners court for correction, and for noting the same in the minutes of the commissioners court, and for certifying the same, with corrections, to the Comptroller, and noting the same on his delinquent tax record, shall receive the sum of \$1.00, to be taxed as costs against the land in each suit. Now, it will be observed that this duty required of the clerk in Article 7686 and the compensation provided for in Article 7691 refers only to the preparation and corrections entered in the delinquent tax records. There being but one delinquent tax record provided for by law, this can only refer to the delinquent tax record compiled in book form under Article 7685, and embracing all delinquent taxes up to the date of the compilation of said record.

Article 7692 provides that the assessor of taxes shall list all delinquent taxes as for each year after the general delinquent tax record has been compiled. This is simply a list of delinquent taxes and is so called. This list shall be made in triplicate, and shall be presented to the commissioners court for examination and correction of any error that may appear and, when so examined and corrected by the commissioners court, such list in triplicate shall be approved by said court. One copy thereof shall be filed with the county clerk and one copy retained and preserved by the collector and one copy forwarded to the Comptroller, but this list is limited to the delinquent lands or lots for the preceding year only, and no provision is made to make a permanent record of this list. It simply is required to be filed in the county clerk's office, there being no duty required of the clerk except the filing of this list, it not being his duty to transcribe same into a permanent record and index the same, he would not be entitled to receive the one dollar compensation that is provided for him in Article 7691, relating to his duties with reference to the tax record.

Various phases of this question have been before the courts. The case of Raht vs. State, 106 S. W., 900, holds that where two or more unimproved town lots belonging to the same person are included in the same suit for taxes, the costs shall be taxed against the lots collectively, as if they were one tract.

The case of the State vs. Wolf, 51 S. W., 657, holds that the county clerk and tax collector are each entitled to the one dollar provided for in the act. However, it will be observed from a reading of this case that, from the statement of facts upon which the decision is based, the court assumed that the delinquent tax record was prepared and embraced the delinquent taxes for which the suit was instituted.

In the case of the Houston Oil Company of Texas vs. The State, 141 S. W., 805, it is decided that the county clerk and tax collector are each entitled to the one dollar for the services required of them, provided, of course, the officers perform the duty contemplated.

Summing the whole matter up, we are of the opinion that the county clerk and the tax collector are each entitled to one dollar for the services required of them in the preparation and filing of the delinquent tax record; that the tax collector is entitled to one dollar for the services required of him in the preparation of the delinquent tax list, and the only duty devolved upon the county clerk being to file the delinquent list so placed with him, we do not believe that he would be entitled to the fee of one dollar provided for him as if the list was the delinquent tax record.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

SHERIFF—JANITOR—COMMISSIONERS COURT.

A sheriff cannot be paid ex-officio for janitor, and is not permitted to receive \$2.00 per day for waiting on the commissioners court.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, AUGUST 22, 1913.

Hon. C. P. Shepherd, County Attorney, Ballinger, Texas.

DEAR SIR: You desire to know if the sheriff of your county who already draws \$500 ex officio would be permitted to receive an additional sum for janitor fees and also would he be permitted to receive \$2.00 per day for waiting on the commissioners court.

We advise you that there is no provision in law that would authorize the sheriff to receive an additional sum with which to employ a janitor. The county commissioners can employ a janitor for both the courthouse and jail if they see fit, but the janitor, employed will be prohibited from doing the services of the jailer and will be prohibited from receiving his pay from any other source than the commissioners court. This could in no way inure to the benefit of the sheriff.

Article 3864, Revised Civil Statutes, provides: "For every day the sheriff of his county shall attend the district or county court he shall receive \$2.00 a day to be paid by the county for each day that the sheriff by himself or his deputy shall attend said court."

This is the only provision of the law relating to this subject and does not include the commissioners court. It would therefore be illegal for

the commissioners court to allow a sheriff an additional sum for the commissioners court.

We regret very much that in the small counties in which there is very little crime the sheriffs are so poorly paid and indeed we would be glad to see them much better paid, but you are well aware that when these matters are submitted to us it is the duty of this Department to simply state the law as we find it. We trust that this will be satisfactory to you.

I recall another letter you wrote this Department on May 29th. I am not sure whether I answered it or not. At any rate I advise you now that the Jamaica ginger you enclosed to this Department would be a violation of the law if sold in your county, your county being dry. Any intoxicating liquor or any liquor capable of being used as a beverage which would produce intoxication is a violation of the local option law. We think you will have no trouble if you can prove that persons use this stuff as a beverage in proving that it will produce intoxication. It would make no difference if it required to be diluted before it is used, if a beverage—so would alcohol, but nevertheless it would be an intoxicating liquor.

We commend you in your faithful efforts to enforce all laws in your county.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

FEEs—INQUESTS—JUSTICE OF THE PEACE.

Inquest fee of \$5.00 is only chargeable, first, when a person dies in prison; second, when there are no witnesses to the death; third, when the body is found and the circumstances of the death are unknown; and, fourth, when the circumstances of the death are such as lead to the suspicion that he came to his death by unlawful means.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 3, 1914.

Hon. C. H. Theobald, County Attorney, Galveston, Texas.

DEAR SIR: We have a communication addressed to this Department from Hon. John M. Murch, county auditor. Sometime since we received a telegram from you with reference to this inquiry, but could not locate same, for the reason that we expected to find it signed by you, whereas the request is signed by Hon. John M. Murch. As you, of course are aware, we can not answer such inquiries to any persons, except county and district attorneys and others provided for by the Acts of the Thirty-third Legislature. However, since you have wired the Department, we shall take the liberty of answering the inquiry to you and will enclose a copy of the opinion to Mr. Murch.

Mr. Murch desires to be advised as to whether or not the justice of the peace of a precinct in Galveston County would be entitled to collect a fee of \$5.00 for holding an inquest, first, over the body of three soldiers

who were killed by lightning in the presence of many witnesses; second, over the bodies of several persons who were killed by a railroad train striking an automobile, which also occurred in the presence of many witnesses.

In reply to this inquiry, we call your attention to Article 1058 of the Code of Criminal Procedure, which is as follows:

"Any justice of the peace shall be authorized, and it shall be his duty, to hold inquests within his county, in the following cases; provided, that all inquests shall be held by the justice of the peace without a jury:

"1. When a person dies in prison.

"2. When any person is killed, or from any cause dies an unnatural death, except under sentence of the law, or in the absence of one or more good witnesses.

"3. When the body of any human being is found, and the circumstances of his death are unknown.

"4. When the circumstances of the death of any person are such as to lead to suspicion that he came to his death by unlawful means."

It appears that there are four conditions upon which an inquest may be held and the fee therefor rightfully paid, and only four, and it further appears from the statement of facts that there was in both instances witnesses present when the accident occurred, which resulted in death. The justice of the peace then clearly would not be entitled to the fee of \$5.00. The object of an inquest is to find out the cause of death when the cause is unknown by any eye witness.

You are, therefore, advised that the justice of the peace would not be entitled to collect the fee of \$5.00 in either of the instances above mentioned. The article of the statute providing for inquest fees should not be confused with the articles of the statute authorizing examining trials. While a justice of the peace might hold an examining trial to determine the facts which resulted in death and be entitled to certain fees as an examining trial court in case it should be found that some person was criminally liable for the death, still this would not entitle the justice of the peace to charge a fee for holding an inquest, unless there was no witness to the death.

Yours very truly,
W. A. KEELING,
Assistant Attorney General.

BONDS—ROAD DISTRICTS—COUNTY TAX ASSESSOR—COMPENSATION.

County tax assessor entitled to one-half of one per cent for assessing taxes for road district, payment to be made out of fund collected to provide interest and sinking fund for bonds of the district.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JULY 25, 1914.

Judge J. P. Pool, County Judge, Victoria, Texas.

DEAR SIR: We acknowledge receipt of your favor of recent date wherein you propound the question:

"How is the county tax assessor to be paid for assessing the taxes in a road district after the money from the proceeds of the sale of the bonds has been exhausted."

Replying thereto beg to advise that Article 634 of the Revised Civil Statutes of Texas, 1911, which provides for the levy of tax to produce interest and sinking fund for the bonds of the road district, provides, in part, as follows:

"* * * Provided, that said tax herein authorized shall be assessed and collected in the same manner as now provided by law for the assessment and collection of other road taxes, if for a whole county, and, if for a political subdivision or other defined district of a county, then it shall be assessed and collected as is now provided by law for the assessment and collection of common school district special local taxes. And it is hereby made the duty of such commissioners court to levy such tax, and it is hereby made the duty of the tax collector and assessor of such county wherein such taxes have been levied to assess and collect the same in the same manner and at the same time as other taxes. * * *"

The compensation allowed the county tax assessor for assessing common school district taxes is set out and defined in Article 2836 of the Revised Civil Statutes, 1911, which reads in part as follows:

"The tax assessor shall assess, and the tax collector shall collect, said district taxes as other taxes are assessed and collected. The tax assessor shall receive a commission of one-half of one per cent for assessing such tax, and the tax collector a commission of one-half of one per cent for collecting the same."

It is a well settled rule of construction that where no compensation is provided by law for public officers, none can be collected for the services required to be performed. The authorities on this point, we take it, are too numerous for collation here.

However, it appears that the statute in this instance fixed the compensation, but does not provide the medium of payment; that is, does not designate the fund out of which payment shall be made. Article 627 et seq., which provide for the issuance of bonds by road districts, provide for the levy of taxes only for the purpose of providing interest and sinking fund for the bonds of such districts.

Under the ordinary construction, since the statute provides for the compensation of the assessor, but fails to provide the medium of payment, or out of which fund it shall be paid, the Department is of the opinion that it can be paid out of any fund within the control of the road district. See *Davis vs. City of San Antonio*, 160 S. W. Rep., 1165.

In the case of *Shaver vs. Robinson*, 50 Ala., 200, construing a section of the Constitution of that State which provided that the "General Assembly may levy a poll tax not to exceed \$1.50 on each poll, which shall be applied exclusively in aid of the public school fund," it was held that the tax was chargeable with the expense of its assessment and collection. The court in that case said:

"It is contended before us that the word 'exclusively' requires that the entire sum of the poll tax, without abatement or diminution for any purpose, shall become part of the school fund. We think this construction too narrow and strict. The exact meaning of the convention, as we understand it, is that the poll tax shall, for all time, constitute a school fund which shall not and cannot

be appropriated to any other object. It was not contemplated that it should be relieved of the common burden of all revenue raised under our statutes—the expense of its own assessment and collection * * * so, we think it was competent for the Legislature to charge upon the poll tax fund the commissions of its assessment and collection.”

In this connection, and to like effect, see the cases of *State vs. Murphy*, 101 Tenn., 515; *State vs. Drew*, 16 Fla., 303; *School Commissioners vs. Wasson*, 74 Ind., 134.

While, it appears that in the cases last above cited, it was provided by statute that each tax should bear its own expense of assessment and collection, yet, this was expressive only of the common law, and the fact that there is no statute upon the statute books of this State expressly providing that the tax shall bear its own expense of assessment and collection, would not require a different construction.

Therefore, it is the opinion of this Department that the county tax assessor is entitled to his compensation out of the fund collected to provide interest and sinking fund for the bonds of such a road district, and it is the duty of the commissioners court to levy such tax as is necessary for the payment of both the interest and sinking fund for the bonds, and the expense of its collection.

Very truly yours,

W. M. HARRIS,
Assistant Attorney General.

POLICE OFFICERS—FEES.

The chief of police is not entitled to fees in examining trials in felony cases.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, AUGUST 26, 1913.

Hon. Richard G. Maury, Criminal District Attorney, Houston, Texas.

DEAR SIR: We have your favor of August 23rd in which it appears that the chief of police of Houston has performed services as a peace officer in examining trials in felony cases before justices of the peace and the police court in the city of Houston, and he now presents a fee bill for fees for his services in such cases, and you desire to know if under the law such fees should be paid by the State upon bill approved by the district judge.

Replying thereto, we beg to say in the first place, that the police of the various cities of this State are statutory officers, and as such, they have the powers enumerated in the statute. They are denominated by our statute “police officers” as much so as the sheriffs and constables of the various counties of the State. They are incorporated in the statutes prescribing the duties of peace officers; their rights and powers as such are fully set out and defined in the statute. (Articles 33 and 34, Code of Criminal Procedure.) The general statute laws, however, above cited and referred to, are dealing with peace officers and policemen as such,

only in a general way in defining their powers and duties, and do not relate to the appointment and compensation of such officers.

It is true that police officers really execute public or State, as distinguished from corporate duties. Police officers are in fact State officers, and are to be considered so more than in the sense of officers of the city, and while this is true, yet at the same time, the appointment and maintenance of a police force has been committed in this State to the corporate authorities of the various municipalities of the State. Police officers derive their appointment from the governing body of the city; they receive their compensation in such manner and from such source as may be decreed by the city council or board of commissioners of the city. The general statutes of the State do not undertake to prescribe the compensation, nor the manner in which same shall be derived. So we have a peace officer of the State appointed and paid by the governing body of the city. The fact that he receives his appointment from the city and is paid by the city, does not deprive him of his status as a peace officer within the State.

Peace officers in this State are only entitled to the compensation and fees as fixed by the statute, and by referring to the Code of Criminal Procedure, we find that Article 1137 provides that "sheriffs and constables serving process and attending any examining court in the examination of any felony, shall be entitled to such fees as are fixed by law for similar services in misdemeanor cases to be paid by the State, not to exceed four dollars in any one case." It will be noted that this statute applies to sheriffs and constables, and no mention whatsoever is made of the police officers of a city, and unless the statute expressly provided for such fees to be paid to police officers, they would not be entitled to fees in such cases, as an officer is only entitled to such fees as are expressly provided for by statute.

The appointment and maintenance of the police force having been committed to the city authorities, it is their duty to provide the compensation for such officers. This is done either by fixing a stated salary for such officers, or by ordinance of such city defining the fees to be received by such officer in the discharge of his duties but the city council would have no authority to enact an ordinance prescribing fees to be paid by the State. This right exists alone in the Legislature of the State, and until the Legislature has by law declared that the police officers of the cities of this State are entitled to be paid fees by the State for any services they may render, such officers are not entitled to such fees.

We are therefore of the opinion, and so advise you, that the district judge would have no authority to allow the bill presented by the chief of police of Houston.

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

COUNTY ATTORNEY—COMMISSION—TAXES COLLECTED BY SUIT.

The county attorney is not entitled to a commission upon taxes collected by suit, but is only entitled to the fee provided by Article 7691, Revised Statutes.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MARCH 23, 1914.

Hon. V. W. Taylor, County Attorney, Alice, Texas.

DEAR SIR: This Department is in receipt of your communication in which you desire an opinion from this office on whether or not a county attorney is entitled to a commission under Article 362 of the Revised Statutes for taxes collected by suit instituted by him.

Replying thereto we beg to advise that this Department has continuously held to the opinion that the only compensation provided by statute for county attorneys in tax suit is that set out in Article 7691, Revised Statutes, which provides in effect that such compensation shall not be greater than \$3.00 for the first tract in one suit and \$1.00 for each additional tract, if more than one tract is embraced in the same suit to recover taxes, interest, penalty and cost.

Article 363, Revised Statutes, provides that whenever a district or county attorney has collected money for the State or for any county he shall within thirty days after receiving the same pay it into the treasury of the State or of the county in which it belongs after deducting therefrom and retaining the commissions allowed him thereon by law. It further provides that the county attorney shall be entitled to ten per cent on the first \$1000 and five per cent on sums over \$1000.

Our interpretation of these two articles is that the compensation provided by Article 7691 is a special compensation to the county attorney for his service in tax suits and such special compensation provided for this particular service is intended to cover the compensation to the county attorney for such work and precludes the additional compensation of ten per cent on the amount collected under the general statute—Article 363 above cited. In other words, Article 363 is a general statute covering moneys collected by the county attorney by the State or county and does not undertake to enumerate and particularize the duties of the county attorney other than to provide compensation for the collection of funds due to the State or county, while Article 7691 sets out a particular duty of the county attorney and provides a compensation for his services while engaged in such duty.

You refer to the case of *Flynt vs. Jones County*, 50 S. W., 203, and *Spencer vs. Galveston County*, 56 Texas, 384, and cite them as authority for the proposition that the county attorney will be entitled to a commission of ten per cent on taxes collected by suit, but we think you are in error in this and that the cases can not be held as authority on this proposition. The *Flynt* case was a suit instituted to collect moneys from a defaulting treasurer of the county while the *Spencer* case was a suit instituted upon official bonds of the treasurer of the county, and we think that both of said cases fall within the provisions of Article 363 from which the county attorney would be entitled to the commission therein provided for.

We therefore beg to advise you that in our opinion the county attorney will not be entitled to a commission upon taxes collected by suit.

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

COUNTY OFFICERS—EXCESS FEES.

Amounts paid deputies must be deducted before officer is entitled to one-fourth of the excess fees. Article 3889, Revised Statutes, 1911.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MAY 26, 1913.

Mr. E. F. Metze, County Clerk, Cleburne, Texas.

DEAR SIR: This Department is in receipt of your communication of the 22d inst., reading as follows:

"I would like to have your opinion on Article 3889, page 806, Revised Civil Statutes. Suppose I, as county clerk, take in \$6250 cash during the year, and that I pay my deputies \$3000. Would I be entitled to the \$1000 as one-fourth of \$4000 in excess of my \$2250 maximum salary?

"In other words, are all fees above the \$2250 considered excess fees?"

Replying thereto, we beg to say that it was formerly the rule in this State in arriving at percentage of excess fees to which officers were entitled to calculate the 25 per cent excess upon all fees over and above the maximum amount allowed by the fee bill, and not to deduct from such excess the salaries of assistants before calculating the 25 per cent to which the officer would be entitled. This was expressly held in *Hare vs. Grayson County*, 51 S. W., 656. However, this identical question was again before the courts in the case of *Ellis County vs. Thompson*, decided by the Supreme Court, 95 Texas, page 22, and in that case the reverse of the above proposition decided by the Court of Civil Appeals was held by the Supreme Court. In the latter case the court held that before the 25 per cent could be calculated on the excess there must first be deducted from the excess the salary of assistants of the officer. In that case the court says:

"The maximum amount allowed by the clerk, \$2500, and the \$4151.59 paid to the deputies must be deducted to arrive at the excess of fees collected of which Thompson was entitled to retain one-fourth. The one-fourth of the excess could not be a part of the maximum amount allowed and at the same time be a part of the remainder after deducting the maximum and another sum. This language defines the term 'maximum' to mean the specified sum, \$2500, and the phrase, 'the excess of the fees collected by the said officers,' signifies that sum which remains after taking from the whole the maximum and the amount paid to the deputies."

You are therefore advised that in your case you would add to your maximum salary of \$2250 the sum of \$3000 paid to your deputies,

deduct this total from the \$6250 collected by your office, and on the remainder of \$1000 you would be entitled to one-fourth, or \$250.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

FEES—COUNTY JUDGES—ESTATES.

County judge would not be entitled to commission of one-half of one per cent upon investments, collections thereof and reinvestments of funds by guardian belonging to the estate of his ward. Article 3850, Revised Statutes, 1911.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JUNE 24, 1913.

Hon. J. G. Cook, County Judge, Burnet, Texas.

DEAR SIR: We have your favor of June 21, in which you propound to this Department the question of whether or not the county judge, under Article 3850, Revised Statutes, 1911, would be entitled to a commission of one-half of one per cent upon investments, collection of the investment and reinvestment by a guardian of the funds of his ward.

Replying thereto, we beg to say that under the provisions of Article 3850, Revised Statutes, 1911, a county judge is entitled to a commission of one-half of one per cent upon the actual cash receipts of each 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. In your letter you state that your construction of this matter would be that each investment or the lending of funds of the ward, the collection of the note and the reinvestment of the funds would be a separate and distinct transaction, and that the county judge would be entitled to his commission of one-half of one per cent upon the receipts each time collected no matter how often during the term of the guardianship the money might be loaned, collected and reinvested. We can not agree with you that this is a proper and correct rule. If the county judge is entitled to a commission upon the collection of each note, then the guardian under the statute providing for a five per cent commission for paying out and collecting, would be entitled to five per cent on each investment and five per cent on each collection, and if the notes should be for a short term, say for six months or a year, then it would readily be seen that the guardian would be entitled to five per cent for paying out and five per cent for collecting, and the county judge entitled to one-half of one per cent on each collection, that the ward's estate would soon be dissipated in the payment of fees and commissions.

The question of the right of a guardian to the commissions upon investments and collections of funds belonging to the estate of his ward was very ably discussed in the matter of Kellogg, reported in Vol. 7, Paige's Chancery Reports, p. 265, which was a New York case, and from that we beg to quote you rather extensively, for the reason that we

doubt if in your town you will find a library containing such report. We quote from that case as follows:

"The result of such a principle of computing the allowance for commissions, if the investments of the trust fund were made from year to year and the accounts were rendered or passed annually, would be to give the trustee his full commissions upon the principal of the trust fund every year, as well as upon the income thereof received and expended from time to time. And where the trust fund was less than \$1000, if it did not produce more than 5 per cent interest, the whole income would not only be exhausted in payment of the commissions of the trustee, but in the course of time the commissions payable upon the receipt and disbursement of the interest annually would sink the principal also.

"The investment or reinvestment of the fund, from time to time, upon new securities for the purpose of producing an income therefrom, is not such a paying out of the trust moneys as entitles the guardian or trustee to commissions for paying out the same, within the intent and meaning of the statute on this subject; unless such securities are finally turned over to the cestui que trust as money, or otherwise applied in payment on account of the estate. Neither is the guardian or trustee entitled to charge a new commission for the collecting or receiving back of the principal of the fund which he has so invested. But he will be entitled to commissions upon the interest or income of the fund produced by such investments, and received and paid over by him."

Of course, we do not mean to hold that you would not be entitled to your commission of one-half of one per cent upon the interest received upon the investment, but simply hold that you would not be entitled to your commission upon the reinvestment of the loan, and we believe that after a full and careful consideration of the matter you will be convinced that our theory and our ruling as hereinabove contained is correct.

We are sending a copy of this opinion to Hon. Dayton Moses, who wrote us in reference to the matter, as you suggested he would do in your communication.

Trusting I have made myself clear in the above discussion, I am with great respect,

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

OFFICERS—FEES—COUNTY ATTORNEY.

The county attorney is not entitled to fees for services in the corporation court, there being no city attorney.

Fees of county attorney in justice court on pleas of guilty.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MAY 17, 1913.

Hon. C. E. McVey, County Attorney, Shamrock, Texas.

DEAR SIR: In your letter of May the 12th you propound, for the opinion of the Department, the following questions: 1. In your opinion, is the county attorney allowed fees in corporation court where there is no city attorney? 2. Will you please give me the fees allowed

county attorneys on pleas of guilty in justice courts on regular court days?

Replying thereto, we beg to say that under the provisions of Article 911 of the Revised Statutes of 1911, it is provided that county attorneys may appear in behalf of the State in cases in the corporation court, but it is expressly provided therein that they shall receive no compensation for such services. It is provided, however, in Article 1178, Code of Criminal Procedure, that county attorneys are entitled to fees in the corporation courts in cities of from 30,000 to 40,000 population, but we take it that this article would not have application in your county yet awhile. You are, therefore, advised that you would not be entitled to fees in corporation courts.

Replying to your second question, beg to say that Article 1179 of Code of Criminal Procedure provides that where a defendant pleads guilty to a charge before a justice, mayor or recorder, the fee allowed the attorney representing the State would be \$5.00. Article 1177, Code of Criminal Procedure, provides that upon a trial in the justice court, the county attorney would be entitled to the fee of \$10 for his conviction, but, upon the matter presented by your question, the county attorney would be entitled to the fee of only \$5.00 upon a plea of guilty in the justice court on regular court day.

Article 1180, Code of Criminal Procedure, provides for the fee of \$5.00 upon a plea of guilty at other times than the regular term of court, and, therefore, reading the two statutes together, you will find that the county attorney is entitled to a fee of only \$5.00 where defendant pleads guilty in the justice court.

Trusting the above is clear and that same is the information you desire, I am,

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

SHERIFF—FEES—EX OFFICIO SERVICES.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 14, 1913.

Mr. W. C. Jordan, Sheriff, Kountze, Texas.

DEAR SIR: This Department is in receipt of your favor of the 11th, in which you ask us to advise you what fees should be allowed for delivering certified copies of bills of indictment to prisoners in the jail.

Replying thereto, beg to state that there is no provision for fees to be paid to sheriffs in matters of this kind.

Article 3866 of the Revised Civil Statutes, 1911, provides for the compensation for ex officio services performed by a sheriff, and, after enumerating certain duties covered by the ex officio compensation, the statute reads as follows: "And doing all other public business not otherwise provided for."

We therefore beg to advise you that, in the opinion of this Department, the duty to deliver copies of indictments to prisoners is one of the duties covered by Article 3866, above referred to, and would be covered by your ex officio compensation in whatever an amount should be allowed you by the commissioners court.

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

COSTS—CITATIONS IN PROBATE MATTERS—SHERIFF.

When citations in probate matters are served by posting, the law requires that three notices be posted in three of the most public places in the county, one at the courthouse door, and no two of which shall be in the city or town. When citations in such cases are served in this manner, the sheriff would be entitled to his compensation of \$1.00 for each notice posted by him, together with the mileage traveled by him in posting same.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, FEBRUARY 27, 1914.

Hon. Richard L. Burgess, Assistant County Attorney, Beaumont, Texas.

DEAR SIR: Under date of February 26th, we have the following inquiry from you:

"Will you please advise me as fully as possible whether or not the sheriff of the county is entitled to collect a one dollar fee for each notice posted by him in probate matters, or whether he is only entitled to collect one dollar for posting of the notices in each case, together with mileage."

Replying thereto, you are respectfully advised that citations in probate matters are served either by posting, by delivery in person, or by publication, and when the mode of service is not expressly provided by law, it must be served upon the party to be cited in person by delivering to him a true copy of such citation at least ten days, exclusive of the days of service, before the day upon which he is required to appear and answer. If the sheriff should serve citations in probate matters by delivering same in person, he would unquestionably be entitled to his fee for the service of each citation. When citation is required to be posted, it means for ten days, exclusive of the day of posting before the date upon which the party is required to appear and answer. Such citations must be posted at three of the most public places in the county, one of which shall be at the courthouse door and no two of which shall be in the same city or town. Under the sheriff's fee bill he is allowed for posting notices not otherwise provided for in the fee bill, the sum of one dollar. The posting of notices in probate matters is not specifically provided for in the fee bill. Therefore, such services must be included within the provision above referred to.

The question, therefore, is: Must this one dollar and mileage compensate the sheriff for all three of the notices posted by him, or is he en-

entitled to one dollar for each notice posted, together with the mileage traveled by him?

Inasmuch as he is required by law to post three notices, one of them at the courthouse door, the other two at the most public places in the county, and no two of which shall be in the same city or town, we are of the opinion that he would be entitled to one dollar for each notice posted, together with the mileage he travels in posting same.

Yours truly,

C. A. SWEETON,
Assistant Attorney General.

COUNTY ATTORNEY—CLERK—COMMISSION—CONVICT BOND.

County attorney and clerk shall be entitled to 10 per cent on all fines recovered by him when collected, and under Article 1193, Code of Criminal Procedure (1911), county attorney and clerk would be entitled to this commission upon the fine when same is paid in under a convict bond.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MARCH 29, 1913.

Hon. R. J. McMurrey, County Judge, Anahuac, Texas.

We are in receipt of your favor of March 26, as follows:

"Where a county convict is hired out on bond made payable to the county judge, and payments are regularly met until all fine and costs are fully paid, please advise me what officers of the county are entitled to commissions out of the money paid."

Replying thereto, we beg to say that there are only three officers about which there could be any question as to whether or not they would receive commissions upon the amounts collected upon convicts' bonds, and those three are the county attorney, the clerk of the court in which conviction was had, if such court had a clerk, and the county judge, who collect the amount of the bond.

Article 1193 of the Code of Criminal Procedure, 1911, provides as follows:

"The district or county attorney shall be entitled to 10 per cent of all fines, forfeitures or moneys collected for the State or county, upon judgments recovered by him; and the clerk of the court in which such judgments are rendered shall be entitled to 5 per cent of the amount of said judgments, to be paid out of the amount when collected."

It will be noted from the reading of this article that the county attorney and clerk shall be entitled to ten per cent on all fines recovered by him when collected, and we are of the opinion that the county attorney and clerk would be entitled to this commission upon the fine when same is paid in under a convict bond. The method of the collection of this fine and when the same is paid is not material, and regardless of when or how the same is paid the county attorney and clerk would be entitled to his commission. The duty of the county attorney and clerk

in order that they may be entitled to such a commission, has been performed when judgment is recovered, and they are entitled to receive such commission when the amount has been collected.

As to whether or not the county judge would be entitled to a commission out of the money paid to him under a convict bond, we beg to say that this department, on March 28, 1913, rendered a very full opinion upon that subject to Hon. J. C. Lumpkins, county judge of Ellis county, at Waxahachie, Texas, which opinion holds that the county judge would not be entitled to receive such commission. The writer of this opinion knows nothing I might add to the opinion to Judge Lumpkins, and we herewith enclose a copy of that opinion for your information.

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

COURT REPORTER—TRANSCRIPT FEE.

Duty of court reporter to make up and file with clerk of court transcript of testimony without payment of 15 cents per folio where defendant is too poor to pay same.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 25, 1913.

Judge C. F. Spencer, Denton, Texas.

DEAR SIR: We have your communication, in which you call attention to certain provisions of the Act of the Thirty-second Legislature, with reference to court stenographers, statement of facts, etc., and state that you find an apparent conflict between Section 8 and a portion of Section 14. You quote portions of these two sections as follows:

"Section 8. Provided, that when any criminal case is appealed and the defendant is not able to pay for the transcript, as provided for in Section 5 of this act, or to give security therefor, he may make affidavit of such fact and upon the making and filing of such affidavit the court shall order the stenographer to make such transcript in duplicate, and deliver them, as herein provided in civil cases, but the stenographer shall receive no pay for same."

"Section 14. * * * and should an appeal be prosecuted in any judgment of conviction, whenever the State and defendant cannot agree as to the testimony of any witness, then and in such event so much of the transcript of the official shorthand reporter's report with reference to such disputed fact or facts shall be inserted in the statement of facts as is necessary to show what the witness testified to in regard to the same, and constitute a part of the statement of facts, and the same shall apply to the preparation of bills of exception," etc.

You ask our construction as to whether or not the official reporter is required to furnish a question and answer statement of the testimony upon the filing by the defendant of an affidavit of his inability to pay for such record; or is the stenographer merely required to supply the testimony in instances where the State and defendant failed to agree.

Replying thereto, we beg to say that we are unable to find the conflict between these two articles.

Under the provisions of Section 5 of the act it is provided that the shorthand reporter shall transcribe the testimony in the form of questions and answers and file the same in the office of the clerk of the court; that the transcript shall be made in duplicate and that the reporter shall be paid the sum of 15 cents per folio of 100 words for the original copy, said transcript to be paid for by the party ordering the same on delivery and the amount so paid shall be taxed as costs. On the filing of a transcript, as above set out, it is the duty of the counsel to prepare the statement of facts therefrom. A portion of Section 6 of the act provides that the party appealing may have the shorthand reporter prepare from the transcript a statement of facts in narrative form and shall pay the reporter therefor the sum of 15 cents per folio of 100 words, which amount shall not be taxed as costs. This section merely provides a convenient and effective way of preparing the statement of facts, but there is nothing in the law which would prevent parties from preparing their own statement of facts without the aid of the official court reporter. The portion you quote from Section 8 merely gives to the appellant who is too poor to pay the transcript fee provided for in Section 5 a method to have such transcript of the evidence in question and answer form filed with the clerk without the payment of the 15 cents per folio of 100 words provided for in Section 5. The portion you quote from Section 14 applies only in instances where parties make up the statement of facts themselves and fail to agree upon the testimony of any witness and then it is provided that so much of the testimony of the witness as may be necessary may be inserted from the transcript of the official shorthand reporter's report.

You are, therefore, advised that in the opinion of this Department, upon the filing of the affidavit provided for in Section 8 of the act, it would be the duty of the court reporter to file with the clerk a transcript of the evidence, as provided for in Section 5.

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

OFFICERS—FEES—LUNACY PROCEEDINGS.

Officers are entitled to fees upon a conviction for lunacy.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 30, 1913.

Hon. Wayne Davis, County Attorney, Goliad, Texas.

DEAR SIR: In your letter of April the 23rd, you ask if the officers of court would be entitled to the fees where a party is tried for lunacy, and defendant is found to be of unsound mind but the jury further finds that it is not necessary that she be restrained.

Replying thereto, we beg to say that in the opinion of this Department the facts you state would be a conviction within contemplation of law,

and the officers of court would be entitled to their fees. Under Article 155 of the Revised Statutes of 1911 it is made the duty of the judge to submit in a lunacy trial certain special issues, the first of which is, "Is the defendant of unsound mind?" which is the main issue to be tried in the case, and the question of whether or not it is necessary that the defendant should be restrained only becomes important to determine whether or not the authorities will have the power to send the defendant to the asylum or require that the defendant shall be restrained by someone under bond, as is provided in the law. The officers of the court have performed their duties, and whether or not the defendant is to be restrained is not material in determining the right of the officers to their fees.

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

COUNTY TREASURER—COMPENSATION.

The commissioners court has the discretion to fix the compensation of the county treasurer at not to exceed $2\frac{1}{2}$ per cent for receiving and $2\frac{1}{2}$ per cent for paying out money.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 30, 1913.

Hon. J. M. Edwards, State Treasurer, Capitol.

DEAR SIR: The question involved in the communication from Mr. Sid T. Ridling, submitted by you, is whether or not a commissioners court has the power to reduce the salary of the county treasurer to \$20 per month, or whether they must fix a salary that would be reasonable under the circumstances of the particular case.

This question is expressly adjudicated in the case of *Sauls vs. Hill County*, 134 S. W. Rep., 267. The statute provides that the commissioners court may fix the commissions to be received by the treasurer on moneys received and paid out by him as follows: "for receiving all moneys other than school funds for the county not exceeding $2\frac{1}{2}$ per cent, and not exceeding $2\frac{1}{2}$ per cent for the paying out of the same." Another article of the statute provides that the county treasurer shall receive one-half of 1 per cent for receiving and one-half of 1 per cent for disbursing available and permanent free school funds for the county.

In the case of *Sauls vs. Hill County*, *Sauls*, who was county treasurer, contended that the commissioners court reduced his salary to an unreasonable basis; with reference to this question and the power of the court the Court of Civil Appeals said:

"The law vested in the commissioners court the power to fix the commissions of the county treasurer; the only limitation being that it should not exceed $2\frac{1}{2}$ per cent on the dollar for receiving and paying out money. Having fixed the maximum rate, it seems, had the lawmakers intended the commissioners court should not fix a lower rate, they would have said so. As the amount fixed was within the discretion given by law, it is not within the powers of the courts to

interfere. Besides, appellee was aware of the court's action, and, if the compensation was too small, he was not compelled to perform the services, and, having done so, he can not complain. It may be that the compensation fixed was too small and an injustice done to appellee, but, on the other hand, the compensation may have been sufficient under the then existing conditions; at any rate, the commissioners court has exercised the discretion granted by law, and this court is powerless to interfere."

Yours very truly,

LUTHER NICKELS,
Assistant Attorney General.

DELINQUENT FEES—DISTRICT CLERK—SHERIFF—STENOGRAPHER.

1. Delinquent fees shall be collected by the officer to whose office the fees accrued, and it is therein provided that the officer making such collection shall be entitled to 10 per cent of the amount collected by him.

2. There is no grant of power to district clerk to collect a commission on the sheriff's fees, and the same is true with reference to the stenographer's fees.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 14, 1913.

Mr. P. H. Geraughty, District Clerk, Corsicana, Texas.

DEAR SIR: In your communication to this Department of January 11, 1913, you request an opinion as to whether or not under Article 3892, Revised Statutes, the district clerk is entitled to charge a commission on the delinquent fees of the sheriff's office collected by him (clerk) as well as on the delinquent fees of the district clerk's office, and whether or not he is entitled to the commission on the delinquent fees of the stenographer.

Under the provisions of the article cited it is required that the delinquent fees shall be collected by the officer to whose office the fees accrued, and it is therein provided that the officer making such collection shall be entitled to ten per cent of the amount collected by him. The word "officer" as used in the provisions stated refers to the same person, that is to say, the delinquent fees due to the ex-sheriff shall be collected by the incumbent sheriff and such incumbent sheriff is the "officer" making such collection. There is consequently no grant of power to the district clerk to collect a commission on the sheriff's fees and the same is true with reference to the stenographer's fees.

You also ask whether these delinquent fees due the sheriff shall be paid direct to the ex-sheriff from the district clerk's office or shall they be paid over to the present sheriff for disbursement.

The present sheriff is the officer whose duty it is to collect the fees, consequently you would not be authorized to pay them directly to the ex-sheriff, but this is a matter between the incumbent and the retiring sheriff, the excess to be paid by the incumbent sheriff into the county treasury.

Yours truly,
LUTHER NICKELS,
Assistant Attorney General.

FEE BILL—SUBSTITUTING SALARY BASIS FOR STATE OFFICERS IN LIEU OF FEE SYSTEM.

1. Where the Constitution provides for fees, commissions, etc., the Legislature has no right to substitute a salary therefor.
2. Where the Constitution creates the office, but does not provide for compensation, the Legislature may provide for salary.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 27, 1913.

Hon. John E. Davis, House of Representatives, Capitol.

DEAR SIR: In your favor of the 21st inst., addressed to this Department, you enclose copy of Senate Bill No. 62, the purpose of which is to abolish the fee system as it relates to certain district and county officials and to substitute therefor a salary basis for their compensation, and you ask us to advise you if there are any constitutional objections to the bill, and if so to advise how the same can be corrected and how the same purposes may still be accomplished.

To answer your question it will require somewhat of an analysis of the bill and a comprehensive statement of the provisions of the Constitution in regard to the compensation of these officials dealt with in the bill.

It seems that the bill will place the district attorneys of the State on a salary of \$2500 per annum, to be paid monthly by the State of Texas on warrants drawn by the Comptroller, and that the compensation so paid shall be in lieu of fees and all other compensation as now fixed by law.

The bill further provides that all fees now required by law to be collected by the county judges, sheriffs, county attorneys, district and county clerks, justices of the peace and constables shall be paid into the county treasury for the use and benefit of the county, and that the commissioners court of each county shall require of each of said officials a bond and that such fees as such officers fail to collect shall be deducted from their salaries as fixed in the bill, unless upon satisfactory proof the commissioners court should decide that the same were non-collectible.

The bill then arranges a schedule of salaries, varying according to the population of counties, for the county judges, county attorneys, sheriffs, tax collectors, tax assessors, district clerks, county clerks and county treasurers.

It also arranges a schedule of salaries for precinct officers, varying according to the population of precincts, for justices of the peace and constables. The act requires the commissioners court to meet at a stated date and fix and determine the salary to be paid to each of the officers affected by the provisions of the bill. The act further specifically enacts that all fees of office accruing to said officers under the provisions of any law, or payable to them in their capacity of officers for services, shall become the property of the county electing such officers and shall be paid over monthly to the county treasurer thereof. Section 16 of the act provides "The annual compensation payable to the officers affected

by the provisions of this act shall be paid in twelve equal installments, payable monthly by warrant issued by the commissioners court and countersigned by the county judge and auditor whenever such county may contain an auditor."

From the above statement we get a very clear idea of the purpose of the act, which is that the system of compensating officers by fees, perquisites and commissions is abolished and in lieu thereof these officers are compensated by a salary paid periodically in installments of equal amount.

The different provisions of the Constitution in regard to the pay or compensation of the public officers of this State are as follows:

Referring to the Governor the Constitution says:

"He shall at stated times receive as compensation for his services an annual salary of four thousand dollars, and no more." Sec. 5, Art. 4.

Referring to the Lieutenant Governor the Constitution provides:

"The Lieutenant Governor shall, while he acts as President of the Senate, receive for his services the same compensation and mileage which shall be allowed to members of the Senate, and no more, and during the time he administers the government as Governor he shall receive in like manner the same compensation which the Governor would have received had he been employed in the duties of his office, and no more." Sec. 17, Art. 4.

With reference to the Secretary of State the Constitution provides that,

"He shall receive for his services an annual salary of two thousand dollars, and no more." Sec. 21, Art. 4.

With reference to the Attorney General the Constitution provides that,

"He shall receive for his services an annual salary of two thousand dollars, and no more, besides such fees as may be prescribed by law; provided, that the fees which he may receive shall not amount to more than two thousand dollars annually." Sec. 22, Art. 4.

With reference to the Comptroller of Public Accounts, the State Treasurer and the Commissioner of the General Land Office the Constitution provides that each of them shall

"Receive an annual salary of two thousand five hundred dollars, and no more."

And there is a further provision as to these officers that

"All fees that may be payable by law for any service performed by any officer specified in this section or in his office shall be paid when received into the State Treasury." Sec. 23, Art. 4.

With reference to the Supreme Judges the Constitution provides as follows:

"And shall each receive an annual salary of four thousand dollars until otherwise provided by law." Sec. 2, Art. 5.

With reference to the judges of the Court of Criminal Appeals the Constitution provides that

“Said judges shall have the same qualifications and receive the same salaries as the judges of the Supreme Court.” Sec. 4, Art. 5.

With reference to the judges of the Courts of Civil Appeals the Constitution provides:

“And shall receive for their services the sum of three thousand five hundred dollars per annum until otherwise provided by law.” Sec. 6, Art. 5.

With reference to district judges the Constitution provides:

“And shall receive for his services an annual salary of two thousand five hundred dollars until otherwise changed by law.” Sec. 7, Art. 5.

With reference to district clerks, Section 9, of Article 5, creates this office for each county, but no reference is made to the amount of his compensation or how the same shall be paid.

With reference to county judges the Constitution provides that

“He shall receive as a compensation for his services such fees and perquisites as may be prescribed by law.” Sec. 15, Art. 5.

Section 19, of Article 5, of the Constitution creates the offices of justices of the peace, constables and county commissioners, but there is no provision as to the amount or character of compensation or when and how it shall be paid.

As to county clerks the Constitution provides that he shall be clerk of the county and commissioners court and recorder of the county “whose duties, perquisites and fees of office shall be prescribed by the Legislature.” Sec. 20, Art. 5.

With reference to county and district attorneys, the Constitution provides that:

“District attorneys shall receive an annual salary of five hundred dollars, to be paid by the State, and such fees, commissions and perquisites as may be provided by law. County attorneys shall receive as compensation only such fees, commissions and perquisites as may be prescribed by law.” Sec. 21, Art. 5.

As to sheriffs the Constitution provides:

“Whose duties and perquisites and fees of office shall be prescribed by the Legislature,” etc. Sec. 23, Art. 5.

With reference to county tax assessor, Section 14, of Article 8, creates the office, but it fails to state the amount or manner of paying his compensation.

With reference to the sheriff, Section 16, of Article 8, creates the office and states that in addition to his other duties he shall be the collector of taxes, but providing that in counties having ten thousand inhabitants, to be determined by the preceding census, a collector of taxes shall be elected, but the Constitution does not provide the amount or the manner of paying the compensation of these officers named.

Section 44, of Article 16, creates the offices of county treasurer and county surveyor and provides, "and shall have such compensation as may be provided by law."

Section 44, of Article 3, of the Constitution has this general provision relative to the subject under consideration:

"The Legislature shall provide by law for the compensation of all the officers, servants, agents and public contractors not provided for in this Constitution, but shall not grant extra compensation to any officer, agent, or servant or public contractor after such public service shall have been performed or contract entered into for the performance of the same, nor grant by appropriation or otherwise any amount of money out of the treasury of the State to any individual on a claim, real or pretended, when the same shall not have been provided for by pre-existing law, nor employ anyone in the name of the State unless authorized by pre-existing law."

The above provisions of the Constitution are submitted as practically all of those provisions that will shed any light on the inquiry, and it will be noticed that with reference to some of the officers named the Constitution is silent as to the amount or the method of paying their compensation, while with reference to others it is stated to be an annual salary, and with reference to other fees, perquisites and commissions are provided for.

Each of these terms has in the course of time assumed a definite meaning. For instance, perquisites is "something gained by a place or office beyond the regular salary or fee." It was held to be used in this sense in the Constitution of Maryland, where it was provided for the compensation of clerks of courts in the city of Baltimore, directing that they shall be entitled "to no other perquisite or compensation." *Van Sant vs. State*, 53 Atl., 711; 96 Md., 110.

Fees, as used in connection with offices, means "a recompense prescribed by law for services performed by one in an official capacity." *City of Austin vs. Johns*, 62 Texas, 179; *First Burrell Law Dictionary*, page 474; *First Bouvier Law Dictionary*, page 577.

The word "salary" means "an annual or periodical payment for services, a stipulated periodical recompense, a stipend, wages." *Indianapolis vs. Wasson*, 74 Ind., 133.

Webster defines "salary" to be "the recompense or consideration stipulated to be paid to a person for services, annual or periodical wages or pay."

"Salary is a fixed compensation which is paid at stated times." *Dane vs. Smith*, 54 Ala., 47.

"The recompense or consideration stipulated to be paid by the year, as to governors, magistrates, etc." *People vs. Meyer*, 11 N. Y. Supp., 217; 25 Abb. N. C., 368.

"Commissions," as that term is used in connection with compensation to an officer, means "a percentage allowed by law on sums of money received or collected." *Smith vs. Dunn*, 8 Pac., 625; 68 Cal., 54.

The term "compensation" is comprehensive enough to include salary, fee, perquisites, commissions, wages or any other pay received by an officer for the services performed, and in its usual and ordinary accepta-

tion applies not only to salaries but to compensation by fees for specific services or commissions upon moneys collected, etc. *Commonwealth vs. Carter* (Ky.), 55 S. W., 701.

It is the opinion of this Department that with reference to those officers named in the proposed bill, whose compensation as provided by the Constitution is to be paid from fees, commissions, perquisites, etc., the Legislature is without authority to place them on a salary basis; but with reference to those officers whose compensation is not fixed by the Constitution the act in question will be fully authorized by the Constitution. We believe these different provisions of the Constitution, indicating how public officials are to be compensated,—that is, whether by a salary or from fees, costs, commissions, perquisites, etc.—are exclusive, and that there arises an implied limitation against the power of the Legislature to arrange their compensation otherwise than directed. We are not entirely without some light from our courts construing similar provisions of the Constitution.

Section 11, Article 5, of the Constitution, specifies the grounds that disqualify a judge of the Supreme Court from sitting in a case, in the following language:

“No judge shall sit in any case wherein he may be interested or where either of the parties may be connected with him either by affinity or consanguinity within such a degree as may be prescribed by law, or where he shall have been counsel in the case.”

In the case of *Investment Company vs. Grymes*, 94 Texas, 618, the qualification of Mr. Justice Williams to participate in the decision of a case was called in question by reason of the fact that he, as a member of the Court of Civil Appeals, took part in the decision of the cause before it reached the Supreme Court. The Supreme Court, in disposing of this question, said:

“The grounds of disqualification of the judges of the courts in this State are specified in the Constitution and they are exclusive of all others, and the fact that a judge may have tried the case in the lower court or participated in the decision in such court is not made one of them.”

In the case of *Parks vs. West*, 102 Texas, 11, the Supreme Court was considering the provision of Article 7, Section 3, of the Constitution, which reads as follows:

“And the Legislature may also provide for the formation of school districts within all or any of the counties of this State by general or special laws,” etc.

The question arose as to the power of the Legislature to create a district composed of parts of two or more counties. The court said:

“Undoubtedly the discretion granted as to locating school districts is broad, but it is not unlimited. By authorizing the creation of districts within all or any of the counties the Constitution impliedly commands that they be not created otherwise. We may no more reject these words than we may any others in the provision. When proper effect is given to them, no room is left for the application of the principle that the Legislature possesses unlimited power in forming the district. This power is expressly given and is so defined as to exclude any broader one applicable to the formation of such districts. No definition of the words of the phrase in question will make them embrace districts

not comprehended by the line of any county but covering parts of several counties. Any construction that would do that would not only contradict the amendment (Constitution), but would leave the phrase under consideration without any operation whatever. For, if it had been intended to give power to locate districts without regard to the division of the State into counties, no reference to the counties would have been at all necessary."

The underlying principle of these decisions is that the Constitution, having expressly directed how a certain thing is to be accomplished, is to be considered exclusive, and by implication prohibits the Legislature from adopting any other course.

With reference to the question under consideration, it occurs to us that this proposition is placed almost without controversy by reason of the language of Section 44, Article 3, quoted above, wherein it is stated, "The Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors not provided for in this Constitution." It seems that inevitably there arises by implication a restriction upon the power of the Legislature to provide for the compensation of officers in any manner other than as directed in the different provisions of the Constitution hereinbefore quoted.

Responding to your request, that in the event the proposed bill should be, in our opinion, in conflict with the Constitution, to suggest how the same may be corrected and the same desired results accomplished, we beg to suggest that it is our opinion that officers can be put, to all intents and purposes, upon a salary basis by providing that their compensation shall be paid in fees of office up to the maximum that is proposed for their salary, and that all of the excess over and above that amount, if any, shall be paid into the treasury of the State or of the county, as the case may be. There is no denying the fact that each of these systems has its merits and demerits, and we believe that a blending of the two ideas, that is, to fix an amount beyond which they shall not be paid, to be retained, however, out of their fees of office, the balance to be covered into the treasury, is to all intents and purposes, so far as the merits are concerned, a salary basis, and yet they are left to work out their salvation under the fee system and to that extent will retain whatever merit there is in that system in the way of encouraging diligence and activity on the part of officers.

Yours very truly,
B. F. LOONEY,
Attorney General.

FEEs—WITNESSES IN CIVIL CASES—DISTRICT CLERK.

The fees of district clerk for swearing and filing the claim of witnesses in civil cases should be taxed as costs and the witnesses not held responsible for same.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 29, 1913.

Hon. A. S. Curtis, District Clerk, Marshall, Texas.

DEAR SIR: This Department is in receipt of your favor of March the 28th, in which you propound the inquiry as to whether your fees

for swearing and filing the claim of witnesses in a civil case should be charged to the witness personally or whether your fees should be taxed as other costs in the case.

Replying thereto, we beg to say that Article 3644, of the Revised Statutes, 1911, provides that witnesses shall be allowed a fee of one dollar for each and every day they may be in attendance on the court, and six cents for every mile they may have to travel in going to and returning therefrom, which shall be paid on the certificate of the clerk, but the party summoning them, which certificate shall be given on the affidavit of the witness before the clerk. Article 3855, describing the fees of the clerks of the district courts, allows a fee of fifty cents for this service, but does not state how or by whom same should be paid.

So far as we have been able to discover, this question has been before the courts in but one case, and in that case the court uses the following language:

"The clerk charged for taking the affidavits of witnesses, and, in addition thereto, for issuing certificates of attendance. The statute, Article 2268, provides for the clerk giving a certificate on the affidavit of a witness as to attendance, but in our opinion only one fee should be charged. The taking of an affidavit of a witness and giving the certificate should be considered one act, and a separate charge for each should not be made, but a charge only for the two combined; that is, the clerk is only entitled to 50 cents for taking the affidavit of a witness and giving the certificate of attendance. This charge comes under the item in the schedule of fees, which allows 50 cents for 'administering an oath,' or affirmation, 'with certificate and seal.' This fee should be taxed as costs, and the witnesses not held responsible therefor."

See *Texas Midland Railroad vs. S. H. Parker*, 28 Texas Civ. App., 116.

Relying upon the decision in the above case, you are advised that in the opinion of this Department your fees in matters of this character should be taxed as costs and the witnesses not held responsible for the same.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

DISTRICT CLERK—FEES.

After one qualifies as district clerk and a mandate comes down from the Court of Criminal Appeals in a case previously appealed, and such clerk issued necessary papers on the mandate, the fee of \$8.00, provided by law, is in the nature of a trial fee, and said clerk's predecessor is entitled to such fee, because the case was tried under his administration.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 21, 1913.

Mr. A. S. Wheatley, District Clerk, McKinney, Texas.

DEAR SIR: It appears from your letter that after you qualified as district clerk a mandate came down from the Court of Criminal Appeals in a case which had been previously appealed, and that you issued the

necessary papers on the mandate. The question is, as propounded by you, who should receive the \$8.00 fee provided for in Article 1127 of the Code of Criminal Procedure; that is to say, would this fee properly go to you or to your predecessor in the office. The article referred to reads:

"Clerks of the district courts shall receive for each felony case tried in such courts by jury, whether the defendant be convicted or acquitted, the sum of \$8.00."

The same section also provides that district clerks shall receive for each felony case finally disposed of without trial or dismissal or nolle prossed, eight dollars.

It appears in the matter under consideration that the case was tried, and therefore if any fees should be allowed it would be allowed under the first sentence in the article referred to. It appears from the article that this fee is really in the nature of a trial fee, and it is the judgment of this Department that your predecessor is entitled to the fee, because the case was tried under his administration.

Yours very truly,

C. M. CURETON,

First Assistant to Attorney General.

COUNTY JUDGE—FEES—ESTATE OF MINOR HEIRS.

Where an estate of minor heirs is transferred from one county to another upon application of guardian recently appointed to succeed former guardian, the county judge at the time the cash was actually received by guardian is the judge entitled to commission.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 21, 1913.

Mr. O. A. Stubbs, County Judge, Batesville, Uvalde County, Texas.

DEAR SIR: In your letter to this Department you say there has been an estate of some minor heirs which has been transferred from your county to another county upon the application of the guardian recently appointed to succeed the former guardian, deceased.

Your questions are:

Is the county judge of this county entitled to the commission under the above quoted article? If so, should this commission be paid to the present incumbent or should it be paid to the former county judge during whose administration the cash was received?

The answer to your questions involves a construction of Article 3850, Revised Statutes, 1911, which reads as follows:

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

It is our opinion that the county judge who held that position at the time the cash was actually received by the executor, administrator or

guardian, is the one who is entitled to the commission; that particular clause in the articles referred to which states that the county judge shall receive this commission upon the approval of the exhibits, etc., merely sets the time or date at which the commission should become due.

Yours very truly,

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

DISTRICT CLERK—CRIMINAL CASES—FEES—CHANGE OF VENUE.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 17, 1913.

Hon. Ira Weakley, County and District Clerk, Post City, Texas.

DEAR SIR: Replying to your favor of March the sixth, in which you ask if you are entitled to the district clerk's fee of ten dollars (\$10.00) for the final disposition of a criminal case when a change of venue is taken to some other county in the district, we beg to say that Article 1129 of the Code of Criminal Procedure provides that the clerk of the district court shall receive, for each felony case tried in such court by jury, whether the defendant be convicted or acquitted, the sum of ten dollars (\$10.00), and it further provides that for each transcript on appeal or change of venue, ten cents (10c) for each one hundred words, and in the opinion of this Department he would only be entitled to ten dollars (\$10.00) fee in case of a trial of a case in his court, and that the only fee or compensation allowed upon a change of venue would be the ten cents (10c) for each one hundred words for making out the transcript. Under that clause which states "for each felony case finally disposed of without trial, or dismissed, or *nolle prosequi* entered, ten dollars," you would not be entitled to this for the reason that the case has not been finally disposed of. This clause means that the case must, in fact, have a final disposition and be off the docket, so to speak, of any court and be not pending.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

SUSPENDED SENTENCE LAW—FEES OF PROSECUTING ATTORNEY.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 17, 1913.

Hon. L. J. Truett, County Attorney, McKinney, Texas.

DEAR SIR: This Department is in receipt of your favor of March 8, 1913, inquiring whether or not prosecuting attorneys would be entitled to the fees upon conviction of felony where the sentence was suspended

under the provision of what is known as Senate Bill No. 5, approved by the Governor February 11, 1913.

Replying to the above inquiry, beg to say that, in the opinion of this Department, the attorney would be entitled to such fee. While the law provides that the verdict of conviction nor the judgment entered thereon shall become final except under conditions provided, yet at the same time, if the prosecuting attorney has performed all the duties devolving upon him in such case and, by his efforts, has brought about a condition which fulfills the law, a conviction has been had and the defendant, by his act in accepting the suspension of the sentence, has estopped himself from the right of appeal. And in so far as any effort of a district or county attorney is concerned the judgment has, in effect, become final. The suspension of the sentence, while not a pardon, is, in effect, a parole, and one that is liable to become final at any time, in the event the defendants should breach the conditions required by law. There is nothing yet to be done in the present case by the prosecuting attorney, and, so far as he is concerned, the case is at an end. The only remaining act to be performed is the pronouncement of a sentence by the court contingent upon a future indictment and conviction of the defendant upon another charge.

This matter, however, would be more definitely determined should an amendment to that effect be enacted by the Legislature so as to settle at least any question about the right of the prosecuting attorney to his fee.

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

FEES—COUNTY JUDGE—CRIMINAL CASES.

The county judge is authorized to collect from the county a fee of \$3.00 in each criminal action tried and finally disposed of by him.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 14, 1913.

Hon. W. S. Shipp, County Judge, Beiton, Texas.

DEAR SIR: In your letter of January 11, 1913, you submit for our opinion the following question:

"Your advice is desired upon the following question: A number of appeal cases from the city court of Temple to the county court of Bell county have been, upon motion of the city attorney of Temple, dismissed, and said cases certified back to the proper officers at Temple for enforcement of the judgment therein.

"Appeals were dismissed on various grounds, and the clerk of the county court has certified same to the clerk of the corporation court at Temple, and I desire to know if the county judge is entitled to the fee of \$3.00 in each case for finally disposing of them.

"None of these cases were dismissed, but the appeals were dismissed and, of course, the judgment theretofore rendered in the city court of Temple will now be enforced."

You are respectively advised that in the opinion of this Department, under the facts stated in your letter a county judge would not be authorized to collect the \$3.00 in each case for the dismissal of the appeals.

The language of the statute, granting a fee of \$3.00 to the county judge in criminal cases, is as follows:

"There shall be paid to the county judge by the county the sum of \$3.00 for each criminal action tried and finally disposed of before him."

You will observe that a final disposition of the case alone under this statute would not authorize the \$3.00 charge, but there must be a trial and final disposition of the case before such charge could be lawfully made.

A dismissal of an appeal is not a trial of the case in any sense of the word.

In the case of Brackenridge vs. The State, reported in 11 S. W., p. 630, this statute was before the Court of Criminal Appeals for a construction, and in that case the court announced the rule as follows:

"A dismissal of a case is not a trial of it within the meaning of the law. A dismissal of a case is to send it out of court without a trial upon any of the issues involved in it. It is a final disposition of that particular case but not a *trial* of it. A final disposition of the case does not, of itself, *entitle* the county judge to the fee allowed by Article 1075 (the article under discussion). To entitle him to the fee, the case must have been tried and finally disposed of before him. He must *both* try and finally dispose of it. Such is the plain language of the statute."

It is therefore clear to us that before the county judge would be authorized under the law to make the \$3.00 charge against the county in criminal actions, the cases must have been tried and finally disposed of in his court. Any other disposition of the case would not authorize him to charge and collect said fee.

Yours very truly,
C. A. SWEETON,
Assistant Attorney General.

**OPINIONS RELATING TO PRIVATE CORPORATIONS,
CHARTERS, ETC.**

CORPORATIONS—FRANCHISE TAXES—REVIVAL OF CORPORATE RIGHT TO
DO BUSINESS.

1. Although the right of a railroad company to do business was forfeited for failure to pay its franchise tax, it may now pay the tax and accrued penalties, and the Secretary of State would have authority to revive its right to do business. R. S., Art. 7399; Chapter 159, Acts Thirty-third Legislature.

2. Inasmuch as Chapter 139, Acts of Thirty-third Legislature, does not prohibit the Secretary of State from receiving the franchise taxes and penalties due by defaulting corporations after September 1, 1913, he has such right, and he may accept such taxes and penalties and revive the right of such corporations to do business.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, SEPTEMBER 5, 1913.

Hon. F. C. Weinert, Secretary of State, Capitol.

DEAR SIR: On this date we had up for consideration with the Hon. D. A. Gregg, your chief clerk, the question of the status of the Glen Rose & Walnut Springs Railway Company. This is an ordinary railway corporation the right to do business of which was forfeited in July, 1912, for failure to pay its franchise tax in accordance with the provisions of Article 7399, Revised Statutes. The company now desires to pay this tax and be reinstated as far as may be done by your office. Mr. Gregg requested an opinion of this Department as to whether or not this might be done. This request involves a construction of Chapter 159 of the Acts of the Regular Session of the Thirty-third Legislature. That portion of the act referred to reads in part as follows:

“Every private corporation heretofore chartered under the laws of this State, whose charter or right to do business, and every foreign corporation whose right to do business within this State has heretofore been forfeited as provided by law, solely and only because of its failure to pay, within the time provided by law any franchise tax or taxes and penalty or penalties prescribed by law for failure to pay such tax or taxes when due, shall be permitted and authorized to pay to the Secretary of State on or before the first day of September, A. D. 1913, the aggregate amount of its franchise tax or taxes and the penalty or penalties thereon as provided by law, calculated for the entire period of time, beginning with the day upon which the first unpaid franchise tax payment became due and ending with the date of such payment; and upon such payment being made to the Secretary of State, he shall cancel such previous forfeiture of the right of such corporation to do business within this State, and shall endorse upon the margin of the record kept in his office relating to such corporation the word ‘Revived,’ and the date of such revival. Failure of any such domestic corporation to pay such aggregate amount on or before the first day of September, A. D. 1913, shall constitute sufficient grounds for the forfeiture of the charter of any court of competent jurisdiction of the charter of such domestic corporations; provided, that none of the provisions of this section shall apply to any corporation whose right to do business within this State or whose charter may have been legally forfeited for tax or taxes and such penalty or penalties. Provided, that this act shall not in any manner

affect any litigation by or against any corporation which cause of action or defense to any cause of action originated since the forfeiture of the charter or cancellation of permit and prior to the time of taking advantage of this act."

It will be noted that the act provides that corporations of the status of the railway company under consideration "shall be permitted and authorized to pay to the Secretary of State on or before the first day of September, A. D. 1913, the aggregate amount of its franchise tax or taxes and the penalty or penalties thereon as provided by law, etc."

The act then provides, as shown above, that when the aforesaid payment has been made that the right of the corporation to do business shall be revived. It is noted further that this act does not in express terms prohibit the payment of the tax and penalties after the first day of September, A. D. 1913; but it does in effect provide a penalty for a failure to revive the right to transact business by that date; the penalty is shown in the latter part of the section quoted and is in substance as follows:

"Failure of any such domestic corporation to pay such aggregate amount on or before the first day of September, A. D. 1913, shall constitute sufficient grounds for the forfeiture by a judgment of any court of competent jurisdiction of the charter of such domestic corporation," etc.

It is clear from this act, as well as from the other provisions of the Revised Statutes, of which this act becomes a part, that no action could be brought by the Attorney General to forfeit the charter of the corporation, provided it paid its taxes and penalties by the first of September, 1913, but that after that date such an action could be brought. But the question here is, whether or not this corporation may now come in and pay its taxes and the penalties which have accrued with reference thereto and have its right to do business revived. Our opinion is that the corporation has such a right. If suit had already been entered against the corporation for a forfeiture of its charter, then a different question would be presented, but no suit has been entered against this company. We have reached this conclusion on the theory that where a statute provides that a thing shall be done within a certain time that if the act be done at any time after the expiration of that date the act becomes still valid and binding except in those particular cases where time is the essence of the contract of the law. Provisions regulating the duties of public officers and specifying the time for their performance are generally directory. Though a statute directs a thing to be done at a particular time it does not necessarily follow that it may not be done afterwards. In other words, as the cases universally hold, a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, is directory unless the nature of the act to be performed or the phraseology of the statute is such that the designation of time must be considered as a limitation on the power of the officer. (Sutherland on Statutory Construction, Sec. 612.)

A statute required the township clerk to certify on or before the first Monday of October of each year to the supervisor of his township

the amount of the town indebtedness growing out of the payment of bounties. Where such certificate was not made within that period but was made within a week afterwards, it was held good and the provision so far directory.

The assessors of a school district were directed by a statute to assess the district tax within thirty days after the clerk had certified the vote for raising the tax, and it was held to be merely directory, as there were no negative words in the statute limiting their power to make the assessment afterwards.

If a statute direct a tax to be levied at a given time and it is omitted, it may be levied at a different time. The following statutes relating to taxes were held directory as to time: A statute requiring county treasurers, immediately after a tax sale, to deposit in the office of the county clerk a statement containing a description of the property sold, the names of the purchaser and owner and the amount of the sale; a provision that school district clerks shall deliver to the selectmen of the town an attested copy of every vote of the district to raise money within ten days after the meeting at which the vote was taken; a requirement that county treasurers should make the delinquent tax list on the first day of April and should immediately certify it to the clerk of the district court; a provision requiring the tax levy to be certified to the county auditors by October 1st.

Sutherland on Statutory Construction, Sec. 613.

Smith vs. Crittenden, 16 Mich., 152.

Pond vs. Megus, 3 Am. Dec., 131.

State vs. Harris, 17 Ohio St., 608.

Anderson vs. Mayfield, 19 S. W., 598.

State vs. Hannibal Ry. Co., 21 S. W., 14.

Allen vs. Allen, 114 Wis., 615.

Smith vs. Swain, 52 Atl., 357.

State vs. St. Paul Trust Co., 76 Minn., 423.

State vs. West Duluth Land Co., 75 Minn., 456.

Again, it is a general and elementary rule of law that statutes which take away penalties or which are in favor of those on whom taxes are assessed or burdens laid, are to be liberally construed.

Sutherland on Statutory Construction, Sec. 680.

Statutes are always strictly construed against a forfeiture. A statute which subjects one's property or rights to forfeiture must be strictly construed and the forfeiture may not be had or maintained by implication.

Sutherland on Statutory Construction, Sec. 547.

Steamboat Ohio vs. Stunt, 10 Ohio St., 582.

The foregoing general rules apply with particular force to the charters and franchises of corporations. The general rule is that the courts will proceed with extreme caution in adjudging a forfeiture which is intended to forfeit corporate franchises, and that such forfeiture will not be allowed except under express limitations or plain abuse of power by which the corporation fails to fulfill the design or purpose of its organization.

Joyce on Franchises, Sec. 487, 491.

Topeka vs. Topeka Water Co., 58 Wis., 349.

State vs. Morris, 73 Texas, 435.

We reach the conclusion, therefore, in view of the general rule for interpreting statutes of the character under consideration, that inasmuch as this statute does not inhibit or prohibit the Secretary of State from receiving the taxes and penalties after September 1, 1913, and reviving the right of the corporation to transact business, that the Secretary of State has such right, and that when this corporation shall have tendered to you the amount of its franchise taxes and penalties that you have the authority and the right to accept the same and to revive the corporation.

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

CORPORATIONS—AMENDMENTS TO CHARTERS—CONSTRUCTION OF
LAWS.

Corporations chartered under the Act of May 15, 1899, for the purpose of storing, transporting, buying and selling oil, gas, salt and other mineral solutions, are subject to the Act of 1907, which requires all private corporations (with exceptions) to have full amount of its authorized capital or authorized increase of capital subscribed, and 50 per cent thereof paid up. Overruling a former opinion of the Attorney General's Department, which held that such corporations were not contemplated by the Act of 1907.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 20, 1913.

Hon. T. L. Foster, Member of the House, Capitol.

DEAR SIR: In your favor of the 17th instant you state:

"As a member of the House of Representatives, I have under consideration Senate bill No. 97, by Bailey, by the terms of which all charters and charter amendments increasing the capital stock of corporations organized under Chapter 117 of the Act of the Twenty-sixth Legislature of the State of Texas, approved on May 15, 1899, and which were filed in the office of the Secretary of State prior to the taking effect on September 1, 1911, of the Revised Civil Statutes of 1911, are fully validated."

You state that certain companies, chartered under this act, construed the law to be that amendments increasing capital stock could be filed after the passage of the Act of 1907 without the necessity of fully subscribing the increase and without paying in fifty per cent thereof as required by the Act of 1907. You state that you understand during the administration of Attorney General Davidson a ruling to this effect was made by this Department. You ask whether or not the increase of capital stock of such a company, so organized, without subscribing the full amount thereof and paying in fifty per cent, is in violation of the law.

Under our view of the law, we are compelled to dissent from the former opinion of this Department, referred to in your letter. It is with

extreme reluctance that we dissent from a ruling of our predecessors, and in view of this and the high regard that this entire Department has for the splendid ability of the Assistant Attorney General who rendered the opinion in question, we have felt constrained to give your inquiry more than ordinary consideration.

We understand from a reading of the opinion of Mr. Leddy, and from the contention of those who are seeking the passage of Senate Bill No. 97, that the Act of 1899, under which certain corporations were formed, by reference, adopted the provisions of Chapter 2, Title 21 of the Revised Civil Statutes of the State as they then existed, as to the manner and method of organizing such corporations, and having thus adopted by reference the provisions of the existing statutes, that the subsequent Act of 1907 amending the law with reference to the increase of capital stock and providing the amount of same that should be subscribed and paid, did not by implication amend or affect the law of 1899, nor did it amend or in any way affect the charter rights of corporations formed thereunder, and hence corporations formed thereunder were not required to have subscribed the full amount of an increase of capital stock proposed in an amendment subsequent to the Act of 1907 and was not required to have fifty per cent thereof paid up.

This contention may for the sake of the argument be admitted to be correct, and yet it has within it no answer whatever to the proposition that the Act of 1907, passed subsequently thereto, being a general law applicable to all private corporations organized for profit, except those corporations exempted from the provisions thereof, was applicable alike to corporations formed under the Act of 1899 as well as corporations formed under Chapter 2 of Title 21 of the Revised Civil Statutes and the amendments adopted thereto.

The caption of the Act of 1899 (Session Acts, page 202), is as follows:

"An act to provide for the organization of corporations for the purpose of the storage and transportation and purchase and sale of oil, gas, salt, brine and other mineral solutions; to provide the manner and method of organizing such corporations; to provide the rights, powers, privileges and duties of such corporations; to authorize such corporations to conduct, operate and maintain pipe lines, tanks, pump stations, buildings, machinery, apparatus and devices as may be necessary; to own, use and occupy lands, easements, buildings and structures; to empower such corporations to condemn lands and other property for the uses and purposes of such corporation, and to provide the methods therefor; issue stock and bonds and to borrow money and mortgage its franchises and property."

Section 1 of this act reads as follows:

"Any number of persons not less than three may organize themselves into a corporation for the purpose of storing, transporting, buying and selling of oil and gas, salt, brine and other mineral solutions in this State."

Section 2 of the act is as follows:

"The manner and method of organizing such corporations shall be the same as provided by law for the organization of private corporations in Chapter 2, Title 21 of the Revised Civil Statutes of the State, and the provisions of this act shall apply to all corporations already organized for any of the purposes of this act."

The act, proceeding in Sections 3, 4, 5 and 6, clothes corporations formed for this purpose with the powers, as indicated in the caption of the bill hereinbefore quoted.

It will be readily seen that this act was an addition to the then existing code of laws regulating private corporations organized for profit, and was in no sense dissimilar but was rather an extension or an addition of purposes for which private corporations might be formed, and in construing this act it is to be regarded as *in pari materia* with all other laws which relate to the same subject.

We have this rule enunciated in 36 Cyc., p. 1147, as follows:

"Statutes *in pari materia* are those which relate to the same person or thing or to the same class of persons or things. In the construction of a particular statute or in the interpretation of any of its provisions, all acts relating to the same subject or having the same general purpose should be read in connection with it, as together constituting one law. The endeavor should be made by tracing the history of legislation on the subject to ascertain the uniform and consistent purpose of the Legislature or to discover how the policy of the Legislature with reference to the subject matter has been changed or modified from time to time. With this purpose in view, therefore, it is proper to consider not only acts passed at the same session of the Legislature but also acts passed at prior and subsequent sessions, and even those which have been repealed."

In the case of *State vs. Omaha*, 75 Neb., 637, 106 N. W., 979, 110 N. W., 874, the court says:

"We think it clear that the whole series of statutes directed against combinations and monopolies should be considered as a part of a connected system, and that no one act should be singled out for construction and be considered apart from the general trend of legislation upon the subject. Statutes *in pari materia* are to be construed together, and repeals by implication are not favored. The courts will regard all statutes upon the same general subject matter as part of one system, and later statutes should be construed as supplementary or complementary to those preceding them. They are to fill up the gaps left by former attempts to mend the evil."

In *Wellsburg R. Co. vs. Panhandle Traction Company*, 56 W. Va., 18, 48 S. E., 746, was a holding that

"An undeviating course of legislation in a certain direction for a long time in an effort to perfect the law relating to a given subject strongly emphasizes the express language embodying the final declaration of legislative will."

In the case of *Jackson County vs. Branaman*, 169 Ind., 80, 82 N. E., 65; *Indianapolis Traction Company vs. Raner*, 37 Ind. App., 264, 76 N. E., 808, the court announced the rule that

"The rule of construction by the aid of statutes *in pari materia* does not restrict the court to the consideration of other legislation enacted on the same day or at the same session. The use of the rule, like all other methods of construction, is to ascertain the intention of the Legislature by reference to other enactments relating to the same subject matter—to the same person or thing or to the same class of persons or things. Similar illustrations are found in the interpretation and construction of progressive statutes relating to the rights of married women or to the regulation of the liquor traffic."

Authorities to the same effect could be cited, to no purpose except to emphasize the correctness of the rule hereinbefore stated. Hence we

conclude that the Act of 1899 finds its place and falls into the body of laws as they then existed with reference to the formation of private corporations for profit, and, like all other corporations chartered under the provisions of any law in existence, must abide the result of any amendments to the corporation code that might be adopted by the Legislature.

Article 1139 of the Acts of 1911 was enacted April 23, 1874, and stands today as it left the legislative hands on the day of its enactment, and reads as follows:

"All charters or amendments to charters under the provisions of this chapter shall be subject to the power of the Legislature to alter, reform or amend the same."

This provision of the corporation code of this State, as well as all other provisions of the corporation code of this State as they existed in 1899, as well as any amendments adopted thereto subsequently, became as much a part of the charter of companies formed under the Act of 1899 as the articles of incorporation themselves.

Mr. Cook in his work on Corporations, Volume 1, Section 2, announces the rule as follows:

"* * * The charter of a company formed under the general law consists not only of its articles of association, but also of the general statutes of the State under which the organization takes place."

In a foot-note under Section 2 from the same writer, the rule is announced:

"The charter of a company formed under a general statute consists of such statute and of the articles of incorporation. Where the statutes in existence at the time of incorporation provide for the extension of corporate charters, a stockholder can not prevent the corporation from extending its existence in accordance with such statute."

Quoting again from Cook, Volume 2, Section 501, in discussing the right of the Legislature to deal with corporations after being chartered, we read the following:

"Under this reserve power, however, the Legislature, it is held, may impose a statutory liability upon stockholders after they have been incorporated and have gone into business under a charter which does not embody such liability. The exercise of this power by the Legislature in such a case is held to be only a repeal of part of the corporate franchises."

Therefore, in view of the statute of this State reserving the power of the Legislature to amend all charters, and in view of the fact that the Act of 1899 is to be construed as *in pari materia* with the other laws of this State constituting the corporation code, we are of the opinion that the Act of 1907 was applicable to all corporations formed under the Act of 1899, the same as other private corporations formed for profit, except those that were expressly exempted from the provisions of the Act of 1907.

This brings us to a consideration of the Act of 1907, the caption of which is as follows:

"An Act on the subject of private corporations, prescribing the terms and conditions on which they may be chartered, and providing the amount of capital stock to be paid in and when the remainder shall be paid; also prescribing the method by which the capital stock of private corporations may be increased and decreased; also providing for the dissolution of corporations and the procedure incident thereto; also forbidding any such corporation to use its assets, property, stock, means or funds in the interest or for the success of any political party or candidate for office or for the defeat or success of any question submitted to a vote of the people, or for any purpose other than to accomplish the legitimate objects of its creation."

It will be observed that the caption of this act indicates a general law on the subject of private corporations, and does not purport to be an amendment of any particular existing article, act or chapter, but was intended to be general in its nature and applicable alike to all private corporations.

Section 3 of this act, dealing specifically with the increase of capital stock of a private corporation, reads as follows:

"A corporation may increase its authorized capital by a two-thirds vote of all its stock; and when such vote is given in favor of the increase the same may be done by the vote of the directors, trustees or managing board of such corporation; and upon such increase of stock being made in accordance with the above provisions and certified to the Secretary of State by the directors, together with satisfactory proof, which shall be the affidavit of the directors showing that the full amount of the increase has been in good faith subscribed and 50 per cent thereof paid and in other respects conforming to the proof required as on original application for charter; or showing that such portion thereof has been subscribed or subscribed and paid as is required for the corporation thus increasing its stock; and if the Secretary of State is satisfied that the increase of stock has been made in accordance with law and that the requirements of law have been complied with as to the subscription and payment of stock and in other respects as on an original application for charter, he shall file such certificate of increase, and thereupon the same shall become a part of the capital stock of such corporation, and in case of the failure by the stockholders to pay the unpaid portion of the increase within two years from the date of the filing of such certificate of increase in the office of the Secretary of State, the charter of such company shall be forfeited," etc.

It will be observed that there is no provision or language of the above quoted portion of the bill with reference to the increase of capital stock that would render it inapplicable to all corporations of a private nature chartered under the Act of 1899 or under any other act of the Legislature. If it can be successfully contended that the Act of 1907 is not applicable to corporations chartered under the Act of 1899 with respect to the increase of its authorized capital stock, then it can also be successfully contended that the other provisions of the Act of 1907 are not applicable. In other words, the provision of the Act of 1907 with reference to the dissolution of corporations would not be applicable. The provision of the same act which prohibits the corporation to use its assets, property, stock, means or funds in the interest or for the success of any political party or candidate for office or for the defeat or success of any question submitted to a vote of the people, or for any purpose other than to accomplish the legitimate objects of its creation, for the same reason, would not be applicable to or binding upon corporations formed under the Act of 1899. We can not believe that the Legisla-

ture contemplated any such result, but instead that they were passing laws of a wholesome nature establishing sound public policy with reference to all private corporations of this State organized under whatever provisions of the statute.

We furthermore find from the Act of 1907 that certain corporations were exempted from the provisions with reference to the full subscription of the authorized capital stock and to the payment of fifty per cent thereof. Those excepted are corporations created under Sections 21, 29, 37, 53, 54 and 61 of Article 642, Revised Statutes, as they then existed, and it was further provided that the act should not apply to corporations formed for the construction, purchase and maintenance of mills and gins having a capital stock of not exceeding fifteen thousand dollars, nor to mutual building and loan associations, nor to water-works, ice plants, electric light plants and cotton warehouses in cities of less than ten thousand inhabitants.

The express mention of the class of corporations exempted from the provisions of the Act of 1907 strengthens the conclusion at which we arrive, that is, that those corporations formed under the Act of 1899 not being among those excepted were intended to be included within the provisions of the Act of 1907.

Sutherland, in his work on Statutory Construction, Volume 2, Section 494, announces this universal rule of construction, as follows:

"An express exception exempting or saving excludes others. Where a general rule has been established by statute with exceptions, the court will not curtail the former nor add to the latter by implication. Exceptions strengthen the force of a general law and enumeration weakens it as to things not expressed. Power of eminent domain was granted to a railroad company to enter on land and appropriate as much of it, except timber, as might be necessary for its purposes. 'Why an exception,' asked Gibson, C. J., 'if the word land was not supposed to embrace everything else?' The expression of one thing is the exclusion of another, and consequently no further exception was intended. A statute declared that all offices, posts of profit, professions, trades and occupations, except the occupation of farmers, shall be valued and assessed and subject to taxation; it was held that the exception of farmers excluded any other, and that the calling of a minister of the gospel was a profession and taxable. Certain exemptions of industries being expressed in a statute, by fair implication all other property is liable. When a declaratory provision of the Legislature enacts that a thing may be done which before that time was lawful, and adds a proviso that nothing therein shall be so construed as to permit some matter embraced in the general provision to be done, this is an implied prohibition of such act, though before that time it was lawful."

We are therefore driven to conclude that by mentioning corporations to which the Act of 1907 would not apply, renders the conclusion all the more imperative under the rule of construction above quoted, that corporations chartered under the Act of 1899, not excepted, were included in the provisions and bound by the requirements of the Act of 1907.

In order to arrive at the legislative intent we are permitted to look to the history of the times, the state of the existing law and the evils to be remedied by the new law. (36 Cyc., p. 1137.) This rule is stated by Mr. Sutherland, Volume 2, Section 471, as follows:

"In order to ascertain the purpose or intention, if it is not clearly expressed in a statute or that such purpose or intention may be carried into effect, the court will take notice of the history of its times when it was enacted. It is needful, in the construction of all instruments, to read them in view of surrounding facts. To understand their purport and intended application one should, as far as possible, be placed in a situation to see the subject from the maker's standpoint and study his language with that outlook. Statutes are no exception. The court may look to the surrounding circumstances. It accords with Lord Coke's rule, and a liberal sense of what is suitable to ascertain what were the circumstances with reference to which the words of the statute were used and what was the object appearing from those circumstances which the Legislature had in view. When occasion arises for resort to such extrinsic facts, the court may obtain information from any authentic source. As was said by Mr. Justice Malone in *Gardner vs. Collector*, 'from any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer.' Always seeking, first, that which in its nature is most appropriate unless the positive law has enacted a different rule. It is proper to consider the origin and history of the law, the prior condition of the law and the general policy and course of legislation. There are few guides to construction more useful than that which directs attention to the prior condition of the law to aid in determining the full legislative meaning of any statutory change thereof. The legislative department is supposed to have a consistent design and policy and to intend nothing inconsistent or incongruous. The mischief intended to be removed or suppressed or the cause or necessity of any kind which induced the enactment of a law, are important factors to be considered in its construction. The purpose for which the law was enacted is a matter of prime importance in arriving at a correct interpretation of its terms."

Now, applying this last test to the Act of 1907, we are justified in looking to the status of the law, the history of the times, the evil sought to be prohibited. It is known of all men that a few years prior to the Act of 1907 that oil was discovered at Beaumont and in the vicinity in fabulous quantities. Gushers came forth with such spontaneity and furnished such an output of oil and gas that it astonished and attracted the civilized world. People flocked into that community from every quarter of the United States and also from Europe and all over Texas, especially, there was a fever of excitement and a species of speculative insanity seems to have fallen upon the people and the times. All character of grafting and swindling schemes were concocted by the get-rich-quick crowd that floated into Texas upon that wave of excitement. Stocks were sold in Texas corporations all over the United States, and many an unsuspecting victim parted readily and easily with his money. The history of the times are but faintly outlined in the above statement. The condition of the law was such that it permitted all this to happen. It permitted our people to be fleeced. It made it possible for unscrupulous men under a plausible and pleasing pretext of legality to issue stock and swindle the public. This was the state of the law. The Act of 1907 in question was with reference to this condition of affairs and to remedy this unbearable evil. The truth is, it was directed primarily at just such corporations as were authorized to exist under the Act of 1899 as well as other oil companies that could be chartered under any other provision of the statute then in existence. Applying this last test and rule of construction, we are driven to conclude that it was intended by the Act of 1907 to require all oil companies, whether

chartered under the Act of 1899 or otherwise, to subscribe the full amount of any increase of capital proposed in an amendment and to pay fifty per cent thereof.

We therefore conclude, and give it to you as the opinion of this Department, that all amendments increasing the authorized capital stock of corporations formed under the Act of 1899, made after the passage of the Act of 1907, where the full amount of the increase was not subscribed and fifty per cent thereof not paid, were unlawful, and that such amendments should not have been filed.

Yours truly,
B. F. LOONEY,
Attorney General.

CORPORATIONS—TRUST COMPANIES—STOCKS AND BONDS—CONSTRUCTION OF LAWS.

(1) The bonds that a trust company may guarantee the performance of are bonds that are given by individuals or corporations which are to insure the faithful performance of some duty or some act or series of acts.

(2) A trust company is not permitted to loan more than fifty per cent of its securities upon real estate, and shall not make a loan on real estate of an amount greater than fifty per cent of the reasonable cash value thereof.

(3) A corporation organized under the trust company section of our banking laws has no authority under its charter to guarantee the payment of bonds issued by another corporation, etc.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, APRIL 8, 1913.

Hon. B. L. Gill, Commissioner Insurance and Banking, Capitol.

DEAR SIR: In your favor of the 4th inst. you state:

"This Department is advised that the Guaranty Trust and Banking Company, of El Paso, Texas, now in process of liquidation, did, during the time it engaged in business, guarantee for a stipulated compensation the payment of some \$31,000 in bonds for two certain Delaware corporations, such bonds running over a long period of years. The said trust company referred to was incorporated under the banking laws of this State with all the privileges of a trust company. I desire to propound the question to you whether or not a trust company incorporated under the trust company section of the banking laws has authority under its charter to guarantee the payment of an issue of bonds issued by another corporation, such bonds not having been purchased by such trust company, but sold by the original issuing corporation, the trust company merely guaranteeing their ultimate payment or the payment of interest thereon without purchasing or selling such issue of bonds."

The answer to your question will be found in the proper construction of Subdivisions 9 and 11 of Article 385, Revised Civil Statutes of 1911. This article sets out the powers of bank and trust companies such as the trust company in question, and is as follows:

"Article 385. Corporations may be created under Articles 380 and 381 for the purpose of establishing a bank of deposit or discount, or both of deposit and discount, with the powers set out in Article 376, and any one or more of the following purposes:"

There then follows eight subdivisions, neither of which is pertinent to this inquiry, the ninth reading as follows:

"To purchase, invest in, guarantee and sell stocks, bills of exchange, bonds and mortgages and other securities; and when moneys, or securities for moneys, are borrowed or received on deposit, or for investment, the bonds or obligation of the company may be given therefor, but it shall have no right to issue bills to circulate as money."

Subdivision 11 of this article reads as follows:

"To guarantee the fidelity and diligent performance of their duty by persons or corporations holding places of private or public profit or trust, in all cases where individual bonds are not required by law, to guarantee or become surety on any bond given by any person or corporation, and to reinsure or guarantee any person or corporation against loss or damage by reason of any risk assumed by insuring the fidelity or the diligent performance of duty of any such person or corporation, or by guaranteeing or becoming surety on any bond; provided, this act shall never be construed as authorizing the granting of a trust not lawful as between individuals."

We regret that the crowded condition of this office precludes a more thorough examination of this question than we have been able to give it, but we do not hesitate to express the opinion that the statute in question does not authorize a trust company such as is mentioned in your letter to guarantee, for a stipulated compensation, the payment of bonds issued by other corporations unless the bonds have been purchased by the trust company and belong to the trust company under the authority given it to own and invest in such class of property as is intended in Subdivision 9 of the statute above quoted. The language "to purchase, invest in, guarantee and sell stocks, bills of exchange, bonds and mortgages and other securities," when construed in connection with all the provisions of the banking law, evidently means that the trust company is only permitted to make itself liable on a guaranty of the stocks or bonds of other corporations when it shall have purchased or invested in the same as it is authorized to do under Section 9.

The authority given it under Subdivision 11, quoted above, is to guarantee or to become surety on any bond given by any person or corporation and to reinsure or guarantee any person or corporation against loss or damage by reason of any risk assumed by insuring the fidelity or the diligent performance of duty of any person or corporation by guaranteeing or becoming surety on any bond. This is a species of insurance business and in no sense connected with the business of guaranteeing the payment of obligations of other corporations. The bonds that a trust company may guarantee the performance of are bonds that are given by individuals or corporations, which are to insure the faithful performance of some duty or some act or series of acts. If a trust company is permitted for a consideration paid to guarantee the stocks and bonds of other corporations, it may easily jeopardize its entire capital in one transaction, because with reference to this subject there is no provision of the law limiting the amount of such an obligation, if it is permitted to assume such; whereas we find in other provisions of the law that a trust company is not permitted to loan

more than fifty per cent of its securities upon real estate, and shall not make a loan on real estate of an amount greater than fifty per centum of the reasonable cash value thereof. (Art. 376.) And is also prohibited from loaning to any individual, corporation or company, directly or indirectly, or permit any individual, corporation or company to become at any time indebted or liable to it in a sum exceeding 25 per cent of its capital stock actually paid in, or permit a line of loans or credit to any greater amount to any individual or corporation. (Art. 539.)

We are therefore constrained to the opinion, and so advise you, that a corporation organized under the trust company section of our banking laws has no authority under its charter to guarantee the payment of bonds issued by another corporation, such bonds never having been purchased by such guaranteeing company.

Yours truly,

B. F. LOONEY,
Attorney General.

CORPORATIONS—BLUE SKY LAW.

1. (a) The Blue Sky Law does not apply to the sale of stock by corporations which had been chartered prior to the date the law went into effect, in so far as their original stock is concerned.

(b) It does not apply to the increased capital stock of corporations chartered prior to the time the law went into effect, where such increase took place prior to the taking effect of this act of the Legislature.

2. (a) The following classes of corporations are exempt from the provisions of the Blue Sky Law: "All corporations, or the promoters thereof, which do not directly or indirectly agree to pay any commission, promotion or organization fees incident to the sale of its stock, unless such corporations are mining, oil, gas or townsite corporations. In the case of the last named character of corporations the provisions of the law apply, regardless of the question of the payment of promotion or other fees incident to the organization."

(b) The terms of the act do not apply to any national bank nor to any corporation having a charter granted under any act of Congress, nor to any State bank or trust company organized under the laws of this State, nor to any corporation organized under the Federal Reclamation Act, nor does the act apply to any corporation or its promoters where such corporation organized under the laws of this State does not sell or contract to sell its stock to more than twenty-five bona fide purchasers; provided, such corporation does not act as agent or trustee, holding or sales company, in the promotion of any concern included within the terms of the act. This exemption applies to mining, oil, gas and townsite corporations the same as it does to other corporations.

(c) The act does not apply to any railroad corporation, interurban nor street railway.

(d) It does not apply to the sale of stock of the corporation by a bona fide owner of the same, who in good faith bought the same and is not acting, directly or indirectly, as a promoter or agent of the corporation.

(e) Nor does the act apply to a bona fide stock or stock broker in the sale of stock, which stock has been theretofore issued and sold, bona fide, to some purchaser, provided, however, that such purchaser or broker is not acting, directly or indirectly, as promoter of the corporation.

3. (a) The Blue Sky Law applies to townsite, mining, oil and gas corporations incorporated under the laws of this State where its increased capital stock is paid out of the surplus earnings of the corporation; provided, how-

ever, that the purpose of the increase is to sell the stock based on its increased capital.

(b) But where the increased capital is paid in by the existing stockholders and the stock is issued directly to them, or where the stock is issued against the surplus earnings of the company in the nature of a stock dividend, then such acts do not come under the provisions of the law.

(c) Any act of the corporation which does not amount to a sale of stock by it or by promoters for it, is not subject to the law.

4. Certain portions of Section 3 of the act are unconstitutional and should be disregarded.

5. If a foreign corporation had secured its charter and was in all things duly incorporated prior to the enactment of the Blue Sky Law, then the sale of its original capital stock would not come within the terms and provisions of Blue Sky Law.

6. (a) Promotion fees, commission, organization fees, and other incidental expenses incurred prior to the chartering of the corporation, can not be paid out of the capital stock of the corporation taken at its par value, and such fees must be collected from the purchasers of stock in addition to par value of the stock.

(b) Attorney's fees, charter fees, franchise taxes, permit fees and expenditures for stationery and supplies may be paid out of the capital stock taken at its par value.

(c) A promoter is one who actively engages in the financing and organization of an enterprise under the corporate form, and may be defined as a person to bring about the incorporation and organization of corporations.

(d) The constitutional provision providing that corporations can only issue stock for money paid, labor done or property actually received, means money paid to the corporation, labor done for the corporation and property actually received by the corporation.

(e) The word "property," as used in the Constitution, means something substantial and capable of being made an asset of the corporation, which might respond in law to the claims of creditors.

(f) The term "money paid" is definite and plain. It does not mean that the stock may be sold for money to be paid, but must be sold for cash. Of course, the payments may be paid in installments, but the stock must be paid for in money.

(g) The property which may be received by a corporation in payment of stock must be such property as the corporation has authority under its charter to take and hold; if the property is not such as is necessary or proper for the the conduct of the corporation's business, then it could not issue stock therefor.

(h) The labor performed by a promoter or stock salesman is not labor performed for the corporation and can not be paid for out of the capital stock of the corporation, and if paid by the corporation, must be paid out of a sum of money collected for such purpose in addition to the par value of the capital stock.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 10, 1914.

Hon. F. C. Weinert, Secretary of State, Capitol.

DEAR SIR: This Department has from time to time rendered you various opinions construing what is known as the Blue Sky Law. You have stated to us that you desired to publish the holding heretofore made in regard to this measure in a pamphlet with the forms prepared by this Department for your use and have requested that the several holdings heretofore made by us be placed in one opinion for the convenience of your Department and of those who might have occasion to consider the rulings of this Department on the questions in issue. This opinion is now written for the purpose stated.

The subject of this discussion is what is known as the Blue Sky Law,

being Chapter 32, Acts of the First Called Session of the Thirty-third Legislature. This measure was approved by the Governor on August 21, 1913, and became a law ninety days after the adjournment of the Legislature, which adjournment took place on August 19, 1913. The law therefore became effective on the 18th day of November, 1913.

1.

The first question for consideration is: Does the Blue Sky Law apply to the sale of stock by corporations which had been chartered prior to the date the law went into effect, as to their original issue of capital stock, and does it apply to the increased capital stock of corporations where such increase took place prior to the taking effect of this act of the Legislature?

We answer this question in the negative and say that the law does not apply to such corporations. This is apparent from a consideration of the context of the act. For example, Section 1 of the act provides in substance that every private corporation attempting at the time the act takes effect or which might thereafter attempt to increase its capital stock, and every proposed corporation attempting to be organized when the act takes effect or thereafter, must comply with the provisions of the act, provided, of course, such corporations do not come within the exceptions named in the act.

Section 3, of the act, also makes it clear that the provisions of the act apply only to increases of capital stock of existing corporations made after the act takes effect and to corporations chartered after the act takes effect, for it provides in substance the following:

"Before offering for sale or contracting to sell, directly or indirectly, any stock of such proposed corporation, or such increased stock of any existing corporation, etc."

A part of Section 4 also reads to the same conclusion:

"Provided, that where any proposed corporation has already sold stock, or a part thereof, or any part thereof has been subscribed at the time this act shall take effect, this act shall not affect stock previously sold or subscribed nor any contracts made in reference to same."

If, however, the context of the act should give rise to any doubt as to this issue, the caption of the act settles the question of construction. The caption reads as follows:

"An Act to regulate and supervise the sale and purchase, in this State, of stocks of private, foreign and domestic corporations organized for profit, which propose to increase their capital stock; and to regulate and supervise the sale and purchase, in this State, of stocks of private, foreign and domestic corporations being organized and hereafter organized or proposed to be organized, for profit; and to regulate and supervise the offering or contracting for sale and purchase of such stock of such corporation or proposed corporation, and to fix commission and promotion fees allowed to be charged; and providing for service of process, examination fees, and exempting certain corporations from the effect of this act; providing penalty for the violation of the provisions of this act, and declaring an emergency."

It is a well recognized rule of construction that the caption of the act is one of the proper sources to which we may look in determining the meaning and intent of the act.

State v. Delestineer, 7 Texas, 76.

Byrnes v. Sampson, 7 Texas, 79.

Walraven v. Farmers, etc., Nat'l Bank, 96 Texas, 331.

Texas-Mexican Ry. Co. v. Jarvis, 60 Texas, 527.

This construction is also consistent with the due regard for the vested rights of existing corporations. If we should hold that the provisions of this act apply to the increased capital stock of corporations where the increase had been made under provisions of law prior to the taking effect of the act, then we should meet with serious constitutional objections to the act; because such increase of capital would have been made under existing law and the right of the corporation to dispose of this stock in the manner then provided by statute would be a vested right, which could not be interfered with by the Legislature even under the provisions of our law which reserved to the State the right to alter or amend the charters of corporations or the laws governing the same. In other words, the limitations placed by this act on the right of a corporation to sell its stock, the manner of its sale and the method of its contracting with parties for the sale of the same are not the regulation of an existing right, but in many respects the destruction of an existing right, and are such character of regulation as to substantially impair the rights of a corporation whose stock was issued under the old law or whose capital or increased capital was provided for under the old law. The rule is stated thus by Judge Cooley in his great work on Constitutional Limitations:

"The maxim, *Sic utere tue ut alienum non laedae*, is that which lies at the foundation of the power; and to whatever enactment affecting the management and business of private corporations it can not fairly be applied, the power itself will not extend. It has accordingly been held that where a corporation was chartered with the right to take toll from passengers over their road, a subsequent statute authorizing a certain class of persons to go toll free was void. This was not a regulation of existing rights, but it took from the corporations that which they before possessed, namely, the right to tolls, and conferred upon individuals that which before they had not, namely, the privileges to pass over the road free of toll. 'Powers,' it is said in another case, 'which can only be justified on this specific ground (that they are police regulations), and which would otherwise be clearly prohibited by the Constitution, can be such only as are so clearly necessary to the safety, comfort, and well-being of society, or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the Constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it.' And it was therefore held that an act subsequent to the charter of a plank-road company, and not assented to by the incorporators, which subjected them to a total forfeiture of their franchises for that which by the charter was cause for partial forfeiture only, was void as impairing the obligation of contracts. And even a provision in a corporate charter, empowering the Legislature to alter, modify, or repeal it would not authorize a subsequent act which, on pretense of amendment, or of a police regulation, would have the effect to appropriate a portion of the corporate property to the public use. And where by its charter the corporation was empowered to construct over a river a certain bridge, which must necessarily constitute an

obstruction to the navigation of the river, a subsequent amendment making the corporation liable for such obstruction was held void, as in effect depriving the corporation of the very right which the charter assured to it. So where the charter reserved to the Legislature the right of modification after the corporators had been reimbursed their expenses in constructing the bridge, with twelve per cent interest thereon, an amendment before such reimbursement, requiring the construction of a fifty-foot draw for the passage of vessels, in place of one of thirty-two feet, was held unconstitutional and void." (Cooley's Constitutional Limitations, pages 710 to 712.)

So we suggest that if any construction other than that which we give this law should be given it, then serious constitutional objections are met with, and we believe that it is proper for us to give the act a construction which will make it in this respect constitutional. The general rule is that a statute should not be held invalid if it can be so construed, considering all its provisions, as to make it a valid one, and a construction which would render the statute unconstitutional will not be adopted where a constitutional purpose can fairly be derived from its terms.

Brown vs. City of Galveston, 97 Texas, 1.

Robinson vs. Varnell, 16 Texas, 382.

G. H. & S. A. Ry. Co. vs. State, 93 S. W. 464.

Runge & Co. vs. Wyatt, 27 Texas Supp., 291.

Womack vs. Womack, 17 Texas, 1.

Madden v. Hardy, 93 Texas, 613.

So on the whole we conclude, and so advise you, that the Blue Sky Law does not apply to the increased capital stock of corporations where such increase was made prior to the time the act took effect, and that it does not apply to the capital stock of corporations which were incorporated prior to the time the act took effect. Of course, the act will apply to all increases of capital stock made after the act took effect, whether such corporations were incorporated prior to that time or since that time, provided, of course, the corporations are not within the exceptions specified in the act.

2.

(a) You are advised that the following classes of corporations are exempt from the provisions of this act: All corporations, or the promoters thereof, which do not directly or indirectly agree to pay any commission, promotion, organization or other fees or expenses incident to the sale of its stock, unless, of course, such corporations are mining, oil, gas or townsite corporations; in the event a corporation is a mining, oil, gas or townsite corporation, then the provisions of the act apply regardless of whether or not a promotion fee or other fee incident to the sale of the stock is charged.

(b) The terms of the act do not apply to any national bank nor to any corporation having a charter granted under any act of Congress or of the United States, nor to any State bank or bank and trust company or to any trust company organized under the laws of this State, nor to any corporation organized under the Federal Reclamation Act approved June 17, 1902, or the regulations established by the Secretary of the Interior in pursuance thereof. Nor do the terms of the act apply to any

corporation or the promoters of any corporation organized under the laws of Texas which does not sell or contract to sell its stock to more than twenty-five *bona fide* purchasers, provided, of course, such corporation does not act as agent or trustee, holding company or sales company in the promotion of any concern which is included under the terms of this act.

This exemption applies to mining, oil, gas and townsite corporations the same as it does to other corporations.

(c) The act does not apply to any railroad or railway corporation or interurban railroad or railway company or to any street railroad or railway company.

(d) Nor does the act apply to the sale of stock of the corporation by a *bona fide* owner of the same who in good faith bought the same and who in the purchase and sale of the same is not acting directly or indirectly as a promoter or agent of such corporation; and,

(e) Nor does the act apply to a *bona fide* stock or stock broker in the sale of stock, which stock has been by such corporation sold and issued to a *bona fide* purchaser prior to the offering of same for sale by such broker; provided, of course, that such purchaser or broker was not acting, directly or indirectly, as promoter of such corporation.

3.

Among other questions propounded by you is the following :

“Does Chapter 32, Acts of the First Called Session of the Thirty-third Legislature, apply to townsite, mining, oil and gas corporations incorporated under the laws of this State where all of the increase is paid in cash or paid out of the surplus earnings of the corporation?”

We answer this question and state that where the purpose of the corporation is to sell the stock based upon its increased capital, then that such corporation comes under the terms and provisions of the law regardless of whether or not the increased capital was paid in cash or whether the stock is issued against the surplus earnings of the corporation, but where the increased capital is paid in by the existing stockholders and stock is issued directly to them, or where the stock is issued against the surplus earnings of the company in the nature of a stock dividend and no promotion fee of any kind is charged, then the corporation in that matter does not come under the provisions of the law; the reason being that no sale of the stock is made and the purpose of the act is to regulate, as stated in the caption, “the sale and purchase in this State of stocks, etc.”

Any act of the corporation which does not amount to a sale of stock by it or by promoters for it would not be subject to the provisions of the law, except, of course, where such act is material to the sale of the stock, when it might or might not come under the provisions of the law, depending on the nature and quality of the act.

4.

We now direct your attention to a portion of Section 3 of this act, which is wholly void and of no effect, and should be disregarded by you. This part of the section is as follows:

"No corporation proposed to be organized for the purpose of buying or selling town sites and town lots shall hereafter be granted a charter by the Secretary of State, or if a foreign corporation, shall not be granted a permit to do business in the State of Texas unless the incorporators of said proposed corporation or officer of such foreign corporation shall file with the Secretary of State each and every document, contract and all papers referred to in Section 3 of this act, as well as a general statement of the plan of its proposed town site, and a general statement of its methods of advertising same, together with a sample copy of its advertising literature, and no charter shall be granted any corporation unless after the compliance with the provisions of this act and in the judgment of the Secretary of State such business of any proposed townsite corporation will be honestly and fairly conducted both to the corporation and to the public. And each and every corporation in this State now existing or hereafter organized desiring to engage in the sale of townsite lots or sites shall, prior to such sale, file with the Secretary of State a general plan of said proposed lots to be sold, as well as a copy of any and all proposed contracts to be made with the public in the sale thereof, and a general statement of the literature proposed to be issued, and all matter referred to in Section 3 hereof, and if in the judgment of the Secretary of State said sale will be conducted both honestly and fairly to the corporation and to the public, a permit to conduct said sale shall be granted. This provision shall not be construed to authorize the creation of any corporation for any purpose not now authorized by the laws of this State."

It will be noted from a reading of the foregoing excerpt from the act that it relates wholly and solely to the incorporation of townsite corporations and the conduct of the business of townsite companies in the sale of town lots. In other words, it requires certain conditions of townsite companies before they may be incorporated, and requires them to obtain a permit on certain conditions before they may be permitted to sell their lots. This subject is one entirely foreign to the general purposes of the bill and has no relations to the sale and purchase of stocks. We do not know the history of its incorporation in the provisions of this measure, but it is very clear that the subject of the provision quoted above is not embraced within the caption of the act and such omission to place it in the caption is fatal to the provision.

We direct your attention to Section 35, Article 3, of our Constitution, which provides:

"No bill (except general appropriation bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated) shall contain more than one subject, which shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

We have already quoted the caption or title of this act, and it is not necessary here to restate the same, but the title of the act has to do only with the supervision of the purchase and sale of stocks and in no part of the same makes any reference to imposing terms upon which townsite companies may be incorporated or imposing terms under which town-

site companies may be permitted to sell their town lots. The title in substance is:

"An act to regulate and supervise the sale and purchase in this State of stocks of private, foreign and domestic corporations and to regulate and supervise the sale and purchase, in this State, of stocks of private, foreign and domestic corporations being organized," etc.

There is absolutely nothing in the title to the act indicating any intention to pass a law regulating the incorporation of town-site companies or the sale of town lots. Therefore, so much of the act as we have just quoted above, relative to incorporating town-site companies and the sale and obtaining permits to sell town lots by such companies, is unconstitutional, void, of no effect and should be disregarded by you.

Article 3, Section 35, of the Constitution.

M., K. & T. Ry. Co. vs. The State, 102 Texas, 155.

Clark vs. Commissioners, 54 Kansas, 634.

Henderson vs. Insurance Co., 20 L. R. A., 829.

State vs. Co. Comm., 47 Neb., 428.

In the case of the M., K. & T. Ry. Co. vs. State, cited above, the caption of the bill defined it to be: "An Act to protect the rights and property of the traveling public and the employees of the railroads in the State of Texas." The first and second sections of the act made it unlawful for railroad companies to run any passenger train, freight train, or light engine*outside of the yard limits with less than the full crews of the number of men specified for each. The Supreme Court of this State held that the caption was wholly insufficient and that it did not express the subject of the act. In passing upon the question, the court said:

"Is that subject expressed in the title? We think it clear it is not. The title no more expresses and directs attention to that subject than it would to any other legislation which might have been written under it, the tendency of which might have been to protect the lives and property of the traveling public and of railroad employes, such as laws directed against robbers, the obstruction of or injury to tracks, interference with cars and engines, or regulating the conduct of persons at crossings, or the giving of signals, and numerous others that might be instanced. A title so general as that of this act gives no intimation of the particular subject to which the body of the act is confined. That which is expressed in the title is not the subject of the act, but the general end of purpose to be subserved. * * * The title must not only express a subject, but must express that which is dealt with in the body of the act. No authority but the plain language of the Constitution is needed for that purpose."

The evident purpose of the Constitution in requiring that the subject should be stated in the bill and that there should not be two purposes in any one bill, was to prevent (a) hodge-podge or log-rolling legislation; (b) to prevent surprise or fraud upon the Legislature by means of provisions in bills, of which the titles give no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted and (c) to fairly apprise the people through such publication of legislation as is usually made of the subjects of legislation that are being considered, in order that they may have an opportunity of being heard by

petition or otherwise, if they shall desire. (Cooley on Constitutional Limitations, p. 172.)

Concerning this matter Judge Cooley has said:

"1. *The Evils Designed to Be Remedied.*—The Constitution of New Jersey refers to these as 'the improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other.' In the language of the Supreme Court of Louisiana, speaking of the former practice: 'The title of an act often afforded no clue to its contents. Important general principles were found placed in acts private or local in their operation; provisions concerning matters of practice or judicial proceedings were sometimes included in the same statute with matters entirely foreign to them, the result of which was that on many important subjects the statute law had become almost unintelligible, as they whose duty it has been to examine or act under it can well testify. To prevent any further accumulation to this chaotic mass was the object of the constitutional provision under consideration.' The Supreme Court of Michigan say: 'The history and purpose of this constitutional provision are too well understood to require any elucidation at our hands. The practice of bringing together into one bill subjects divers in their nature and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislator and dangerous to the State. It was scarcely more so, however, than another practice, also intended to be remedied by this provision, by which, through dexterous management, clauses were inserted in bills of which the titles gave no intimation, and their passage secured through legislative bodies whose members were not generally aware of their intention and effect. There was no design by this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number; but the framers of the Constitution meant to put an end to legislation of the vicious character referred to, which was little less than a fraud upon the public, and to require that in every case the proposed measure should stand upon its own merits, and that the Legislature should be fairly satisfied of its design when required to pass upon it.' The Court of Appeals of New York declare the object of this provision to be 'that neither the members of the Legislature nor the people should be misled by the title.' The Supreme Court of Iowa say: 'The intent of this provision of the Constitution was, to prevent the union, in the same act, of incongruous matters, and of objects having no connection, no relation. And with this it was designed to prevent surprise in legislation, by having matter of one nature embraced in a bill whose title expressed another.' And similar expressions will be found in many other reported cases. It may therefore be assumed as settled that the purpose of these provisions was: First, to prevent hodge-podge or 'log-rolling' legislation; second, to prevent surprise or fraud upon the Legislature by means of provisions in bills of which the title gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and, third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire."

However, the mere fact that that portion of the act just above quoted by us is unconstitutional does not necessarily render the act void, for the reason that the Constitution itself has provided against just such a contingency, for the constitutional provision referred to contains this clause:

"But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

In holding that portion of the act quoted and here under consideration unconstitutional and void we have given this act the most considerate and tenderest construction which we could give it. If we were to hold that the portion of the act quoted was embraced within the caption, then very clearly the caption would contain two subjects and would be in violation of the Constitution and the whole act rendered void.

82 Texas, 496.

San Antonio vs. Gould, 34 Texas, 49.

State vs. McCracken, 42 Texas, 383.

We have preferred, therefore, to give the act a construction which, if possible, will render it constitutional by eliminating from the act the unconstitutional and void provision referred to and quoted. We have heretofore cited authorities showing that this is a correct rule of construction. It is also one generally recognized by the courts of the country. (Cooley's Constitutional Lim., p. 177.)

5.

The next question for consideration is that suggested in your letter of December 24th and answered in our departmental opinion No. 1079, which question was whether or not the Blue Sky Law would apply to the sale of stock made in this State under a contract with a foreign corporation, where the contract was made prior to the enactment of the Blue Sky Law.

In reply to this inquiry, we beg to advise you that if the foreign corporation referred to had secured its charter and was in all things duly incorporated prior to the enactment of the Blue Sky Law, then the sale of its stock would not come within the terms and provisions of the Blue Sky Law; in other words, the opinion heretofore rendered you is as applicable to foreign corporations as it is to domestic corporations. It is unnecessary for us to enter into a detailed discussion to support the view here expressed, but we call your attention to the caption of the Blue Sky Law. That part to which we direct your attention reads as follows:

"An act to regulate and supervise the sale and purchase, in this State, of stocks of private, foreign and domestic corporations organized for profit, which propose to increase their capital stock; and to regulate and supervise the sale and purchase, in this State, of stocks of private, foreign and domestic corporations being organized or hereafter organized or proposed to be organized, for profit; * * *"

You will note from the foregoing that the caption covers three classes of corporations or proposed corporations:

(1) Foreign and domestic corporations already chartered but which propose to *increase their capital stock*.

(2) Proposed domestic or foreign corporations being organized but which have not received their charters; and,

(3) Proposed corporations; that is, corporations which may be proposed to be organized after the Blue Sky Law goes into effect.

Section 1 of the act is not quite so definite as the caption and embraces the two classes named above in one provision, that is, it classifies them as proposed corporations. That part of Section 1, to which it is necessary to refer, reads as follows:

"Every private corporation, foreign or domestic, organized for profit, which is now attempting or shall hereafter attempt to increase its capital stock, and every proposed corporation attempted to be organized," etc. * * *

It is very clear, therefore, from the caption and the first section of the act that it does not apply to the sale of the original stock of either a domestic or foreign corporation where such corporation was chartered before the Blue Sky Law went into effect. However, if such domestic or foreign corporation had not been fully chartered, that is to say, if it was merely in a process of promotion, or had merely secured a permit to organize a corporation, as is necessary in some of the States, then the Blue Sky Law would apply to the sale of its stock in Texas, except to that portion of the stock which had already been sold or which had been contracted to be sold prior to the enactment of the Blue Sky Law. The exception is embraced within Section 4 of the Blue Sky Law and is, in part, as follows:

"Provided, that where any proposed corporation has already sold its stock, or a part thereof, or any part thereof has been subscribed at the time this act shall take effect, this act shall not affect stock previously sold or subscribed nor any contracts made with reference to same; but if any of the stock of said proposed corporation remains unsold or unsubscribed, said corporation shall, nevertheless, be entitled to a permit upon complying with the other conditions of this act, including the future sale or subscription of any of its stock."
* * *

This, of course, means that if the stock in a proposed corporation is sold or subscribed for previous to the enactment of the Blue Sky Law, then such law should not apply to so much of the stock as was subscribed or sold, but that the Blue Sky Law did, as to such proposed corporation, apply to all unsubscribed or unsold stock at the time the Blue Sky Law went into effect.

It is not very clear from the letter, attached to your communication, whether or not the corporation to which he refers had already been chartered at the time the Blue Sky Law went into effect. If it had been chartered and the corporation stock referred to was the original capital stock of the corporation, then, of course, the sale of that stock would not be under the Blue Sky Law; but if the corporation had not been chartered but was merely in the process of organization, then the Blue Sky Law would apply. In such case, the mere fact that a contract had been made to sell the stock of such proposed corporation prior to the enactment of the Blue Sky Law would be immaterial, as such contract would subordinate the right of the State to regulate the sale of stocks within its boundaries. This question would probably be presented if the corporation was already chartered and was offering for sale its capital stock, and it is probable that the purpose of the Legislature in writing the law as written was to keep this suggested question from arising.

6.

The next question for consideration is whether or not promotion fees, commissions, organization fees, and other incidental expenses incurred prior to the chartering of the corporation may be paid out of the capital stock of the corporation, or must such fees be paid out of the par value of the capital stock of the corporation.

The answer to this question involves an examination into two other questions:

(a) The nature of the services rendered by the promoter, stock salesman, or other person bringing into existence the corporation or selling its stock; (b) The constitutional and statutory method of paying in the capital stock of corporations chartered under the laws of Texas.

We will consider the questions in the order named.

Section 1, Chapter 32, General Laws of the First Called Session of the Thirty-third Legislature, appears to divide the pre-corporate expenses of a corporation into two general classes. The first class consists of those expenditures designated as "any commission, promotion or organization fee or other expenses incident, directly or indirectly, to the sale of its shares of stock," and the second class is composed of "attorney's fees, charter fees, franchise tax, permit fees, and stationery and supplies."

It is only those corporations in a general way which are brought into existence by incurring the first class expenditures that come within the terms of the Blue Sky Law. Section 2 of the act designates certain corporations which come within the law, however, regardless of the question of incurring the expenses mentioned in the first class designated, but, it is not necessary in this paragraph of this opinion to discuss these exceptions. The second class of expenses it will appear may be incurred by the corporation, or assumed by it, after its organization, without bringing the corporation within the terms of the Blue Sky Law. For the purpose of convenience we will designate all the various expenditures referred to in the first class as taken from Section 1 of the act as promotion fees; that is, for the purpose of this opinion, we describe commissions, promotion fees, organization fees, and other expenses incident, directly or indirectly, to the sale of shares of corporate stock as promotion fees.

A promoter is one who actively engages in the financing and organization of an enterprise under the corporate form; promoters have been defined by an eminent authority as persons who bring about the incorporation and organization of corporations.

Conyngton on Corporate Organization, Sec. 225.

Cook on Corporations, Sec. 650.

Dickerman vs. Northern Trust Co., 176 U. S., 203.

Thompson on Corporations, Sec. 415.

It may be stated, therefore, that the purpose of the promoter is to bring into existence a corporation, but the contracts made by him in carrying into effect this purpose are not contracts with the corporation,

but only contracts between the promoter and the incorporators, or between the incorporators themselves. The corporation must have a full and complete organization and existence as a legal entity before it can enter into any kind of contract or transact any business. The doctrine which obtains generally in the United States and which has been adopted in Texas is, that engagement of promoters do not bind the future corporation, unless the corporation, expressly or impliedly, ratifies them. The corporation may after its creation, of course, ratify agreements which are within its corporate powers, but the contract of the promoter himself is not the contract of the corporation, and therefore the services rendered by him are not services for the corporation.

Thompson on Corporations, Sec. 480.

W. M. W. & N. W. Ry. Co. v. Granger, 86 Texas, p. 352, et seq.

Conyngton on Corporate Organization, Sec. 229.

The Granger case, supra, defines the status of a promoter and the rights of those contracting with him in line with the propositions just made by us, and is altogether a very clear and convincing opinion written by Judge Gaines while he was Associate Justice of the Supreme Court of this State. In the opinion referred to the rule is stated as follows:

"It is generally held that, in the absence of such provision in the act of incorporation in case of a special charter, or in the general law or in the articles of incorporation under a general law, no implied promise can be imputed to a corporation to pay for the services of a corporator or promoter before the corporation comes into existence. A contract made by promoters may be adopted by a corporation, expressly or impliedly, by exercising rights under it; but otherwise it is not binding upon such corporation." (86 Texas, 356.)

In its opinion the court held also that services given by an attorney in preparation of the articles of incorporation which are usually necessary services, if made under a contract with the promoter, could not be collected from the corporation after it was chartered, unless the corporation after it came into existence agreed to pay the same. The court said:

"Such services are usually necessary, and it would seem that the corporation should pay for them. Such payment is frequently provided for in the act of incorporation, or in the articles when the incorporation is effected under a general law. When such is the case, persons who take stock in the company are chargeable with notice that a liability for this purpose has already been created, and it is proper for the corporation to discharge it. *But in the absence of such provision in the statute or in the articles, it may be unjust to shareholders to charge the corporation with liabilities of which they had no actual knowledge at the time they accepted the shares. We therefore hold, with some hesitation, that claims for the necessary expenses of the organization, under our statute, should not be excepted from the general rule applicable to contracts made before the corporation has come into legal existence.*" (86 Texas, 357.)

It would appear, therefore, to be a settled law of this State that the expenditures heretofore referred to as class one, described in Section 1, of Chapter 32, supra, and even the attorney's fees in class two, described in said section, when such expenditures are incurred or authorized by

the promoters, or in the promotion of the corporation, are not in any sense the liabilities of the corporation, unless adopted by the corporation after it is chartered, and that in all probability they could not be adopted by the corporation over the protest of its stockholders, unless the subscription contracts contained a clause showing the subscribers that such expenditures would be adopted by the corporation with its liabilities after the charter is issued. The entire trend of authority would show, which is the proposition we here submit, that services rendered prior to the time the charter is granted are services which are rendered to the incorporators themselves and not to the corporation as such, and that therefore all labor done or money expended in this direction is not necessarily labor done for the corporation nor money expended for it. It is true that there are certain expenses, such as attorney's fees, charter fees, franchise tax, permit fees, stationery and supplies, which are those expenditures referred to by us as class two of Section 1 of the act, which are in reality for the corporation and may be adopted by it, but the expenditures referred to as class one of Section 1, of the act, are not expenditures necessarily for the corporation.

(b) We will next consider the constitutional and statutory method of paying in the capital stock of corporations chartered under the laws of this State.

The Constitution of this State in Article 12, Section 6, provides:

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

Analyzed, this section of the Constitution means that the corporation can not issue its stock except for: (1) Money paid to the corporation; (2) Labor done for the corporation; (3) Property actually received by the corporation. The courts have held that the money paid to the corporation must not be less than the par value of the stock and that where paid up stock of a corporation has been issued to subscribers for double the amount of their subscription, they are liable for the unpaid part of their stock if debts were contracted by the corporation before they transferred the stock.

Nenny vs. Waddill, 25 S. W. 308.

Mathis vs. Pridham, 20 S. W. 1015.

Thompson on Corporations, Secs. 1652, 1653, 1578, 1579, 1582, 1583, 1685.

The term "paid up nonassessable stock" can only mean stock that is made nonassessable by reason of the fact that the amount for which it calls has been fully paid.

Street Railway Co. v. Adams, 87 Texas, 130.

The word "property," as used in the Constitution, must be something substantial; the terms in which this section of the Constitution referred to is expressed show that it was intended that the assets of the corporation should be something substantial and of such a character that they could be subjected for the payment of claims against the cor-

poration, as well as to secure the shareholders in their rights in the capital stock.

O'Bear-Nester Glass Co. v. Antiexplo Co., 101 Texas, 431.

The term "money paid" is very definite and plain and does not mean that stock can be sold for money to be paid, but must be sold for cash. Of course, it can be paid for in installments, but it must be paid for in money, or in property actually received *or by labor actually performed* for the company.

San Antonio Irrigation Co. v. Deutschmann, 102 Texas, 201.

It is obvious also that the property which the corporation is authorized to receive in payment of its stock must be such property as the corporation has authority under its charter to take and hold. If the property is not necessary to the conduct of its authorized business, then any contract for its purchase, either for stock or cash, is, unless expressly permitted by its charter, ultra vires, and stock issued therefor would not be paid up stock.

Conyngton on Corporate Organizations, Sec. 222.

Powell vs. Murray, 3rd Appel. Div., N. Y., 273.

Montgomery vs. Brush El. Co., 48 App. Div., N. Y., 12.

Thompson on Corporations, Secs. 1604, 1605, 1606, 1643.

Mr. Thompson in his work thus states the rule:

"A corporation can not accept payment for shares in specific property, unless such property is of a kind which the corporation is authorized by law to take and hold. Thus, a railway company which is not authorized to receive and hold lands and goods, can not accept payment for its shares in lands or goods." (Sec. 1643.)

"* * * And even where the statute or other governing instrument, by its terms, requires payment in money, yet unless the language is such as to import a prohibition of anything but money, the courts are generally agreed that payment may be made in any kind of property which the corporation may lawfully purchase in the prosecution of its business, provided it be done in good faith. The reason is that the law is practical in its requirements and does not require the parties to such a contract to do the vain thing of the subscriber finding money wherewith to pay his subscription, and the corporation then handing the money back to him in payment of property which it desires to purchase of him. That circumlocution may be avoided, and the property may be conveyed directly in satisfaction of what the subscriber owes for his shares. The general rule, then, is that, if a man contracts to take shares, he must pay for them, to use a homely phrase, "in meal or in malt." He must either pay in money or in money's worth; if he pays in one or the other, that will be a satisfaction. He may pay in any kind of property or services which the corporation has power to purchase for its use; provided, the transaction be had in good faith and the property conveyed at a fair valuation." (Thompson on Corporations, Sec. 1605.)

It will appear from a consideration of these authorities that the money referred to in the Constitution must be paid to the corporation; that the property referred to must be such property as the corporation can use and be delivered to the corporation; and it would follow, we think, that the labor to be performed, as referred to in the Constitution, must be labor performed for the corporation. Since we have concluded that the labor performed by a promoter in promoting the corporation and the expenditures incurred by him outside of the attorney's fees and prepara-

tion of the charter. charter fees, franchise tax fees, permit fees, and stationery and supplies are incurred not for the corporation but for the incorporators, it must follow that the class of expenditures herein generally defined as promoters fees, and being the first class of expenditures referred to in Section 1, Chapter 32, supra, are not expenditures or services for and on behalf of the corporation, and therefore can form no part of the capital stock of the corporation; for the reason that this class of expenditures or service are not money paid to the corporation nor property received by the corporation nor labor done for the corporation, and stock, under our Constitution, could not be issued in payment therefor.

It follows from the foregoing that commissions, promotion fees, organization fees, and other expenses incident, directly or indirectly, to the sale of the shares of the capital stock of a corporation can not be paid out of the par value of the capital stock of the corporation; and, if such fees are paid by the corporation, then they must be paid by an amount collected over and above the par value of the capital stock of the corporation. Attorney's fees, charter fees, franchise taxes, permit fees, and expenditures for stationery and supplies, although incurred prior to the filing of the articles of incorporation, may be paid out of the capital stock of the corporation when these expenditures have been approved by the corporation after its charter is granted.

We believe that the foregoing answers substantially the various questions propounded to us by your department.

Yours very truly,

C. M. CURETON,

First Assistant Attorney General.

CORPORATIONS—OFFICERS' AND DIRECTORS' LIABILITY—FRANCHISE TAXES AND PENALTIES.—R. S.; ART. 7399.

1. The provisions of Article 7399 making officers and directors liable as partners for debts of the corporation contracted after the forfeiture of its permit or charter for failure to pay its franchise tax has no application to the amount due as a franchise tax and the penalties incident to a failure to pay the same.

2. Franchise taxes are generally regarded as of the same nature of obligation as ordinary taxes, and are not debts in the usual sense of that term.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, SEPTEMBER 6, 1913.

Hon. F. C. Weinert, Secretary of State, Building.

DEAR SIR: In your communication some time ago, you directed our attention to Article 7399, Revised Statutes, in which it is, in substance, provided that any corporation either domestic or foreign which shall fail to pay any franchise tax provided for, when the same shall become due, shall become liable to a penalty, the character and amount of which is described in this article of the statute. This article of the statute then concludes as follows:

“* * * And each and every director and officer of any corporation whose right to do business within this State shall be so forfeited shall, as to any and all debts of such corporation which may be created or incurred, with his knowledge, approval and consent, within this State, after such forfeiture by any such directors or officers, and before the revival of the right of such corporation to do business, be deemed and held liable thereon in the same manner and to the same extent as if such directors and officers of such corporation were partners.”

Your inquiry is, in substance and effect, whether or not the provisions of this article just quoted creating an officers' and directors' liability makes them liable for the taxes and penalties provided for in the article and in other portions of the title and chapter of which said article is a part.

We answer your inquiry in the negative, and say that the officers' and directors' liability, created by Article 7399, refers to debts or obligations of corporations created or incurred by such directors or officers and has no reference to any debt or obligation, penalty or tax imposed by the statute.

The very verbiage of the act itself leads to this conclusion. It refers to “any and all debts of such corporation which may be created or incurred *with the knowledge and consent and approval of the directors or officers referred to*; further on, in the same sentence, it refers to such debts so created *by any such directors or officers.*”

It is clear, therefore, from the language of the act itself that the officers and directors liability created is created for the purpose only of making them liable as partners for contractual debts or obligations created by them as such officers or directors in the name and on behalf of the corporation. The general rule also that taxes are not debts from the regular sense of those terms is persuasive that this construction is a correct one.

Franchise taxes are generally regarded as taxes and as of being of the same nature as an obligation as ordinary taxes. (Cooley on Taxation, 3rd Edition, p. 37.)

The term “debt” in its ordinary sense does not include tax; a tax in its essential characteristics is not a debt nor in the nature of a debt; a tax is an imposition levied by authority of government upon its citizens or subjects for the support of the State; it is not founded on contracts or agreement; the collection of taxes ordinarily depends on the remedies given by statute for their enforcement, of course, where no remedy is specially provided a remedy by suit may be fairly implied, but where one is given it does not embrace an action at law. This is one of the distinguishing characteristics between a debt and a tax.

Lane County vs. Oregon, 74 U. S., 71.

App. of Schied, 70 Penn. Ct. Rep., 282.

Loeber vs. Leininger, 56 Am. Rep., 591.

Merriweather vs. Garrett, 102 U. S., 472.

Fla., etc., Ry. Co. vs. Reynolds, 183 U. S., 471.

State vs. Travellers Insurance Co., 66 St. Rep., 138.

City of Charleston vs. Phosphate Co., 34 S. C., 541.

Texarkana Water Co. vs. State, 35 S. W., 788.

U. S. vs. Baltimore & O. Ry. Co., 84 U. S., 322.

Cooley on Taxation, 3rd ed., pp. 17 to 22 inclusive.

Penalties in certain proceedings have also been held to be not debts within the constitutional prohibition against imprisonment for debt. The same holding as to a constitutional prohibition against imprisonment for debt has been made with reference to ordinary taxes, and therefore the rule in this respect as to penalties and taxes is the same. (State vs. Brewer, 19 L. R. A., 362.) For many authorities on this question see pages 1882 to 1885 inclusive "Words and Phrases," Vol. 2.

Mr. Cooley, in his work on Taxation in discussing the question as to whether or not taxes are debts, says:

"It sometimes becomes a question whether a tax can be regarded as a debt in the ordinary sense of that term, so that the ordinary remedies for the collection of debts can be applied to it. In general it will be found that statutes imposing taxes make special provision for their collection, and do not apparently contemplate that any others will be necessary; but these may, nevertheless, fail; and the question then arises whether the tax must fail also, or whether resort may be had by the State to such remedies as would be available to individuals to enforce demands owing to themselves. But instances have occurred of tax laws which provided for laying the tax, but made no provision whatever for collection. In such case it may well be held that the Legislature contemplated the enforcement of the tax by the ordinary remedies; and, therefore, if the tax was assessed against an individual, that *assumpsit* or debt, would lie for the recovery thereof. The same reasoning would support a proceeding in equity to enforce a lien for the tax when assessed, not against an individual, but against property; and some courts have gone so far as to hold that the imposition and assessment of a tax create a legal obligation to pay, upon which the law will raise as *assumpsit*, although the statute has given a special remedy. But, in general, the conclusion has been reached that when the statute undertakes to provide remedies, and those given do not embrace an action at law, a common law action for the recovery of the tax as a debt will not lie. The assessment of a tax, though it may definitely and conclusively establish a demand for the purposes of statutory collection, does not constitute a technical judgment; and the taxes are not 'contracts between party and party, either express or implied; but they are the positive acts of the government, through its various agents, binding upon inhabitants, and to the making and enforcing of which their personal consent individually is not required.' They do not draw interest, as do sums of money owing upon contract; but only when it is expressly given. They can not be assigned as debts, or be proved in bankruptcy as such; nor, if uncollected, are they assets which can be seized by attachment or other judicial process, and subjected to the payment of municipal indebtedness. They are not the subject of set-off, either on behalf of the State or the municipality for which they are imposed, or of the collector, or on behalf of the person taxed, as against such State, municipality or collector. Taxes are not within a statute exempting certain timber claims from debts; nor are proceedings to enforce them barred by the ordinary statutes of limitation. The law abolishing imprisonment for debt has no application to taxes; and the remedies for their collection may include an arrest if the Legislature shall so provide.

"The repeal of a law puts an end to all right to proceed to a levy of taxes under it, even in cases already commenced, unless the right is reserved in the repealing statute; and statutory remedies for the enforcement of a tax are gone when the statute is repealed without an express saving."

It will be noted in this quotation that Mr. Cooley lays down the rule that taxes are not debts in the ordinary acceptance of the term, and cites various holdings persuasive of and as giving a reason for that rule.

Therefore, in view of the wording of the statute under consideration

and of the general rule that taxes are not debts, which obtains practically every jurisdiction in the country, we are of the opinion that the officers and directors liability imposed by Article 7399 of the statutes has no reference to the franchise tax and penalties to which reference is made in this article of the statute.

Yours very truly,
C. M. CURETON,
First Assistant Attorney General.

CORPORATIONS—GAS COMPANIES—CHARTERS.

Chapter 111, General Laws, Regular Session, Thirty-second Legislature; Vernon's Sayles' Annotated Statutes, Title 25, Chapter 21A.

1. Corporations may be chartered under provisions of Chapter 111, General Laws passed by the Regular Session of the Thirty-second Legislature, for purpose of producing, transporting and selling natural gas.
2. A suggested purpose clause for corporations of this character.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 1, 1914.

Hon. F. C. Weinert, Secretary of State, Capitol.

DEAR SIR: Judge C. S. Bradley of Groesbeck, Texas, has submitted to the Attorney General the purpose clause of a corporation proposed to be organized under the provisions of Chapter 111, General Laws of the Regular Session of the Thirty-second Legislature. An examination of this clause requires a construction of this act, and we have concluded to write our views of the matter in the form of an opinion to you, rather than a mere letter of advice to the promoters of the corporation.

Our purpose in doing this is to construe Chapter 111, General Laws of the Thirty-second Legislature, in order that the public may be advised as to the opinion of this Department relative to a correct construction of this act of the Legislature.

(1) Section 1 of the law under examination provides in substance that any number of persons not less than three may organize themselves into a corporation in the same manner that corporations are generally organized under the Revised Statutes of the State for the purpose of generating, manufacturing, transporting and selling gas, electric current and power in this State.

The powers of such corporation are set forth in Section 3 of the Act as follows:

"Such corporation shall have the power to generate, make and manufacture, transport and sell gas, electric current and power to individuals, the public and municipalities for light, heat, power and other purposes and to make reasonable charges therefor; to construct, maintain and operate power plants and substations and such machinery, apparatus, pipes, poles, wires, devices and arrangements as may be necessary to operate such lines at and between different points in this State; to own, hold and use such lands, rights of way, easements, franchises, buildings and structures as may be necessary for the purpose of such corporation."

The fourth section of the act confers the right of eminent domain and prescribes the manner of its exercise upon and by corporations chartered for the purposes above set forth.

(2) The precise question for determination is whether or not corporations organized for the production and sale of natural gas may be chartered under this law. It is the opinion of this Department that corporations whose business is the production and sale of natural gas may be chartered under the Act. The reasons which lead us to this conclusion will be briefly set forth by us.

It is an elementary rule of construction that when we are called upon to determine the meaning of a law we must take into consideration the existent facts which led to its enactment.

McLelland vs. Shaw, 15 Texas, 321.

Cannon vs. Vaughn, 12 Texas, 401.

Higgins vs. Rinker, 47 Texas, 398.

The rule is tersely laid down in Cannon vs. Vaughn, one of the cases cited above, as follows:

"Among the most important of these rules are the maxims that the intention of the Legislature is to be deduced from the whole and every part of a statute, when considered and compared together; that the real intention, when ascertained, will prevail over the literal import of the terms; and that the reason and intent of the legislator will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction, and absurdity; *that when the words are not explicit the intention is to be collected from the occasion and necessity of the law, and from the mischief and objects and remedy in view*; and the intention is to be presumed according to what is consonant to reason and good discretion." (12 Texas, 401.)

The statement made in the case of McLelland v. Shaw, supra, to the effect that those who are charged with the construction of a law are not required to ignore the well known historical facts to which the act itself makes reference is but a corollary of the general rule which we have quoted from the Cannon-Vaughn case. The entire rule is elementary and it is only in its application to the law and facts of any particular transaction which give rise to any controversy.

Bearing in mind this rule of construction which we have invoked let us analyze this act of the Legislature. It is clear that the purpose of the Legislature was to authorize the chartering of corporations which might engage in the business of transporting gas from the place of its origin to the cities, and towns of the State for sale; in other words, the creation of a corporation having power and authority to produce the gas, to transport it and to sell it. The fact that corporations chartered thereunder are given the right of eminent domain is conclusive of the question that the purpose is to create a corporation having authority to produce and transport the gas from the field of production through the country to the point of sale and to permit such corporation after having produced the gas to transport it and sell it, at the market point. At the time of the enactment of this measure there was no authority in the corporation laws of this State for the creation of a gas company of this character.

There was ample authority under the provisions of Subdivision 13, Article 1121, for the production of gas and its sale to the public, either by artificial or natural means, but so far as transporting this gas from a field of natural production to a market point was concerned the provision was a practical nullity, for the reason that corporations chartered thereunder did not have the power of eminent domain. Such companies engaged alone in the production of gas within any city, town or village already had abundant authority to lay their pipes through the streets, alleys, lanes and squares of the city, town or village, and, therefore, did not need the additional authority of eminent domain.

Revised Statutes, Article 1182.

Provision had likewise been made for the incorporation of pipe line companies, engaged in transporting gas, but this class of corporations are common carriers and are not authorized by law to produce gas. It is therefore clear from an examination of the statute that there was not on the statute books of this State at the time of the enactment of this law any provision authorizing the creation of gas companies engaged in the production of gas, its transportation through the country to a point of sale and its sale after transportation.

It is clear from a reading of the law that it was the intention of the Legislature to authorize the creation of a single corporation with the triple right to produce gas, transport it through the country from the point of production to the place of market and there sell it to the public. The question is—what kind of gas? Did it mean artificial gas, such as was then being generally created in the municipalities of the country, or did it mean natural gas produced from the gas fields of the State? Let us consider for a moment the existing facts which confronted the Legislature when this measure was before it. In the first place it was an existing fact that corporations then engaged in the production of artificial gas did not and had never transported artificial gas from the point of production through the country to any other market point, but had confined their endeavors solely to the municipalities of their location, requiring for their operation only those rights as to means of laying pipes, etc., given them by the provisions of Article 1282, of the Revised Statutes. Viewed from an historical standpoint companies engaged solely in the production of gas by artificial means had no occasion to be given the authority conferred upon gas corporations by the provisions of the act here under consideration, because the transportation of artificial gas from one town to another was not then being engaged in by any corporation and the transportation of such artificial gas from one town to another was evidently from a business standpoint an impractical business.

However, there was in existence at the time this measure was passed several large natural gas fields in the State, where gas in large quantities was being taken from the earth at points distant from the cities and municipalities of the State and therefore distant from the market. Looking at it, therefore, from an historical standpoint there existed a reason for giving to natural gas companies the power of eminent domain, so that the same corporation might produce the gas in the natural

gas field and through its own pipes transport it to the market point and there sell it to the public. In our judgment, the existence of natural gas fields in this State at points distant from the cities and towns of the State was the reason and necessity which brought about the enactment of the law under examination, in so far as it referred to gas companies.

This view of the matter is supported to some extent by the general trend of legislation, upon examination of which we find that the power of eminent domain is not ordinarily conferred upon companies engaged in the production of artificial gas.

Mr. Thornton, in his recent and exhaustive work on oil and gas says: "Companies for furnishing artificial or manufactured gas seldom possess the power of eminent domain." (Thornton on Oil and Gas, Sec. 357.)

The reason, manifestly, that the power of eminent domain is not usually conferred upon corporations engaged in the production of artificial gas is that such corporations do not transport gas outside of the limits of the municipality in which they are located. But production and transportation of natural gas is impractical without the exercise of the power of eminent domain, because natural gas fields are seldom found within the corporate limits of any municipality and are generally distant from the point of sale and necessarily they must have the power of eminent domain, in order to lay their pipe lines from the gas fields to the markets.

In statutes relating to the rights of gas companies, unless the context should show otherwise, the meaning of "gas" has been held to include natural as well as artificial gas. This construction has been given even though at the time of the enactment of the law or ordinance natural gas was unknown.

Thornton on Oil and Gas, Sec. 742; citing *Chillicothe v. Logan Natural Gas and Fuel Co.*, 8 Ohio, N. P., 88; 11 Ohio, S. C. & P., Dec. 24; *Cline v. Springfield*, 7 Ohio, N. P. 626; 10 Ohio, S. & C. P., Dec. 389; *Compton v. Peoples Gas Company*, 10 L. R. A. (N. S.), 787.

The construction we here give this law is not inconsistent with the letter and terms of the law itself, although the terms used are those which by strict construction would apply to companies engaged in the production of artificial gas, rather than to companies engaged in the production of natural gas.

Section 3 of the act in defining the powers of corporations chartered thereunder, states that such corporations shall have power to "generate, make and manufacture, transport and sell gas."

The production of natural gas is, of course, not the manufacture of gas, unless the gas is refined in some manner after it is taken from the ground, which is not ordinarily the case. The mere appropriation of an article which is furnished by nature is not a manufacture. The authorities hold that the liberation of natural gas or oil from the earth and its transportation to consumers is not a manufacture, but the *production* of illuminating gas.

Commonwealth v. Northern Electric Light & Power Company, 14 L. R. A., 107.

The act we are here considering goes somewhat further and provides that such companies shall have authority to "generate" and "sell" gas. One of the definitions of generate found in the dictionaries is "to produce," and we think it is in this sense that the word generate was used in this act, and if this definition be given then the law in literal terms authorizes the production of natural gas. Then again, the fact that corporations may be chartered to sell gas under the terms and provisions of this law carries with it the necessary right to obtain the gas for sale by any ordinary means, which must include the production of natural gas or artificial gas or the purchase of either one by such selling company.

(3) Taking the act, therefore, as a whole and looking at the matter historically, bearing in mind the occasion, the reason and necessity of the law and construing its provisions and terms in the light of the historical facts then in existence and bearing in mind the reason, necessity and evident purpose of the law we conclude that companies engaged in the production, transportation and sale of natural gas may be chartered under the provisions of Chapter 111, Acts of the Thirty-second Legislature, or what is now Chapter 21A, Title 25, of Vernon's Sayles' Texas Civil Statutes, 1914.

(4) We have examined the purpose clause quoted in the communication of Judge Bradley and rather think that the purpose clause is a proper and sufficient one, but we believe that a briefer, more comprehensive and better one would be substantially as follows:

"The purpose of this corporation is to produce, make and manufacture gas by natural or artificial means and to transport and sell the same to individuals, the public and municipalities for light, heat, power and other purposes and to make reasonable charges therefor, to construct, maintain and operate power plants, substations and such machinery, apparatus, pipes, devices and arrangements as may be necessary to operate such lines at and between different points in this State and to conduct the business of this corporation at and between different points in this State; and generally to do any and all things and to exercise any and all powers as a gas company set forth in Chapter 111 of the General Laws passed by the Regular Session of the Thirty-second Legislature."

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

CORPORATIONS—DISSOLUTION—FRANCHISE TAXES.

A corporation whose right to do business has been forfeited for failure to pay franchise taxes may voluntarily dissolve without first paying its past due franchise taxes and penalties.

This does not mean, however, that the corporation will cease to owe the franchise tax and penalties; on the contrary, although the corporation may be dissolved, it will still be indebted to the State for all penalties and franchise taxes due, which may be collected out of the property of the corporation.

Revised Statutes, Title 251, and particularly Articles 1193-4, and 7399, 7402, 1205.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 14, 1914.

Hon. F. C. Weinert, Secretary of State, Capitol.

You desire the opinion of this Department as to whether or not corporations whose right to do business has been heretofore forfeited for failure to pay franchise taxes may voluntarily dissolve without first paying their past due franchise taxes and penalties.

In response to your inquiry we beg to advise you that such corporations may voluntarily dissolve without first paying their past due franchise taxes and penalties accrued thereon.

Article 7399, Revised Statutes, 1911, provides that when any corporation, domestic or foreign, shall fail to pay its franchise tax when due, then they shall become liable to a penalty of twenty-five per cent of the amount of such franchise tax due by such corporation, and should they fail to pay such tax and penalty on or before the first day of July following, then such corporations for such default shall forfeit its right to do business in this State, and the Secretary of State shall enter upon the margin of the record kept in his office relating to such corporations the words "right to do business forfeited," with the date of the forfeiture, etc.

Article 7402, Revised Statutes, provides that in all cases in which the charter or right to do business of any domestic corporation heretofore chartered under the laws of this State, or the permit of any foreign corporation or its right to do business in this State, shall have been or shall hereafter be forfeited, it shall be unlawful for any person or persons who were or shall be stockholders or officers of such corporation at the time of the forfeiture to do business within this State, in or under the corporate name of the corporation, etc. The sum and substance of these two provisions is that when the corporation fails to pay its franchise tax and thereafter fails to pay such tax with the accrued penalties, it shall not longer transact business or do business within the State. In no instance does the statute provide that the corporation should not have the right to dissolve or exercise any other corporate function short of transacting business, except, of course, it may not have any standing in the courts, as set forth in Article 7399, Revised Statutes. The statute is a penal one and must be strictly construed, and we will not construe its effect further than its letter warrants.

The question then is whether or not the forfeiture of the right to do business carries with it an inhibition against the right of the stockholders to meet and dissolve the corporation. We do not think it does. To do business is to carry on any particular occupation or employment for a livelihood or gain, and in the instance of a corporation should be construed to mean the doing of any substantial part of the business for which the corporation was organized; that is to say, the performance and doing of those acts and things directed and permitted by the purpose clause of the charter of the corporation.

Live Stock Co. vs. Cattle Co., 50 Pac., 630.

People vs. Horn Silver Mining Co., 105 N. Y., 76.

Beard vs. Union & American Pub. Co., 71 Ala., 60.

The definition given is the usual and ordinary one, and evidently does not embrace a meeting of the stockholders of a corporation for the purpose of dissolution. In fact, the dissolution of a corporation has the very opposite meaning to that of transacting business by the corporation, because the dissolution is ceasing to do business. Article 1205, Revised Statutes, does not require that a corporation shall have paid its franchise tax before its stockholders have the right to surrender its corporate franchise by dissolving. Chapter 7 of Title 25, and particularly Articles 1193 and 1194, Revised Statutes, recognize the right of a corporation to dissolve without the payment of forfeitures or penalties which may be due the State by providing that the right of action of the State for this class of debts shall not abate by reason of the dissolution, and that the State shall have a lien on the property of the dissolved corporation. This would appear to be conclusive of the position taken by us. We advise you, therefore, that the stockholders of a corporation have a right to voluntarily dissolve it in accordance with the statute without paying any past due franchise taxes and penalties which have accrued thereon.

This does not mean, however, that the corporation will cease to owe the franchise tax and penalties; on the contrary, although the corporation may be dissolved, it will still be indebted to the State for all penalties and franchise taxes due, which may be collected out of the property of the corporation.

After having talked this matter over with your chief clerk, Mr. Gregg, we are of the opinion that it would be the proper course for you to turn over to the State Revenue Agent a list of all franchise taxes and penalties due the State which you have not been able to collect through your office, and then should he fail to collect the amounts due we will be glad to take up the matter and see if there are any such amounts due as will justify suit on behalf of the State for the collection thereof.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

MINORS—RIGHT TO HOLD OFFICE IN TRUST COMPANY.

A minor can not become an officer in a trust company. He may be its agent, and his acts as such binds the company. But as to the minor the contract would not be legal.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 6, 1913.

Hon. B. L. Gill, Commissioner Insurance and Banking, Building.

DEAR SIR: In reply to your inquiry of January 6th, in which you submit to us the question following:

"Can a minor; that is, a young man under twenty-one years of age, become

an officer of a trust company? Can he be cashier or secretary, and can he be a vice-president or president?"

We beg to say that Article 574, Revised Statutes, provides as follows:

"Every officer of every State bank, upon whom the powers of a cashier or treasurer may be imposed by the board of directors, shall, before entering or being permitted to enter upon the exercise of such powers, or the duties of his office, give a good and sufficient bond in such sum and with such surety or sureties as the board of directors, etc., may approve."

It therefore appears that in the event a minor should become the cashier or secretary of a trust company, or should he be assigned the duties pertinent and relevant to these positions, that he would be required to give a bond, under the provisions of the article referred to above.

Such a bond would be a contract, and since under the laws of this State a minor, that is, one under the age of twenty-one years, can not make a valid, legal and binding contract, it follows that under the law a minor can not become a cashier or secretary of a trust company, nor could he become the president or vice-president of such company in the event, as such president or vice-president, he would be called upon to perform any of the duties incident or pertaining to the office of treasurer or cashier.

Article 574, Revised Civil Statutes.

Bullock vs. Spowles, 93 Texas, 189 et seq.

Vogelsang vs. Null, 3 S. W., 451.

Cyc., Vol. 22, p. 600.

A minor may become agent of a trust company, and as such agent his action would be binding upon the company. (Cyc., Vol. 22, p. 515, and authorities cited in note 26.)

And in the event such minor, as an agent, should execute a bond in favor of the trust company, and his sureties were aware of the fact that he was a minor, then the contract of surety, as far as the sureties were concerned, would be binding. (Lee vs. Yandell, 69 Texas, 36.)

But as to the minor the contract would not be legal, but would be voidable at his option.

However, in the case of the trust company to which you refer in your communication, we notice that the minor which this company desires to make an officer of the corporation is over nineteen years of age, and we suggest to you that he may have his disabilities of minority removed by the district court, under Articles 5947, 5948, 5949 and 5950 of Revised Statutes of 1911, at a nominal cost, and that after such removal he will have the right to execute the necessary bond and serve as cashier or treasurer of the company or fill any other position with the company.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

CORPORATION—FINES AGAINST.

A corporation may be fined for violation of a penal statute. Law construed: Article 872, Criminal Statutes.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JUNE 9, 1913.

Hon. J. G. Cook, County Judge, Burnet, Texas.

DEAR SIR: We have your favor of June 4th, in which you call attention to Article 872, Revised Criminal Statutes, which provides that persons and corporations who fail to construct fish ladders at dams erected by them on streams shall be punished by fine, etc. You state that you are unable to find any provision in the statute prescribing the manner in which the fine in such case could be enforced against a corporation, or for arresting and trying a corporation upon a penal charge.

Replying thereto, we beg to say that there is no express provision in our statutes for the arrest and trial of corporations upon a penal charge. This, however, does not shrieve a corporation from the penalties laid down for the violation of the criminal statutes, and a corporation can violate a criminal statute just as much so as an individual, and is subject to the same penalties as an individual, with the exception, of course, that a corporation can not be imprisoned, and therefore an indictment against a corporation would not lie in a case, the penalty of which or any part thereof, might be imprisonment. In a case of this character the prosecution would have to lie against the officers of the corporation, but where the punishment is by fine only, the complaint and information or indictment could run against the corporation.

Cook on Corporations, Vol. 1, p. 99.

U. S. v. J. Kelso Co., 86 Fed. Rep., 304.

Commonwealth v. New Bedford Bridge, 68 Mass., 339.

Commonwealth v. Vt. Ry. Co., 70 Mass., 22.

State v. Morris R. R., 23 N. J. L., 360.

State v. White, 96 Mo. App., 34.

So. Express Co. v. State, 58 S. E., 67.

So. Ry. Co. v. State, 125 Ga., 287.

Commonwealth v. Pulacke Co. Assn., 92 Ky., 197.

State v. Passaic Soc., 54 J. J. L., 260.

As to the manner of bringing a corporation into court on a criminal charge of course a warrant of arrest in the strict sense could not be served upon a corporation, nor a bail bond taken from it, but such a corporation can be brought to trial upon a criminal charge upon a summons issued out of the court, clearly setting forth the nature of the charge against the corporation, and commanding it to appear in court upon a day fixed, such summons or citation to be served in the usual manner, by the sheriff or constable, etc.

Trusting the above is clear, we are, with respect,

Yours very truly,

C. W. TAYLOR,

Assistant Attorney General.

CORPORATIONS—COMMISSION OF OFFENSES—CRIMINAL PROSECUTION.

1. The Legislature has the power and authority to provide for the indictment and prosecution of corporations for the commission of offenses consisting in either a misfeasance or non-feasance of duty to the public.

2. The word "person" as used in penal statutes wherever the offenses consist of either misfeasance or non-feasance of duty to the public includes and embraces artificial as well as natural persons.

3. Under all such statutes where the penalty is fixed by fine only a corporation may be indicted and a criminal prosecution may be successfully maintained against it.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 23, 1914.

Mr. R. A. Sowder, County Attorney, Lubbock, Texas.

DEAR SIR: Under date of January 12, 1914, we have the following communication from you:

"We have a violation of the pure feed law, the violator being persistent, but is a corporation. Now I desire to know if I can file and sustain a prosecution against the corporation. Unless I can, I am afraid we have no way of enforcing the law, and the violator's domicile is in another county, and the stuff comes in 'shipper's order' in the name of the corporation."

In answering your inquiry it will be necessary to ascertain whether or not a corporation may be proceeded against criminally for the violation of the criminal statute. This question seems to be an open one in this State, inasmuch as we have failed to find after a careful and diligent search where a case involving this question has ever reached the Appellate Courts of our State. Therefore in solving this question we must resort to the different text-book authorities and the decisions of courts of other jurisdictions.

Where a criminal statute embraces corporations, as well as individuals and persons within its terms and provides a penalty to be suffered by such corporation in the event of infractions, the question is one easy of solution, for in such cases it is clearly apparent that the Legislature intended to make the law applicable to artificial, as well as natural persons, but where the statute does not specifically name corporations as coming within its inhibitions the question as to whether corporations under the terms of such a statute may be proceeded against as natural persons is one more difficult of satisfactory solution.

We assume that Article 740, Penal Code, 1911, is the one under which you contemplate bringing proceedings. This article reads as follows:

"Any person manufacturing, selling or offering for sale any adulterated feeding stuff within this State shall upon conviction therefor be punished by fine of not less than \$25 and not more than \$200 or be imprisoned in the county jail for a term of not less than thirty days and not more than sixty days or by both fine and imprisonment."

Does the word "person" in this statute include and comprehend corporations, and, if so, may a corporation be prosecuted thereunder when the punishment for such offense may be jail imprisonment entirely or a money fine and jail imprisonment?

As bearing upon the question as to whether the word "person" in a

criminal statute embraces artificial, as well as natural persons, and also as bearing on the question of whether a State may proceed criminally against corporations for the violation of penal statutes, Mr. Thompson in his commentaries on the Law of Corporations discusses the question as follows:

"There is some authority justifying the conclusion that corporations aggregate are not included in general statutes forbidding the doing of particular acts under penal sanctions, except where they are included in express language. This conclusion may be regarded as a deduction from the rule of statutory interpretation that statutes giving penalties are strictly construed; but it must, in every case, yield to an inquiry as to what the Legislature properly intended, as disclosed in the language of the particular statute, when construed in comparison with other statutes, *in pari materia*. Where the statute imposed a penalty upon 'the owner, agent, or superintendent of any manufacturing establishment,' for employing any child under twelve years of age, and gave a private action for the penalty, it was held that the action thus given could not be maintained against the manufacturing corporation, the court saying: 'The provisions of acts imposing penalties are not to be extended, by construction, beyond their obvious meaning and intent, as manifest upon the face of the statute. Corporations are not in terms included in the statute on which this action is brought.' So, where the special act of the corporation provided that 'if any person or persons shall willfully, maliciously, or contrary to law, take, remove, break down, dig under, or otherwise any part of said canal or canals,' etc., 'such persons shall forfeit and pay to such corporation a sum not less than fifty dollars nor more than five hundred dollars,' etc., it was held that the canal company, for whose protection this statute had been enacted, could not maintain an action thereon, for the penalty, against a municipal corporation. So, where a statute gave a penalty and a *qui tam* action therefor against 'any person' who should take, carry away, etc., any saw logs without the consent of the owner, and another section of the same statute declared that the fraudulent and willful doing of the act should be larceny, it was held that the act did not apply to corporations; for, although the word 'person' may, for some purposes, be held to include corporations aggregate, yet such a corporation is incapable of the criminal intent denounced by the second section of the statute; and besides such statutes are not to be enlarged by construction. The soundness of these decisions may well be doubted. The rule that laws are to be construed with such strictness as to restrain the real purpose of the Legislature, where they are penal, is believed to have no just principle on which to rest. There is no reason why a corporation should be included in the word 'person' for the purpose of jurisdiction, and be excluded from it for the purpose of being exempted from liability to penal actions for the commission of wrongs for which the statute law makes individuals so liable. On the contrary, such an interpretation gives to an aggregated body of wrongdoers an immunity from punishment which individuals do not enjoy. The sound rule is, that corporations are to be considered as 'persons,' when the circumstances in which they are placed are identical with those of a natural person expressly included in a statute, and where the statute can be as aptly applied to them as to corporations."

The writer cites many authorities in his foot notes from different jurisdictions holding that where the law-making power uses the word "person" it is to be assumed that the legal and not the social or ordinary meaning is intended.

Summing up his discussion of this particular feature of the question the same author uses the following language:

"We may conclude that it is a settled principle of modern jurisprudence that an indictment will lie against a corporation aggregate, though not for every species of crime or misdemeanor."

And on the question as to what offenses corporations may be prosecuted criminally for committing, this same author declares the law to be as follows:

"The idea that a corporation cannot be punished criminally for a malfeasance has inhered to some extent in modern decisions; but it is now thoroughly settled both in England and America that a corporation may be prosecuted by indictment for a misfeasance, as well as for non-feasance."

Joyce, in his work on Actions by and against Corporations, discussing this same question has the following to say:

"A corporation may be indicted for a misfeasance as well as for a non-feasance. So railroad corporations are liable to an indictment for the act of their officers and agents. So a corporation may be punished criminally for peddling through the medium of an unlicensed agent. So the general manager of a corporation in active charge of its affairs and with knowledge of the illicit business may be held criminally liable for such offense. A corporation may also be charged with an offense which only involves an intention to do a prohibited act, and it may be properly convicted when, in its corporate capacity, and by direction of those controlling its corporation action, it does the prohibited act, as in case of the violation of an eight-hour law.

"A corporation is not, merely because it is a creature of the law without physical existence, immune from indictment and criminal prosecution for non-feasance in neglecting to perform duties which it owes to the public."

Also Cook on Corporations considering this same question declares the following to be the law with reference to the responsibility of corporations under criminal or penal laws:

"A corporation may be guilty of a criminal libel and may be punished therefor by a fine. A corporation may be guilty of the crime of violating the eight-hour law, and may be fined therefor. Since corporations are not in themselves capable of any evil intent, they can be indicted only for such offenses as arise from misfeasance—such as a nuisance; or obstructing a road. Or for non-feasance—such as an omission to perform a legal duty or obligation. A statute may render a railroad corporation subject to indictment and fine for failing to supply pure drinking water to its patrons. A corporation may be subject to criminal prosecution for furnishing liquor to a minor in violation of the statute. The corporation as such, the technical legal entity, cannot suffer imprisonment for a crime, but those who represent it and act for it as its officers and agents can."

Abbotts' Digest on the Law of Corporations cites many cases in different States to the effect that the word "person" in criminal statutes includes and embraces artificial, as well as natural persons; also many cases are cited in this work to the effect that corporations may be indicted and prosecuted for offenses of the nature and character of misfeasance and non-feasance.

In the case of *Overland Cotton Mill Company vs. People*, 105 American State Reports, page 74, the question of the right of the State to prosecute a corporation for the violation of the criminal statute was exhaustively discussed by the Supreme Court of Colorado. In that case the *Overland Cotton Mill Company* was a corporation organized under and by virtue of the laws of Colorado, and it was being prosecuted criminally for employing a child under fourteen years of age in its mill and factory. The statute under which the prosecution was brought

did not specifically include corporations within its terms. In considering this question that court said:

"The Overland Cotton Mill Company is a corporation organized under the laws of this State, and it is argued that, because the statute only says that 'any person' who shall employ children under the age of fourteen years in any mill or factory shall be deemed guilty of violating its provisions; that, therefore, a corporation, in its capacity as such, cannot be reached in a prosecution of this character. In other words, because the statute does not specify corporations, that they are exempted from the statutory provision on the subject of the employment of children under the age of fourteen years. In support of this contention, attention is directed to the provision that the officer to whom a warrant is issued against the person charged with violating the statute shall bring that person into court, and that such person, if found guilty, shall be committed to jail if the fine imposed is not paid; that other provisions in the chapter relating to children in which the section under consideration appears, expressly include corporations; that a corporation cannot be imprisoned, and that the act can be amply enforced by proceeding against the employees of corporations who violate it. These matters may be taken into consideration in ascertaining whether or not corporations are included, but they are not conclusive, nor do they furnish the true test in determining whether or not the word 'person,' as employed in the statute, embraces a corporation. In the earlier cases, and before corporations become such important factors in industrial affairs, it was held that, as statutes imposing a penalty were to be strictly construed, they did not apply to corporations, unless they included them in express terms or by clear implication. This view is no longer entertained by the modern decisions, either in England or this country, for various reasons, among which may be noticed that it ignored the principle that statutes are to be applied to corporations, when they can be, the same as to natural persons; that so far as their nature will permit, they are amenable to the laws of the land the same as individuals; and that to exempt them from the operation of a statute would result in conferring upon them rights which natural persons were not permitted to enjoy. 10 Cyc., 1208. Prima facie, the word 'person' in a penal statute which is intended to inhibit an act means 'person in law'; that is, an artificial, as well as a natural, person, and, therefore, includes corporations, if they are within the spirit and purpose of the statute. *Pharmaceutical Assn. vs. London, etc., Assn., Ltd.*, 5 App. Cas., 857; 7 Ency. of Law, 2d ed., 841; 1 Clark & Marshall's *Private Corporations*, Sec. 252; *Bishop's Statutory Crimes*, 3d ed., 841.

"Whether corporations are included within the statute depends largely upon its object. The purpose of the statute, as indicated by its title, was to prohibit the employment of children under fourteen years of age in certain kinds of work. It is common knowledge that the places which, by the statute, children under the age of fourteen years are inhibited from working in are operated by individuals or corporations. Whether such places were operated by individuals or corporations could make no difference with respect to the employment, for it would be just as detrimental to the child in one instance as in the other. If corporations are exempted from the act, then the purpose of the Legislature, in inhibiting the employment of children under a certain age in certain kinds of work, would not be accomplished. Corporations, therefore, are clearly within the spirit and purpose of the statute, because its ultimate object was to prevent children under a given age from being employed in specified work."

In the case of *Southern Railway Company vs. Georgia*, 125 Ga. Rept., p. 287, the Court of Appeals of that State decided this question in the following language:

"And it is now very generally held that a corporation may be indicted and fined for offenses consisting of mere non-feasance, as where it neglects to perform duties which it owes to the public. The old idea, that, inasmuch as a corporation was created for lawful purposes and had no power to do anything un-

lawful, it was not responsible for the acts of its servants or officers in excess of its charter authority, has long since been repudiated. An action of trespass, as well as of trespass on the case, will lie against a corporation. It is perfectly competent for the creator of this artificial person to prescribe corporate responsibility for failure to perform certain acts which may be required of it. Nor can there be any possible objection that corporate disobedience of the sovereign's command may be punished by fine, or by forfeiture of charter. With the power in the State to inflict a penalty for the violation of a statute enjoining duty, it matters little whether the procedure be in its nature civil or criminal. In some instances the remedy by indictment is more efficacious and prompt than by civil action. While a corporation may not be imprisoned, it may be fined, and the fine enforced by levy on its property."

Also the Court of Appeals of Kentucky in the case of Commonwealth vs. Pulaski County Agricultural and Mechanical Association, 17 S. W., p. 442, said :

"The appellee, the Pulaski County Agricultural and Mechanical Association, a corporation, was indicted for permitting gaming upon its fair grounds. A demurrer was sustained to the indictment, and it was dismissed. It is contended that a corporation cannot commit this offense. It was in the early history of the law held that, as a corporation was soulless, it could do no wrongful or immoral act, and could not, therefore, be liable in tort. This doctrine has long since become obsolete, and it has long been well settled that a corporation is liable *civilliter* for all torts committed by its authority, express or implied. With the growth of corporations came the necessity for this rule, and its adaptability to change circumstances is an excellence of the common law. So far does the rule extend that a corporation is liable civilly for every intended or negligent wrong it may do, although the act may be *ultra vires*. If it be incidental to or connected with its business, or if it ratify the transaction, as by accepting the benefit, it must respond in damages, although the act be done, as it must, by an agent. In time, it came to be admitted that a corporation was liable to be indicted for a neglect of duty, or a mere non-feasance; but it was claimed that its nature did not admit of its doing positive wrong, and that, therefore, it was not liable criminally for a misfeasance whereby a wrong was done by a violation of its duty. This same reason, however, if sound, applied equally to civil as well as criminal injuries; and it soon became known from experience that, as has been said, if a corporation had no hands with which to strike, it may employ the hands of others. This distinction was therefore properly disregarded as unsound. If the argument be sound that a corporation is not liable to indictment for any offense, because the criminal act was not warranted by its corporate powers, then the same reasoning would result in its non-liability for all wrongs, civil as well as criminal. Such a rule would lead to its absolute impunity for all wrongs, which the experience of this day shows would produce great injustice both to individuals and the public. If it be said that the individuals who might do the act would be liable, it may be said that this is true as to every servant or agent who does a wrong, but because this is so the principal is not exempt. Indeed, it has been and should be rather the policy of the law, because that is likely to the better protect from the commission of wrong, to look rather to the principal than the agent, and it seems to us especially should this be so in the case of corporations for whose benefit the act is done, or, being connected with its business, is negligently omitted to be done; its directors in charge or its workmen being perhaps unknown and irresponsible. The object should be to reach and punish the real power in the matter, and thus prevent a repetition of the offense. Experience showed the necessity of modifying the old rules; and the decided tendency of modern decision has been to extend the application of all legal remedies, both civil and criminal, to corporations, and subject them thereto, as in the case of individuals, so far as is possible. It is, therefore, now well settled in the courts of this country, as well as in England, that they are indictable for misfeasance as well as a non-feasance of duty unlawful in itself, and injurious to the public. It has, therefore, been held that they

may be indicted for a nuisance whether arising from misfeasance or non-feasance or for an injury otherwise to the public, unlawful in itself, and arising either from commission, or the omission to perform a legal duty. They may be indicted for erecting and continuing a building; for leaving railroad cars in a street; for neglecting to repair a highway; for permitting stagnant water to remain on their premises; for libel; for 'Sabbath breaking' by doing work on Sunday in violation of a statute; and in many other instances. It is true there are crimes of which from their very nature, as perjury, for example, they can not be guilty. There are crimes to the punishment for which, for a like reason, they can not be subjected, as in the case of a felony. But wherever the offense consists in either a misfeasance or a non-feasance of duty to the public, and the corporation can be reached for punishment as by fine and the seizure of its property, precedent authorizes, and public policy requires, that it should be liable to indictment. Any other rule would in many cases preclude adequate remedy, and leave irresponsible servants to answer for the offense, rather than those who are really most at fault."

For other authorities bearing on this question, see *Com. vs. Proprietors*, 2 Gray, 339; *State vs. Railroad Co.*, 23 N. J. Law, 360; *Railroad Co. vs. State*, 3 Head, 523; *Bank vs. Graham*, 100 U. S., 699.

This court in this same case is discussing the penalty feature had this to say:

"If the penalty prescribed for the act be both fine and imprisonment, then so far as the punishment can not from the nature of the offender be carried out, the statute is of course inoperative."

In the case of *Southern Express Company vs. State*, 58 S. E. Rep., p. 68, the Court of Appeals of Georgia, in discussing this same question, said:

"And it is well settled that a corporation is included in the word 'person,' used in the criminal statute. It is true that the doctrine of holding corporations responsible for violation of penal laws is one developed by gradual evolution; but it is none the less the law, and is of healthful necessity and utility. * * * A corporation is a person under the law—an artificial person, created by the Legislature. It has a name—a local habitation, too. It is not a citizen in every sense of the word, but it is an inhabitant. It dwells where by law it is located. * * * A corporation is a 'judicial person'—a legal entity. * * *

"Where the lawmaking power used the word 'person,' where it is found in the statute book, it is to be presumed that the legal meaning is intended, and not the social or ordinary meaning."

From the review of the authorities, therefore, it is clear that the Legislature has the right, power and authority to provide for the indictment and prosecution of the corporation for offenses consisting in either a misfeasance or non-feasance of duty to the public, and it is likewise considered by the great weight of authority to be the law that the word "person" in penal statutes defining offenses for misfeasance and non-feasance of duty to the public includes and embraces artificial, as well as natural persons and in all such cases where the punishment for the commission of such an offense by a person is fixed by fine only, the corporation may be proceeded against criminally even though the word corporation is not specifically named in the statute. We do not think, however, a corporation could be prosecuted criminally for the violation of a penal statute, the penalty for which is optional or mandatory, im-

prisonment in the county jail or in the penitentiary, unless corporations are specifically named in such statutes and a special penalty provided for them. The reason for this conclusion is perfectly plain and obvious. A corporation being an artificial person can not possibly under any circumstances be subjected to a penalty of imprisonment.

If the statute under consideration did not fix an optional jail penalty as a part of the punishment we do not think there would be any question as to your right to proceed against a corporation for a violation of same, but, inasmuch as the penalty, or a part of the penalty, may be by imprisonment in the county jail, and it being absolutely impossible to inflict such a penalty upon a corporation, the statute therefore must be held to be inoperative as to corporations. However, we will suggest that the officers, agents and employees of such corporation may be prosecuted although by reason of the penalty feature of the statute the corporation itself may not be reached. The illegal acts of the corporation are really committed by the agents, officers or employees of said corporation and such officers, agents or employees guilty of committing unlawful acts may be prosecuted.

Yours truly,
C. A. SWEETON,
Assistant Attorney General.

FOREIGN CORPORATIONS—POWERS CONFERRED BY CHARTER AND LAWS—
IMPLIED POWERS—RULES OF CONSTRUCTION—TERMS OF ADMIS-
SION—TRAMP CORPORATIONS—STOCK BUYING CORPORATIONS.

1. The powers of corporations are strictly limited to those granted in their charters or the statutes under which they are organized.
2. Whatever may be a corporation's legitimate business, it may foster it by the usual means, but it can not go beyond this.
3. A foreign corporation has no absolute right of recognition in another State, but depends for such recognition and enforcement of its contracts upon their assent, which assent may be granted upon such terms and conditions as the State may think proper to impose.
4. A corporation should always be required to show a plain and clear ground for the authority it assumes to exercise.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 3, 1913.

Hon. John L. Wortham, Secretary of State, Capitol.

SIR: We herewith return you the charter of the Securities Company.

The charter was issued by the State of Arizona, through its Corporation Commission. This company seeks a permit to transact in this State the business of promoting and taking stock in manufacturing companies or corporations. Since this is the first application for a permit by a foreign corporation which you have referred to this Department under the present administration, we desire to state our position with reference to granting these permits for your future guid-

ance and information. This will lead us somewhat beyond the limits of your inquiry, but since the subjects discussed will from time to time arise, we think it in the interest of economy in both time and trouble that we undertake to settle the constantly recurring questions with which you have to deal. This it seems to us is essential to the prompt, systematic and legal administration of the affairs of your office.

It seems to us that in order to determine the rights of and law with reference to foreign corporations, that it is essential to have in mind the general rules and principles of law applicable to corporations generally, and the rules of construction with reference to the rights of corporations generally. Therefore, it is our purpose to incorporate in this opinion certain portions of our previous opinion on the rights of corporations. This, of course, is not necessary for your use and purpose, but we find such a general demand for the opinion of the Department on the rights of foreign corporations that we feel it is essential to the proper administration of your office, as well as our own, that we make the opinion full, so that it may be used for purposes of general distribution to people whose rights are affected.

POWERS CONFERRED BY CHARTER AND LAWS.

The ordinary rule is that the powers of corporations are strictly limited to those granted in their charters or the statutes under which they are organized. Or, as was said by the Supreme Court of the United States in the Dartmouth College case, "a corporation being a mere creature of the law possesses only those properties which the charter confers upon it, either expressly or as incidental to its very existence."

Revised Statutes, Arts. 1164, 1167.

Revised Statutes, Art. 1140.

Ry. Co. vs. Morris et al., 67 Texas, 699.

Fort Worth Ry. Co. vs. Rosedale Ry. Co., 68 Texas, 176.

Irrigation Co. vs. Vivian, 74 Texas, 173.

Sabine Tram Co. vs. Bancroft, 40 S. W., 839.

Lyons, Thomas Hardware Co. vs. Perry Stove Co., 24 S. W., 16.

Rue vs. Mo. Pac. Co., 74 Texas, 479.

Thomas vs. Ry. Co., 101 U. S., 81.

Article 1140 of the Revised Statutes gives the general powers of a corporation, which are:

"1. To have succession by its corporate name for the period limited in its charter, not to exceed fifty years, and, when no period is limited, for twenty years.

"2. To maintain and defend judicial proceedings.

"3. To make and use a common seal.

"4. To purchase, hold, sell, mortgage or otherwise convey such real and personal estate as the purposes of the corporation shall require, and also to take, hold and convey such other property, real, personal or mixed, as shall be requisite for such corporation to acquire in order to obtain or secure the payment of any indebtedness or liability due or belonging to the corporation.

"5. To appoint and remove such subordinate officers and agents as the business of the corporation shall require, and to allow them a suitable compensation.

"6. To make by-laws not inconsistent with the existing laws for the man-

agement of its property, the regulation of its affairs and the transfer of its stock.

"7. To enter into any obligation or contract essential to the transaction of its authorized business."

Article 1164 of the Revised Statutes provides:

"No corporation, domestic or foreign, doing business in this State, shall employ or use its stock, means, assets or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation or those permitted by law."

Article 1167 reads:

"Any corporation which shall violate any of the provisions of either of the three last preceding articles shall on proof thereof in any court of competent jurisdiction forfeit its charter, permit or license, as the case may be, and all rights and franchises which it holds under, from or by virtue of the laws of this State. Whenever it appears that the money, assets, property or funds of a corporation have been issued, paid out or used in violation of any of the provisions of either of the three last preceding articles by any agent, attorney, director or officer of such corporation, it shall be held and considered the act of the corporation," etc.

In the case of *Railway Company vs. Morris*, supra, the Supreme Court of the State said:

"The rule that a corporation has power to do only such acts as its charter, considered in relation to the general law authorizes it to do, applies to every class of corporation.

"The law requires articles of incorporation to be adopted, signed and filed in the office of the Secretary of State, and these are required to give information on specified subjects, and, among others, to state the identical thing the contemplated corporation proposes to do.

"When the articles of incorporation have been filed and recorded, as herein provided, the persons named as incorporators therein shall thereupon become and be deemed a body corporate and be authorized to proceed to carry into effect the objects set forth in such articles in accordance with the provisions of this title." (The latter quotation being from the Revised Statutes as quoted in the opinion referred to.)

In the case of *Fort Worth Railway Company vs. Rosedale*, cited above, the Supreme Court of this State, among other things, stated:

"Through its act of incorporation the appellant acquired simply a corporate existence, through which it might conduct the business specified in its articles of incorporation. This being such as the general law, under which its incorporation was effected, contemplates. This is the extent of the right and power acquired by the appellant through its articles of incorporation.

"The statute specifies the purposes for which under it corporations may be created by the voluntary act of the incorporators, and it declares the general powers which such corporation may exercise. One of these purposes is the construction and maintenance of street railways, but a compliance with the statute gives no right other than a corporate existence and no power other than such as the law itself declares the corporation, when created, may exercise, or such as may be fairly implied from the powers expressly conferred or the nature of the business to be carried on by the corporation."

The Court of Civil Appeals, in the case of the *Sabine Tram Co. vs. Bancroft*, cited above, says:

"A corporation has no more powers than are granted expressly or by impli-

cation from its charter, which is dependent upon the law of the State authorizing the creation of corporations and prescribing their powers, duties and liabilities. * * *

"The law authorizing the organization of corporations in Texas details the objects for which they may be created, gives the limit of their duration, makes a specific grant of their powers and prescribes their duties, naming the officers through whom and by whom they shall be controlled and governed, and provides that no corporation shall employ its stock, means, assets or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation. * * *

"It is true that in prescribing the powers of corporations the power is given 'to enter into any obligation or contract essential to the transaction of its authorized business,' but that power does not confer the right to enter into any contract contrary to public policy and inconsistent with the object of the creation of the corporation. The contracts into which it may enter are those 'essential to the transaction of its authorized business,' not all contracts that may advance its interests or add to its prosperity or wealth—for contracts entirely foreign to the nature of its creation might accomplish these things—but to enter into all contracts necessary to carry on the business and further the enterprise for which it was chartered by the means and machinery provided by law for its existence."

In the case of *Thomas vs. Railway Co.*, supra, the Supreme Court of the United States said:

"We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under the legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers and the enumeration of these powers implies the exclusion of others."

In this same case the court quoted with approval from an English case, in which the following language was used:

"They can not, said the court, engage in a new trade, because they are incorporated only for the purpose of making and maintaining the Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking in some way benefited their line? Whatever be their object or prospect of success, they are still but a corporation for the purpose only of making and maintaining the Eastern Counties Railway; if they can not embark in new trades because they have only limited authority, for the same reason they can do nothing not authorized by their act and not within the scope of their authority."

IMPLIED POWERS.

While there is no exception to the general rule, that a corporation can exercise only such powers as are conferred by its charter, the strict letter of the rule is modified to the extent that a corporation has the implied power to do whatever is necessary or reasonably appropriate to the exercise of the authority expressly conferred, which powers are such as are usually incidental in practice to the prosecution of its business, but no more. Whatever may be a corporation's legitimate business, it may foster it by the usual means, but it can not go beyond this. It may not under the pretext of fostering entangle itself in proceedings with which it has no legitimate concern. If the means be such as are usually resorted to and constitute a direct method of accomplishing the purposes

of the incorporation, they will be regarded as within the corporation's powers, but if they are unusual and tend only in an indirect manner to promote its interests they are beyond its corporate powers.

North Side Ry. vs. Worthington, 88 Texas, 562.

Indianola vs. Gulf Ry. Co., 56 Texas, 594.

Ency. of Law, Vol. 7, p. 700.

People vs. Chicago Gas Co., 17 Am. St. Rep., 319.

Franklin vs. Lewiston Inst., 28 Amer. Rep., 9.

Buffet vs. Troy Ry. Co., 40 N. Y., 176.

In the case of the North Side Railway Company vs. Worthington, the Supreme Court of this State, through Judge Gaines, has laid down the general rule for determining the implied powers of a corporation, quoting with approval from another authority on the question. The court in the case referred to says:

"Corporations are the creatures of the law, and they can only exercise such powers as are granted by the law of their creation. An express grant, however, is not necessary. In every express grant there is implied power to do whatever is necessary or reasonably appropriate to the exercise of the authority expressly conferred. The difficulty arises, in any particular case, whenever we attempt to determine whether the power of a corporation to do an act can be implied or not. The question has given rise to much litigious controversy and to much conflict of decision. It is not easy to lay down a rule by which the question may be determined, but the following, as announced by a well-known text-writer, commends itself not only as being reasonable in itself, but also as being in accord with the great weight of authority:

"Whatever be a company's legitimate business, the company may foster it by all the usual means; but it may not go beyond this. It may not, under the pretext of fostering, entangle itself in proceedings with which it has no legitimate concern. In the next place, the courts have, however, determined that such means shall be direct, not indirect; i. e., that a company shall not enter into engagements, as the rendering of assistance to other undertakings from which it anticipates a benefit to itself, not immediately, but immediately by reaction, as it were, from the success of the operations thus encouraged—all such proceedings inevitably tending to breaches of duty on part of the directors, to abandonment of its peculiar objects on part of the corporation." Green's Brice's *Ultra Vires*, 88.

"In short, if the means be such as are usually resorted to and a direct method of accomplishing the purposes of the incorporation, they are within its powers; if they be unusual and tend in an indirect manner only to promote its interest, they are held to be *ultra vires*." (Pages 568-569.)

In the case of the People vs. Chicago Gas Company, cited above, it appears that the facts were that it was contended that the Chicago Gas Company being a corporation authorized to manufacture and sell gas, did not have the authority under its charter, by implication, to purchase and hold the stocks of another gas company. The Supreme Court of Illinois, in passing upon the question, among other things, said:

"Corporations can only exercise such powers as may be conferred by the legislative body creating them, either in express terms or by necessary implication; and the implied powers are presumed to exist to enable such bodies to carry out the express purposes granted and to accomplish the purposes of their creation. An incidental power is one that is directory and immediately appropriate to the exclusion of the specific power granted, and not one that has a slight or remote relation to it. Citing *Hood vs. N. Y. & New Hamp. R. R.*, 22 Conn.; *Franklin Co. vs. Lewiston Savings Inst.*, 28 Amer. Rep., 9."

"Where a charter in express terms confers upon a corporation the power to

maintain and operate works for the manufacture and sale of goods, it is not a necessary implication therefrom that the power to purchase stock in other gas companies should also exist. There is no necessary connection between manufacturing gas and buying stocks. If the purpose for which a gas company has been created is to make and sell gas and operate gas works, the purchase of stock in other gas companies is not necessary to accomplish such purpose," etc.

The cases quoted and others cited lay down the general rule which they illustrate in various particulars and from various angles, that the implied powers of a corporation are only such as are necessary to the direct and exclusive business of the corporation; that they are such as exist by virtue of the business of the corporation itself; that there are incidental powers which might afford a profit to the corporation, but they are limited to such powers as are necessary to the enjoyment of the privileges of the charter. They are to the corporation what air and sunshine and water are to the life of the individual, that though incidental to life itself, they are necessary to its continued virile and active existence.

RULES OF CONSTRUCTION.

In determining the rights of the applicant corporation, and in determining the rights and powers of corporations under the law, our purpose is to keep in mind the general rules of construction applicable to the charters of corporations and the laws under which such charters may be granted. The general rule is "the charter of a corporation is to be construed most strictly against the corporation and in favor of the public; that if the legislative intent is not ascertainable from the language used in the light of the surrounding circumstances, the doubt is to be determined in favor of the public; that where the object is to grant franchises to corporations, the law must be strictly construed against them; that a corporation should always be required to show a plain and clear ground for the authority it assumed to exercise."

Ency. of Law, Vol. 7, p. 708.

East Line Ry. Co. vs. Rushing, 69 Texas, 314.

Morris vs. Smith Co., 88 Texas, 527.

State vs. So. Pac. Ry. Co., 24 Texas, 127.

Wharf Co. vs. G. C. & S. F. Co., 81 Texas, 494.

Victoria Co. vs. Victoria Bridge Co., 68 Texas, 62.

Williams vs. Davidson, 43 Texas, 1.

Empire Mills vs. Alston, 15 S. W., 200.

N. W. Fertilizer Co. vs. Hyde Park, 97 U. S., 659.

Turnpike Co. vs. Ill., 96 U. S., 68.

Sedgwick on Statutory Construction, p. 291.

Sutherland on Statutory Construction, Secs. 554 and 555.

In the case of Fertilizer Co. vs. Hyde Park, *supra*, the Supreme Court of the United States, in passing upon rights of a corporation under its charter, stated:

"The rule of construction in this class of cases is that it shall be most strictly against the corporation. Every reasonable doubt is to be resolved adversely.

Nothing is to be taken as conceded, but what is given in unmistakable terms or by an implication equally clear, the affirmative must be shown. Silence is negation, and doubt is fatal to the claim. It is axiomatic in the jurisprudence of this court."

In Mr. Sutherland's work, cited above, the rule is laid down as follows:

"(554) The settled rule of construction of grants by the Legislature to corporations, whether public or private, is that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public.

"(555) It results from these principles that a corporation can not be brought into existence except by a statute immediately creating it, or authorizing proceedings for its organization. The charter serves a two-fold purpose: it operates as a law conferring upon the corporation the right or franchise to act in a corporate capacity, and furthermore it contains the terms of the fundamental agreement between the incorporators themselves. The powers of a corporation organized under statutes are such, and such only, as the statutes confer. Consistently with the rule applicable to all acts, that which is fairly implied is as much granted as what is expressed; it is true that the charter of a corporation is the measure of its powers and the enumeration of those powers implies the exclusion of all others. Such acts are strictly construed and all ambiguities are resolved against the corporation."

In Mr. Sedgwick's work the rule is stated to be:

"The uniform language of the English and American law is that all grants of privileges are to be liberally construed in favor of the public and as against the grantees of the monopoly, franchises or charter to be strictly interpreted. Whatever is not unequivocally granted in such acts is taken to have been withheld. All acts of incorporations and acts extending the privileges of incorporated bodies are to be taken most strongly against the companies.

"Corporate powers can never be granted by implication, nor extended by construction. No privilege is granted, unless it be expressed in plain and unequivocal words, testifying the intention of the Legislature in a manner too plain to be misunderstood. In the construction of a charter to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation."

These general rules which we have quoted from the best authorities are all incorporated within and endorsed by the Texas cases which we have cited, many of the cases using the substance and some the identical language of the authorities which we have quoted. So there can be no doubt that the rule of construction is that the charters and the laws under which they are granted must be strictly construed, and, in case of any reasonable doubt as to the rights of the corporation under the law or under the charter, the doubt must be resolved against the corporation and in favor of the public.

The foregoing statement of the general principles of the law of corporations and the usual construction applicable thereto apply as well to foreign corporations as to domestic corporations.

FOREIGN CORPORATIONS.

In the first place, a corporation is a mere creature of the law, and can have no legal existence beyond the limits of the sovereignty which

created it. It must dwell in the place of its creation. The State of its creation can not confer on it a corporate existence beyond its own bounds, nor add to or diminish the powers to be exercised by it in other States; that it must exist only by force of the statute or law of the State in which it is created and that the laws of the State of its creation can by their own vigor have no extra territorial force in another State or country, but are permitted to operate there only on the principle of comity, which will be hereafter discussed.

Thompson on Corporations, Secs. 7875-7881.

Chapman vs. Hallwood Cash Register Co., 73 S. W., 969.

Franco-Texas Land Company vs. Laigle, 59 Texas, 343.

Empire Mills vs. Allston Grocery Co., 15 S. W., 506.

Bank of Augusta vs. Earle, 13 Pet., 519.

In Thompson on Corporations, Art. 7881, that distinguished author, among other things, said:

"The following propositions are believed to be settled law: (1) That a corporation can exist only by force of the statute or other law of the State or country in which it is created. (2) That the laws of one State or country can by their own vigor have no extra territorial force in another State or country, but are allowed to operate there only on the principle of comity. (3) That, as a corporation, it is a creature of the law or State of the country creating it, it can not migrate into another State or country, establish its existence there and exercise its franchises there without the consent of the Legislature of that other State or country, express or implied. This doctrine was conceded in a leading case in the following language, in the opinion of the court, by Chief Justice Taney: 'It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty of which it is created. It exists only in contemplation of law and by force of law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation and can not migrate to another sovereignty.'"

In the case of Chapman vs. Hallwood, etc., above cited, the Court of Civil Appeals of this State quoted with approval a portion of the foregoing excerpt, saying:

"The corporation, being a mere creature of the local law, can have no legal existence beyond the sovereignty where created. It must dwell in the place of its creation, and can not migrate to another sovereignty."

Substantially the same language is used in the Franco-Texas Land Company case, above cited.

TERMS OF ADMISSION.

It follows from the statement of the foregoing principles that every State has the right to prescribe the terms upon which any corporation created in another State or foreign country may do business within its limits, or it may exclude such corporation entirely, with the exception, of course, as to transacting interstate commerce. It also follows that the admission of a foreign corporation to transact business in another State arises purely from the rule of comity between the States, that a foreign corporation has no absolute right to transact business in an-

other State and may be admitted only upon such terms and conditions as the State in which it seeks to be admitted may provide by its laws; that is to say, a foreign corporation has no absolute right of recognition in another State, but depends for such recognition and enforcement of its contracts upon their assent, which assent may be granted upon such terms and conditions as the State may think proper to impose.

Tabor vs. I. B. & L. Association, 91 Texas, 95.

Metropolitan Life Ins. Co. vs. Love, 101 Texas, 446.

Huffman vs. Mortgage Co., 86 S. W., 306.

Thompson on Corporations, Secs. 7884-7887.

8 Cyc., p. 1043.

"From the foregoing principles it must follow that a corporation created under the laws of one State or country can not exercise any of the franchises which are peculiar to corporations and which are not possessed by individuals within the limits of another State or country, except by the comity of that other State or country, which comity is generally expressed by its Legislature in statutes relating to the subject of foreign corporation. * * * It may be stated as a general proposition that as a State has the power entirely to exclude from its limits a foreign corporation, so it has the power of prescribing the terms upon which it alone may be permitted to do business within its limits." (Thompson, Secs. 7884-7886.)

"The recognition of the existence of a foreign corporation by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States. The doctrine of comity will not be extended where the existence of the corporation or the exercise of its powers is prejudicial to the interests of the State or repugnant to its policy. As stated in the case of Paul vs. Virginia, 8 Wal., 181: 'Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.' The views expressed by the Supreme Court of the United States in the above case have been approved by this court and by the Supreme Court of the State." (Chapman vs. Hallwood Cash Register Co., 73 S. W., 970.)

LIMITATIONS OF LAW.

It is also a well known rule of law that a foreign corporation permitted to transact business within this State can do no thing or act not authorized by its own charter and the laws of its own State, nor can it do any act or thing not permitted to be done or authorized to be done by the laws of this State. In other words, when it goes beyond the jurisdiction of the State of its creation, its power and authority to act within the State into which it has gone is limited both by the laws of the State in which it is then acting and the laws of the State in which it was created. In other words, when a foreign corporation is granted to permit to transact business within this State, it becomes subject not only to the laws of the State of its creation, but to all the laws of the State governing domestic corporations, unless otherwise specified in the statute of the State, and it can have no right,

power or authority not granted to domestic corporations, nor can it transact any business, or engage in any business, not permitted to domestic corporations, or which is prohibited by local law.

House of Mercy vs. Davidson, 90 Texas, 533.

Building & Loan Association vs. Griffin, 90 Texas, 480.

Fowler vs. Bell, 90 Texas, 157.

Empire Mills vs. Allston Grocery Co., 15 S. W., 505.

Thompson on Corporations, Secs. 7885-7886.

Murfree on Foreign Corporations, Sec. 416.

Floyd vs. Investment Co., 54 L. R. A., 537.

19 Cyc., page 1220, and many authorities cited in Note 78.

In the Davidson case, cited above, the Supreme Court of this State, among other things, said:

"A foreign corporation can exercise in this State no power prohibited to it by its charter or by the governing statutes under which it is organized, and the appellant corporation, being incapacitated under the law of New York, its charter, to receive the lands devised to it in Cromie's will, which land was situated in Texas, had no more capacity to take the land in Texas than it would have had if the land had been situated in the State of New York." (533.)

In the case of Fowler vs. Bell, supra, a foreign corporation having a permit to transact business in this State attempted to prefer some of its creditors over others. The question arose as to whether or not a foreign corporation, situated as was the one in this instance, had the right to prefer some of its creditors over others, inasmuch as such right was denied domestic corporations under the law as it existed at that time. In passing upon the question, the Supreme Court of Texas said:

"Applying these principles of law to the facts of this case, it follows that, if the mortgage in question was made contrary to the laws of this State or to its public policy, it is void, and conferred no rights upon the mortgage."

Continuing further, in the same opinion, the court quoted with approval Section 7885, Thompson on Corporations, which we have heretofore quoted in the opinion.

In the case of the Building & Loan Association, above cited, the question under consideration was, whether or not a contract made by a corporation chartered under the laws of Dakota, but operating in Texas, which was legal and valid under the laws of Dakota, but usurious under the laws of Texas, was enforceable. In other words, whether the laws of Dakota in which the contract was valid should govern, or whether the laws of Texas in which the contract was made should govern? It was held by the Supreme Court of this State that the laws of Texas governed the contract, and that although it was a legal contract under the laws of Dakota, in which State the contract was made payable, yet, inasmuch as it was an illegal contract under the laws of Texas, it could not be enforced, the Supreme Court of this State saying:

"But this doctrine of comity between the States and between independent governments does not require that any State or government shall enforce the laws of another State, or the rights claimed by citizens of other States, or contracts

to be performed in other States which are so contrary to the laws of the State in which they are sought to be enforced as to work an injury and injustice to the people of the latter State or government or a serious interference with its own policy or laws. * * * The contract in question is subject to the laws of Texas and is usurious according to that law, and, therefore, void for the interest paid thereon."

LIABILITY OF STOCKHOLDERS.

However, the foregoing rule as to the application of domestic laws to a foreign corporation transacting business within their jurisdiction has some limitations, the most important of which is that the liability of a stockholder of a foreign corporation to its creditors must be determined by the laws of the State creating the corporation; that when the stockholders of a corporation are not liable in the place of its creation, they are not liable in the place where it does business. On these principles the limited liability of stockholders and officers to the creditors of a foreign corporation will be determined.

Wharton on Conflict of Laws, Vol. 1, Sec. 105 $\frac{1}{2}$.

19 Cyc., page 1236.

Beale on Foreign Corporations, Secs. 441, 442, 304.

Murfree on Foreign Corporations, Sec. 417.

Bank vs. Mining Co., 6 L. R. A., 676.

Nashua Savings Bank vs. Anglo-American Co., 189 U. S., 227.

"Where stockholders in a domestic corporation have been sued upon contracts entered into by the company in another State with the citizens of that State, it has been held that the liability incurred by them is to be determined not in accordance with the *lex loci contractus*, but by the law under which the company was created and from which alone it derives its powers." (Murfree, Sec. 417.)

In Section 441 of Beale on Foreign Corporations, above cited, the author enumerates the kinds of individual liability to which members of a corporation may in various ways be subjected, and which it is desired to enforce in a foreign State:

(1) The liability of stockholders at common law for unpaid subscriptions to the shares of stock.

(2) The additional liability sometimes placed upon stockholders, which makes them responsible for debts of the corporation up to the par value of their stock; and,

(3) The liability placed upon directors individually for the debts of the corporation by reason of some wrong doing or omission of duty as such officers, as, for example, when the directors file a false statement of the condition of the affairs of the corporation, etc.

Referring to these classes of liability, this authority, in Section 442, says: "In all these cases the existence of the obligation is to be determined by the law of the State of the charter; that law creates the obligation and that alone can determine what liability it has created. The statutes of that State as interpreted by its courts determine the nature and extent of the liability."

Mr. Wharton, in his work on Conflict of Laws, cited above, thus lays down the rule:

"The liability of a stockholder to the creditors of a foreign corporation is determined by the law of the place of the existence of the corporation, supposing that the action of a corporation, in admitting stockholders in the State of the stockholders' domicile, was not prohibited by the latter State. When the members of a corporation are not individually liable in the place of its creation, they are not liable in the place where it does business. On such principles the limited liability of stockholders and officers to creditors of a foreign corporation will be determined."

TRAMP CORPORATIONS.

Another familiar rule of law is that where a charter is obtained in a foreign State for the purpose only of transacting business in a domestic State and with no bona fide intention of transacting business in the State from which the charter is obtained, that such action is a fraud both upon the State issuing the charter and upon that into which it seeks admission for the transaction of business, and a charter obtained under such circumstances and conditions confers no rights upon the corporation and is not within the rule of comity between States which permits corporations chartered within one State to transact business in another.

Empire Mills vs. Allston Grocery Co., 15 S. W., 506.

19 Cyc., p. 1234.

Thompson on Corporations, Secs. 7895-7896.

Railway Co. vs. Commissioners, 6 Kans., 255.

Montgomery vs. Forbes, 148 Mass., 252.

Cleaton vs. Emory, 49 Mo. App., 351.

Hill vs. Beach, 12 N. J. Equity, p. 36.

Booth vs. Wonderly, 36 N. J. Law, 250.

Clark & Marshall on Corporations, Sec. 838, p. 2687.

Harrell vs. City of East St. Louis, 16 Amer. Rep., 632.

Relative to the rule above announced, Mr. Thompson, in his work on Corporations, has this to say:

"(7895) *Status of Tramp Corporations.*—In what has preceded, there has been the assumption that a corporation organized in one State, and seeking to do business in another State under the protection of its laws, is composed of the inhabitants of the State creating it. The case now to be considered is the case where the citizens of one State go into another State for the purpose of organizing a corporation under favorable statutes without the intention of carrying on any business in such State, but with the purpose of carrying on business, we will say, to state the strongest case—in the State of their own residence. We will, for instance, state the case where several citizens of New York organized a pretended corporation in West Virginia for the purpose of doing business, not in West Virginia, or in any other State than New York, the State of their own residence. In such a case is the law to be corrupted and perverted in favor of such manipulation, so far as to hold that the citizens of a State can be allowed to acquire a corporate existence within that State under, subject to and governed by, the laws of another State? To put it another way, can the citizens of New York be allowed to import the laws of West Virginia governing private corporations, into the State of New York, and make those laws the rules of their own government in dealing with other citizens of New York; and will the courts of New York gravely sanction such frauds upon its own laws? These queries are suggested by a recent notable decision of the Court of Appeals of that State, following and extending the doctrine of an earlier notable case. When it is considered that a corporation is, for the purpose of Federal jurisdiction, conclusively presumed to be a 'citizen' of the State

under whose laws it is created, will the citizens of one State be permitted, by becoming thus incorporated under the laws of another State, to defraud the courts of their own State out of their rightful jurisdiction over controversies between them and other citizens of their own State, where the amount in controversy exceeds two thousand dollars? These questions, to the mind of the writer, answer themselves. The conclusion is that the 'tramp corporation' should not be judicially recognized, but that its members should be held liable upon their contracts as partners, and upon their torts as joint tort-feasors. Undoubtedly the question is to be determined as a question of comity; for, considered as a question of mere power, one State can not send any portion of its laws into another State and make them operative there, whether on the backs of a pretended migrating corporation or otherwise. And a State can, if it likes, abdicate its control over its own citizens, and allow its courts to be defrauded of their rightful jurisdiction over them. The liberal policy of the American States in extending hospitality to corporations, created honestly and for honest purposes under the laws of other States, has, in some cases, gone to the extent of holding that the courts of one State will recognize as valid a corporation formed under the laws of another State by citizens or residents of that State for the purpose of doing business in the domestic State; and the mere fact that it was not intended to do any business in the State within which the corporation was organized, will not, of itself, be a sufficient ground for expelling it from the State into which it migrates, or for holding its members liable in that State as partners, there being no actual intent to evade the laws of the State within which it settles.

"(7896) *Further of 'Tramp Corporations.'*—But other courts have taken the view that, irrespective of the residence or citizenship of its members, the organization under the law of one State, of a corporation for the purpose of doing business exclusively in another State, is a fraud upon the laws of the latter State, and that such persons will not be deemed possessed of any immunities of a corporation in the latter State, but will be liable for their undertakings as partners. The Supreme Court of Kansas have held, on the soundest grounds, that where a company was incorporated under the laws of Pennsylvania with the power of doing business anywhere 'except in the State of Pennsylvania,' it could not do business in Kansas; since there was no rule of comity which would allow one State to spawn corporations, and send them forth into other States to do business there which it would not permit them to do within its own boundaries."

It will be noted from the foregoing that there appears to be two doctrines or rules as to the status of tramp corporations, but there can be no mistake as to which rule that eminent author endorses, for it is noted in Article 7895 that he thus expresses his opinion:

"When it is considered that a corporation is, for the purposes of Federal jurisdiction, conclusively presumed to be a 'citizen' of the State under whose laws it is created, will the citizens of one State be permitted, by becoming thus incorporated under the laws of another State, to defraud the courts of their own State out of their rightful jurisdiction over controversies between them and other citizens of their own State, where the amount in controversy exceeds two thousand dollars?"

He answers the question thus:

"These questions, to the mind of the writer, answer themselves. The conclusion is that the 'Tramp Corporation' should not be judicially recognized, but that its members should be held liable upon their contracts as partners, and upon their torts as joint tort-feasors."

To our mind not only the weight of authority, but the conclusions of reasons as well, are on the side of the opinion thus expressed by Judge Thompson. However, as between conflicting authorities on the question,

there can be no mistake as to the position which has been taken by the Texas courts, and that is they are entirely in accord with the opinion of Judge Thompson.

In the case of *Empire Mills vs. Allston*, supra, the Court of Appeals of this State, among other things, said:

"* * * To obtain a charter for the purpose of evading the laws of a foreign State, under cover of the rule of comity, would be a fraud upon the State granting the charter; and to attempt to act under such charter in the foreign State would be a fraud upon the latter. *Mor. Corp.* (1st Ed.), Sec. 508. Comity was never accorded for the purpose of giving any State an unlimited power to dispose of the franchise of acting in a corporate capacity in other States, or to 'spawn corporations' for that purpose. *Railway, etc., Co. vs. Coffey*, 6 Kan., 254. No rule of comity will allow one State to charter corporations to operate in another State, unless there is willingness on the part of the foreign State that it should be so. To hold otherwise would be to say that the right of one State, aided by comity, is superior to the sovereign will of the other. This involves the surrender of sovereignty to a rule of comity and to a matter of international etiquette, which no independent nationality should for a moment think of doing. It is not necessary that a State should by express enactment exclude foreign corporations in order to indicate that they shall not be allowed to act within its jurisdiction; the will of the State may be implied from its general policy and legislation. 'Whenever a State sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made.' *Bank vs. Earle*, 13 Pet., 592; *Myers vs. Bank*, 20 Ohio, 301, 302; *Starkweather vs. Society*, 72 Ill., 50; *Trust Co. vs. Lee*, 73 Ill., 144; *Christian Union vs. Yount*, 101 U. S., 356. In this last case cited, Mr. Justice Harlan, speaking of the rule of comity, said: 'In harmony with the general law of comity obtaining among the States composing the Union, the presumption should be indulged that a corporation of one State, not forbidden by the law of its being, may exercise, within any other State, the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter State, or by its public policy to be deduced from the general course of legislation, or from the settled adjudications of its highest court.' Page 356 of said case. See *Tayl. Corp.*, 'Having Capital Stock,' Sec. 384. (In accordance with these principles, see authorities collated in note to above cited section. They are too numerous to cite here.) Therefore, an act of incorporation, procured for the purpose from one State to evade the laws of another State, and to carry on its business in the latter State would constitute it a fraud upon the State granting the corporate powers, as well as upon the State in which it is sought to organize and operate the corporation. * * *"

In the case of *Montgomery vs. Forbes*, cited above, the Supreme Court of Massachusetts said:

"The apparent corporation was not a corporation. The statute of New Hampshire requires five associates, and the articles of agreement must be recorded in the town in which the principal business is to be carried on, and the place in which the business is to be carried on must be distinctly stated in the articles; otherwise there is no corporation. The defendant's pretended associates were associates only in name; he alone was interested in the enterprise. The articles of agreement were recorded in Nashua, and stated that the business was to be carried on there; but it was not in fact carried on there, and was not intended to be. The defendant took all the shares of the capital stock, and paid in to himself as treasurer only 50 per cent of the amount thereof. This is not a case where there has been a defective organization of a corporation which has a legal existence under a valid charter. Here there was no corporation. It was just the same as if the defendant had nothing at all in the way of establishing a corporation, but had conducted his business under the names of the

Forbes Woolen Mills, calling it a corporation. The business was his personal business, which he transacted under that name. Fuller vs. Hooper, 3 Gray, 334, 341; Bryant vs. Eastman, 7 Cush., 111."

The case of Cleaton vs. Emory, decided by the Missouri Court of Appeals, is a very thorough case, which treats at length the principle here enunciated, and we will quote fully from that case as follows:

"1. It is of course well understood that the incorporating in one nation or State, either by special act or general law, has no extra-territorial force. In other words, the statute laws of one State have no force or effect as such in other States. Such recognition as is given corporate entities in States other than the parent State, or home, of the corporation comes alone from the international courtesy or law of comity always existing by common consent between different countries. It is then only by virtue of this interstate 'common law of comity' that the existence of this exposition corporation created in Colorado can be at all recognized in this State. It is not meant by this law of comity that because a certain corporation may have been, in form, created in one State, it shall necessarily be permitted recognition in another State. This law of comity was not established for the purpose of giving any State an unlimited power to dispose of the franchise of acting in a corporate capacity in other States. To obtain a charter for the purpose of evading the laws of a foreign State, under cover of the rule of comity, would be a fraud upon the State granting the charter; and to attempt to act under such charter in the foreign State would be a fraud upon the latter.' This statement of the law is quoted from 2 Morawetz on Private Corporations, Section 965a, and we regard it as a succinct and pointed recognition of the true rule; and under it we must hold the incorporation here in question only colorable and absolutely void. The procuring of the incorporation of this St. Joseph Fair Association was a fraud on the State of Colorado, as by its statutes it never was meant to incorporate a concern whose entire business was to be conducted in a foreign jurisdiction, not even providing for the location of its general or principal office within the limits of said State. Section 2, Chapter 19, General Statutes, Colorado (1883), which must give life to its corporation (if it has any vitality), admits the right to incorporate for the purpose of conducting a business, a portion of which shall be within and a portion without the State, but impliedly rejects the creation of corporations whose principal office and whose entire business shall be maintained and operated in other States. It is there named as a requisite in the certificate of incorporation, that 'it shall state the name of the town or place and the county in which the principal office of the company shall be kept' (where the entire business is to be transacted in that State); and when any company shall be created under the laws of this State, for the purpose of carrying on *part* of its business beyond the limits thereof, such certificate shall state that fact, and shall state the name of the town and county *in this State* in which the principal office of said company shall be kept.

"Clearly, then, the statutes of Colorado meant to provide for the creation of such corporations, a *part*, at least, of whose business was to be transacted in that State, and manifestly, too, it was the intention that the principal office of the corporation should be kept in the State of Colorado; yet we have here in the articles of association signed by these defendants a provision that the principal office of the corporation shall be at St. Joseph, Missouri. It is true that the articles formerly stipulated for the establishment of branch offices at various cities throughout the country, and among them at Denver, Colorado. Still this does not cover up nor conceal the sole design of the incorporation which was the conduct of a fair and exposition at St. Joseph, and nowhere else. It is disclosed, too, that no branch offices were indeed ever established, unless it was from the appointment of an agent, so called, at Denver during the last days of the exposition at St. Joseph, and when the enterprise was already a pronounced failure.

"We have here, then, the State of Colorado granting a corporate franchise to our own citizens to do business alone in this State. Not only that, but the sole purpose was to avoid the restrictions so wisely engrafted on to our corpora-

tion laws. To hedge about and protect its people from false appearances and merely advertised capital that has no real existence, our Legislature has provided against the creation of those corporations of abundant pretenses and no capital. Hence it was not in the power of these defendants to incorporate, under the laws of Missouri, with a pretended capital of \$1,000,000, while there was in fact less than \$50,000 stock subscribed. And will it be permitted, then, to go to another State and do directly what they can not do here directly? The State of Colorado attempted here by this incorporation to create and send out to another State this organized entity, not to do business within its own realm, but to carry on such business altogether in another State. The well-considered decision of *Land Grant Co. vs. Commissioners of Coffey Co.* (6 Kan., 245) is here applicable. There the corporation was created in Pennsylvania with authority to transact its business in any other State except Pennsylvania. The Supreme Court of Kansas denied such a corporation any recognition, using the following language: 'No rule of comity will allow one State to spawn corporations and send them forth into other States to be nurtured and do business there, when said first-mentioned State will not allow them to do business within its own boundaries.' * * * 'A corporation, in order to have any legal existence, must have a home, a domicile, a principal place of business within the boundaries of the State which creates it.'

"So, in the State of Texas, where corporations for mercantile purposes were not permitted, but a firm at Dallas, in that State, secured incorporation in Iowa, the courts of Texas declined to recognize the concern as a corporation, and held the pretended incorporators as partners. *Empire Mills vs. Grocery Co.*, 15 S. W., 505.

"And in the State of New Jersey certain persons, with the design of operating a quarry in that State, went to New York and became incorporated with a view of limiting their liability. The New Jersey courts refused to recognize such pretended incorporation, declaring that 'it was perfectly manifest, upon the face of such proceedings, that the attempted organization under the general laws of New Jersey, respecting corporations was a fraud upon the law of that State,' and the defendants were held 'as partners trading under the name they have assumed.' *Hill vs. Beach*, 12 N. J. Ch. Rep., 31. Without occupying further space, we refer to the text-books and cases cited by plaintiff's counsel.

"We have carefully read and considered the cases relied upon by defendants; and, while some have gone far in the direction of admitting the validity of foreign corporations, regardless of where the business thereof shall be prosecuted, we have yet to find a decision that goes to the extent we are asked to go in the case at bar. In all of these we find some semblance, at least, of business done or performed in the home State of the corporation, such as the yearly election of directors and officers at the office of the company, kept in the legal domicile of the corporation, as were the cases of *Merrick vs. Van Santvoord*, 34 N. Y., 208, and *Hanna vs. Co.*, 23 Ohio St., 622. Or cases where the corporation was organized in one State and extended its operations into other States, as in *Atchison, T. & S. F. Ry. Co. vs. Fletcher*, 35 Kan., 236. Or, as in the case of *Moxie Nerve Food Co. vs. Baumbach*, 32 Fed. Rep., 205, where, though the main business of the corporation was transacted in jurisdictions other than the parent State, and the incorporators lived in such other States, yet its general office was maintained and the corporate elections carried on at such home office in the parent State.

"So, too, the case cited in the text-books and in defendant's brief, decided by the Superior Court of Cincinnati, entitled *Second Nat. Bank vs. Lovell*, 2 Cin. Rep., 397, has gone almost to the verge of absurdity in sustaining the charters of foreign corporations. But there the incorporation was saved, because the articles of association provided a home office at Covington, Kentucky, and under its charter the corporation was entitled to do business in Kentucky, the parent State, and it did keep its principal office there, where, too, its elections were held.

"We conclude, then, this to be an effort to have the State of Colorado create a Missouri corporation. To concede its validity and recognize its existence, is to admit authority in another State to direct the granting of such franchises in the borders of this Commonwealth; in short, to yield to Colorado the partial

exercise of our State's sovereignty. If this is to be allowed, then any business house at St. Joseph, Kansas City, or elsewhere in this State, desiring to incorporate and thereby limit the liability of the owners and promoters, may get up their articles of association and may choose to go to Denver, and secure incorporation, rather than to Jefferson City, even though the entire business of the proposed corporation (including the maintenance of its principal office, the election of directors, etc.), shall be done at St. Joseph or Kansas City; and this is to be permitted because, forsooth, the laws of Colorado are more 'liberal' than those of Missouri. Such an evasion of our laws by our own people, it seems, can receive no countenance from the courts, even under the laws of comity."

Bearing in mind the rules of construction invoked in determining the rights of corporations, we think the principles enunciated in our statement preceding the foregoing authorities must be the rule of law which obtains in this State, and that these authorities sustain the proposition upon which we rely.

STOCK-BUYING CORPORATIONS.

We have already seen in this opinion that the charter of a corporation is the measure of its powers and that it can exercise only such powers as are conferred upon it either in express terms or by necessary implication. See authorities cited.

Noyes on Inter-Corporate Relations, 2 Ed., 474.

Report and Opinions of Attorney General of Texas, 1908-1910, page 388.

It has been called to our attention that there are some foreign corporations in this State who appear to be dealing in the stocks of other corporations. It is clear to our mind that they have no legal authority to engage in this line of business unless it has been specially authorized by the laws of the State granting their charters, and also by the laws of this State and by the permit issued them for transacting business. The corporation under consideration in this case is asking the permit for the purpose of promoting and taking stock in manufacturing corporations, and its authority under such permit, if issued, will be discussed later on in this opinion, but what we here now desire to discuss, with a view of determining the rights of the applicant later on, is the general authority of one corporation to acquire the stock of another. We think the true rule is, that the powers of a corporation created under the laws of this State, or of a foreign State, are limited to such as the laws of this State may confer, or as it may permit, and that the enumeration of the purposes for which a corporation may be created under the laws of this State excludes all others, and that unless express permission be given so to do, it is not within the general powers of a corporation to purchase or deal in the stock of other corporations, either for purposes of profit or for the purpose of controlling their management.

Morawetz on Private Corporations, Sec. 431.

De La Vergne Co. vs. German Savings Inst., 175, Notes, p. 54.

Thompson on Corporations, Secs. 1102-1103.

California Bank vs. Kennedy, 167 U. S., 366.

First National Bank vs. National Exchange Bank, 92 U. S., 122.

Buckeye Marble Co. vs. Harvey, 18 L. R. A., 252.

People vs. Chicago Gas Trust, 8 L. R. A., 497.

Valley R. R. Co. vs. Lake Erie Iron Co., 1 L. R. A., 413.

10 Cyc., 1107.

Morawetz thus lays down the rule:

"A corporation has no implied right to purchase shares in another company for the purpose of controlling its management, nor may a corporation hold shares in another company as an investment, unless this be the usual method of carrying on its own proper business. The right of a corporation to invest in shares of another company can not be implied merely because both companies are engaged in a similar kind of business. A corporation must carry on its business by its own agents and not through the agency of another corporation. It is clear also that a corporation has no implied right to speculate in shares, unless this be the kind of business for which the company was formed." (Sec. 431.)

"A corporation can not in the absence of express statutory authority become an incorporator by subscribing for shares in a new corporation, nor can it do this indirectly through persons acting as its agents or tools. The right of forming a corporation is conferred by the incorporation laws only upon persons acting individually and not upon associations; moreover, it would under ordinary circumstances be in violation of the charter of an existing company to subscribe for shares of a new company and assume the resulting liabilities."

The rule, as stated in Cyc., supra, may be regarded as an epitome of the controlling decisions relative to this subject, and is as follows:

"One corporation can not, unless authorized thereto, by its governing statute, make a valid subscription to the stock of another corporation, or otherwise become a shareholder, unless for the purpose of receiving payment of or security for a debt owing to it; and even then, it seem that while it may receive dividends, it will not be allowed to exercise the power of controlling the corporation whose shares it has acquired, by voting them as a shareholder, but that its attempt to so vote may be enjoined by the other shareholders." (10 Cyc., pp. 1107-1108.)

The Supreme Court of the United States, in the De La Vergne Co. case, just cited, among other things, said:

"But as the powers of corporations created by legislative act are limited to such as the act expressly confers and the enumeration of these implies the exclusion of all others, it follows that, unless the express permission be given to do so, it is not within the general powers of a corporation to purchase the stock of other corporations for the purpose of controlling their management." (Vol. 175, p. 54.)

Thompson on Corporations, Sec. 1102, is as follows:

"It may be laid down as a general rule that a corporation, unless expressly empowered to do so by its governing statute, can not subscribe to shares of stock in another corporation."

In stating the reason of the rule, Mr. Thompson says:

"The reason of the rule is, that if a corporation could by buying up the majority of the stock in another corporation, be admitted to vote as a shareholder in the meetings of such other corporation, the purchasing corporation could take the entire management of the business of the latter, however foreign such business might be to that which the purchasing corporation was created to carry on. A banking corporation could thus become the operator of a rail-

road or of a manufacturing business, and any other corporation could engage in banking by obtaining the control of the stock of an incorporated bank. 'Nor would this result follow any the less certainly, if the shares of stock were received in pledge only to secure the payment of a debt, provided the shares were transferred on the books of the company to the name of the pledgee.' The reason of the rule was well stated by Mr. Justice Walton: 'If a corporation can purchase any portion of the capital stock of another corporation, it can purchase the whole, and invest all its funds in that way, and thus be enabled to engage exclusively in a business entirely foreign to the purposes for which it was created. A banking corporation could become a manufacturing corporation, and a manufacturing corporation could become a banking corporation. This the law will not allow.' (Sec. 1103; Franklin vs. Lewiston Inst., 28 Amer. Reps., p. 9.)

The foregoing authorities, and many more which might be cited, are conclusive that unless a corporation is specifically authorized by its charter to engage in the purchase and sale of stocks in other corporations, it can not do so. The particular charter under examination purports to authorize in a limited way the corporation about to be formed to take stocks in certain classes of corporations, and we do not intend by referring to the general law to undertake to limit any of the rights which the applicant corporation might have under the statute, but since this opinion is a general one, we have gone into the law of the question in order that foreign corporations operating in this State which have heretofore been violating the law may have an opportunity to cease such violation and thus save this Department the necessity of bringing suits to forfeit their permits to transact business in this State.

PART TWO.

A. Having thus gone over the elementary principles of law governing the admission of foreign corporations to transact business in this State, we will now enter upon a discussion of the charter of the Securities Company tendered you for filing. It will be noted in the certificate of incorporation attached to the charter and issued by the Arizona Corporation Commission, which is the authoritative body authorized to issue charters under the laws of Arizona, that the certificate shows:

"The Securities Company has complied with the provisions of the laws of the State of Arizona relating to the incorporation of companies with exception of filing of affidavit of publication."

Chapter 59, Section 9, of the laws of Arizona, passed at the special session of the State's First Legislature, and shown on page 160 of the session laws of that Legislature, provides, among other things, the following:

"Every corporation organized under the provisions of this title shall publish at least six times in some newspaper published in the county in which the principal place of business is located or works established, if there be one, and if not in some newspaper having a general circulation in such county, a copy of its articles of incorporation, and upon the expiration thereof file an affidavit in the office of the Corporation Commission of Arizona stating that such publication has been made according to law."

"Any corporation organized under the laws of this State may commence busi-

ness as soon as its articles of incorporation are filed for record in the office of the Corporation Commission and a certified copy thereof recorded in the office of the county recorder of the county where its principal place of business is to be, and a certificate of incorporation delivered to said company by the Corporation Commission."

"Its acts shall be valid if the publication of its articles of incorporation is made and an affidavit thereof filed in the office of the Corporation Commission within three months after date of the recording of its articles in the office of the county recorder. * * *"

It thus appears from a consideration of the foregoing section of the Arizona laws that the Securities Company can only transact business in the State of Arizona for three months without making publication of its articles of incorporation as provided by law and filing the affidavit thereto with the Corporation Commission.

Where a publication of the articles of incorporation is required by law, it is an essential requirement to the validity of the charter of the corporation; in other words, the statute is mandatory and must be complied with.

Heinig vs. Manufacturing Co., 81 Ky., 300.

Insurance Co. vs. Cram, 43 N. H., 641.

In the case of Heinig vs. Manufacturing Co., supra, the Court of Appeals of Kentucky held that a corporation organized under the general statutes of that State, which required that notice of the incorporation must be published for four weeks, etc., would not become a corporation until such publication had been made, saying:

"Such corporations have no right to commence business or to do any corporate act until the articles of incorporation are filed with the proper officer for record and the notice specified by Section 5, supra, is published for the length of time and within the time named in Sections 5 and 6."

In the case of the Insurance Company vs. Cram, a corporation was sought to be formed under the statutes of the State, one section of which provided that "every such corporation shall give a public notice of its formation, name and object by publishing such notice three weeks successively in some newspaper printed in the county, etc., and also by posting like notice in one or more public places in the town in which such association is formed and located." The Supreme Court of New Hampshire, in passing upon the question at issue, said:

"In this case a notice was published in the newspaper, but whether in proper form or not, we need not stop to inquire; since it is admitted that no similar notice was posted in the town. It would seem that a notice had been given in town calling the people to come together to consider the expediency of forming such a company, but where signed or by whom such notice had been posted or how the notice had been given, does not appear. It only appears that agreeably to such notice the inhabitants of met, etc., but no notice like the one printed in the paper was posted in town or anywhere giving notice that such association had been formed with its name and object as the statute required. This notice in the town is made as necessary by the statute as the one in the paper. Both are required in every such case and a part performance is not sufficient. Anything less than a legal notice is no notice at all."

The statutes of Arizona requiring the notice referred to are simi-

lar in language, purpose and effect to the statutes under consideration, and upon which was rendered the foregoing opinion. It is clear, therefore, that the publication of the articles of incorporation as required by the statutes of Arizona is mandatory and that a corporation organized under the laws of Arizona would exist only for three months, unless the publication of its articles is made in accordance with the laws of that State. Upon the face of the certificate in this case it is shown that the filing of the affidavit of publication has not been made. The certificate is dated the 23d day of December, 1912, while the articles of incorporation were signed on the 21st day of December, 1912. It follows, therefore, that this corporation is not authorized to transact business under the laws of Arizona any longer than three months from the 23d day of December, A. D. 1912, and that, therefore, if you were to issue a permit for it to transact business, such permit could only be issued for the time intervening between this date and a date three months after December 23, 1912. We think, however, that if a certificate from the Arizona Corporation Commission was filed with you before the expiration of the original three months from the filing of the articles of incorporation with the Arizona Corporation Commission, showing that a publication had been made and the affidavit filed with the Arizona Corporation Commission, then that the permit issued by you could be without an additional payment extended to any time within ten years after the taking out of the original permit.

B. Article 3 of the Articles of Incorporation, accompanying the certificate, among other things, provides:

"All or any portion of the capital stock may be issued in the payment for real or personal property, services or other right or thing of value for the use and purposes of the corporation, and when so issued shall become and be fully paid the same as if paid for in cash at par, and the directors shall be sole judges of the value of the property, right or thing acquired in payment for capital stock."

Subdivision 3, Section 8, page 218, of the laws of Arizona, passed at its First Regular Session, provides that the articles of incorporation must contain "the amount of capital stock authorized and the time when and the conditions upon which it is to be paid."

It appears therefore from this subdivision that it is left with the incorporators themselves to determine the time when and the conditions upon which the capital stock of the corporation is to be paid. It appears from the provisions above in the charter that the incorporators have determined, and so placed in Article 3 of the charter, that the directors shall be the sole judges of the value of the property, right or thing acquired in payment of the capital stock; and since no time is designated when the payments shall be made, it is presumed that the payments are to be upon call of the directors. It would appear, therefore, from the foregoing that the incorporators, when they formulated this charter, have of their own volition destroyed the comity which could exist between the State of Arizona and the State of Texas permitting corporations chartered under that State to transact business within this State.

Article 1141 of the Revised Statutes of the State of Texas provides:

"The stockholders of all corporations chartered, etc., shall, within two years from the date of the filing of such charter by the Secretary of State, pay in the unpaid portion of the capital stock of such company; proof of which shall, within said time, be made to the Secretary of State, in the manner provided in Articles 1126 to 1128, inclusive, for the filing of charter."

Article 1146 of the Revised Statutes provides:

"No corporation, domestic or foreign, doing business in the State, shall issue any stock whatever, except for money paid, labor done, which is reasonably worth at least the sum at which it was taken by the corporation, or property actually received, reasonably worth at least the sum at which it was taken by the company. Any corporation which violates the provisions of this article shall, on proof thereof in any court of competent jurisdiction, forfeit its charter, permit or license, as the case may be, and all rights and franchises which it holds under, from or by virtue of the laws of this State."

Article 12, Section 6, of the Constitution of Texas provides:

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

It appears therefore that the incorporators, in making its directors the sole judges of the value of the property received instead of declaring that the property received must be taken at its actual value, and in leaving it optional with the directors as to when its stock shall become and be fully paid up, have destroyed the comity, so far as this particular charter is concerned, between the State of Arizona and the State of Texas, and that no permit can be issued to the corporation attempted to be created by this charter.

C: Article 8 of the charter of the Securities Company, among other things, provides:

"The private property of the stockholders of the corporation shall be forever exempt from corporate debts of any kind whatever."

Subdivision 5, Section 4, Chapter 49, page 217 of the laws of Arizona passed at the Regular Session of its First Legislature, provides that among other powers corporate bodies shall have the right "to exempt the private property of members from liability for corporate debts."

It appears, therefore, that the exemption of the stockholders from liability from corporate debts was a voluntary act upon the part of the incorporators, and that they are not necessarily exempt under the laws of Arizona.

Under the authorities which we have heretofore cited it appears that, so far as the liability of stockholders are concerned, the law of the creation of the corporation governs and that, therefore, with this exemption in the charter of this corporation, the law of Arizona permitting its insertion would govern in the attempt to levy on the private property of the stockholders of the corporation for any corporate debt, but that had the corporations not voluntarily inserted this provision in their charter the rule would have been otherwise.

Article 1200 of the Revised States of the State of Texas reads:

"If the directors of any corporation shall knowingly declare and pay any dividend when the corporation is insolvent, or any dividend the payment of which would render it insolvent, they shall be jointly and severally liable for all the debts of the corporation then existing, and for all debts of the corporation which thereafter, during the time such directors respectively remain in office, shall be contracted. The amount for which they shall be so liable shall not exceed the amount of such dividend. * * *"

Article 7399, Revised Statutes, provides:

"Any corporation, either domestic or foreign, which shall fail to pay any franchise tax provided for in this chapter when the same shall become due and payable under the provisions of this chapter, shall thereupon become liable to a penalty of twenty-five per cent of the amount of such franchise tax due by such corporation; and, if the amount of such tax and penalty be not paid in full on or before the first day of July thereafter, such corporation shall for such default forfeit its right to do business in this State; which forfeiture shall be consummated without judicial ascertainment by the Secretary of State entering upon the margin of the record kept in his office relating to such corporation the words, 'right to do business forfeited,' and the date of such forfeiture; and any corporation whose right to do business shall be thus forfeited shall be denied the right to sue or defend in any other courts of this State, except in a suit to forfeit the charter of such corporation; and in any suit against such corporation on a cause of action arising before such forfeiture, no affirmative relief shall be granted to such corporation, unless its right to do business in this State shall be revived as provided by this chapter. And each and every director and officer of any corporation whose right to do business within this State shall be so forfeited shall, as to any and all debts of such corporation which may be created or incurred, with his knowledge, approval and consent, within this State, after such forfeiture by any such directors or officers, and before the revival of the right of such corporation to do business, be deemed and held liable thereon in the same manner and to the same extent as if such directors and officers of such corporation were partners."

It appears from the foregoing that the incorporators have exempted the private property of themselves and associates from corporate debts of any kind whatever; that they have done this of their own volition and that their property is not thus necessarily exempt under the laws of Arizona, but that it is exempt because of their own voluntary action. It will be seen from an analysis of the two articles of the Texas statutes quoted that the laws of Texas seek to hold the directors of a corporation liable to a limited extent when they knowingly declare a dividend when the corporation is insolvent, and that under the last named articles every director and officer of a corporation, whose right to do business has been forfeited shall, as to any and all debts of such corporation created with their knowledge and approval, after the forfeiture, is liable as if they were partners in business instead of merely officers and directors of the corporation. In other words, the two Texas statutes present two phases of a stockholders' liability or two circumstances or conditions under which such stockholders may become liable to the creditors of a corporation. Under the provisions of this charter, deliberately and voluntarily put there by the incorporators themselves, they would thus escape the liability provided for by the Texas statutes, for, as we have heretofore shown, the laws of Arizona would control in this particular instance. Article 7399 declares on its face that it is applicable

to foreign corporations, but Article 1200 does not so declare, and the questions naturally suggest themselves as to whether or not both of these articles are applicable to directors and officers of foreign corporations operating in this State who bring themselves within the law permitting the recovery specified. We think that both the statutes are applicable.

Railway Company vs. Hinchliffe, 170 N. Y., 473.

Miller vs. Quincy, 179 N. Y., 294.

Heard vs. Pictorial Press Co., 182 Mass., 530.

Hutchinson vs. Stadler, 85 N. Y., 424.

Nelson vs. Bank of Fergus Co., 157 Fed., 161.

In the case of Miller vs. Quincy, supra, the Court of Appeals of the State of New York held:

“A director of a foreign corporation transacting business and having its principal office in this State may under Sections 1781 and 1782 of the Code of Civil Procedure maintain an action against individuals who were formerly directors for an accounting and restoration of money belonging to the corporation alleged to have been misappropriated and wasted by them in violation of their duties as such directors; the contention that these provisions of the statute apply to domestic corporations only and restrict the maintenance of such an action to directors thereof, is not only unauthorized by the general language of the statute, but is contrary to justice and sound public policy and would render impossible any other form of redress in cases of this character.”

The opinion shows that this action was brought by the plaintiff, alleging that he was one of the directors of a business corporation created by the laws of West Virginia, and that the corporation since its organization has had its principal place of business and office for the transfer of stock in the city of New York and that it is engaged in business in that State. It then alleges that prior to September, 1898, the defendants were elected directors of the corporation and continued as such until May, 1899; that in December, 1898, certain parties named paid to the corporation a sum of \$25,000 as the consideration of a certain business transaction between those parties and the corporation; that subsequently the defendants being then directors, wrongfully appropriated the money for their own use or wasted or misapplied it with other funds of the corporation. The relief demanded was, that the defendants and each of them individually should be required to account for their official misconduct in the management and disposition of the funds and property of the corporation and that they be compelled to pay to the corporation, or its officers, such sum of money as might be found to be due from them upon such accounting. The action was brought under Article 1781 of the Code of Civil Procedure of the State of New York. Under that article an action could be maintained against one or more trustees, directors or managers, or other officers of the corporation, to procure a judgment upon various grounds therein stated. Among the grounds stated are (1) to compel the defendants to account for their official misconduct in the management and disposition of the funds and property committed to their charge; (2) to compel them to pay to the corporation which they represent, or its creditors, any money and the value of any property which

they have acquired themselves or transferred to others or lost or wasted by violation of their duties. In the opinion of the Court of Appeals of New York it was held that while the statute did not specify the officers of a foreign corporation, yet it applied to the officers of a foreign corporation as well as to the officers of a domestic corporation and that a judgment would be sustained against the defendants in the case. The trial court sustained the contention of the defendants that the statute only applied to the officers, directors, etc., of a domestic corporation, but the Court of Appeals, as stated above, overruled this contention, saying:

"The learned court below refused to apply the general language of the statute, but restricted it to particular cases and to certain classes of directors. In other words, it has been held that when our statute permits a director of a corporation to bring an action against the fellow co-directors or parties who have once been directors for their misconduct, the statute means all the time a director of a domestic corporation and not a director of a foreign corporation. * * * Of course, the argument, if sound, must go to the extent of asserting that a creditor can not obtain an action against a defaulting trustee unless he shows that he is a creditor of a domestic corporation, neither can a manager or other officer maintain an action unless he happens to be manager or officer of a domestic corporation. It would necessarily follow from this argument that the directors of a foreign corporation transacting business and having its principal office in this State may plunder the corporation with impunity and the courts of this State are without power to redress such wrongs as appear on the face of the complaint in this case. If they can not be sued here, they can not be sued in a foreign State, unless they come within its jurisdiction. There is no good reason, I think, for holding that the right of a director to bring an action of this character is confined to cases arising with respect to domestic corporations. The language of the statute is broad and general. The purpose of the law and the remedy prescribed is just as applicable to the case at bar as any other. * * * It is a matter of common knowledge that hundreds of corporations in this State are organized under the laws of New Jersey, or some adjoining State, but the business and all the operations of the corporation are conducted here, except possibly once a year there may be a meeting of the stockholders in the State creating the corporation for the purpose of a new election. In all other respects, these corporations stand upon the same footing as though organized here under the laws of this State; and what reason can be given for denying to a director of such corporation the right to bring an action, such as might be brought and maintained by a director of a domestic corporation. The distinction between the two classes of corporations in this respect is simply arbitrary and rests upon no sound reason or any principle of public policy."

In the case of *Nelson vs. The Bank of Fergus County*, the Federal Court of the United States construed a statute of Montana, which provided:

"Every corporation having a capital stock shall annually and within twenty days from and after the 31st day of December, make a report which shall state the amount of its authorized capital and what portion has been paid and the amount of its debts and that if any such corporation shall fail to make such report, its directors shall be jointly and severally liable for all debts of the corporation then existing or which may be thereafter contracted until such report shall be made and filed."

The holding of the Federal Court was that this statute applied to foreign corporations as well as to domestic corporations and that a failure to comply with the same on the part of a foreign corporation rendered its directors liable for the existing debts of the corporation.

In the case of *Hutchinson vs. Sadler*, supra, it was held by the Appellate Division of the Supreme Court of the State of New York that a stockholder of a New Jersey corporation, which transacts business in the State of New York, under authority of the laws of that State, might under the general corporation law maintain in the State of New York an action on behalf of himself and other stockholders of a corporation similarly situated to compel a director of the corporation who participated in declaring dividends on the stock of the corporation out of the capital thereof in violation of similar sections of the corporation laws of New Jersey and New York City to restore to the corporation the amount of the dividends thus unlawfully declared and paid.

The other authorities cited by us are to the same effect, so we conclude that the stockholders' liability specified by the Texas statutes is a character of liability for which a recovery is allowed against the directors and officers of a foreign corporation, but it would appear that this liability could not be enforced against the stockholders of a foreign corporation if they are permitted to put in their charter the provision that their private property shall be forever exempt from the debts of the corporation. We hold therefore that the clause placed in this charter by its incorporators has destroyed the comity existing between the State of Arizona and the State of Texas, which might otherwise permit the filing of the charter; that this provision in the charter is in direct conflict with the laws of this State and that in so much as under the laws of Arizona the incorporators had the right to make such an exemption from liability, the laws of Arizona would govern, and that therefore the incorporators have deliberately by their own acts put themselves beyond the comity of this State in an effort to deprive the creditors of the corporation in this State of the remedy provided by these laws, and that therefore the proposed charter can not be filed.

D. It appears from an examination of the charter, application and certificate of incorporation that the Securities Company was not incorporated for the purpose of transacting any business within the State of Arizona, and that its real purpose and intention is to transact business within the State of Texas, principally at.....Texas. It is true that the articles of incorporation were signed by.....and..... both of whom live at Phoenix, Arizona, but neither of said parties is designated as director of the corporation; on the contrary, the directors are as follows:.....who resides at.....Texas,.....: who resides at.....Texas;who resides at..... Texas; and.....and....., both of whom reside in..... Massachusetts.

It would appear therefore that the purpose of the incorporators in this particular instance was simply to obtain a charter under the laws of Arizona for the purpose of transacting business within the State of Texas, and that there was no bona fide intent to transact business in the State of Arizona. It is true that the application for a permit shows that the home office of the company is at Phoenix, Arizona, but this of

course is a more technical requirement of the laws of Arizona, that its home office shall be designated within that State.

On Saturday, March the 1st, the writer of this opinion asked, the secretary of this company, if the company was chartered with the purpose and intention of transacting business in the State of Arizona, and he stated that it was not; that the purpose of the company was to transact business in Texas, and that an Arizona charter was obtained merely on the suggestion of some one of the interested parties.

It therefore appears that under the propositions of law which we have given in the first part of this opinion that there can be no rule of comity which would permit the granting of a permit to transact business to the Securities Company, it having not been organized bona fide for the transaction of business in the State of Arizona.

E. The purpose for which the permit is desired in this instance is: "The business of promoting and taking stock in manufacturing companies or corporations." This is one of the purposes specified in the charter of the corporation. The business here specified is authorized in Subdivision 49, Article 1121, Revised Statutes of this State, but it is the opinion of this Department that the statement of the purpose of the corporation in the mere words of the statute, as is done in this instance, is insufficient.

Under Article 1123, Revised Statutes, one of the fundamental requirements of the charter is that it must state the purpose for which the corporation is formed.

Article 1314, Revised Statutes, requires the filing of the articles of a foreign corporation with the Secretary of State of this State before a permit may be issued, and says that "if such corporation is created for more than one purpose, the permit may be limited to one or more purposes."

As shown by the authorities in the first part of this opinion, this means one or more purposes permitted by the laws of this State in the same manner and to the same extent as would be permitted a domestic corporation. So it is clear, we think, that the statute which requires the purpose to be stated in the charter of a domestic corporation applies also to a foreign charter and to its permit issued under the laws of this State; and that the same particularity required in a charter of a domestic corporation is also required in the charter of a foreign corporation and in the permit issued to it by the Secretary of State. One of the fundamental requirements, as heretofore stated, of a domestic corporation's charter is that it must state "the purpose for which it is formed." Aside from the fact that this provision is mandatory because required by the statute, there are other cogent reasons, the consideration of which is necessary for a proper interpretation of the statute. In the first place, corporations can only be formed for certain purposes stated in the statute (Revised Statutes, Article 1121), and permits can be issued to foreign corporations only for purposes for which a domestic corporation might be chartered. (See authorities

heretofore cited.) And, second, the statement of such purpose, while not required to be absolutely specific, must be so plain that it will not appear that the State has authorized any act in violation of the law, or contrary to public policy. It follows from this that the statement of the purpose must be clear and explicit and that it may or may not be sufficient to use the statutory words in stating the purpose; that where the language of the statute is not sufficient to make clear the real purpose of the incorporators, or where it is capable of more than one construction, then the articles of incorporation, and the permit as well, must state in definite and sufficient words the real purpose of the corporation or permit so that the stockholders, as well as the State and the public generally, may know its object, purpose, power and authority.

The language used in the charter under consideration and the purpose for which the permit is sought is very indefinite, and various things might be done which would come reasonably within the words used, so it is our judgment that the incorporators should be required to state in the charter what they intend to do and that you should state in the permit what they may do. They know what they intend to do and you do not nor can you know from the language used in this charter, and yet it is absolutely essential that you should know, in order to pass upon the legality of the proposed articles of incorporation and your right to issue a permit thereunder.

In the case of *Johnson vs. Townsend*, 124 S. W., 418, the Supreme Court of the State had for determination the sufficiency and legality of the purpose clause of a charter tendered the Secretary of State for filing, the purpose clause being as follows:

"The purpose for which this corporation is formed is the transaction of a manufacturing and mining business and the purchase and sale of goods, wares and merchandise used for such business."

The applicants in that instance sought to have the charter filed under Subdivision 14 of what is now Article 1121, which reads as follows:

"The transaction of any manufacturing or mining business and the purchase and sale of such goods, wares and merchandise used for such purpose."

The Supreme Court, in passing upon the question, declined to require the Secretary of State to file the charter, and, among other things, said: "The charter must specify the purposes for which the corporation is to be incorporated. This should be done with sufficient clearness to enable the Secretary of State to see that the purpose specified is one provided for by the statutes and to define with some certainty the scope of the business undertaken to be pursued."

Johnson vs. Townsend, 124 S. W., 418.

The following authorities from various viewpoints sustain the proposition laid down above by us:

Ency. of Law, Vol. 7, pp. 649 and 653.

In re *McKees Rocks, etc.*, 6 Pa. Dis. Rep., 477.

Matter of Mutual Aid Association, 15 Phil. (Pa.), 625.

In re Mulholland Benevolent Society, 10 Phil. (Pa.), 19.

In re Helping Hand, etc., 15 Phil. (Pa.), 644.

The National Literary Association, 30 Pa. St. Rep., 150.

West vs. the Bullskin Prairie Ditching Co., 32 Ind., 138.

Crawford vs. the Prairie Creek Ditching Association, 44 Ind., 361.

O'Reilly and others vs. the Kankakee Valley Draining Co., 32 Ind., 169.

In the case of the National Literary Association, the Supreme Court of Pennsylvania had before it the application for a charter, the purpose clause of which was, in substance, the following:

"The promotion of literature and the cultivation of friendly feelings, the establishment of a fund necessary for the accumulation of works and other matters productive of literary attainments."

The court, in passing upon it, said:

"If we grant a charter to an association for the cultivation of friendly feelings and for an accumulation of works and these vague terms are left to be interpreted according to the principles of any associates who may choose to use them, they may include free-love societies, and the works spoken of may be works of art such as are forbidden by law and good morals. We do not know whether this society is a literary, or art union, or musical, or debating, or theatrical or dancing society.

"It is essential that the associates shall each be able to learn from the charter the purposes of the corporation, in order that he may know his rights in the corporation, and the extent to which his interests are involved; and without this he can have no power to hold the association to the objects which he had in view in becoming a member. The charter was rejected because of the insufficient statement of the purposes of the corporation."

In the case of Crawford vs. the Prairie Creek Ditching Company, supra, the Supreme Court of Indiana had before it for construction the articles of incorporation of the Prairie Creek Ditching Association. The purpose of the corporation, as stated in the charter, was as follows:

"Article 2. The object of this company is to drain and improve the prairies and swamped lands lying and being in the following described lands in township 24, range 10, to wit, northwest quarter of Section 11, in the name of George Woolvantant."

Then follows the description of the lands belonging to twenty-four other persons. The court, in passing upon this purpose clause, said:

"It has been repeatedly decided by this court that the articles of association of a company organized under the laws to reclaim wet or overflow lands must so distinctly state the purposes intended to be accomplished that all whose lands are liable to be affected by the work may know the fact and be able to avail themselves of the right given them by the statute to become members of the association and thus participate in the management and control of its operations; and it has also been held that such articles should give the commencement, course and terminus of the ditch proposed to be constructed. (Many authorities cited.) In the present case the only object declared in the articles of association is to drain and improve the prairies and swamped lands in township 24, range 10. The manner of accomplishing this purpose proposed is not stated. There is no reference made to a ditch. As we have seen, the commencement, course and terminus of the ditch proposed to be constructed should have been stated with such directness and particularity that all persons whose lands were liable to be affected might have known the fact. The articles of

association are, in our opinion, fatally defective, and the assumption based upon them can not be enforced." (44 Ind., 362, 363.)

In re Helping Hand, etc., 15 Phil. (Pa.), 644:

"The Act of 1874 indicates the various purposes for which corporations may be formed and the skeleton of the organizations. It is not sufficient to state the purpose in the words of the statute. The act requires the judge to peruse and examine the instrument, and if the same shall be found in proper form and within the purpose named in the first class and shall 'appear lawful and not injurious to the community,' he 'shall indorse thereon these facts.' If it were sufficient to declare the purpose in the words of the act and comply with the act in other respects, all the judge would have to do would be to certify that the instrument was in proper form and within the purpose named in the first class, but when he is required to certify that the purpose is lawful and not injurious to the community, it plainly implies that sufficient information must appear in the instrument from which he can find these facts. This can only appear by the articles of association or something in the nature thereof showing the actual purpose and the plan or means by which it is to be effected." (McKees, Rocks, etc., supra.)

It follows from the foregoing that incorporators should state in their charter not only the mere words of the statute, but they should go into sufficient detail as to the business they expect to follow to enable you to determine whether the business contravenes any of the statutes of this State or the sound public policy of the State. The incorporators, of course, know what they expect to do, and it will be no burden upon them to make the statement definite. We do not mean, of course, that every detail of their contemplated business must be stated, but merely that a sufficient statement shall be made to enable you to determine exactly the nature of the business to the end that its legality may be determined as above suggested.

It will be noted the words of the statute in this particular case are very indefinite. They are "the promoting and taking stock of manufacturing companies or corporations." The incorporators must state what they expect to do. There are many things which might be done within the terms of the language used in the statute which are unlawful under the laws of this State; for example, a corporation could be formed which would become a holding company, by ownership of the stocks of manufacturing corporations, and such a company might thus become a violator of the Anti-Trust Laws of the State, or it might become a holding company of the stocks of corporations organized under the various subdivisions of the statute and thus violate the laws of the State forbidding the formation of corporations in one charter under more than one subdivision of the statute; yet under the broad language of this particular subdivision a corporation might be formed which would in effect be a corporation to engage in all the several business enterprises for which manufacturing corporations may be formed under Article 1121. It is the opinion of this Department that a holding corporation can not be formed under this subdivision of the statute, and that it was the intention of the Legislature only that the corporation should be formed for the purpose of promoting the formation of some one particular manufacturing enterprise or particular

class of manufacturing enterprises, and that the corporation formed under this subdivision could hold the stock no longer than would be necessary for the promotion of the particular enterprise in hand at the time. In other words, that the statute did not intend in any sense of the word to recognize the formation of a holding or stock-dealing company, and yet under the indefinite language of the statute, as well as the indefinite language of the charter in this instance, if a permit should be issued to this corporation, it would have the apparent authority to do any and all of the acts forbidden by law and herein referred to in this opinion.

We will not follow the discussion further, but simply content ourselves with saying that the language in the charter of the Securities Company is wholly insufficient, and that the charter can not be filed. We will say, however, for those who may yet tender charters under this subdivision of the statute, that it is their duty to simply state exactly what they intend to do, and then you will be able to determine whether or not their purpose is lawful and their stockholders and the public generally will be able to determine the extent and limitations of their authority.

F. It follows from what we have said that the charter of the Securities Company is not in proper form, and, therefore, you are advised that you should decline to file the same and decline to issue a permit thereon.

Very respectfully,
C. M. CURETON,
First Assistant Attorney General.

CORPORATIONS—COTTON SEED OIL MILLS—CHARTERS—CONSTRUCTION OF LAWS.

1. The charters of cotton oil mill corporations can not be amended so as to include in their purpose clause the business of operating gins generally for the public.

2. Cotton oil companies are governed by the provisions of Subdivision 73, Article 1121, Revised Statutes, as amended by the Thirty-third Legislature, Chapter 168, page 352, and the provisions of Subdivision 72, Article 1121, have no application.

3. It is settled in this State that corporations can not be chartered for two separate purposes, even though the two purposes are named in one subdivision of Article 1121, Revised Statutes. This is the general rule. There are exceptions. The exceptions in the case of oil mills are specified in Subdivision 73, Article 1121, as amended by Chapter 168, Acts Thirty-third Legislature.

4. If Subdivisions 72 and 73 of Article 1121, Revised Statutes, are in conflict, as to oil mills, Subdivision 73, being the last expression of the legislative will, must prevail.

5. The act under consideration comes strictly within the rule of "expressio unius est exclusio alterius," and inasmuch as Subdivision 73, as amended, creates an exception to the general rule, and enumerates the things which cotton oil mills may do under the exceptions, the enumeration of the particulars is an exclusion of the general provisions of Subdivision 72, and cotton oil mills are governed alone by the special provisions of Subdivision 73, as amended.

AUSTIN, TEXAS, SEPTEMBER 23, 1913.

Hon F. C. Weinert, Secretary of State, Capitol.

DEAR SIR: Some time ago you submitted to us for examination certain proposed amendments to the charters of the McKinney Cotton Oil Company of McKinney and the Farmers' Cotton Oil Company of Farmersville, Texas. The sum and substance of the proposed amendments is that each of these oil companies proposes to add to its purpose clause the additional purpose of maintaining and operating gins. It is not the intention of the proponents of these amendments that the oil companies shall be permitted to operate gins as an incident to their business; that is to say, for the purpose of linting the seed and preparing the seed for milling, but the specific purpose and intention of the proponents of these amendments is to empower the oil mills to go into the ginning business generally for the public, as well as the cotton oil business.

The answer to the question involves a construction of Articles 1121 and 1122 of the Revised Statutes of this State. These articles have been construed heretofore by the courts, and it has been uniformly held that Subdivision 2, of Article 1122, limits the business of a corporation to one purpose.

Johnson vs. Townsend, 124 S. W., 417.

Ramsey vs. Todd, 95 Texas, 614 et seq.

The question is a settled one in this State, and is no longer open to question. In the case of Ramsey vs. Todd, the Supreme Court of the State directly and specifically held that the law governing the creation of private corporations does not authorize an incorporation for two distinct purposes, each of which is mentioned in a separate subdivision of what is now Article 1121, the court saying:

"Our conclusion is that the statute does not authorize the incorporation for two distinct purposes, each of which is mentioned in a separate subdivision of Article 642 (1121) of the Revised Statutes, and that therefore the writ of mandamus applied for in this case must be denied."

In the case of Johnson vs. Townsend it was held that charters could not contain two distinct and separate purposes, defining two distinct and separate businesses, even though these purposes were specified both in one subdivision of Article 1121.

So without the necessity of quoting from these authorities, in support of a rule now generally recognized, we may take it for granted that the proposition will not be disputed that a corporation can not generally be created to carry on two separate businesses, or for two separate purposes, even though the two purposes are specified in one subdivision of Article 1121. This, of course, is the general rule. The statute has in some instances created exceptions to the rule. The corporations tendering the amendments under discussion here seek to bring cotton oil mills within one of the exceptions created by the statute.

It is insisted that Subdivision 72, of Article 1121, creates an excep-

tion which permits oil mills to own and operate gins and engage in the ginning business generally for the public. This subdivision reads as follows:

"Private corporations may be created for or after being created may be so amended as to include two or more of the following purposes, viz.: The construction or purchase and maintenance of mills and gins; the manufacture and supply to the public by any means of ice, gas, light, heat, water and electric motor power, or either, in connection with such mills and gins, or either, the harvesting of grain or the harvesting of corn; provided, that the authorized capital stock of all incorporations authorized by this subdivision shall not exceed two hundred and fifty thousand dollars."

This subdivision of the statute was enacted by the Twenty-eighth Legislature in 1903. The emergency clause declares:

"Whereas, There are now many small corporations in the State incorporated under the provisions of the private incorporate act, which include two or more of the purposes mentioned in Article 650a (which is now Subdivision 72 just quoted); and whereas, since this incorporation the Supreme Court has recently held in effect that such incorporations are illegal; and whereas, there is a public necessity that small corporations incorporated for milling and ginning purposes in the small towns of the State should be allowed to manufacture in connection therewith ice, gas, heat, and light; therefore, an emergency and an imperative public necessity," etc.

The case of Ramsey vs. Todd was decided on June 23, 1902, and this act was passed by the Twenty-eighth Legislature which met in January, 1903. It is apparent, therefore, that the act in question was passed in order to make legal certain corporations which the decision of the Supreme Court had in effect declared invalid, and also to permit the chartering of certain corporations with two or more purposes. By a reading of the emergency clause above referred to, in which it is declared that it is essential that small corporations incorporated for *milling and ginning* purposes in the small towns of the State shall be allowed to manufacture in connection therewith ice, gas, heat, and light, it is very clear that the word "mill," as used in this act meant the ordinary flour and grist mills and not oil mills, because "oil mills" are not, in common and ordinary parlance, engaged in the "milling" business. This view of the matter is further strengthened when we consider that in 1903 oil mills were not common and general in the small towns of the State, while the emergency clause of the act declares the character of mills of which it refers are engaged in the milling and ginning business in the small towns of the State to such an extent that there was a public necessity requiring the passage of the act legalizing such exercise of corporate power. The fact of the business is that the usage of the term "mill" to designate a cotton oil manufacturing concern is not a very accurate term, and the writer has no doubt that cotton oil mills should be incorporated under Subdivision 14, of Article 1121, which reads as follows:

"The transaction of any manufacturing or mining business and the purchase and sale of such goods, wares and merchandise used for such business,"

rather than under Subdivision 28, which provides for the construction

or purchase and maintenance of mills, gins, etc. However, it is unnecessary for us to decide this question.

We will go a little bit further into the history of legislation relevant to this matter.

It will be noted from a reading of Subdivision 72, that it provides that corporations may be created to include any two or more of the following purposes, namely: The construction, purchase and maintenance of:

1. Mills;
2. Gins; and the manufacture and supply to the public by the means of—
3. Ice;
4. Gas;
5. Light;
6. Heat;
7. Water, and
8. Electric motor power.

This provision, however, is subject to two limitations: That the manufacture and supply to the public of either or all the foregoing household necessities must be in connection with the operation of a mill or gin, or both; and the further limitation that the authorized capital stock of such a corporation must not exceed two hundred and fifty thousand dollars. Whether or not the term "mill" as used in this subdivision included cotton oil manufacturing concerns is an issue not necessary to definitely determine, though we are of the opinion that it only included the ordinary flour and grist mills. It could as well have included a stamp mill for the crushing of ore or any one or more of the other scores of kinds of mills which might be named, but, as suggested, it is not necessary to pass definitely upon that question. The law stood with Subdivision 72 as the last word of the Legislature upon the question until the Twenty-ninth Legislature met in 1905; when that Legislature met what is now Subdivision 72, of Article 1121, was enacted into law. This was amended slightly in 1907, but the amendment throws no light on the question here at issue, and we will quote Subdivision 72 as though it had been enacted in 1905 instead of 1907. This subdivision reads as follows:

"A private corporation may be created for or after being created may so amend its charter as to include two or more of the following purposes, namely: The supply of water to the public, the manufacture and supply of ice, gas, electric light and motor power or either of them to the public; and the manufacture, supply and sale of carbonated water and the operation of cotton seed oil mills or cotton compresses; provided, that corporations including more than one of the purposes mentioned in this subdivision in their charter shall each pay the franchise tax as provided by law for each of the purposes included in their respective charters; and, provided, further, that the authorized capital stock of incorporations authorized by this subdivision shall not exceed two hundred thousand dollars. The provisions of this subdivision shall not apply to cities of over ten thousand inhabitants."

It is thus seen that, under Subdivision 72, corporations were author-

ized by the Act of 1905, as amended by the Act of 1907, to include any two or more of the following purposes in their charter, namely:

1. The supply of water to the public; also,
2. Ice;
3. Gas;
4. Electric light;
5. Electric motor power;
6. Carbonated water;
7. The operation of cotton seed oil mills;
8. Cotton compresses.

The corporations, however, embracing these several purposes were subjected to the following limitations:

(a) That they should pay a franchise tax for each of the purposes included in their respective charters.

(b) That the capital stock should not exceed \$200,000.

(c) That the provisions of the act should not apply in cities of over ten thousand inhabitants.

Whatever may have been the law in reference to cotton seed oil mills, when Subdivision 72 became a part of the law of the State, it defined and fixed the right of cotton seed oil mills, and if cotton seed oil mills were at one time embraced within the class of mills referred to in Subdivision 72, then after the passage of the act, which is now Subdivision 73, cotton seed oil mills were no longer embraced within that general class. It is very clear that, under the provisions of Subdivision 73, cotton seed oil mills in cities of over ten thousand inhabitants would not be authorized under the provisions of said subdivision to include within their purposes the manufacture and supply of ice, gas, electric light and motor power or carbonated water, or the operation of compresses, because Subdivision 73 expressly provides that its provisions do not apply to cities of over ten thousand inhabitants. Now, if cotton seed oil mills could avail themselves of the provisions of Subdivision 72, then, as will be seen, they could embrace within their purpose clause the manufacture and supplying to the public by any means of ice, gas, light, heat, water, electric motor power, etc., it might do this in any place, whatever the population might be, whether under or above ten thousand, just so its capital stock did not exceed two hundred and fifty thousand dollars. It is plain, therefore, that if oil mills may take advantage of Subdivision 72, then that the provisions of Subdivision 73 are not applicable to oil mills, because its provisions are inconsistent with the definite rights given to oil mills by the provisions of Subdivision 72; but upon examination it is found that the provisions of Subdivision 73 are expressly made applicable to oil mills, and inasmuch as these two provisions, so far as oil mills are concerned, are in conflict with each other, the last act of the Legislature, that is to say, Subdivision 73, must prevail over Subdivision 72 and be the law as to oil mills. When both of the legislative enactments can not stand together and be made to harmonize with regard to oil mills, then the last specific expression of the Legislature on that subject must prevail.

Conley vs. Daughters of the Republic, 157 S. W., 937.

However, Subdivision 73 was amended by the Thirty-third Legislature, but it, nevertheless, remained substantially the same, and the remarks just made with reference to Subdivision 73 apply with equal force to the same subdivision as amended by the Thirty-third Legislature. However, inasmuch as these charters are tendered under the law as it exists today, we will quote for your guidance and information the amended act.

Chapter 168, page 352, Acts of the Regular Session of the Thirty-third Legislature, expressly amended Subdivision 73, Article 1121, Title 25 of the Revised Statutes of this State, so that the same now reads as follows:

"73. Private corporations may be created for, or after being created may so amend their charters so as to include two or more of the following purposes, namely: The supply of water to the public for irrigation, power, municipal or domestic purposes; the manufacture of and supply of ice to the public; the generation of and supply of gas, electric light and motor power to the public; the manufacture, supply and sale of carbonated water to the public; the operation of cotton seed oil mills and the operation of cotton compresses.

"Provided, that corporations including more than one of the purposes named in this article shall pay the franchise tax provided by law for each of the purposes so included in their said charters or amendments thereto; and, provided, further, that the authorized capital stock of corporations created under or authorized by this article which shall include irrigation and any one or more of the other purposes named in this article shall not exceed \$1,000,000; and that the authorized capital stock of corporations created under or authorized by this article which shall include waterworks, for the supply to the public or municipalities, and any one or more of the other purposes named in this article, except irrigation, shall not exceed \$500,000, and that the authorized capital stock of corporations so authorized by this article for any two or more of the purposes named in this article, except irrigation and waterworks or the supply of water to the public shall not exceed \$200,000."

The principal effect of the amendment, as will be shown by an examination of the act as just quoted, is that it makes definite that a corporation chartered under this subdivision would have the right to supply water to the public for irrigation and municipal purposes, as well as for power and domestic purposes, and the placing in the act some further additional limitations and restrictions consonant with the additional powers conferred upon the corporation. It is unnecessary to notice these additional limitations in order to determine the issue before us, but we will call attention to the fact that this amendment took out of the old act that provision which made Subdivision 73 inapplicable to cities of over ten thousand inhabitants, and leaves Section 73 as amended and as just quoted applicable throughout the State without any regard to the population of the situs of the corporation. When we go back to the history of Subdivision 73, it will be found that it was enacted in 1905 by the Twenty-ninth Legislature. The measure originated in the Senate and was known as Senate Bill No. 211. It passed the Senate without amendment, but when it reached the House the following words were added after the words "carbonated water," namely: "and the operation of cotton seed oil mills." It is thus seen that the words "cotton seed oil mills" were specifically and

purposely placed in the statute by the Legislature which had met within two years after the enactment of Subdivision 72, and which was in a position to know better than we are whether or not the word "mills," as embraced within Subdivision 72, was intended to and did include cotton oil mills. Evidently the Legislature at that time was of the same opinion that we are now, that Subdivision 72 was never intended to embrace cotton seed oil mills. The history of the amendment referred to is shown on page 836 of the House Journal of the Twenty-ninth Legislature. So much for the legislative history of the act under consideration.

Considering the history of the act in question, and in compliance with the established rules of construction, it is our duty, if it may be done, to give some effect, that is to say some consistent and intelligent effect, to that provision of Subdivision 73, which permits cotton seed oil mills to engage in other businesses there named. The question is, how may we interpret the statute? Cotton seed oil mills are expressly given the right, as has just been seen, under the conditions and limitations named above, to engage not only in the business of a cotton seed oil mill proper, but to supply water to the public for irrigation, power, municipal or domestic purposes, to manufacture and supply ice to the public, to generate and supply gas, electric light and electric motor power to the public, to manufacture and sell carbonated water, and to operate cotton compresses. We are confronted by this situation: The Legislature has in express language created an exception to the provisions of Article 1122 of the statute. Article 1122 of the statute, as interpreted by the courts, confines the purpose of a corporation to one purpose only, taken from one of the subdivisions of Article 1121, but here is an act of the Legislature known as Subdivision 73, of Article 1121, as amended by the Thirty-third Legislature, which expressly and in definite, succinct and well understood terms, gives to corporations chartered for the purpose of operating cotton seed oil mills the right to engage in certain specific, well defined businesses in addition to its original purpose of engaging in the manufacture of cotton seed oil. It has not stated that a cotton seed oil or mill corporation could engage in a certain class of business, but the Legislature has been particular and set forth in definite, detailed and well defined terms the exact businesses which such cotton seed oil mill may incorporate within the provisions of its charter and follow, notwithstanding the existence of Article 1121, which provides that only one purpose or one business may be had or followed by a corporation. It is, therefore, very clear that the statute under consideration is one of those to which the maxim "*expressio unius est exclusio alterius*" is peculiarly applicable, and to that rule we will look as an aid in interpreting and determining its meaning. It has been well said that the rule of "*expressio unius est exclusio alterius*" is particularly applicable in the construction of such statutes as create new rights or limitations, derogate from the common law, embrace penalties or punishments, or otherwise come under the rule of strict construction; that it is peculiarly applicable when a statute assumes to specify the

effects of a certain provision; in such instance the rule presumes that no others are intended than those described. The rule is said to apply with great force when a statute gives a new right or a new power and provides a specific, full and adequate mode of executing the power or enforcing the right given; the fact that a special mode is prescribed will be regarded as excluding by implication the right to resort to any other mode of executing the power of enforcing the right.

Black on Interpretation of Laws, Sec. 64, pp. 147 and 148.

Miller vs. Miller, 44 Pa. St., 170.

Johnston vs. Lewisville, 11 Bush., 527.

Bassett vs. Carlton, 32 Me., 553.

Calking vs. Caldwin, 4 Wend., 667.

Spring vs. Russell, 7 Me., 273.

In discussing the rule, Mr. Black, in his work above referred to, among other things, says:

"It is particularly applicable in the construction of such statutes as create new rights or remedies, derogate from the common law, impose penalties or punishments, or otherwise, come under the rule of strict construction. For instance, where a statute enlarging the powers of married women specifically enumerates the cases in which they may sue in their own names, this maxim applies, and they can not maintain an action in any other cases. So where a statute defining an offense designates one class of persons as subject to its penalties, it is to be understood that all other persons are not made liable. Again, when a statute assumes to specify the effects of a certain provision, it is to be presumed that no others are intended than those described. And so, if there is an enumeration of the cases in which creditors shall be allowed to recover interest on their demands, it may safely be assumed that it was not the legislative intention to allow it in any other cases. In an act forming a new county out of portions of old ones, a provision for the transfer of suits pending against defendants from the courts of the old counties into those of the new, without referring to administrations pending in the former, is to be construed as an expression of legislative intent that such administrations should not be removable. Again, a law of Texas, enacted in 1846, provided that collectors of taxes should receive in payment thereof 'all coins made current by the laws of the United States, and the exchequer bills of the republic.' By previous laws they had been authorized to receive certain certificates issued by the republic. It was held that they were not bound to receive these certificates after the passage of the act mentioned. Particularly when a statute gives a new right or a new power, and provides a specific, full and adequate mode of executing the power or enforcing the right given, the fact that a special mode is prescribed will be regarded as excluding, by implication, the right to resort to any other mode of executing the power or of enforcing the right. A statute granting pieces of land to Indians, and prescribing a specific mode in which they may sell the same, impliedly forbids a sale in any other mode. So, an act of Congress conferring on the Secretary of War the power to discharge enlisted miners on certain conditions must be construed as having a mode by which persons improperly enlisted can be discharged, and as having forbidden other modes of obtaining their discharge. Another case in which this maxim may almost invariably be followed is that of a statute which makes certain specific exceptions to its general provisions. Here we may safely assume that all other exceptions were intended to be excluded. For instance, where a law imposing taxes generally makes an express exception in favor of a certain class of persons, this exception excludes all others, and negatives the idea that any other exception was intended."

Mr. Sutherland, in his valuable work on Statutory Construction, in speaking of this rule, among other things, says:

"This maxim, like all rules of construction, is applicable under certain conditions to determine the intention of the lawmaker when it is not otherwise manifest. Under these conditions it leads to safe and satisfactory conclusions; but otherwise the expression of one or more things is not a negation or exclusion of other things. What is expressed is exclusive only when it is creative, or in derogation of some existing law, or of some provisions in the particular act. The maxim is applicable to a statutory provision which grants originally a power or right. In such cases the power or right originates with the statute, and exists only to the extent plainly granted; the right while inchoate, and the power so far as not exercised, cease, if the statute be repealed, and if the statute provides the mode in which they shall be exercised that mode must be pursued, and no other. This conclusion is almost self-evident; for since the statute creates and regulates, there is no ground for claiming or proceeding except according to it. In other words, where a statute gives a new right and prescribes a particular remedy, such remedy must be strictly pursued, and the party is confined to that remedy. 'The rule is certain,' said Lord Mansfield, 'that where a statute creates a new offense, by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offense (not antecedently unlawful) by a particular sanction and particular method of proceeding, that a particular method must be pursued, and no other. Where a statute authorizes a public work, and points out a mode in which parties injured thereby may obtain compensation, that remedy is exclusive; and the scope of the remedy or points of compensation are confined to the statutory limits.' * * * It is, moreover, within this cognate principle that specific provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the law which might otherwise be broad enough to include it. Accordingly, where a legislative act contained two sets of provisions, one giving specific and precise directions to do a particular thing, and the other in general terms prohibiting certain acts, which would, in the general sense of the words used, include the particular act before authorized, then the general clause does not control or affect the specific enactment. * * *

"Where authority is given to do a particular thing, and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded. Such affirmative legislation, and any other which introduces a new rule, implies a negative. * * *

"Where a statute enumerates the person or things to be affected by its provisions, there is an implied exclusion of others; there is then a natural inference that its application is not intended to be general. Thus, where a statute enumerates the cases in which a married woman may sue, she is limited to those cases. An act providing for levying the poor rate specified coal mines only, and it was, therefore, held that no other mines were ratable. An act allowed a house and land to be joined together for the purpose of conferring a qualification; it was held that two different buildings could not be joined for the same purpose. The enumeration of powers granted to national banks in the eighth section of the national bank act is exclusive; being granted the power to loan money on personal security, such banks are precluded from loaning on real estate mortgages; and mortgages to such banks to secure prior loans being expressly permitted, it was held that none given to secure future loans are valid." (Sutherland on Statutory Construction, Secs. 491, 492 and 493; Rogers vs. Kennard, 54 Texas, 38.)

It is unnecessary to cite additional authorities in support of this rule. Mr. Sutherland cites many authorities which are available, but the rule, as laid down, is one recognized in all jurisdictions, and we think it entirely applicable to the facts of this case.

Subdivision 73, as now under consideration, in the first place enumerates the things which may be done by a cotton oil mill corporation, that is, it enumerates those particular purposes which may be embraced within its charter in addition to its ordinary corporate purposes for man-

ufacturing cotton seed oil. This comes strictly within the rule above quoted, that where a statute enumerates the things to be effected by its provisions, there is an implied exclusion of others, and that the natural inference is, that its application is not to be general. The question here is kindred to the instance cited by Mr. Sutherland, that the enumeration of powers granted to national banks in the eighth section of the National Bank act is exclusive: that inasmuch as a national bank is granted the power to loan money on personal security, by implication, it is precluded from loaning money on real estate mortgages, and that inasmuch as the law gives the bank a right to take mortgages on real estate to secure prior loans, that it in effect expressly prohibits the loaning of money on real estate mortgages as an original proposition.

Fowler vs. Scully, 13 Amer. Rep., 609.

National Bank vs. Matthews, 98 U. S., 621.

National Bank vs. Whitney, 103 U. S., 99.

It is likewise plain that the act under consideration and the question at issue comes strictly within the rule laid down by Mr. Sutherland that specific provisions of law relating to a particular subject must govern in respect to that subject as against general provisions in other parts of the law, which might otherwise be broad enough to include it. Let us examine the question. It is contended that the provisions of Subdivision 72 with reference to mills, generally, is broad enough to include cotton seed oil mills. If that be conceded, still under the rule suggested, inasmuch as specific provision is made in Subdivision 73 with reference to cotton oil mills, then cotton oil mills are limited by the specific provision and can not be governed by nor receive the privileges provided in the general provisions of Subdivision 72.

Sutherland on Statutory Construction, Sec. 491, p. 919.

Felt vs. Felt, 19 Wis., 196.

Again, upon examination of the act in question it is seen that authority is given to cotton oil mill corporations to do a particular thing, that is to say, it is given the right and privilege of incorporating within the purpose clause of its charter the right to transact other businesses as well as that of cotton seed oil manufacturing. We must then look to see what other businesses it may transact; when we look we find these businesses prescribed in Subdivision 73, and therefore we find that the act in question comes strictly within the rule laid down by Mr. Sutherland, that where authority is given to do a particular thing and the mode of doing it is prescribed, then the authority is limited and the thing may be done only in the mode prescribed, all other modes being excluded.

Sutherland on Statutory Construction, Sec. 492.

Rogers vs. Kennard, 54 Texas, 90.

Smith vs. Stevens, 10 Wall., 823.

New Haven vs. Whitney, 36 Conn., 373.

Township vs. Dubuque, 7 Iowa, 262.

Childs vs. Smith, 55 Barb., 45.

Intoxicating Liquor Cases, 37 Amer. Rep., 284.

Then again, the statute under consideration comes strictly within

the rule and maxim laid down by Mr. Sutherland, that where a statute gives or creates a new right and prescribes a particular remedy, such remedy must be strictly pursued and the party is confined to that remedy. This statute created a new right, one in derogation of Article 1122, and prescribed the method and manner by which the right could be exercised. Such being the case, the manner and method of its exercise is exclusive, and it must be strictly pursued and confined.

Sutherland on Statutory Construction, Sec. 491.

Bailey vs. Bryan, 67 Amer. Dec., 246.

Camden vs. Allen, 36 N. Y. L., 398.

Rochester vs. Campbell, 10 L. R. A., 393:

Madden vs. Lancaster Co., 67 Fed., 188.

So it matters not from what angle you may view it, the conclusion constantly forces itself upon one, that the Legislature by singling out and naming cotton oil mills, by selecting this particular species from the genus mill, to confer certain rights upon, that the purpose and intention was to single out this particular species which it is claimed belongs to the genus mill, and confer upon it certain particular rights subject to the specified limitations. It is one of those instances which appears to have been created for the very purpose of illustrating a correct application of the rule "*expressio unius est exclusio alterius.*"

We conclude, therefore, from a consideration of the whole matter that corporations chartered for the purpose of engaging in the manufacture of cotton seed oil, or to use the common term, that cotton seed oil mill corporations can not as the law now exists engage in the business of ginning cotton generally for the public and that their charters can not be amended or otherwise be made to contain a provision authorizing them to maintain and operate cotton gins.

The amendments of the McKinney Cotton Oil Mill and the Farmers Cotton Oil Mill, being for an illegal and unauthorized purpose, can not be filed under the laws of Texas, and we, therefore, advise you to respectfully decline to file these tendered amendments.

Very respectfully,

C. M. CURETON,
First Assistant Attorney General.

CORPORATIONS—LOAN COMPANIES—ACCUMULATION AND LOAN OF MONEY.

(Revised Statutes, Article 1121, Subdivision 29.)

1. The accumulation of money means the amassing or gathering together of money.
2. A loan is an advancement of money upon a contract or stipulation, express or implied, to repay it at some future day.
3. Banking is the business of establishing a common fund for loaning money, discounting notes, receiving deposits, and negotiating bills of exchange.
4. "Discount" and "loan" are employed by the court indiscriminately and synonymously in all cases where compensation for the use of money advanced is retained out of the gross sum at the time of the advancement.

5. Corporations chartered under Subdivision 29 of Article 1121 are prohibited from receiving money on deposit; buying and selling exchange; buying and selling gold and silver coins of all kinds; discounting commercial paper as the term "discounting" has been defined in the opinion; engaging in any business for which corporations may be chartered under the laws of Texas; that is, under any other article or subdivision of any article of the Revised Statutes; engaging in any business inconsistent with the principal purpose of corporations chartered under this subdivision, which is to loan money.

6. Corporations chartered under Subdivision 29 may, however: (a) Make direct loans of their own money upon personal or collateral security, or without security, provided the interest is not taken out in advance or added to the face of the note so as to bring it within the terms of a discounting transaction; (b) make loans upon real estate in any amount they see fit; provided, the loans do not assume the form of a discounting transaction as that term has been defined; (c) buy any class of commercial paper except bills of exchange, even at a discount from the face value of such paper or notes, provided the seller does not become personally liable either as maker, endorser or guarantor, of the paper; they may buy such paper, however, even though the seller is liable as maker, endorser or guarantor, provided they pay face value for the paper; (d) such corporations may sell any paper taken or purchased by them at any price they may see fit to sell it, as the sale of commercial paper even at a discount is not the exercise of a discounting privilege within the terms of the prohibitory statute under consideration; (e) such corporations may also receive money as agents or bailees of other persons for the purpose of investing the same for such other persons in such securities as such corporations have authority under the law to deal in, or for the purpose of loaning the same for such other persons; provided, however, that in receiving said money the relation of debtor and creditor is not created as between the corporation and the person so placing said funds with them.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 14, 1914.

Hon. F. C. Weinert, Secretary of State, Capitol.

DEAR SIR: Some days ago..... was in our office and discussed with us the organization of the..... Loan Company. After that discussion he tendered to your department the charter of the proposed corporation, the purpose clause of which read as follows:

"The general nature of the business in which this corporation shall engage is as follows, to wit: The accumulation and loan of money by making straight loans of our own money and re-discounting our paper at such prices as the company sees fit. But this company shall not exercise discount or banking privileges."

The charter was prepared and tendered by this proposed company under the provisions of Subdivision 29, of Article 1121, Revised Statutes. We think the purpose clause in the charter sufficient and that the powers there specified are no broader than those permitted by the statutes and Constitution of this State. This has been the construction placed on this section of the statutes since our opinion No. 361, dated February 17, 1913, was rendered; but this is the first occasion we have had to advise your department of our construction of the law. We have therefore made a thorough study and re-examination of the question, and beg to give you the benefit of the results of our efforts in this matter.

Subdivision 29. of Article 1121, Revised Statutes, reads as follows:

"The accumulation and loan of money; but these subdivisions shall not permit corporations with banking or discounting privileges."

This subdivision of Article 1121 was placed in the statute under the Constitution of 1876. Section 16, of Article 16, of the Constitution of 1876, prior to the amendment of 1904 read as follows:

"No corporate body shall hereafter be created, renewed or extended with banking or discounting privileges."

The subdivision of the statute as first enacted simply read:

"The accumulation and loan of money."

The next Legislature, however, added the phrase "but these subdivisions shall not permit corporations with banking or discounting privileges." (Gammel's Laws, Vol. —, pp.——.)

It is clear therefore that it was intended by the Legislature which incorporated this subdivision in our statutes to make the same in harmony with Section 16, of Article 16, of the Constitution of 1876. However, Section 16, of Article 16, of the Constitution was amended in 1904, and the creation of banking corporations was authorized by the Legislature. Section 16 as amended reads as follows:

"The Legislature shall by general laws authorize the incorporation of corporate bodies with banking and discounting privileges, and shall provide for a system of State supervision, regulation and control of such bodies which will adequately protect and secure the depositors and creditors thereof. Each shareholder of such corporate body incorporated in this State, so long as he owns shares therein, and for twelve months after the date of any bona fide transfer thereof, shall be personally liable for all debts of such corporate body existing at the date of such transfer, to an amount additional to the par value of such shares so owned or transferred, equal to the par value of such shares so owned or transferred. No such corporate body shall be chartered until all of the authorized capital stock has been subscribed and paid for in full in cash. Such body corporate shall not be authorized to engage in business at more than one place, which shall be designated in its charter. No foreign corporation, other than national banks of the United States, shall be permitted to exercise banking or discounting privileges in this State." (Harris' Annotated Constitution, p. 743.)

It is thus seen that the amendment of the Constitution has not made any material change in the meaning and purpose of Subdivision 29 of Article 1121.

Building and loan associations have heretofore been chartered under Subdivision 29 as well as under Subdivision 17 of Article 1121, Revised Statutes, but since the Legislature has passed an elaborate act governing this particular class of corporations, which act we have recently construed in an opinion, a copy of which we enclose you, it is unnecessary to discuss this subdivision with reference to building and loan associations. We therefore direct our examination and discussion to a determination of the powers which a corporation chartered under Subdivision 29 for purposes other than a building and loan association may exercise.

2. A corporation chartered under this subdivision of the statute may:

(a) accumulate money, and

(b) loan money.

But corporations organized for these purposes are subject to two classes of limitations:

(c) They must not exercise banking privileges, and

(d) They must not exercise discounting privileges.

Further analyzed, it would appear to mean that corporations chartered under this subdivision may accumulate money in any lawful manner except in the manner which would be the exercise of banking privileges; and that such corporation may loan money, in any lawful way except in a manner which would be the exercise of discounting privilege.

3. Bearing in mind this analysis and these limitations, we will proceed to a determination of these words of authority and limitation, that is, the meaning of the phrases, "accumulation and loan of money" and "banking and discounting privileges."

The accumulation of money means merely the amassing or gathering together of money. The word "accumulation" has ordinarily no technical signification, and in this statute should be given its general and ordinary meaning.

Peoples Fire Ins. Co. vs. Parker, 35 N. J. L., 575.

Sutherland on Statutory Construction, Sec. 392.

Revised Statutes, Art. 5502.

The lending or loaning of money finds its interpretation in the definitions of the word "loan." A loan has been properly defined as an advancement of money upon a contract or stipulation, express or implied, to repay it at some future day.

Britten vs. Freeman, 17 N. J. L., 191.

Philadelphia vs. Kelly, 31 Atl., 47.

Payne vs. Gardner, 29 N. Y., 167.

Savings Bank of San Diego County vs. Barrett, 58 Pac., 914.

It is thus seen that the language of the act unrestrained by its words of limitation would mean the right to gather together money in any lawful manner and advance the same to anyone in any lawful manner upon a contract or stipulation, express or implied, to repay it at some future day. But the right thus conferred is limited. Corporations chartered under this statute could not gather together money in any manner which would be the exercise of a banking privilege or a discounting privilege. The next step therefore in our inquiry is to determine what are banking and discounting privileges.

4. Banking is defined as the business or employment of a banker; the business of establishing a common fund for loaning money, discounting notes, issuing bills, receiving deposits, collecting moneys or notes deposited, and negotiating bills of exchange. (5 Cyc., p. 432.)

"The business of banking as defined by law and custom consists in the issue of receiving deposits, loaning money and dealing in coin, bills of exchange, etc." (Exchange Bank vs. Hines, 3 O. St., 1.)

"The business of banking as defined by law and custom, consists in the issuance of notes payable on demand, intended to circulate as money, where the banks are banks of issue; in receiving deposits payable on demand; in dis-

J
counting commercial paper; making loans of money on collateral securities; buying and selling of bills of exchange; negotiating loans and dealing in negotiable securities issued by the government, State or national, and municipal and other corporations." (Mercantile Bank vs. New York, 121 U. S., 156.)

"There ought not, however, to be any serious difficulty in determining what was meant by the words 'banking powers,' as used in the Constitution of 1870. We think the language employed should be used in its common, ordinary sense, and when this is done the banking powers referred to mean such as are ordinarily conferred upon and used by the various banks doing business in the country. The ordinary and usual powers exercised by banks are to discount notes and receive deposits. They may, and often do, possess other powers, but these are the ordinary and usual powers conferred upon and exercised by banks and bankers. Bouvier, in defining a bank, says: 'A place for the deposit of money; an institution, generally incorporated, authorized to receive deposits of money; to lend money and issue promissory notes, usually known by the name of bank notes; or to perform some one or more of these functions.' 'Banks are said to be of three kinds: deposit, discount and circulation.' See also *People vs. Dcty*, 80 N. Y., 225; *Pratt vs. Short*, 79 N. Y., 437. Speaking in a commercial view, Bouvier is doubtless correct in his definition of a bank; but one of the chief characteristics and one of the most essential elements of a bank, as that term is ordinarily understood, is that it is a place for the deposit of money. The powers and functions of a bank are well stated in *Coulton vs. Savings Institution*, 84 U. S., 17 Wall., 117 (21 L. ed., 618), as follows: 'Banks, in the commercial sense, are of three kinds, to wit: (1) of deposit; (2) of discount; (3) of circulation. Strictly speaking, the term bank implies a place for the deposit of money, and that is the most obvious purpose of such an institution. Originally the business of banking consisted only of receiving deposits, such as bullion, plate, and the like, for safe keeping, until the depositor should see fit to draw it out for use; but the business, in the progress of events, was extended, and banks assumed to discount bills and notes, and to loan money upon mortgage, pawn, or other security, and at a still later period to issue notes of their own, intended as a circulating currency and a medium of exchange instead of gold and silver. Modern bankers frequently exercise any two or even all three of these functions; but it is still true that an institution prohibited from exercising any more than one of these functions is a bank in the strictest commercial sense.

"Another interesting case upon the same subject is *Savings Bank vs. Collector*, 70 U. S., 3 Wall., 495 (18 L. Ed., 207). The act under which the bank was incorporated was in many respects similar to the act under which appellant is incorporated. The bank had not capital stock; it had no shareholders; no corporators were interested in the profits. The corporators were trustees who constituted a board of managers. The question arose whether the incorporation was engaged in the business of banking within the meaning of the United States Revenue Law, and the court held that savings banks which receive deposits and lend the same for the benefit of depositors, although they may have no capital stock, and neither make discounts nor issue any money for circulation, are engaged in the business of banking within the meaning of the revenue law, which provides for a tax upon any person, bank, association, or company engaged in the business of banking.

"In *People vs. Manhattan Co.*, 9 Wend., 383, the court in speaking of the powers of banks, says: 'Banking powers have been defined by this court to consist in the right of issuing negotiable notes, discounting notes, and receiving deposits.' 15 Johns, 340, per Spencer, J.; 2 Cow., 710, per Savage, Ch. J." (*Reed vs. People ex rel. Atty. Gen.*, 1 L. R. A., 326.)

The statutes of this State enumerate the powers of a State bank as follows:

"Every such corporation shall be authorized and empowered to conduct the business of receiving money on deposit and allowing interest thereon, and of buying and selling exchange, gold and silver coins of all kinds; of loaning money upon real estate and personal property and upon collateral and personal securities at a rate of interest not exceeding that allowed by law; provided, that

no bank organized under this title shall loan more than fifty per centum of its securities upon real estate; and no such bank shall make a loan on real estate of an amount greater than fifty per centum of the reasonable cash value thereof; also of buying, selling and discounting negotiable and non-negotiable paper of all kinds, as well as all kinds of commercial paper." (R. S., Art. 376.)

Summarized, this article of the statute provides that State banks are empowered to conduct the business of

- (a) Receiving money on deposit;
- (b) Buying exchange;
- (c) Selling exchange;
- (d) Buying gold and silver coins of all kinds;
- (e) Selling gold and silver coins of all kinds;
- (f) Loaning money upon real estate;
- (g) Loaning money upon personal property;
- (h) Loaning money upon collateral security;
- (i) Loaning money upon personal security;
- (j) Buying negotiable paper of all kinds;
- (k) Selling negotiable paper of all kinds;
- (l) Buying non-negotiable paper of all kinds;
- (m) Selling non-negotiable paper of all kinds;
- (n) As well as buying and selling all kinds of commercial paper.

It is thus seen that the powers conferred upon a State bank are somewhat broader than those ordinarily conferred upon and used by various banks doing business in the country. The ordinary and usual powers exercised by banks, as shown by the authorities we have quoted, are to discount notes and receive deposits. Bank may and often do possess other powers, as they undoubtedly do under the Texas statute, but those suggested by us above are the ordinary and usual powers conferred upon and exercised by banks and bankers. (Reed vs. People, 1 L. R. A., 326.)

It must be borne in mind that the Texas banking statute was enacted many years after Subdivision 29, Article 1121, Revised Statutes, was incorporated within our statute, and we do not think that it was intended by the amendment of Article 16, Section 16, of our Constitution and by the enactment of Article 376, Revised Statutes, to limit the powers which corporations had previously exercised under Subdivision 29, Article 1121. In other words, we think in the construction of Subdivision 29 we should not be limited by the powers enumerated in Article 376, but should follow the definitions of banking and discounting privileges as generally understood at the time of the enactment of the statute and as generally understood throughout the country at this time. We would say, therefore, that the banking privileges intended to be prohibited by Subdivision 29, Article 1121, are substantially the following:

- (a) Receiving of money on deposit;
- (b) Buying exchange;
- (c) Selling exchange;
- (d) Buying gold and silver coins of all kinds;
- (e) Selling gold and silver coins of all kinds;
- (f) The discounting of such commercial paper as has been the

privilege of banks generally in times past to discount, or such as is embraced within the term "discounting privileges."

5. The definition of the words "discounting privileges" is contained within the definition of the word "discounting" and a determination of this meaning will make clear the meaning of the statutory words before us.

The terms "discount" and "loan" are employed by the courts indiscriminately and synonymously in all cases where compensation for the use of money advanced is retained out of the gross sum at the time of the advancement. Discounting or loaning money with the deduction of the interest in advance is a part of the general business of banking. By the language of the commercial world and the settled practice of bankers, a discount by a bank means, *ex vi termini*, a deduction or drawback made upon its advances or loans of money upon negotiable paper, or other evidence of debt, payable at a future day, which are transferred to the bank. The term "discount," as a substantive, means the interest reserved from the amount lent at the time of making the loan; as a verb, it is used to denote the act of giving money for a note or bill of exchange, deducting the interest. A distinction between "discount" and "loan" is sometimes enforced by the terms of the statutes obtaining in the premises; but, in the absence of any element of this kind, whenever the words stand alone upon the signification accorded them in the general law, every loan upon evidence of debt, where compensation for the use of money till the maturity of the debt is deducted from the principal and retained by the lender at the time of making the loan, is a discount.

Youngblood vs. Trust Co., 20 L. R. A., 59.

Anderson vs. Cleburne Building & Loan Co., 16 S. W., 298 et seq.

Sweeney et ux. vs. El Paso Bldg. & Loan Assn., 26 S. W., 290.

Plockner vs. Bank of U. S., 21 U. S., 338.

National Bank of Cloversville vs. Johnson, 104 U. S., 276.

Salt—vs. Planters & Merchants Bank, 14 Ala., 677.

Valley Loan Co. vs. Turner, 13 Conn., 259.

Pape vs. Topeka Capital Bank, 20 Kan., 440; 27 Am. Rep., 183.

Niagara County Bank vs. Baker, 15 Ohio St., 85.

Talmadge vs. Bell, 7 N. Y., 328.

Columbus City Bank vs. Bruce, 17 N. Y., 55.

Freeman vs. Britton, 17 N. J. L., 206.

Eastin et al. vs. Third National Bank of Cincinnati, 42 S. W., 1115.

Carroll vs. Drury, 170 Ill., 575.

Bobo vs. People National Bank of Shelbyville, 21 S. W., 889.

Black vs. First National Bank, 54 Atl., 94.

State of Mo. vs. Boatmen's Savings Institution, 48 Mo., 195.

Morris on Banks and Banking, Vol. 1, Sec. 49, page 138.

In the case of Anderson vs. Cleburne Building & Loan Association, *supra*, the facts alleged in the petition were substantially as follows: The defendants averred that the plaintiff corporation, in violation of the terms of its charter and the Constitution of the State, loaned to A. B. Anderson, the sum of \$150, and received as security for the payment

of said sum a note signed by Anderson, with three other parties as sureties. The note was made payable twelve months after date with interest at the rate of twelve per cent after maturity. Some time after the note was executed, A. B. Anderson, maker, died, and a new note was executed by S. L. Anderson, the son of A. B. Anderson, with the same securities. The note was executed for \$150 received by Anderson plus \$36 added into the face of the note at the time of its execution. It was contended on the trial of the case that this was a discounting transaction, the contention being that the terms "discount" and "banking" as used in Subdivision 29 of what is now Article 1121, Revised Statutes, meant bank discounts. This contention was sustained by the court on the appeal of the case. In the opinion rendered by the court, which was rendered by Judge White while Presiding Judge of the Court of Appeals of this State, and which opinion has never been overruled, the meaning of the term "discount" was discussed at length, and among other things the court said:

"Discount is the difference between the price and the amount of the debt the evidence of which is transferred. That difference represents interest charged, being at some rate according to which the price paid, if invested until the maturity of the debt, will produce its amount; and the advance, therefore, upon every note discounted, without reference to its character as business or accommodation paper, its properly denominated loan for interest is predicable only of loans being the price paid for the use of money.' Bank vs. Johnson, 104 U. S., 276; Macl. Bank, 43. 'To discount paper, as understood in the business of banking, is only a mode of loaning money, with the right to take the interest allowed by law in advance.' In Loan Co. vs. Towner, 13 Conn., 249, it was held that, 'where it was provided in the charter of a corporation established for the purpose of loaning money that nothing therein contained should be construed to authorize the company to discount notes or exercise any banking privileges whatever,' the taking of a note for the sum loaned, and the receiving of the interest on that sum in advance for the period of the loan, was thereby prohibited, and there could be no recovery on the note thus discounted. And so in Insurance Co. vs. Ely, 5 Conn., 560, it was held: 'A corporation has only such rights and powers as are expressly conferred by its charter, or as are necessary to carry its express rights and powers into effect. Hence it can not contract unless it is enabled to do so by its charter, and then only in the mode and as to the subject matter prescribed.' It was further held in that case that 'a corporation authorized by its charter to make contracts of fire and marine insurance, to loan on bottomry respondentia or mortgage of real estate or chattels real, to buy in mortgaged property when necessary to secure debts, and generally to purchase and hold property necessary to carry on its business, but expressly prohibited from exercising banking powers, can not loan money on the discount of notes.'" (16 S. W., 298-300.)

In the later case of Sweeney vs. El Paso Bldg. & Loan Association, supra, the Court of Civil Appeals of the State, in an opinion upon which a writ of error was refused by the Supreme Court of the State, adhered to the definition and rule laid down by Judge White in the opinion from which we have just quoted, and said:

"It is a discounting to purchase the evidence of a debt for less than its face. It is also a discounting in making an evidence of debt payable in the future for the lender to deduct and retain from the principal the compensation for the use of the money until the termination of the debt." (26 S. W., 292.)

It will be noted also that in this opinion from which we have just

quoted, the case of *Youngblood vs. Trust Co.*, which we have cited above, was cited as an authority for the conclusion of the court.

Our statement of the rule is substantially a paraphrase from the opinion of the court in the *Youngblood* case, and it is unnecessary for us to here quote it.

6. In considering the definition of the term "discounting privileges" we must bear in mind it is used in this statute in connection with the word "banking," and is modified and controlled thereby. Substantially this statute has been in the Constitution or laws of this State since the days of the Republic, and the construction here suggested is the one given when the question first came before the courts for adjudication. (*State vs. Williams*, 8 Texas, 225.)

In the case cited a petition was filed by John W. Harris, Esq., Attorney General, in behalf of the State, charging that an association and company of individuals consisting of Samuel M. Williams et al. "have, from and after the first day of May, eighteen hundred and forty-eight, until the second day of June, in the said year, that is to say for the space of one month next from and after the said first day of May, 1848, kept their office and exercised banking privileges in said county and State without the authority of law, and have been thereby guilty of a misdemeanor, and are liable to a fine of five thousand dollars." The statute under which the suit was brought by the Attorney General was follows:

"That any corporation, company, or association of individuals who shall use or exercise banking or discounting privileges in this State, or who shall issue any bill, check, promissory note, or other paper in this State to circulate as money, without authority of law, shall be deemed guilty of a misdemeanor, and shall be liable to a fine of not less than two thousand dollars nor more than five thousand dollars, which may be recovered by a suit in the district court in the name of the State."

The defendants leveled a general demurrer at the State's petition, which was sustained. One of the reasons assigned by the court for sustaining the general demurrer was that the petition charge the unlawful exercise of "banking or discounting privileges."

In passing upon this particular feature of the case Judge Lipscomb, writing the opinion for the Supreme Court of the State of Texas, said:

"This suit was brought to recover the penalty for the infraction of the law under the first specification in our analysis: 'The use or exercise of banking or discounting privileges for one month.' The charge contained in the petition is, 'kept their office and exercised banking privileges,' adding to the words of the statute 'kept their office,' and omitting 'or discounting' between the words 'banking' and 'privileges' in the statute, thus materially departing from the language of the statute, more objectionable for the words omitted than those added, as they formed a component part of the offense defined." (8 Texas, 266-7.)

We merely direct your attention to this case as tending to show that the words "discounting privileges" as used in the act have special reference to discounting privileges as that term is understood in banking. In other words, the discounting privileges inhibited is the discounting privilege as exercised by banks, and that therefore the word "discount"

should be given its restricted and technical meaning as heretofore defined by us, and not the broad general significance of the term. It becomes important therefore to distinguish between "discounting" as used in this act and "purchasing," for this difference, technical though it is, exists and determines material rights of corporations chartered or which may be chartered under the provisions of this law.

"Discounting" as distinguished from a sale of a note is that where a note is discounted money is loaned thereon by a bank, taking the interest in advance, and the person offering the note for discount becomes liable thereon either as a banker or an endorser, while a "sale" of the note implies a transfer of the title only by which the seller parts with all interest in and liability on the paper; in other words, wherever a note is discounted the party offering the same for discount is either a maker of the note and primarily liable to the bank, or he must be an endorser of the note and secondarily liable; while in the sale of a note the party selling the same does not become liable upon it in any manner. The mere fact that in the sale of the note the purchasing bank does not pay full face value for the note but discounts the same within the general meaning of the word "discount" does not render the transaction a discounting one as understood in the banking world unless the seller becomes either primarily or secondarily liable on the paper; for the transaction to become a discounting transaction within the technical and banking meaning of the term "discount," two facts must exist: (1) less than the face value of the note must be paid for it, and (2) the party offering the note to the bank must be liable upon the note either as a maker, endorser or guarantor. In the absence of either of these two requisites the transaction is not a discounting one such as is inhibited by the statute under examination.

9 Am. & Eng. Encyc. of Law, 470-1.

Morse on Banks & Banking, Sec. 73, p. 169.

Neilsville Bank vs. Tuthill, 30 N. W., 154.

Freeman vs. Brittin, 17 N. J. L., 191.

Farmers & Merchants Bank vs. Baldwin, 23 Minn., 206.

Niagara County Bank vs. Baker, 15 Ohio, 85.

Schöler vs. Loan Assn., 35 Pa., 229.

In Mr. Morse's work, cited above, he says:

"Power to discount notes is not power to purchase them. The right of purchasing is an entirely distinct and independent one, which may or may not be enjoyed by any bank, according to the circumstances of its particular case and the language of its incorporating act. If possessed, it is simply a right to buy the notes in the market for their fair value, whatever that may be. It must be a bona fide transaction of bargain and sale. If it be colorable only, and resorted to for the purpose of covering up a usurious dealing, it will be treated as a usurious contract." (Morse on Banks and Banking, Sec. 73, p. 169; citing *Fleckner vs. Bank of the United States*, 8 Wheat., 338; *Talmadge vs. Pell*, 3 Seld. (N. Y.), 328; *Dunkle vs. Renick*, 6 Ohio St., 524; *McLean vs. Lafayette Bank*, 3 McLean, 587; *Philadelphia Loan Co. vs. Towner*, 13 Conn., 259.)

In the case of *Freeman vs. Brittin*, cited above, the Supreme Court of New Jersey discussed the distinction between a discount and a sale of commercial paper, saying, among other things, the following:

"1. Every discount of a bill or note, is a loan, and includes a contract for forbearance. I use the term discount here, in its appropriate mercantile sense, as distinguished from a sale, of a note or bill—a distinction which I shall attempt to illustrate hereafter.

"In *Auroil vs. Thomas*, 2 T. R., 52; *Hammett vs. Yea*, 1 Bos. & Pull., 144; *Marsh vs. Martindale*, 3 Bos. & Pull., 154. and in almost all the English cases, I have looked into, the discounting of a bill or note is spoken of and treated both by courts and counsel, as including in it, *ex vi termini*, a contract for a loan. Mr. Byles in his treatise on bills, p. 72, Law Lib., Vol. 16. says, 'the ordinary transaction of discounting a note, is a lending, within the statute. The party discounting, does in fact lend money on interest, to be repaid, either by the person receiving or by some other party to the bill, at a certain period.'

"But authorities are not necessary to establish this position. It results from the very nature of the transaction. It is not necessary in order to constitute a loan, that there should be in very terms, an application to borrow, or an agreement to lend. Every advancement of money, for the accommodation of another, to be repaid to the person making the advance, by the person receiving it, or by any person for him, or by or out of his funds, is literally and legally, a loan of money. *Byrne vs. Kennifeck*, 1 Batty's R. 273; *Fireday vs. Wightwick*, 1 Tomlyn's R. 250. Whoever therefore gets a bill or note, discounted at bank, or by an individual, gets a loan. He literally borrows money. If it is on accommodation paper, it is to be repaid at maturity, by himself, or by his friends for him. If, on a business note, received by him for a valuable consideration, he pledges, by a transfer of the note, his own specific funds, for the repayment of the money, and superadds his general responsibility by indorsing the note.

"In short, the position that an ordinary discount of a note or bill, is not a loan of money, is contradicted, not only by the common sense of the community, but by innumerable cases in England and in this country, in which, discounts, have been held to be usurious, which all admit, they could not be, unless they involved a loan of money.

"2. Without pursuing this subject any further, I proceed to consider the second proposition; that every transfer of a note or bill by a general indorsement is a contract.

"Great ingenuity has been displayed in building up this new, and to my mind very extraordinary system, by which, a premium is held out to brokers and money dealers, to discount notes, upon the most oppressive terms, under the sanction of law, with a guaranty, that they shall be no losers in the end. The operation is this: if the maker or any prior party to the note, is solvent and able to pay, the broker gets the whole amount, and pockets the exorbitant excess of interest, he has screwed out of the needy indorser. But if he fails to recover from the maker of the note, he may come back upon his indorser for the money advanced with interest. It is obvious, that upon this principle, it is greatly for the broker's interest to obtain the note as cheap as possible; for the less he gives for it, the greater his profit, if the maker is solvent; and the smaller his loss, if all parties should fail.

"Among other arguments in support of this system, it is said, the indorsement of a note, is no part of the contract, between the indorser and the indorsee; that the latter derives his title from the sign manual of the indorser, and not from the contract between them—that the only contract, between the indorser and indorsee, is the implied one, that if the maker fails to pay at maturity on demand, the indorser will pay; and that the indorsee's title to the note, is not founded on this implied contract, but is derived from the handwriting of the indorser on the note.

"This is certainly ingenious, not to say specious; but laying all sophistry aside, I appeal to the honest feelings of every professional man, whether the substance and legal import of the contract between the indorser and indorsee, is not, that in consideration of so much money paid by the latter, the holder of the note agrees to transfer it, by indorsement, to the indorsee, with the money due and to grow due upon it, with recourse to the indorser on failure of payment by the maker, upon his being duly requested so to do? And if such be the contract in legal effect, I desire to know, whence the indorsee derives his title to

the note, if he does not acquire it by that contract? To say that the indorsement passes the title to him, is begging the question. It is true the indorsement gives the indorsee, *prima facie*, a title to the note: but it does so only because it includes and is evidence of the contract under which he claims it.

"Again, if the indorsement of a note is no contract, in what sense, can it be said, that every indorsement of a note is equivalent to a new bill of exchange? And yet our books declare it to be so, and the ablest judges have maintained that position. I believe it will not be said, that a bill of exchange is not a contract—nor that a bill of exchange, can not be made upon an usurious consideration.

"If, as I think has been shown, every discount of a note, whether by a bank, or an individual, includes a loan, and if the indorsement of a discounted note, constitutes a contract, between the lender and the borrower, then it follows that the New York decisions, to which we have been referred, have to a great extent, repealed the statute against usury.'" (17 N. J. L., 206-208.)

Continuing further the court said:

"To my mind, the difference between a sale and a negotiation or discount of a bill, in the ordinary course of trade, is so palpable, that I feel some reluctance in attempting to explain it. It can not be denied that a bond, or bill or note, is as much the subject of bargain and sale, and as capable of being bought and sold, as any other article of property; and when so bought or sold, the contract of sale, is governed in all respects, by the same rules of law, that are applicable to contracts for the purchase and sale of other things. The vendor, as in other cases, in the absence of fraud and of any special agreement to the contrary, is answerable only for the validity of his title, and it may be also, for the genuineness of the instrument, but not for its ultimate payment. But in the case of ordinary transfers of bills and notes, by indorsing the same, the rights, duties, and liabilities of the indorser and of all other parties to the instrument, are of a very different character; and are regulated and governed by the law of merchants, applicable exclusively to this species of securities and contracts.

"If, then, a discount and transfer of a note, by an unqualified indorsement, is a sale of it, by what authority, I would respectfully ask, can the court, in the absence of all fraud, hold the vendor liable to refund the consideration money, with interest to the purchaser? I am at a loss for an answer; and disposed as I always am to treat with great respect, the judicial decisions of our sister States, I can not refer to them so far, as to adopt a system at once, repealing, in effect, the statute of usury; abrogating in part, the common law, on the subject of negotiable paper, and permitting a purchaser to sue his vendor, to recover back the purchase money, because he can not get the value of the article he has bought, from other persons; a doctrine more favorable to usurers, the most heartless of them, could not desire. A similar course of decisions in England, would have relieved the courts at Westminster Hall, in a multitude of cases, from the trouble of deciding, when the discount of a note was tainted with usury, and when it was not. But they have not ventured so far to encroach upon the legislative department of the government.

"But the distinction between a sale and a discount of a bill or note, is recognized and illustrated by numerous English writers and cases.

"Mr. Byles, a very recent and respectable writer, in his treatise on bills of exchange, page 91, says: 'If the bill or note be delivered without indorsement, not in payment of an antecedent debt,' but for a valuable consideration passing at the time, 'such a transfer is held to be a sale of the bill, a purchase of it, with all risks, by the transferee.' In *Fenn vs. Harrison*, 3 T. R., 757, Lord Kenyon says, 'It is extremely clear, that if the holder of a bill, send it into market, without indorsing his name upon it, neither morality, nor the laws of the country, will compel him to refund the money, for which he sold it, if he did not know at the time that it was not a good bill'; and see *Evans vs. Whyte*, 5 Ring., 485; *Ex parte Shuttleworth*, 3 Wis., 367, and other cases cited in *Byles on Bills*, 91, etc., see also 1 *Holt's R.*, 256, in 3 *Engl. C. L. R.*, 87, in note.

"In my opinion, therefore, every transfer of a note by an unqualified indorse-

ment of it, upon a discount, whether for more or less than the legal rate of interest, does import, and includes a contract for a loan of money." (17 N. J. L. 209-11.)

In the case of the Farmers & Mechanics Bank vs. Baldwin, 23 Minn., 198, the Supreme Court of the State of Minnesota made the distinction which we make here, and held that the power to carry on the business of banking by discounting bills, notes and other evidences of debt, is not, within the meaning of that section, a power to buy such securities, but to loan money thereon, with the right to take lawful interest in advance. In discussing the question the court said:

"It is not contended, and can not be, that the power to purchase and traffic in promissory notes, as a species of personal property, belongs to any bank as a necessary incident to its existence, or to the exercise of any of its powers as a bank of circulation and deposit alone. It is not conferred, in express terms, by any provision of the statute. It must exist, therefore, if at all, as an incident necessary to enable it to transact its business as a bank of discount. A bank of discount alone is defined to be 'one that furnishes loans upon drafts, promissory notes, bonds, or other securities.' Am. Cyc., Vol. 2, title banks. 'The discounting of notes,' says Spencer, J., in *People vs. Utica Ins. Co.*, 15 John., 358, 392, 'is one mode of lending money.' In *New York Firemen Ins. Co. vs. Ely*, 2 Coven, 678, 699, Sutherland, J., adopts the same definition; and Gardner, J., in delivering the opinion of the court in *Talmadge vs. Pell*, 7 N. Y., 328, 343, declares that 'to discount bonds, in banking, is only a mode of loaning money.' In *Pleckner vs. Bank of United States*, 8 Wheaton, 338, 350, Story, J., uses the following language: 'Nothing can be clearer than that, by the language of the commercial world and the settled practice of banks, a discount by a bank means, *ex vi termini*, a deduction or drawback made upon its advances or loans of money upon negotiable paper, or other evidences of debt, payable at a future day, which are transferred to the bank. We suppose that the Legislature used the language in this its appropriate sense.' The correct proposition, as we understand it, is concisely stated in the syllabus of the case of *Niagara County Bank vs. Baker*, 15 Ohio St., 68, as follows: 'To discount, as understood in the business of banking, is only a mode of loaning money, with the right to take the interest allowed by law in advance.'

"Discounting a note and buying it are not identical in meaning, the latter expression being used to denote the transaction 'when the seller does not endorse the note, and is not accountable for it' (1 Bouv. Law Dict., title Discount, citing *Pothier De l' Usure*, 128), and it is admitted that such was the character of the transaction in this case. In view of this understanding of the functions of a bank of discount, the legal signification attached to the word 'discount,' and the distinction between it and the word 'purchase,' when applied to the business of banking, it is obvious that the power 'to carry the business of banking, by discounting notes, bills, and other evidences of debt,' is only an authority to loan money thereon, with the right to deduct the legal rate of interest in advance. This right can be fully enjoyed without the possession of the unrestricted power of buying and dealing in such securities as choses in action and personal property. Though, as is urged by plaintiff, the bank acquires a title to discounted paper, and hence may, in a certain sense, be said to have purchased it, yet it is a purchase by discount—which is permitted—and does not involve the exercise of a power of purchase in any other way than by discount." (23 Minn., 205, 206.)

In the case of *Niagara County Bank vs. Baker*, 15 Ohio St., 85, it was held that a power given a corporation by statute to carry on the business of banking by discounting bills, notes and other evidences of debt, is not a power to buy promissory notes, but to loan money upon the paper described. The court said, "A discount may be a loan, but

every loan is not a discount; and there is nothing inconsistent in the fact that the bank was expressly authorized to make loans in either way. But the naked power to discount paper is not given; it is the 'power to carry on the business of banking by' (among other things) 'discounting bills, notes, and other evidences of debt.' And the question is, what is discounting paper, as understood in the business of banking?"

The court was of the opinion that discounting paper as understood in the business of banking was only a mode of loaning money, and said:

"It is true that the term discount may in a general sense be understood as counting off, an allowance or deduction made from the gross sum of money on any account whatever, but in the section under consideration the term is evidently used in a more limited and technical sense. * * * Power to discount promissory notes * * * is given in terms as distinct from and additional to the power of buying and selling promissory notes, which is also given in terms and is unqualified."

The authorities cited by us support the proposition as announced, and we believe that Subdivision 29 in inhibiting the exercise of discounting privileges by corporations chartered thereunder means that transactions which amount to discounting as understood in the banking world are prohibited, and that is was not the intention of the Legislature to prohibit the purchase of commercial paper by corporations chartered under this subdivision where no obligation, directly or indirectly, was assumed by the seller to pay the note, even though the note should be purchased at less than its face value. In other words, we give to the term "discounting" as used in the statute its limited and technical meaning. This technical meaning was given a statute where the same terms were used in much the same manner in the case of the Philadelphia Loan Co. vs. Towner, 13 Conn., 248 et seq. The suit in that cause was brought on a promissory note which had been signed by Towner and others. The law under which the loan company was incorporated contained the following provision:

"2. It shall be lawful for the said company to loan money in any sum or sums from one dollar upwards on purchases of goods and chattels and other security to be deposited with the company as security therefor and to charge all reasonable expenses incident to the same and at interest not exceeding six per cent per annum; provided, however, that nothing intended in this act shall be construed to authorize said company to discount notes; and provided, that this corporation shall issue no notes or bills of credit or promissory notes in the nature of banking, or exercise any banking privileges whatsoever."

It is thus seen that this statute prohibited the exercise of banking or discounting privileges, and in that respect was similar to the statute here under review. The note upon which the suit was brought had been discounted by the loan company. On the first of December, 1836, a note was taken from the maker for the same sum as the note in suit and was renewed several times, in each case the interest being paid in advance or secured, and the note upon which the suit was brought was the last of these renewal notes. The question was as to whether or not this was a discounting transaction inhibited by the statute. The court held it was, saying:

"The discounting of notes by receiving interest in advance * * * being one of the peculiar privileges of a banking institution, we can not doubt that it was one of those privileges that the Legislature intended this company should not possess. The plaintiffs had repeatedly been discounting notes of these defendants, and in fact the very note in question. It was not only without the authority of the charter, but in violation of its terms." (13 Conn., 259-60.)

We cite this case merely to show that in the opinion of the court the use of the word "discount" in connection with the word "banking" in a statute very much similar to our own was held to mean discount or discounting as exercised by banks. This was an opinion written in 1839 and grew out of the same general conceptions of law from which arose the identical statute here under consideration, because this statute entered into our laws about the same time or shortly after the decision in the Connecticut case. Statutes somewhat similar to our own obtained in many States of the Union in this period of time and subsequent thereto. This class of statutes were a direct outgrowth of the abuses which produced the policy of President Jackson, whose views on the subject of banking dominated the laws of the several States of the Union for many years and particularly the Constitution and laws of this State. We say particularly the Constitution and laws of the State of Texas because it may be safely assumed that General Houston, who was a great admirer of President Jackson, brought with him into the State of Texas these views of his distinguished countryman. The views of President Jackson were no doubt further enforced on the people of Texas by the era of wild cat banking in the States, particularly in the Southern States, and were never finally abrogated in Texas until the amendment of our Constitution in 1904.

4. From authorities heretofore cited by us it is apparent that discounting notes is one of the most important of banking functions, as is receiving deposits. These two functions of a bank have from almost time immemorial characterized their business. (Morse on Banks and Banking, Secs. 2, 13; 3 Encyc. of Law, p. 790.)

5. Buying and selling exchange is likewise one of the usual and incidental powers of banking along with the two first named, and is prohibited by the statute under consideration. (3 Am. & Eng. Encyc. of Law, 798; Zane on Banks and Banking, Sec. 293; Morse, supra, Sec. 156.)

6. We think also that corporations chartered under Subdivision 29 may purchase any class of commercial paper except bills of exchange, even at a discount from the face value of such paper or notes, provided the seller does not become personally liable either as maker, endorser or guarantor of the paper; that they may buy such paper, however, even though the seller does become liable as maker, endorser or guarantor, provided they pay face value for the paper.

It is true the statute in this instance does not in so many words give corporations of this character the right to purchase notes as distinguished from a loan, but we think that by the use of the broad unrestricted term "accumulation of money." it was the intention of the Legislature to give such corporations the right to deal in all paper which evidences a

loan, and that the purchase and sale of this class of paper is one of the methods of accumulating money in contemplation of the statute. Manifestly in using the word "accumulation" the statute meant the accumulation of money by some character of investment, in addition to the power of loaning money, and yet the corporation being essentially a loan company the power of investment would be limited by this general purpose. If the statute had used the term "investing and loaning money" then it would have the right to purchase commercial paper. (*Savings Bank of Santiago Co. vs. Barrett*, 58 Pac., 914.)

The term "accumulation" is one of broader significance than investing, and we think may be reasonably construed to include the latter. It was well known to the Legislature that promissory notes were bought and sold at the time this statute was enacted, and that the purchase of the same was not the exercise of a banking or discounting privilege, and had it been the intention of the lawmakers to prohibit the purchase of notes as contra-distinguished from discounting notes, it would undoubtedly have said so.

We conclude therefore on the whole that corporations chartered under this subdivision of the statute may purchase commercial paper and sell the same except bills of exchange, provided the acts of purchase are brought within the limitations of this opinion.

We will, however, for the purpose of setting at rest any question as to the rights of corporations chartered under this statute, discuss the question of additional powers which may be exercised by such a corporation in the accumulation of funds.

It is a well recognized principle of law that corporations when not restrained in any particular manner by their charters may adopt all reasonable modes in the execution of their business which a natural person may adopt in the exercise of similar powers.

State vs. Lincoln Trust Co., 46 S. W., 600.

Morowitz on Corporations, Sec. 336.

Green Bay & M. R. Co. vs. Union Steamboat Co., 107 U. S., 98.

Henning vs. Ins. Co., 47 Mo., 425.

Wendell vs. State, 62 Wis., 304.

It will be noted that the statute under examination, which enters into and becomes a part of the charter of each corporation created thereunder, does not define the manner in which such corporation shall accumulate money and restrains such corporations only in one respect; that is, they shall not accumulate money in the exercise of a banking or discounting privilege. We have already discussed the meaning of banking and discounting privileges at some length, and have determined that one of the banking privileges referred to is that of receiving deposits. It is everywhere recognized that the receipt of deposits is a banking privilege.

Morse on Banks and Banking, Vol. 1, Secs. 47, 178.

Mr. Morse says: "It is the essence of the business of banking that the bank or banker should receive on deposit the money and funds of other persons."

Having shown that the receiving of deposits is the exercise of a banking privilege, and therefore inhibited to corporations chartered under the statute we are discussing, it next devolves upon us to determine the nature of the relation created between a depositor and the bank. It is elementary that a general deposit of money in a bank creates a debt from the bank to the depositor.

Zane on Banks and Banking, Sec. 130.

First State Bank vs. Shannon, 159 S. W., 401.

Young vs. Bundy, 158 S. W., 568.

Van Winkle Gin Co. vs. Citizens Bank, 89 Texas, 153.

Duncan vs. Magette, 25 Texas, 248.

National Bank vs. National Bank, 84 Texas, 43.

Concerning this proposition the Court of Civil Appeals, in the case of the First State Bank vs. Shannon, cited above, said:

"It is well recognized that a bank deposit is a debt owing by the bank to the depositor. Van Winkle vs. Citizens Bank, 89 Texas, 153, 33 S. W., 862; Baker vs. Kennedy, 53 Texas, 200. When a general deposit is made, it is not contemplated that the identical money shall be returned: but the relation of debtor and creditor arises between the parties. Templeman vs. Hutchings, 24 Texas Civ. App. 1, 57 S. W., 868; Hoskins vs. Velasco National Bank, 48 Texas Civ. App., 246, 107 S. W., 598. Whether the deposit is a general one or for a specific purpose, as our courts sometimes say a special deposit, we do not understand that the relation of debtor and creditor is changed. The only difference is that the money so deposited can not be used for a purpose other than that for which the bank holds it. There is no practical difference between such deposit and a general deposit. If the purpose for which this specific deposit was made fails, the bank is liable to the depositor for the return of the funds. Morse on Banks and Banking, Secs. 207, 208, and 210; Ellis vs. National Exchange Bank, 38 Texas Civ. App., 619, 86 S. W., 776. * * * (159 S. W., 401.)

"As stated above, a deposit with the bank created the relation of debtor and creditor. This arises as upon an implied contract. First National Bank vs. Greenville National Bank, 84 Texas, 40, 19 S. W., 334; Baker vs. Kennedy, 53 Texas, 200; Dunkin vs. Magette, 25 Texas, 245. This deposit must be in money, and when so made implies the obligation to repay in money of equal value upon demand. Money, when so deposited, becomes the property of the bank." (159 S. W., 401.)

In the case of Young vs. Bundy, supra, the same court also said:

"Appellants contend that the deposit in the bank was a special deposit, and therefore a bailment, and did not establish the relation of debtor and creditor or banker and customer, and therefore appellants were not liable except for negligence in paying out the money upon the forged check, if it was such. If the deposit was only a special deposit, and did not establish the relation of banker and customer, the care required of appellants in such case was only ordinary care. A special deposit is the placing of something in the charge or custody of the bank of which specific thing restitution must be made. Morse on Banks and Banking (4th. Ed.) Secs. 183 and 190; Duncan vs. Magette, 25 Texas, 245. A special deposit is no part of the bank's available assets. It does not enter into the general funds of the bank, and form a part of its deposable capital. It is to be kept by itself and specifically returned. Morse on Banks and Banking, Sec. 205. A deposit is general unless expressly made special or specific. 'In the absence of evidence to show that it is the bank's duty by agreement express or clearly implied to keep the funds and their investment separate, it must be treated as a general deposit.' Id., 186. Where money is received on deposit, it is a well recognized principle of law that the deposit is a debt owing by the bank to the depositor. Van Winkle Gin Co. vs. Citizens Bank, 53 Texas, 200.

It is not contemplated that the identical money shall be returned, but the relation of debtor and creditor arises between the parties. *Templeton vs. Hutchens*, 57 S. W., 831; *Hoskins vs. Velasco National Bank*, 48 Texas Civ. App., 246, 107 S. W., 598." (158 S. W., 568-9.)

The proposition enunciated and the two cases quoted from is well supported by the opinions of the Supreme Court we have cited as well as those cited in the cases themselves. The doctrine is also that which obtains in other jurisdictions.

Kenneth, etc., Co. vs. National Bank of the Republic, 70 S. W., 177.
In re *Salmon*, 145 Fed., 651.

Camp vs. First National Bank of Ocala, 103 Am. St. Rep., 177.

Elliott vs. Capital City State Bank, 1 L. R. A. (N. S.), 1134.

We take it as well settled then that generally when we refer to the receipt of deposits by a bank we refer to the creation of the relation of debtor and creditor as between the bank and its depositors, and not to the creation of the relation of bailee, although in the case of special deposits the relation of bailee may sometimes be created. However, in the general and ordinary sense of the terms as used in the business of banking we would say that the receiving of deposits as a banking privilege is the receiving of general deposits or special deposits which create the relation of debtor and creditor, and not the relation of trustee and *cestui que trust* or of bailee and bailor, or of principal and agent.

In the case of the *Kenneth Investment Co. vs. National Bank of the Republic*, 70 S. W., 176, the Court of Appeals of the State of Missouri, in discussing this subject, said:

"The relation between a depositor and a banker is that of debtor and creditor, and not of bailor and bailee. And that being true, it follows that no degree of diligence exercised by the banker in scrutinizing checks presented to him for payment, in order to detect forgeries of his depositor's signature, could avail to enable him to cast upon the latter losses sustained by him in the paying out of money on checks purporting to be those of the depositor, but in fact forged. The implied contract between him and depositor being in fact that, in consideration of the latter's lending him such an amount of money, he will pay a like amount to him, or to any one to whom he may order, by checks, from time to time, the burden rests upon him to determine, at his peril, whether a check presented to him for payment is the genuine check of his depositor or not. As against the debt he owes the creditor for the money loaned him, he can claim no credit, except for moneys he has paid to him, or to some one to whom he had ordered him to pay. If he pays to any one else, then he merely pays his own money at his own risk, and can not charge the depositor for it. All this is well settled law, about which there is no room for question. *McKean vs. Bank*, 74 Mo. App., 281-287; *Knecht vs. Savings Inst.*, 2 Mo. App. 563-4; *Bank vs. Morvan*, 117 U. S., loc. cit., 106, 6 Sup. Ct., 657, 29 L. Ed., 811; *Bank vs. Risley*, 111 U. S., loc. cit., 127, 4 Sup. Ct., 322, 28 L. Ed., 374; *Marine Bank vs. Fulton Bank*, 2 Wall., 252, 17 L. Ed., 785." (70 S. W., 177.)

In the case of *Elliott vs. Capital City State Bank*, supra, the Supreme Court of the State of Iowa held in accordance with the proposition we have just enunciated, saying:

"Deposits are made in a bank in accordance with the universal commercial usage, which becomes a part of the law of the transaction. They are neither loans, nor bailments in the strict sense of the term. A deposit is a transaction peculiar to the banking business, and one that the courts should recognize and

deal with according to commercial usage and understanding. The primary purpose of a general deposit is to protect the fund, and some of the incidental purposes thereof are the conveniences of checking and transacting large business interests without keeping and handling large sums of money. The transaction is in reality for the benefit and convenience of the depositor; and, while the relation of debtor and creditor exists, and the bank has the use of the money for commercial gain, it assumes no further obligation than to pay the amount received when it shall be demanded at its banking house. *Girard vs. Bank of Penn. Twp.*, 39 Pa., 92, 80 Am. Dec., 507." (1 L. R. A. (N. S.), 1134-5.)

In case of *In re Salmon*, 145 Fed. Rep., 651 et seq., also sustains the view taken by us; in that case the court said:

"It is conceded by the respective counsel in this case that the well-settled rule of law is that a deposit of money in a bank or with a banking concern establishes the relation of creditor and debtor between the depositor and the depository. The deposit does not partake of the nature of a trust fund, but becomes an asset of the bank, whereby *Salmon & Salmon* became a simple debtor to the depositor, subject to its call check for the payment thereof. And it may also be conceded that, although the fund so deposited arose from taxes for municipal or school purposes, it did not alter the relation of mere creditor and debtor, and that in case of bankruptcy of the depository such depositor is not entitled to any preference over other creditors of the bank in the distribution of the assets of the estate. *Multnomah County vs. Oregon National Bank (C. C.)*, 61 Fed., 912; *Spokane County vs. Clark (C. C.)*, 61 Fed., 538; *Brown vs. Board of Commissioners (Kan. Sup.)*, 50 Pac., 838; *Board of Commissioners vs. American Loan & Trust Company (Minn.)*, 78 N. W., 113; *Hall County vs. Thomsson (Neb.)*, 89 N. W., 393; *In re State Treasurer's Settlement (Neb.)*, 70 N. W., 532, 36 L. R. A., 746; *McNulta vs. West Chicago Park Commissioners*, 99 Fed., 900, 40 C. C. A., 155." (145 Fed., 651-2.)

Our view of the matter is further borne out by the celebrated case of *State of Missouri vs. Lincoln Trust Co. et al.*, 46 S. W., 593. It will be recalled that the laws of Missouri form the basis of our banking laws, having been written largely by the Honorable Thomas B. Love, who, prior to his removal to the State of Texas, lived in the State of Missouri. The *Lincoln Trust Company* case was decided by the Supreme Court of Missouri in 1898, which was several years prior to the enactment of our State banking laws, and therefore may well be considered as an authority in determining the meaning of banking privileges under our State banking laws. It is true that the statute under consideration was enacted many years prior to the decision of the case referred to, but at the same time it must be construed *in pari materia* with the banking laws of the State. In the *Lincoln Trust Company* case the Attorney General of Missouri brought a *quo warranto* proceeding against the *Lincoln Trust Company*, the *Union Trust Company of St. Louis*, the *St. Louis Trust Company*, and the *Mississippi Valley Trust Company*, all of the city of St. Louis, to oust them of their franchise because of the exercise of powers and privileges not conferred upon them by law. These trust companies were organized and conducted their business by virtue of Article 11, Chapter 42, Revised Statutes 1889, and amendments thereof of the State of Missouri. The unauthorized and unlawful acts complained of by the State were, among other things, receiving upon deposit subject to check and draft at sight sums of money ranging in amount from one dollar and upwards; and through

their officers and agents opening regular banking accounts according to the customs and usages of regularly incorporated banks in the State of Missouri. It was contended by the trust companies that they had the right to conduct a regular deposit business by virtue of certain provisions of their charters and of certain provisions in the law authorizing their creation. By Section 4 of the act under which these trust companies were created they were authorized "to receive moneys in trust, and accumulate the same at such rate of interest as may be obtained or agreed on, or to allow such interest thereon as may be agreed, not exceeding in either case the legal rate; * * * to act as agents for the investment of money for other persons, etc."

It was contended by the trust companies that under these provisions they were entitled to conduct a deposit business as conducted by banks generally under the banking laws of Missouri. The Supreme Court of the State, however, disagreed with this contention and denied them the right to conduct a deposit-business as generally understood, saying:

"There is nothing in the words used that would justify their extension by implication in favor of the respondents beyond the natural and obvious meaning of the words employed, and these do not support the right asserted. The fact that respondents are incorporated as trust companies seems to be inconsistent with the relation of that of debtor and creditor, and in favor of the relation of trustee and *cestui que trust*." (46 S. W., 588.)

This holding is valuable and worthy of consideration to this extent: it draws the line of demarcation between the receipt of deposits generally and the right "to receive moneys in trust and to accumulate the same at an agreed rate of interest," and shows that the authority to do the latter does not embrace the right and authority to perform the former, and is inconsistent therewith. Its value is increased because the opinion comes from a State whose banking laws form the basis of our own and though not directly in point on the question here at issue affords some light to assist us in interpreting the statute before us. There are further authorities also on the question showing a line of demarcation between the right to receive deposits generally and the right to accumulate money by receiving the same as bailments. Under the statutes of Missouri, 1889, provision was made for the creation of a savings bank and fund companies. The statute provided in substance that any five or more persons in any county of the State could associate themselves together by articles of agreement for the purpose of establishing a bank of deposit or discount or both deposit and discount. The same statute provided for the creation of trust companies, providing that any three or more persons could incorporate a trust company. The two statutes were before the Supreme Court of Missouri in the case of *State vs. Reed*, 28 S. W., 172, and in that case the court discussed the difference between the rights of banks and trust companies, saying:

"For example, banks have the right to receive money on deposit, and thereby the relation of debtor and creditor is established between the bank and the depositor. Trust companies have no right to receive deposits, but can only receive money in trust, and thereby the relation of *cestui que trust* is established between the company and the customer."

This case, as shown, and as suggested, makes a distinction between the right to receive deposits generally and the right to receive money as trustee. Both authorities referred to are valuable as showing that the right to receive deposits under the banking laws of Missouri was exclusive only to the extent that such deposits were general in their nature and created the relation of debtor and creditor.

The case of *Mercantile National Bank of New York vs. Mayor, etc.*, of New York, 121 U. S., 138, is authority for the position taken by us on this question. That action arose on a bill filed by the Mercantile National Bank of the City of New York against the mayor and others of New York City to restrain them from collecting certain taxes from the stockholders of the national bank, it being contended that the taxes were discriminatory and in violation of the National Banking Act. The National Banking Act provided in substance that the tax imposed under the laws of that State upon the shares of any national bank should not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State where such national bank is located. It is unnecessary to analyze the New York tax laws, because not material to the question here at issue. It is sufficient simply to state the contention of the parties. It was contended that trust companies organized under the laws of New York were in reality banking corporations, and hence the taxes collected against national bank stock could not exceed that collected against stock in domestic trust companies. In discussing the question the Supreme Court of the United States held that the trust companies were not banking corporations. In that opinion the court defined the business of banking as follows:

"The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in *receiving deposits payable on demand*; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, State and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute 'money capital.' Corporations and individuals, carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the act of Congress." (121 U. S., 156.)

The opinion also states the business of trust companies under the New York statute, saying:

"Trust companies, however, in New York, according to the powers conferred upon them by their charters and habitually exercised, are not in any proper sense of the word banking institutions. They have the following powers: To receive moneys in trust and to accumulate the same at an agreed rate of interest; to accept and execute all trusts of every description committed to them by any person or corporation or by any court of record; to receive the title to real or personal estate on trusts created in accordance with the laws of the State and to execute such trusts; to act as agent for corporations in reference to issuing, registering, and transferring certificates of stocks and bonds, and other evidences of debt; to accept and execute trusts for married women in respect to their separate property; and to act as guardian for the estates of infants." (121 U. S., 159.)

Commenting upon the foregoing powers, the court said:

"It is evident, from this enumeration of powers, that trust companies are not banks in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchanges of commerce." (121 U. S., 159.)

From this opinion it is clear that the receipt of money by a corporation as bailee or as agent for the purpose of investment and not as a deposit in which the relation of debtor and creditor is created, would not be the exercise of a banking privilege; for it is seen from the definition of the business of banking as given by the Supreme Court of the United States in this case that the receipt of deposits as a banking privilege generally is the "receiving of deposits payable on demand." It does not follow from what we have said that a corporation chartered under Subdivision 29 would have the right to receive deposits payable at any fixed period of time. What we mean to say is that corporations chartered under the provisions of Subdivision 29 may receive money from other persons as bailees or for investment so long as the relation of debtor and creditor is not created; that the receipt of deposits which creates the relationship of debtor and creditor is a banking privilege which is inhibited by the statute. Whatever conflict there might be among the authorities on other questions, they all agree that the receipt of deposits which creates the relation of debtor and creditor is a banking privilege. It is true that trust companies under the laws of Missouri and of New York exercise a banking privilege to a limited extent because authorized to do so by their charters, but even in those States the element of trusteeship enters into the transaction. We believe that the Legislature had in contemplation the prohibition only to the receipt of deposits by corporations created under this subdivision of the statute only when such deposits created the relation of debtor and creditor, and that such corporations are authorized to accumulate money by receiving the same as bailees or as agents for investment so long as the receipt of money in this manner does not create the relation of debtor and creditor.

We will say, therefore, that in the accumulation of money under Subdivision 29, Article 1121, corporations would have the right to engage in the business of acting as bailees and agents for other persons in receiving money from such other persons for investment in securities such as are dealt in by the corporation. For example, such corporation would have the right to receive as bailee any sum of money, as, for example, a thousand dollars to be invested by it for the person delivering the money to it in vendor's lien or other notes, but it could not receive the money on deposit and become indebted to the person delivering the money to it, for such a transaction as this would be the exercise of a banking privilege. But it can receive the money as bailee and as agent of a third party for the purpose of investment in such securities as it is authorized to deal in.

An exact statement of the authority of a corporation chartered under the provisions of Subdivision 29 to accumulate money is difficult of

designation, but by a process of elimination we may arrive at it for all practical purposes. Outside of the limitations heretofore suggested by us there is the additional limitation that such a corporation can not accumulate its money by engaging in any business for which any other corporations may be created. For example, Article 1121 contains some seventy-four subdivisions, while the provision is made in various articles and chapters of the statutes for the incorporation of various and sundry kinds of corporations. What we mean to say is that a corporation chartered under the provisions of Subdivision 29 could not accumulate its money by following any of the businesses authorized by any of the articles of the statute providing for the chartering of corporations. As, for example, it could not perform any of the functions designated for trust companies under the provisions of Subdivision 37, of Article 1121. So it may be said in its final analysis that corporations chartered under Subdivision 29 of Article 1121 are prohibited from:

- (a) Receiving money on deposit.
- (b) Buying and selling exchange.
- (c) Buying and selling gold and silver coins of all kinds.
- (d) Discounting commercial paper as the term "discounting" has been heretofore defined.

- (e) Engaging in any business for which corporations may be chartered under the laws of Texas under any other article or subdivision of any article of the Revised Statutes.

- (f) Engaging in any business inconsistent with the principal purpose of corporations chartered under Subdivision 29, which is to loan money.

It would follow from what we have said heretofore in this opinion that corporations chartered under Subdivision 29 may, however:

- (a) Make loans of their own money upon personal or collateral security, or without security, provided the interest is not taken out in advance or added to the face of the note so as to bring it within the terms of a discounting transaction.

- (b) They may make loans upon real estate in any amount they see fit, provided the loans do not assume the form of a discounting transaction as that term has been defined.

- (c) They may buy any class of commercial paper except bills of exchange, even at a discount from the face value of such paper or notes, provided the seller does not become personally liable either as maker, endorser or guarantor of the paper; they may buy such paper, however, even though the seller is liable as maker, endorser or guarantor, provided they pay face value for the paper.

- (d) Such corporations may sell any paper taken or purchased by them at any price they may see fit to sell it, as the sale of commercial paper even at a discount is not the exercise of a discounting privilege within the terms of the prohibitory statute under consideration.

- (e) Such corporations may also receive money as agents or bailees of other persons for the purpose of investing the same for such other person in such securities as such corporations have authority under

the law to deal in, or for the purpose of loaning the same for such other persons; provided, however, that in receiving said money the relation of debtor and creditor is not created as between the corporation and the person so placing said funds with them.

We have gone into this matter at considerable length and covered a wider field than was necessary to determine the lawfulness of the charter tendered you, but the question has long been a troublesome one in this Department as well as in your department, and we have thus gone into the matter at length for the purpose and with the intention of settling, if we can, the law of this question.

We advise you, therefore, that so far as the purpose clause of the Loan Company charter is concerned, that the same is sufficient.

Yours very truly,

C. M. CURETON,

Assistant Attorney General.

C. A. SWEETON,

First Assistant Attorney General.

BUILDING AND LOAN ASSOCIATIONS—CORPORATIONS.

(General Laws, First Called Session, Thirty-third Legislature, Chapter 33.)

A foreign building and loan association which elects to deposit a surety bond in lieu of securities, as provided in Section 27, must make a new bond each year, which bond must be in lieu of the previous bond, and be so drawn as to protect all existing and future contracts and creditors within the protection of the statute.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MARCH 21, 1914.

Hon. W. W. Collier, Commissioner of Insurance and Banking, Building.

DEAR SIR: You request the opinion of the Attorney General as to whether or not the surety bond provided for in Section 27 of Chapter 33, General Laws of the First Called Session of the Thirty-third Legislature, must be given by a building and loan association which chooses to give a surety bond each year.

In response to your inquiry, we beg to advise you as follows:

The bond referred to is one required to be given by a foreign building and loan association before it is granted the certificate of authority to transact business in this State, in the event it desires to give a surety bond in lieu of a deposit of securities. Section 27 of the act referred to reads as follows:

"No foreign building and loan association shall do any business in this State until it shall procure from the Secretary of State a certificate of authority to do so. To procure such certificate of authority such foreign corporations shall comply with the following provisions:

"1. It shall file with the Secretary of State a certified copy of its articles of incorporation, a copy of its by-laws and rules governing it, and of its certificates and all printed matter issued by it, together with a statement of its

financial conditions, such as is required annually from all building and loan associations organized under the laws of this State.

"2. It shall file with the Secretary of State a written instrument, properly executed, agreeing that any summons or process of any court in this State may issue against it from any county in this State, and when served upon the Secretary of State shall be accepted irrevocably as a valid service upon such foreign corporation; provided, however, that the Secretary of State shall mail a copy of such legal process served upon him to the home office of such foreign association, and the Secretary of State shall, within six days, certify to the court from which such summons or process issued the fact of such mailing. The plaintiff shall for each process so served pay to the Secretary of State, at the time of such service, a fee of \$2.00, which shall be recovered by the plaintiff as part of the taxable costs if he prevail in the suit.

"3. It shall deposit with the Secretary of State one hundred thousand dollars (\$100,000), either in cash or bonds of the United States, or bonds of any State in the United States, or bonds of any county or municipal corporation in the State of Texas, or mortgages, being first liens on improved and productive real estate located within this State, and worth at least twice the amount of the liens, or furnish surety company bond in said sum of \$100,000; which securities or surety company bond shall be approved by the Secretary of State. Said deposit shall be held as security for all claims of residents of this State against foreign associations, and shall be liable for all judgments or decrees thereon; and said securities shall not be released until all shares of such foreign associations held by residents of this State shall have been fully redeemed and paid off, and its contracts and obligations to residents of this State shall have been fully performed and discharged. Such foreign associations may collect and use the interest on any securities so deposited, so long as it fulfills its obligations and complies with the provisions of this act. It may also exchange them for other securities of equal value, if satisfactory to the Secretary of State; provided, that if the business of such associations be solely that of lending money in this State, and that it sells none of its stock except where loans are actually made on real estate in this State for the full amount of the stock so sold, and made at the time of the sale of such stock; then in such event the provisions of this act requiring a deposit bond of one hundred thousand dollars (\$100,000) shall not apply."

It is apparent from a reading of this section that a foreign building and loan association can not procure a certificate of authority to transact business in this State until it shall have complied with the provisions of Section 27. It is unnecessary for us to notice the several things required to be done save and except that provision relating to surety bonds. It appears that the surety bond is to be deposited with the State Treasurer, who with his sureties, shall be responsible for the safe keeping thereof.

Now, after the building and loan association has complied with the provisions of Section 27, it then becomes the duty of the Secretary of State to certify such fact to the Commissioner of Insurance and Banking, and thereupon such foreign association shall also furnish the Commissioner of Insurance and Banking a full and complete statement of its financial affairs, together with such other information as the Commissioner of Insurance and Banking shall require, which said report shall be filed annually thereafter. If the Commissioner of Insurance and Banking is satisfied that such association is in sound financial condition and shall be satisfied that such foreign association is conducting its business in accordance with the laws of this State, and shall regard it safe, reliable and entitled to public confidence, he shall so certify

to the Secretary of State, who shall issue certificate of authority and renewals of such certificate of authority upon the payment of the fees as herein provided.

These last named requirements and regulations are set forth in Section 29 of the act. It is noted that this section provides for the filing of the reports annually and likewise for renewals of the certificate of authority upon the payment of the fees provided for.

The fees provided for are those specified in Section 30 of this act, which reads as follows:

“All foreign building and loan associations shall pay to the Secretary of State the following fees, which shall be paid into the State Treasury, to wit: For filing each application for admission to do business in this State, fifty dollars (\$50); for each certificate of authority and an annual renewal of the same, twenty-five dollars (\$25), and an annual franchise tax of two hundred and fifty dollars (\$250).”

It is thus seen from Section 30 that the renewals of certificates of authority are to be annually issued upon the payment of twenty-five dollars (\$25) to the Secretary of State.

Taking these Sections 27, 28, 29 and 30 and reading them together, it is clear that the bond must be given before a certificate of authority or any renewal thereof may be issued. In other words, the issuance of a renewal of the certificate of authority is made contingent upon the compliance by the association with the several provisions of the act and the payment of the fees therefor as well as the result of the examination of the Commissioner of Insurance and Banking.

II.

We therefore conclude on the whole that the bond must be filed annually, but that it is only necessary for the company to have one bond deposited in the treasury and that when the new annual bond is given it is given in lieu of the old existing bond, and should be so drawn as to protect the existing contracts of the company and its existing creditors, as well as those who might become contract holders and creditors after the giving of the new bond. This would appear to be warranted by the fact that third subdivision of Section 27 provides for an exchange of securities of equal value, if satisfactory to the Secretary of State.

It may be that a bond could be drawn which would be sufficient to extend over from year to year, but it would have to be annually reapproved by the Secretary of State, and, in view of complications which might arise, we think it best to require that new bonds be given each year.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

CONSTITUTIONAL LAW—CORPORATIONS—BUILDING AND LOAN
ASSOCIATIONS.

Chapter 33, Acts of the First Called Session, Thirty-third Legislature; Revised Statutes, Article 1121, Subdivisions 17 and 29.

1. Building and loan associations have been in existence since the year B. C. 200, having originated in China, and during all that period of time have retained substantially the characteristics which the law now ascribes to a building and loan association.

2. (a) There is one general characteristic which differentiates a building and loan association from any other corporation engaged in loaning money. This is the periodical contribution of shareholders or members to a common fund and the loaning of this fund to shareholders or members from time to time. This element of mutuality is a definite and well defined characteristic of this class of corporations, and any corporation engaged in loaning money which has this element is a building and loan association. (b) Any corporation, the purpose of which is to accumulate money from contributions made at stated times by its members, and in turn to loan these accumulated funds to its members is a building and loan association, and comes within the terms and provisions of this law.

3. Corporations, the capital stock of which is all subscribed and paid up and which loan money not to their members or stockholders but to other persons only, are not building and loan associations and do not come under the terms and provisions of this law even though the loans are made on the installment plan.

4. Chapter 33, under construction, applies to all building and loan associations which have been incorporated in this State since 1874.

5. Domestic corporations are not required to have a certificate of authority such as is designated for foreign corporations, but the certificate issued by the Commissioner of Insurance and by the Secretary of State on compliance by the corporation with the provisions of this law are tantamount to such certificate and evidence of the right of the corporation to transact business.

6. The Secretary of State should issue and deliver to the incorporators two certified copies of the charter filed with him. One of these should be delivered to and be filed by the Commissioner of Insurance and Banking. The Commissioner should then certify on the other certified copy that a certified copy had been delivered to him and filed in his office. Then this second certified copy with the Commissioner's certificate thereon should be filed by the corporation in the office of the county clerk of the county in which is located its home office.

7. (a) The term "unauthorized association," as used in Section 35 of this act, means an association formed for the purpose of doing a building and loan business but which has not complied with the terms of the law. (b) The term "authorized association" means such association as has complied with the terms and provisions of the act.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 12, 1914.

Hon. W. W. Collier, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: In response to your several requests for construction of Chapter 33, General Laws, passed by the First Called Session of the Thirty-third Legislature, which governs building and loan associations in this State, we beg to make the following reply:

1. Inasmuch as the statutes of this State have not defined building and loan associations, we are compelled to look elsewhere to determine the character of corporation affected by the provisions of the law under consideration.

We will first consider the matter briefly from an historical viewpoint. The origin of building and loan societies, say the historians, can not

be determined with certainty, but that they have been in existence in various countries of the world from remote periods of time, we are assured. The earliest associations of which the law writers have taken any notice existed in China and were called Lee Woee. They were first established about the year B. C. 200 by Pong Koong, an official of great wealth who flourished during the Hon Dynasty in the Chinese Empire. It is worth while to note that institutions of this character, even at that early date, had many of the characteristics which they have at this day and time. The way the Chinese societies were formed was substantially as follows: A person who is anxious to obtain a loan calls upon his relatives and friends to form a society. The first rule is that a company shall consist of a definite number of members; that each member shall contribute an equal sum to the fund; that a meeting shall be held at the end of each quarter; that at such meetings all members must attend; that due notice of the meeting shall be given; that each meeting shall be held at the house of the president of the club; that the various sums contributed to the fund shall be carefully weighed and examined by him. The second rule is that at each properly notified meeting the borrower shall pay back an installment of the loan with interest at a rate *per mensem* previously agreed upon. The installment to the fund shall be equal to the amount contributed by each individual in the first instance, the interest to be divided equally amongst the members of the club. The third rule is that each member shall, at each of the meetings duly and properly notified, contribute to the fund a sum equal to that which he contributed at the first meeting; that in order to give each an opportunity of borrowing the collective amount thus formed, each shall deposit in a lottery box placed on the table for that purpose, a tender, written in a legible hand, setting forth the rate of interest which he is disposed to pay on the amount in question; that the tenders shall then be taken out of the lottery box by the president of the club, and that he who is found to have made the highest offer shall be declared the receiver of the loan. The fifth rule is that each member shall be provided with a book in which the minutes of each meeting may be duly recorded, and that, should any member be unable to contribute to the general fund at any one of the meetings the amount required from him, three days' grace shall be allowed him. At the expiration of that time, should he continue a defaulter, he shall be mulcted in the sum of two mace per diem until the sum due be paid up.

It will be noted from the foregoing summary, which we take from an authoritative source, that some of the principal features of the modern building and loan association are and for two thousand years have been preserved in the Lee Woee associations, namely:

- (1) the formation of a society of limited number;
- (2) equal contribution and payment at stated periods;
- (3) fines for failure to pay;
- (4) loans made upon competitive bids;
- (5) an equal share in the profits upon loans.

Probably no phenomenon of law has preserved for so long a time

the identical characteristics as that of building and loan associations. After the expiration of more than twenty centuries the building and loan associations provided for by the laws of Texas are the same substantially in principle and practice as those to which we have referred in China. (Thornton on Building and Loan Associations, Sec. 1; citing History of the Laws, Manners and Customs of the People of China, by John Henry Gray, M. A., LL. D., Vol. 2, p. 84.)

The first English associations were contemporaneous with and may be regarded as an outgrowth of what is known in the history of economics as the "Factory System," originating in the last quarter of the eighteenth century. They are known to have existed at Birmingham, England, as early as 1795, and there is authority for the statement that these societies existed there as early as 1781, or perhaps earlier. The first building association, however, about which the law writers give any definite information is the "Greenwich Union Building Association," established in 1809. A society somewhat similar was organized in 1815, in Scotland, by the Earl of Selkirk, which has been regarded as the prototype of modern associations. (Supra, Sec. 2; citing Encyc. Britannica, Vol. 4, p. 513; Johnson's Universal Cyclopaedia, Vol. 1, p. 821; Langford's Century of Birmingham Life.)

During the decade between 1830 and 1840, building associations, both in England and America, had so far increased in numbers and importance, as to require legislative enactments for their management and control. The first society in America was organized in 1831, at Frankfort (now a part of Philadelphia), Pennsylvania. It was called "The Oxford Provident Building Association," and was the result of a suggestion by gentlemen familiar with the operation of the English societies. This example was followed in 1836 by the organization of the "Brooklyn Building and Mutual Loan Fund Association of Brooklyn, N. Y.," from which date the idea seems to have been accepted as a permanent feature of our institutions, and has found ready acceptance in all portions of the Union. (Supra, Sec. 2; Bibb County Loan Association vs. Richards, 21 Ga., 592.)

It is worth while to note, however, that so far as the State of Texas is concerned the act of the Legislature now under consideration is the first law definitely regulating building and loan associations, although such associations have been chartered by the State of Texas for many years under Subdivisions 17 and 29 of Article 1121, Revised Statutes.

2. In the foregoing review of the origin of building and loan associations we have foreshadowed the definition of corporations of this character. However, we will call your attention to the definitions given by the standard text writers on this subject, which have become a part of the law of the land by their general acceptance in the courts of the country and may be considered as defining the character of corporations referred to and governed by the provisions of Chapter 33 of the General Laws passed by the First Called Session of the Thirty-third Legislature of this State.

Mr. Thornton, in his valuable work on Building and Loan Associations, defines a building and loan association as follows:

"A building association may be defined as a society (generally incorporated) organized for the purpose of creating a fund derived from periodical payments by persons upon stock subscribed for by them, as well as from fines, forfeiture and incident fees; and if the shareholder be also a borrower, by the payment of premiums and interest; which fund is to be loaned to its members secured by mortgage upon real estate to enable them to secure homes; such payments to continue until the sum of the payments and profits on each share equal its face value (after deducting necessary expenses incident to the management of the society's business), at which point of time all the shares of such members as are matured are canceled or extinguished." (Thornton on Building and Loan Associations, Sec. 3.)

Judge Endlich, in his celebrated work on this subject, gives the following extensive and illuminating definition:

"A building association, then, is a private corporation for gain, erected for such time, limited or unlimited, as may be permitted by the laws under which it is incorporated, for the accumulation, from fixed periodical contributions of its shareholders in payment of the stock subscribed by them, the penalties for their non-payment and the profits upon their investment, of a fund to be applied, from time to time, in accommodating such shareholders with loans or advancements, primarily for the purpose of acquiring the free possession of real estate or constructing dwellings or both, under terms and regulations prescribed by legislation or reasonably and lawfully ordained by charter and by-laws of the association, upon principles of strict mutuality and equality of benefits and obligations, with the effect of extinguishing the liability incurred for such loans and advancement simultaneously with the termination of the shareholder's periodical contributions upon the stock held by him in the association; the object of the latter being completed when the fund raised is sufficient to distribute to each member the par value of all shares subscribed by him and held without loans, and to extinguish all loans held by shareholders.

"It was originally assumed, that all the stockholders would at some period become borrowers to the full extent of their presumptive interest in the association's finally accumulated fund. It was not intended to allow capitalists, under pretense of philanthropy, or upon any other ground, to obtain for their money a greater interest than could be got through the ordinary channels of investment. Therefore, whilst, in practice, a large percentage of the members of building associations do not become borrowers, but remain merely investors, yet the results of the scheme which follow as to the former enter as an essential part into the proper definition of the institution. For the investors, it is merely a co-operative savings fund, or loan fund association, into which they make their stated payments, in due season receiving back their money, increased by the accumulations of an unusually high rate of interest. The shares of all the members, be they borrowers or investors, advance, of course, at the same rate, and reach the same ultimate value at the same time. In the case of the former, that value has been anticipated, drawn in advance. They have nothing more to look for (unless, indeed, they hold a larger number of shares than whose par value is equal to the amount borrowed by them, and are, as to such excess, merely investors), except to be released from any subsisting liability for what they have already received. The latter have, as yet, taken nothing. Their money has gone on accumulating, until, the shares having attained to their fixed value, they are entitled to receive that amount in payment of them. It is, therefore, practically and legally quite immaterial, whether that period of maturity be described as the period when the funds of the society shall be sufficient to distribute a certain sum to all its stockholders, or, when it shall be sufficient after cancelling the obligations of borrowing members, to distribute that sum to the unadvanced members. But it would be incorrect to suppose that the latter is the supreme object of the building association scheme. It is merely a result. The principal aim is to provide for its members, desirous of owning homesteads, the opportunity of obtaining advancements, with facilities for gradual liquidation, not elsewhere to be obtained, which, together with the mutuality of the whole plan, amply compensates for the apparent exorbitancy of premiums and interests of the investor as well as of the bor-

rower. "These associations are founded on mathematical calculations, and a close scrutiny of their charters will show that their rules are based upon the highest principles of equity and fairness." The results which they achieve are arrived at by various methods, constituting so many different species of the genus building association." (Endlich on Building and Loan Associations, Sections 16 and 17.)

Mr. Charles N. Thompson, in his brief but clear treatise on the subject, thus defines building and loan associations:

"The building association, as now existing, is a private corporation, designed for the accumulation by the members of their money by periodical payments into its treasury, to be invested from time to time in loans to the members upon real estate for home purposes, the borrowing members paying interest and a premium as a preference in securing loans over other members, and continuing their fixed periodical installments in addition, all of which payments, together with the non-borrower's payments, including fines for failure to pay such fixed installments, forfeitures for such continued failure of such payments, fees for transferring stock, membership fees required upon the entrance of the member into the society, and such other revenues, go into the common fund until such time as that the installment payments and profits aggregate the face value of all the shares in the association, when the assets after payment of expenses and losses are prorated among all members, which in legal effect, cancels the borrower's debt, and gives the non-borrower the amount of his stock." (Thompson on Building Associations, Sec. 2.)

These definitions leave but little to be said in defining a corporation engaged in the business of a building and loan association, but it does appear that there is one general characteristic which is probably the determining characteristic differentiating a building and loan association from any other corporation engaged in loaning money. That characteristic is the periodical contribution by the shareholders or members to a common fund and the loaning of this accumulated fund to the shareholders or members of the corporation from time to time. In other words, this element of mutuality is a definite and well defined characteristic of building and loan associations, and any corporation engaged in loaning money which has this characteristic would no doubt be a building and loan association and come within the terms and provisions of the law here under discussion.

A building and loan association is, as has been suggested, essentially a corporate partnership, and has no functions except to gather together from small stated contributions sums large enough to justify loans. Their officers are the agents of each stockholder. They have no debtors and ordinarily no creditors except the stockholders, and whether a stockholder is a creditor or debtor depends on whether he is exercising his privilege of borrowing money from the common fund. As suggested above, mutuality is the essential principle of this character of association. Its business is confined, with certain express exceptions under the statute here under review, to its own members. Its object is to raise a fund to loan among its own members, or to such of them as may desire to avail themselves of that privilege. Each shareholder, whether a borrower or non-borrower, participates alike in the earnings of the association, and alike assists in bearing the burden of the loss sustained.

Ebersman vs. Schmidt, 21 L. R. A., 184.

Security Savings & Loan Association vs. Elbert, 54 N. E., 753.

Union Mutual Building & Loan Association vs. Aichle, 61 N. E., 11.

McCauley vs. Workingman's Building and Savings Association, 35 L. R. A., 244.

Rhodes vs. Missouri Savings & Loan Co., 42 L. R. A., 93.

Albany Mutual Bldg. Assn. vs. City of Larime, 65 Pac., 1011.

Washington National Bldg., Loan & Investment Assn. vs. Stanley, 58 L. R. A., 816.

It may be said, therefore, that any corporation the purpose of which is to accumulate money from contributions made at stated times by its members and in turn to loan these accumulated funds to its members, is a building and loan association and comes within the terms and provisions of this law; nor does it matter by what names or terms the rights and liabilities of the members or those making contracts with the association are called. It is not the name or term given the act or person which fixes his legal status or the status of the corporation, but it is rather the thing done and the method of conducting the business. We are quite aware that there are corporations transacting business in this State that use various and sundry names to define the relationship existing between those who make contracts with the corporation and the corporation, but regardless of these names, whether called contracts, bonds, policies, debentures, shares, or "what not," such corporation is engaged in the business of a building and loan association if one may find that through its machinery money is collected at stated times and placed in a common fund and thereafter loaned in a manner fixed by contract to those contributing the same; provided, of course, the loans referred to are loans to be made on real estate.

The definitions which we have quoted and those which we have here suggested are ones in harmony with the statutes of this State under which building and loan associations have heretofore been incorporated, and in harmony with the act of the Legislature we are now discussing.

Heretofore, building and loan associations have been incorporated under Subdivisions 17 and 29 of Article 1121, Revised Statutes. Subdivision 17 reads as follows:

"The purposes for which private corporations may be formed are: * * * The erection or repair of any building or improvement, and the accumulation and loaning of money for said purposes. * * *"

Subdivision 29 is as follows:

"The accumulation and loan of money; but these subdivisions shall not permit incorporations with banking or discounting privileges."

It appears from these two subdivisions that the accumulation of money is one of the characteristics of a building and loan association which the Legislature had in mind when corporations were authorized to be chartered to do a building and loan business. It is clear from what we have said heretofore that any corporation which does not obtain the funds loaned by it by accumulating the same through contributions made at stated periods by its members or those occupying a similar legal status,

is not a building and loan association and does not therefore come within the purview of the statute under consideration.

We desire to say, however, that in order to determine whether or not any particular corporation is a building and loan association and within the purview of this statute it would be necessary for you to have before you the charter and by-laws, contracts, stock certificates, debentures, bonds, policies, and all other forms used by the corporation in the transaction of its business, and that finally you will have to consider each corporation separately in order to determine its legal status. What we are attempting to say is that in fixing the status of corporations which may come under the provisions of this law you will have to follow the old rule that "every tub must stand on its own bottom."

3. In response to the last paragraph of your second question, we desire to say that corporations the capital stock of which is all subscribed and paid up and which loans money not to its members or stockholders but to other persons, is not a building and loan association and does not come under the terms and provisions of this law, even though such loans are made on the installment plan for the purpose of enabling the borrower to pay for a home, and even though such corporation may be called a building and loan association.

The last part of Section 2 of Chapter 33, in which it is stated that "the provisions of this act shall not apply to loan corporations heretofore incorporated under the laws of Texas loaning money on real estate, or improvements thereon, in cities of this State of more than thirty thousand inhabitants and not requiring the borrowers to be members thereof, or holders of shares in such corporations, and which have been doing business for as long as ten years prior to the passage of this act," does not limit the exemptions we referred to, and corporations of the character described are exempt from the provisions of the act whether they are transacting business in cities of thirty thousand inhabitants, etc., or not. The act simply does not cover that character of corporations, and the insertion of the exemption in Section 2 was superfluous.

Your fourth question is answered just above.

4. In response to your fifth question, we beg to advise you that Sections 6, 7 and 8 apply to all building and loan associations, or rather to all corporations doing a building and loan association business, and that a business which is not done on the mutual plan is not a building and loan association business. The plan of every building and loan association must be mutual in its nature, and any corporation whose business is not of this nature, is not a building and loan association and does not come within the provisions of this law. Sections 6, 7 and 8, like the balance of the act, have no reference to corporations which do not transact business on the plan which we have heretofore defined as being the plan of conducting a building and loan association.

5. Answering several of your questions together, we advise you that the law under consideration applies to all building and loan associations incorporated under the laws of Texas prior to the enactment of Chapter

33, Acts of the First Called Session of the Thirty-third Legislature, as well as to those which may have been or may yet be incorporated after the enactment of this law. It is apparent from the face of the act itself that the purpose of the Legislature was to make it apply so far as it could constitutionally be done to the then existing building and loan association corporations as well as to those which might thereafter be created. Section 2 of the act contains an exempting clause exempting certain existing corporations from its provisions, and this within itself would imply the application of the law to existing corporations. Section 3 of the act expressly provides that it shall apply to corporations chartered prior to the enactment of this law, for it in part provides:

"The corporate powers of every building and loan association *heretofore organized under the laws of this State* or which may be incorporated under this act shall be exercised by a board of directors of not less than five members, who shall elect from their own number the officers of the association." etc.

Sections 4 and 5 of the act, by the language in which they are written, are made clearly to apply to all corporations described in Section 3, while the remaining sections of the act make no distinction between corporations existing at the time the measure was passed and those which might thereafter be chartered, showing that the purpose of the Legislature was to make the provisions apply to all corporations of the character then under consideration, regardless of the time when they may have been chartered. It is true that Section 13 provides only that every association formed under the provisions of the act should at the close of its first year's operations, etc., publish a statement; but this section does not necessarily exclude the idea that it should apply to corporations in existence at the time of its enactment, and since the general purpose and intent of the act is plain that all the provisions thereof should apply to then existing corporations, the language of Section 13 would not be sufficient to forbid such application, and Section 13 as well as all other provisions of the measure apply to corporations which have been chartered prior to its enactment as well as to those which may have been or may be chartered since its enactment. This construction of the act is in no manner inconsistent with the Constitution of this State or of the United States. It will be recalled that Section 17, Article 1 of the Constitution of Texas provides:

"No irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof."

While Article 1139, Revised Statutes, which was enacted in 1874 and has been the law since said date and has therefore entered into and become a part of every corporate charter granted since its enactment, provides:

"All charters or amendments to charters, under the provisions of this chapter, shall be subject to the power of the Legislature to alter, reform or amend the same."

It is clear, therefore, that all corporations of the character here under

review, chartered in this State since 1874, embraced within their provisions the reserve power of the State to alter or amend the same as specified either in the statute of 1874 or in the Constitution of 1876, or in both of these instruments. Such reserve clause having become a part of all existing charters obtained since 1874, such charters have not become contracts with the State but are merely franchises to be regarded as simple legal powers resulting from the provisions of the statute under which they were issued. They may, therefore, be altered or amended by the Legislature in the exercise of its functions. (Morowetz on Private Corporations, Vol. 2, Sec. 1094.)

The reservation of this power is to be interpreted as placing the State Legislature back on the same platform of power and control over the charters as it would have occupied had the constitutional provision in the Federal Constitution or the State Constitution never existed. (Supra, Vol. 2, Sec. 1097; Sinking Fund cases, 99 U. S., 700-748.)

The act of incorporation by corporations chartered prior to the passage of this law having been performed according to law, and the charters having been accepted by the incorporators, something in the nature of a compact is struck between the State and the incorporators, but the extent and effect of this compact is limited by the reserved right of the State to alter or amend the charter retained in the Constitution and in the statutes. (Endlich on Building Associations, Sec. 42.)

But it is not intended by the reserved right aforesaid that the State shall have or exercise the right to pass statutes having a retro-active efficiency; nor is it intended that the State would have the right to enact laws impairing the contractual obligations between the corporation and third parties. (Supra, Sec. 43; Morowetz on Private Corporations, Secs. 1101-2.)

To illustrate this last proposition let us suppose the case of a building and loan association which had contracted to sell a series of shares of say 100, fifty of which shares had been purchased at the time this law was enacted. Let us suppose that under the terms of the contract it was necessary for 100 shares to be sold in order to mature the contracts of each shareholder in this series within the time and under the terms specified in his contract. It would not be competent for the Legislature to pass a law which would prevent the fulfillment of this contract even though it should prohibit the creation of any new series. This is on the principle that the rights of the shareholders have become vested and could not be destroyed by the Legislature even under the reserve right to alter or amend the charters. (Security Savings & Loan Assn. vs. Elbert, 135 Ind., 203.) But generally it may be said that inasmuch as the Constitution and the statutes of this State retained for the Legislature the right to alter or amend the charters of corporations which might be chartered thereunder, that the Legislature had the right to pass any law which did not destroy the vested right of the third party or which did not confiscate the property of the corporation. Again, we think that the enactment of this law comes clearly within the police powers of the State, which in no event could be bargained away by the

Legislature although no reserve clause was retained in the charter or in the general law and constitution under which the corporation was incorporated. A building and loan association is to a more or less extent of the same nature as the banking business, and certainly of the same general nature insofar as the police powers of the government are concerned, since this character of association deals in the funds of the entire community. The banking business and its regulation, like that of other quasi public business institutions, has always been held to be a subject of police control, and the fact that in most of the States of the Union there are elaborate laws controlling and governing building and loan associations would indicate the general trend of judicial and legislative thought that building and loan associations are as much within the terms of the police power as are banking corporations.

Morowetz on Private Corporations, Vol. 2, Sec. 1072, 1065.

In the Matter of Reciprocity Bank, 29 Barb. (N. Y.), 369.

Union Improvement Co. vs. Commonwealth, 69 Pa., 140.

The West Wisconsin Ry. Co. vs. Board of Supervisors of Trempealeau County, 35 Wis., 265.

Brady vs. Mattern, 106 Am. St., 214-5.

You are advised, therefore, that all corporations doing a building and loan association business, as that business has been heretofore defined in this opinion, whether such corporations are chartered prior to the enactment of the law here under construction or since its enactment, are within the terms of and subject to the law and must comply with its provisions or liquidate their affairs and go out of business. It will be the duty of all corporations in existence when the law went into effect to obtain certified copies of their charters on file in the Secretary of State's office and file the same in your office as well as a certified copy of the same in the office of the county clerk of the county in which their home office is situated just as though such corporations had been chartered under this law. They would likewise also be required to comply with other provisions of the law, including that provision which requires them to submit to you for your approval a copy of the by-laws regulating the management of their business. They must likewise elect a board of not less than five directors to manage their business provided for in Section 3 of the act. It is unnecessary for us to go through the act and specify the several duties prescribed. It is sufficient to say that those things which a corporation now tendering its charter to the Secretary of State must do are required to be done by corporations chartered before this law became affective.

6. Domestic corporations are not required to have a certificate of authority such as is designated for foreign corporations by the Secretary of State; but the very certificates made by you and by the Secretary of State upon compliance by the corporations with those provisions of law touching their relationship to your respective offices, although not designated as certificate of authority, are tantamount thereto, and are the evidence on behalf of the corporation of its right to transact business.

7. In response to your third interrogatory, which is as follows:

"In issuing charters to companies incorporated under this chapter, should the Secretary of State issue two certified copies, one to be delivered to the corporation, and one filed in this department, or should he issue only one certified copy and this department make a certified copy and send such certified copy of the certified copy to the incorporation?"

we beg to advise you as follows: The Secretary of State should issue and deliver to the incorporators, two certified copies of the charter filed with him. One of these certified copies should be delivered to and filed by you. You should then certify on the other certified copy delivered by the Secretary of State to the incorporators the fact that a certified copy had been delivered to and filed by you. Then this second certified copy above referred to with your certificate thereon should be by the corporation filed in the office in the county clerk of the county in which is located its home office. This is a correct construction of this portion of Section 2 of the act covered by your question.

8. The term "unauthorized association," as used in Section 35 of this act, means an association formed for the purpose of doing a building and loan association business, as that business has been defined in this opinion, without having complied with the terms and provisions of Chapter 33, General Laws passed by the First Called Session of the Thirty-third Legislature. The term "authorized association" means such association as has complied with the terms and provisions of this act.

9. This law is of course a new law and it is quite likely that there are a number of corporations engaged in this class of business which will meet with some difficulty and embarrassment in adjusting their affairs to the terms and provisions thereof. If there are such corporations, this Department will be glad to co-operate with you and with the corporations themselves in an effort to bring their affairs within the terms of the law with as little expense and trouble as possible. We may say also that we are very sure that the affairs of such corporations may be brought under the terms of this law without any considerable expense or any unnecessary embarrassment.

In view of the fact that this is a new law, and looking wholly to the general welfare and efficiency of its administration under you, we would suggest that no oppressive steps be taken against any corporation which has not complied with this law until it has been given a reasonable time and opportunity to bring itself within the terms and provisions of the act.

Yours very truly,
C. M. CURETON,
First Assistant Attorney General.
C. A. SWEETON,
Assistant Attorney General.

CORPORATIONS—FOREIGN CORPORATIONS—PIERCE OIL CORPORATION.

The Pierce Oil Corporation, a proposed foreign corporation to be organized under the laws of Virginia, seeks a permit to do business in this State. It proposed to become the successor of Waters-Pierce Oil Company and Pierce-Fordyce Oil Association. *Held*, that the proposed corporation could not be granted a permit to do business in this State.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MAY 5, 1913.

Hon. John L. Wortham, Secretary of State, Capitol.

DEAR SIR: The body of your communication of April 26th is as follows:

"I herewith call to your attention the list of stockholders of the Pierce Oil Corporation that I understood will seek a permit to do business in this State. This corporation is proposed to be organized under the laws of Virginia, but take over all the property of the Waters-Pierce Oil Company and the Pierce-Fordyce Oil Association.

"I also transmit herewith printed copy of the certificate of incorporation of the Pierce Oil Corporation which accompanies the list of the stockholders of the present Waters-Pierce Oil Company and the Pierce-Fordyce Oil Association.

"Please advise as to whether or not in your opinion I will be justified in filing the application for a permit granting the Pierce Oil Corporation a permit to do business in this State, if the law is complied with."

You transmitted with this letter the following instruments:

(a) A printed copy of the proposed certificate of incorporation of the Pierce Oil Corporation, to be issued under the laws of the State of Virginia. This instrument transmitted to us is not either the original or certified copy of the charter, but is a mere printed copy of a proposed charter.

(b) List of stockholders of the Waters-Pierce Oil Company as they now exist on the records of that company.

(c) List of stockholders of the Pierce-Fordyce Oil Association as they now exist on the records of that association:

These several instruments were deposited with you, not for the purpose of being filed at the present time, but for the purpose of ascertaining the attitude of this State toward the Pierce Oil Corporation; that is to say, to ascertain whether or not if the Pierce Oil Corporation should be chartered and take over the properties of the Waters-Pierce Oil Company and the Pierce-Fordyce Oil Association, it would be granted a permit to transact business in Texas.

After the matters under consideration had been referred to this Department by you, Judge N. A. Steadman, of Austin, Texas, attorney for the proposed Pierce Oil Corporation, asked leave to file with this Department for consideration a brief on the questions which would necessarily arise upon our examination of the matters at issue. Following the established custom of this Department, leave was granted, and on May 2nd, Judge Steadman filed an exhaustive and able brief in support of the position of the proponents of the charter. In this brief, among other things, he says:

"The proposed Virginia corporation, to be known as the Pierce Oil Corporation, in the accomplishment of its objects, purposes to take over the properties of the Waters-Pierce Oil Company, a Missouri corporation, and the properties of the Pierce-Fordyce Association, a partnership, as has been stated. The former owns no property and has no business in Texas; the latter owns property in Texas and has an established business here. * * * The partnership is not only not a defaulting corporation, but it is not a corporation at all, and that it derived title to the properties and business of the Pierce Oil Company in Texas through a purchase made by S. W. Fordyce in behalf of himself and H. C. Pierce of such properties and business under an order of sale made by the district court of Travis county. Since the organization by Mr. Fordyce and Mr. Pierce and their associates of the partnership, that concern has carried on business in the State of Texas and is still carrying on business in the State as an independent enterprise. * * * As regards its operations in Texas, the new corporation, if admitted, will occupy the status of succeeding to the properties and business of the partnership."

Continuing further, Judge Steadman says:

"My information derived from my client is that the Waters-Pierce Oil Company, the Missouri corporation, has been freed from any association with the Standard Oil Company, the connection with which was the main, if not the sole cause, of the conviction of the Waters-Pierce Oil Company for violating the Texas anti-trust laws. I am advised that Mr. H. C. Pierce has acquired all the interests that the Standard Oil Company formerly had in the Waters-Pierce Oil Company. All the statements that I have made to you are based upon information derived from my client, and I desire that if you have any question as to any matter of fact, you make known the same to me, so that I may discuss the same with you, and if necessary, obtain statements from the interested persons. As I informed you in conversation a few days ago, I have been instructed to make a full and complete disclosure of the exact situation of the properties involved to yourself and the Secretary of State; and as I then stated to you, liberty will be accorded to you or the Secretary of State, or any person whom you and he may appoint, to examine the books and papers of the Waters-Pierce Oil Company and the Pierce-Fordyce Oil Association, if it is so desired."

Matters of History.

In order that you may understand and follow the course of reasoning by which our conclusion has been reached in this case, it is necessary to review some matters of history throwing light upon the issues involved.

Prior to the year 1896, the Waters-Pierce Oil Company, a Missouri corporation, was transacting business in Texas under a permit granted under the laws of the State. On the 5th day of February, 1896, the State of Texas, acting by and through her Attorney General, brought a suit in the district court of Travis county against this company, the purpose of which was to cancel its permit to do business in the State of Texas. Thereafter, on the 15th day of June, 1897, judgment was rendered in the district court of Travis county granting the prayer of the State as contained in her petition and an order was entered cancelling the permit of the Waters-Pierce Oil Company and enjoining it from doing business in the State of Texas, which judgment became final, and the Waters-Pierce Oil Company was excluded from the State.

On the 29th day of May, 1900, Mr. H. C. Pierce, Mr. Andrew R. Finlay, Mr. John P. Gruett, Mr. Charles M. Adams and Mr. John D.

Johnson, all of St. Louis, Missouri, obtained a charter under the laws of Missouri, chartering the Waters-Pierce Oil Company, and it is this last named company which is now in existence—the old company which was excluded from the State of Texas by judgment of the district court of Travis county on June 15, 1897, having been dissolved and its assets taken over by the last named Waters-Pierce Oil Company. The old Waters-Pierce Oil Company, which for purposes of this opinion will be known as Waters-Pierce Oil Company No. 1, was dissolved by the proper affidavit under the laws of Missouri filed with the Secretary of State of Missouri on May 29, 1900, that being the same day that the present Waters-Pierce Oil Company, which we will call Waters-Pierce Oil Company No. 2, was chartered. This affidavit states “that said corporation was on the 28th day of May, 1900, by an unanimous vote of its stockholders duly dissolved and is no longer in existence.”

On the 29th day of May, 1900, being the date upon which the affidavit of dissolution of the Waters-Pierce Oil Company No. 1 was filed with the Secretary of State of Missouri, and the date on which the Waters-Pierce Oil Company No. 2 was chartered, Mr. John P. Gruett, Secretary of the Waters-Pierce Oil Company No. 2, made an application for a permit for said company to do business in Texas, which application was in the usual form and was filed with the Secretary of State of Texas on the 31st day of May, 1900. This application for a permit was accompanied by a certified copy of the Articles of Incorporation of the Waters-Pierce Oil Company No. 2, in which it is shown that the capital stock of this corporation was Four Hundred Thousand Dollars, divided into four thousand shares of the par value of One Hundred Dollars each, and that of these shares Mr. H. C. Pierce of St. Louis, Missouri, owned three thousand nine hundred and ninety-six, while the remaining four incorporators owned one share each. The purpose of this corporation, as shown in the purpose clause of its charter and in the application for a permit, is as follows, to wit:

“The purposes for which said company is formed are, dealing in naval stores and dealing and compounding petroleum and other oils and of the products thereof and buying and selling the same in the State of Missouri, and elsewhere.”

The application for a permit received favorable consideration from the Secretary of State and the permit was granted.

The Waters-Pierce Oil Company No. 2 then continued its operations in the oil trade in Texas until its final exclusion from the State, the date hereafter to be mentioned. On the 20th day of September, 1906, the State of Texas, acting by and through her Attorney General, brought a suit in the district court of Travis county against the Waters-Pierce Oil Company No. 2 and various other parties seeking to recover penalties for violation of the Anti-Trust Laws of the State and for a forfeiture of the permit of the said Waters-Pierce Oil Company to do business in the State of Texas and enjoining it forever from re-entering; that this suit resulted on June 1, 1907, in the recovery on behalf of the State of Texas of a large sum in penalties and a decree cancelling the permit of said Waters-Pierce Oil Company to do business in the

State of Texas, on account of violation of the Anti-Trust Laws of the State, and enjoining it from transacting business within this State—the language of the judgment relative to the injunction being as follows:

“It is further ordered, adjudged and decreed that the permit of the defendant, Waters-Pierce Oil Company, to do business in the State of Texas, be and the same is hereby cancelled and held for naught, and that the said defendant be enjoined and prohibited from doing business in the State of Texas, except the inter-State business, but all other business it is hereby perpetually enjoined and prohibited from transacting within the State of Texas.”

After this judgment of the district court of Travis county had become final, and on the 7th day of December, 1909, all property within the State of Texas belonging to said Waters-Pierce Oil Company was ordered sold and said property was purchased at said sale by Sam W. Fordyce, and associates of St. Louis, Missouri, the purchaser afterwards forming in Texas the partnership known generally throughout the State as the Pierce-Fordyce Oil Association.

What is Now Proposed to Be Done.

It is now proposed by the stockholders of the Waters-Pierce Oil Company and of the Pierce-Fordyce Oil Association, that a corporation be organized under the laws of Virginia known as the Pierce Oil Corporation for the purpose, among other things, of taking over the property of the Waters-Pierce Oil Company and of the Pierce-Fordyce Oil Association and conducting an extensive oil business throughout the United States and the other countries of the world. The question is: Should the Pierce Oil Corporation be chartered and should it take over the assets of the Waters-Pierce Oil Company and of the Pierce-Fordyce Oil Association, would it be entitled to a permit to transact business within the State of Texas?

We have not made a technical examination of the proposed charter, and, of course, do not pass upon the application for a permit or the sufficiency of the Anti-Trust affidavit, because these have not been tendered to you, and of course can not be tendered to you until the proposed corporation has been chartered. The main question for determination at this time is the one we have just stated above, and inasmuch as it appears to us that in no event could a corporation be formed in the manner and under the circumstances suggested, which would have the right to receive a permit to transact business in this State, we have not addressed ourselves to the minor question of determining whether or not the proposed charter is in proper technical form.

Statutes Construed.

The determination of the question involved a construction of several articles of the statute applicable to the facts in the case.

Article 7803, Revised Statutes, provides:

“Every foreign corporation violating any of the provisions of this chapter is hereby denied the right and is prohibited from doing any business within this

State, and it shall be the duty of the Attorney General to enforce this provision by injunction or other proceedings in the district court of Travis county in the name of the State of Texas."

It was under authority of this provision of the statute that the proceedings of 1907 were instituted and prosecuted against the Waters-Pierce Oil Company and by virtue of which it was enjoined from transacting any further business in this State.

Article 7805 provides:

"Whenever any foreign corporation has been convicted of a violation of any of the provisions of this chapter and its right to do business in this State has been forfeited, as provided in Article 7803 of this chapter, no other corporation to which the defaulting corporation may have transferred its properties and business or which has assumed the payment of its obligations shall be permitted to incorporate or do business in Texas."

Each of the foregoing articles of the statute was passed and enacted into law in 1903 and were the law at the time of the institution of the suit against the Waters-Pierce Oil Company and at the time of the judgment against that company.

Article 1193, Revised Statutes, give the State a lien upon the property of a defaulting corporation, where a judgment has been rendered against it for violation of the Anti-Trust Laws, but this act was not passed until April, 1907, and was therefore not in effect at the time of the institution of the suit against the Waters-Pierce Oil Company.

It is earnestly insisted that Article 7805, which provides "that no corporation to which the defaulting corporation may have transferred its properties and business shall have a right to do business in the State," means that no such corporation to which such transfer has been made prior to the rendition of the judgment of ouster and forfeiture shall be permitted to do business in the State, and counsel cite the fact that at the time of the enactment of this article of the statute there was no law giving the State a lien on the property of the corporation charged with violating the Anti-Trust Laws and contends that the purpose of Article 7805 was to preserve the property in the hands of the defaulting corporation so that it might be in hand to respond to any judgment on behalf of the State, and that it was not the purpose of this article to inhibit the transaction of business on the part of any corporation to which the properties of the defaulting corporation might be transferred after the rendition of the judgment or the satisfaction of the State's judgment for damages for violations of the Anti-Trust Laws. We can not agree to this construction so urgently insisted upon by counsel. In the first place, if the purpose of Article 7805 was to preserve the property in the hands of the defaulting corporation until it might respond to the damages awarded the State, then the statute would be wholly ineffective for such purposes, because the statute does not in any way restrict the right of private individuals to become the purchaser of the property of the defaulting corporation, and if the purpose was to preserve the property, then the statute is wholly ineffective to accomplish this. In the second place, if this had been the intention of the Legislature, it would have been just as easy to have written a statute

establishing the lien as it was to have written the section which is now Article 7805. Again, when we consider the history of this legislation, we believe it will be apparent that the purpose of the Legislature was to prevent any other corporation from ever becoming the owner of the property or business of a defaulting corporation and carrying on the business within the State of Texas. It will be recalled as a matter of current history that at about the time this legislation was enacted that the agitation over the readmission of the Waters-Pierce Oil Company had become prevalent in this State. The company had previously been excluded from the State, as has been shown in our preliminary statement in this opinion, but some two or three years afterwards it had dissolved the old offending Missouri corporation and on the same date taken out a charter for the present Waters-Pierce Oil Company and made application for a permit to transact business in the State. The application was granted and the permit issued and the new Waters-Pierce Oil Company, or as we have designated it in this opinion, Waters-Pierce Oil Company No. 2, was permitted to transact business in the State. This transaction at this time had begun to be criticised and the criticism increased in volume and grew in vehemence until finally a suit of ouster was filed against the Waters-Pierce Oil Company No. 2 and it too was ousted from the State. It was on the inception of this agitation that Article 7805 became the law and undoubtedly in response to the demand, that offending corporations should not be permitted "to shed their skin" and come back into the State and engage in the same character of business. The history of this particular article of the statute supports this position.

On May 23, 1903, the Legislature had before it for consideration, a bill which afterwards became the present Anti-Trust Law. On the day this measure passed the House, an amendment was offered by Representatives Napier, Mays and Robertson of Bell, which was and became Article 7805 of the Revised Statutes. This amendment was offered and adopted apparently without debate and without a roll call. The bill was then put upon its final passage and received 103 affirmative votes and 2 negative votes, there being a number of members absent at the time. Mr. Bridgers was one of those who voted against the passage of the measure. He filed extensive reasons why he voted against the measure, among other things, he said:

"Anti-trust legislation is popular, but has not been effective, and I do not see any reason to anticipate glowing results from this measure, should it become a law. In the Twenty-sixth Legislature I voted for anti-trust legislation, which, I, at that time, believed would free Texas from trusts and bring happiness and prosperity to the people, but that delusion has been dispelled *for I behold the trusts doing business at the same old stand, and utterly oblivious of the fact that Texas has legislated against them.* I believed then, as I believe now, that the trust was and is now inimical to the interests of the masses, but my faith in State legislation against trusts has received a severe shock, and expectancy no longer fills my heart with hope and enthusiasm." (House Journal, Twenty-eighth Legislature, pp. 941-942.)

After an examination of the files of the daily papers, we have failed

to find reported any discussion of the question at issue, or any particular discussion of the Anti-Trust measure, although it was pending for sometime in the Legislature and had more or less opposition because it was thought at that time that it would prevent the organization of labor unions; but the fact that the friends of his measure incorporated just before the vote was taken what is now Article 7805 in the bill and the fact that Mr. Bridgers has referred to the non-effectiveness theretofore of anti-trust legislation, supports our position that one of the matters which the Legislature had before it at the time was the fact that although the powers of the courts had been invoked in terms of law against the Waters-Pierce Oil Company, yet it had by a mere change of corporate existence been permitted to come back into the State and exercise the same practice which had characterized it before its expulsion, and that the intention and purpose of the act was to prevent the re-enactment of such a transition as that which characterized the Waters-Pierce Oil Company by any other defaulting corporation in the State.

Aside from these matters, we will invoke the general rule of statutory interpretation by construing the anti-trust statutes together to find the intention of the Legislature.

The general rule of construction is, that statutes in *pari materia* are to be construed together. This rule holds good in the construction of anti-trust statutes.

Two or more anti-trust statutes enacted at different sessions of the Legislature on the same subject are to be treated in *pari materia* and the court must presume that the Legislature intended all the enactments to constitute a consistent treatment of the subject within constitutional limitations.

Joyce on Monopolies, Sec. 116.

Northern Securities Insurance Co. vs. U. S., 193 U. S., 197.

We are led to believe, therefore, that the purpose of Article 7805 was to prevent any corporation from ever at any time under any circumstances from obtaining the property of the defaulting corporation convicted of violating the Anti-Trust Laws and with such property continuing to operate its business within the State of Texas.

Upon first impression, it may appear that Article 7805 is a limitation upon the right of alienation of property, but upon further consideration, this view of the matter does not appear to be valid. In the first place, private individuals or a partnership may become the purchaser of the property of a defaulting corporation at any time and continue to operate the business. Another corporation might become a purchaser of the property, but it could not, of course, operate the property as a business, so that in fact there is no limitation upon the right of alienation, but it is a limitation upon the right of a corporation after it has acquired the property and business of such defaulting corporation to carry on the business. The sum and substance of it is that the act is a mere limitation upon the rights of a corporation to pursue a certain business and this character of limitation the State has the right to impose. In fact, it is wholly a matter with the legislative department of the government to determine whether or not it

will permit corporations to engage in the oil trade, or if they do permit them to engage in the oil trade, it may make such limitations as the Legislature thinks proper. This rule applies with peculiar force to foreign corporations, because the State has the right to exclude a foreign corporation all together from transacting business within the State, or to impose such conditions upon the admission of a foreign corporation as it sees fit.

Tabor vs. I. B. & L. Association, 91 Texas, 95.

Metropolitan Life Insurance Co. vs. Love, 101 Texas, 446.

Huffman vs. Mortgage Co., 86 S. W., 308.

Thompson on Corporations, Secs. 7884 and 7887.

8 Ency., page 1043.

It appears to us that it is entirely proper for the State to say "we will permit foreign corporations to engage in the oil trade in the State of Texas, but we will not permit any foreign corporation to engage in such trade where it has purchased the property and business of a corporation against which a judgment of ouster and forfeiture has been rendered by our courts." It is true that inasmuch as the statute permits individuals to become the successors of a defaulting corporation by the purchase of its property and effects and to continue to engage in the oil business, and prohibits this privilege to corporations, there is apparently a discrimination in favor of a private individual or of partnerships. This discrimination, it appears to us, is one which the Legislature had the right to make and one which rests upon sound reason. The liberty of the citizen can not be preserved by an academic discussion or the enactment of laws based upon an academic consideration of existing conditions. The Legislature must consider the facts as they exist. When this law is viewed in this light, the reason and purposes of the law is plain enough. It was an existent fact with which the Legislature had to deal and which it no doubt had in mind, that trusts and monopolies arose almost exclusively under corporate management and not under individual or personal ownership. The Legislature in this instance evidently tried to make a law to fit existing conditions and remedy the existing evil; it therefore saw fit to permit private individuals or partnerships to become the purchasers and operators of the property and business of defaulting corporations, but to inhibit such a right to corporations, whether domestic or foreign.

When we construe Article 7803 and Article 7805 together, it will be found that they mean, in substance, this: "Every foreign corporation violating any of the provisions of this chapter and its corporate successors, is hereby denied the right and is prohibited from doing any business within this State." This would be the sum and substance of the two articles referred to when read together or made into one. The word "successor," as used above, fully embraces within its meaning the substance of Article 7805. It has been defined by the Supreme Court. In the case of I. & G. N. Ry. Co. vs. Smith County, 65 Texas, 25, the Supreme Court of the State had before it an act of the Legislature, which declared, among other things:

"The said railroad company and its successors, and its and their capital stock, rights, franchises, railroads constructed and to be constructed pursuant to the said Act of August 5, A. D. 1870, and this act, rolling stock and all other property which is now or hereafter may be owned or possessed by said company, or its successors, in virtue of said Act of August 5, 1870, is hereby exempted and released from all State, county, town, city, municipal and other taxes for a period of twenty-five years," etc.

In construing the word "successors," the Supreme Court of the State, said:

"The word 'successors' is evidently used to designate such corporations or persons as may, in any lawful manner, acquire the proprietorship of the corporate rights and property through which they are to be exercised."

In other words, the word "successor," as used in that act, merely meant such corporation or person as may have acquired by legal transfer the property or business of the preceding corporation, so it appears to us that in this act the corporation to which may have been transferred the properties and business of the defaulting corporation, becomes and would be a mere successor of the defaulting corporation, and that if Article 7803 should be made to read as suggested by us above, it would cover all the ground covered by both Articles 7803 and 7805 and would make clear the meaning and intention of the Legislature. So we conclude that the real meaning and intent of Articles 7803 and 7805 is, that every foreign corporation violating any of the provisions of the act and its corporate successors are denied the right and are prohibited from doing any business within the State of Texas.

That part of the judgment decreeing the injunction against the Waters-Pierce Oil Company reads as follows:

"It is further ordered, adjudged and decreed that the permit of the defendant Waters-Pierce Oil Company to do business in the State of Texas be, and the same is hereby, canceled and held for naught, and that the said defendant be enjoined and prohibited from doing business in the State of Texas, except interstate business, but all other business it is hereby perpetually enjoined and prohibited from transacting within the State of Texas."

This portion of the judgment perpetually enjoining the Waters-Pierce Company from transacting business in the State must be read in the light of Articles 7803 and 7805 just above referred to and also in the light of Article 4661, Revised Statutes, which provides:

"Any injunction restrains the counsellors, solicitors, attorneys, agents, servants and employes of the party, as well as the party himself."

So we believe that in view of these several articles of the statute, the decree of injunction against the Waters-Pierce Oil Company has the same effect as though it read as follows:

"* * * and that the said defendant, its counsellors, solicitors, attorneys, agents, servants and employes and its corporate successors be enjoined and prohibited from doing business in the State of Texas, except interstate business, but all other business is hereby perpetually enjoined and prohibited," etc.

It follows from this view of the law and this interpretation of the

articles of the statute, that neither the Waters-Pierce Oil Company nor any corporate successor of that company may be permitted to transact business within the State of Texas.

THE OBJECTIONS.

Speaking in general terms, there are two objections to the admission of the Pierce Oil Corporation in Texas and the transaction of business within this State by that corporation:

1. The admission of the corporation into the State and the transaction of intrastate business by it would be in violation of the injunction decreed by the District Court of Travis County against the Waters-Pierce Oil Company.

2. Because it comes within the inhibition of Article 7805, Revised Statutes, which prohibits the admission of a corporation which has purchased the properties and business of a foreign corporation whose permit has heretofore been forfeited for a violation of the anti-trust laws of the State.

Let us consider the first of these objections, that is, that the admission of the Pierce Oil Corporation into the State and the transaction of intrastate business by it, will be in violation of the injunction against the Waters-Pierce Oil Company. This objection is valid upon three grounds, to wit:

(a) Because the Pierce Oil Corporation is the same in identity as and is but a continuation of the Waters-Pierce Oil Company.

(b) Because the admitted facts show that the Pierce Oil Corporation is the successor of the Waters-Pierce Oil Company and as such is bound by the judgment of ouster and comes within the inhibition of the injunction against the Waters-Pierce Oil Company.

(c) Because to permit the Pierce Oil Corporation to enter the State under the facts would be to permit an evasion of the injunction rendered against the Waters-Pierce Oil Company, and would in effect to be a legal fraud upon the court, which perpetuated that injunction, and upon the laws of the State.

We will consider the first of these subdivisions:

(a) The question as to whether or not the Pierce Oil Corporation is a continuation of the Waters-Pierce Oil Company and identical with that company is largely one of intent on the part of the incorporators, to be determined from their acts in the matter and the circumstances surrounding the transaction. The mere fact that the incorporators have procured a new charter for the purpose of conducting the same business, would not make the corporation a new corporation or an entity separate from that of the old one, but it would be substantially a continuation of the old corporation with the same property, the same rights and the same liabilities, and would become within the letter and spirit of the injunction against the Waters-Pierce Oil Company.

Thompson on Corporations, Sec. 256.

Morawetz on Corporations, Sec. 812.

30 Cyc., p. 826.

Methodist Episcopal Church vs. Brownell, 12 Hun. (N. Y.), p. 466.

Miller vs. English, 21 N. J. Law, p. 317.

Lea vs. Canal Co., 3rd Abbotts' Prac., p. 10.

Montgomery Webb Co. vs. Dienett, 19 Amer. St. Repts., 666.

Grand River College vs. Robertson, 67 Mo., 336.

Coffee vs. National Bank, 46 Mo., 143.

Blanc vs. Pay Master Mining Co., 29 Amer. St. Repts., 156.

In Mr. Thompson's Work on Corporations, cited above, he says:

"It is often a question of great importance whether an act of reincorporation has had the effect of merely reviving and continuing the old corporation, or of creating a new one; since, if it has the latter effect, the new corporation does not possess the rights and is not subject to the liabilities of the old one. If the act of reincorporation is under a special charter granted by the Legislature, the charter must be looked to for the purpose of solving this problem. If the act is accomplished by the action of the old corporation through its proper officers, or members in filing a new certificate or other instrument of incorporation under a general law, then the question must be solved by reference to what they have done. In either case it becomes a question of *intent*. Where it is to be determined upon the terms of a written instrument, e. g., the charter, it is, of course, a question of law for the court, but where it is to be gathered from facts and circumstances, it is on principle a question of fact for a jury. The question of entity, said Randolph, Judge; that is, whether the new act creates a new body politic or corporate or merely revives the old one, is one of intention. To ascertain, says Story, Judge, whether a charter creates a new corporation, or merely continues the existence of the old one, we must look to its terms and give them a construction consistent with the legislative intent and the intent of the incorporators.

"Accordingly, where a religious society incorporated under a general law, held a new election of trustees for the purpose of being reincorporated, if the object of the new election and certificate is to preserve and not to change or dissolve the old corporation, the new corporation will be held to be merely a continuation of the old. * * * It is held that where a State bank has, under the provisions of an enabling act of the State and of Section 44 of the National Banking Act, reorganized as a national bank, the entity of the corporation is not changed and its obligations are not impaired. It remains substantially the same institution under another name and under a new jurisdiction; the change is a transition and not a new creation." (Sec. 256.)

In the case of Miller vs. English, cited above, a controversy arose between the rival trustees of what they supposed to be two different religious corporations. It appeared that the first corporation had been chartered under an existing law, but that afterwards the members of this corporation held an election and by compliance with the law, formed another corporation, under the then existing laws of the State of New Jersey. One of the questions at issue was whether or not by the second act of incorporation, a new corporation was created or the old corporation was revived or continued. In passing upon this question, the Supreme Court of New Jersey, among other things, said:

"Nor do I see anything incompatible in the old incorporation becoming revived or reincorporated under the Act of 1799, which in terms applies to 'every religious society or congregation of Christians entitled to protection.' Under the old act, the society could only hold property to the annual value of five hundred pounds. By the Act of 1799 this sum was extended to two thousand dollars. But although for this purpose reincorporation was not necessary, yet I see nothing in the law to prevent the trustees, if for any purpose they desired it, from filing anew their certificate and oaths and declaration of a corporate

name, as was done in this instance; and thus, whilst they preserved their identity, became a religious corporation under the Act of 1799. This is repeatedly done by legislative enactment, and in England by royal charter—why may it not be done under a general act of incorporation, without the loss of identity or forfeiture of franchise? In the Colchester Corporation vs. Seaber, 1 Burr, 1866, it was held that where a corporation, by death of some of its members, became disabled to act, and dormant, and a new charter was granted, that the acceptance thereof did not create a new, but merely revived the old corporation. 'Whenever a corporation,' says Wilmot, Judge, 'accepts a new charter, it *remains* to every intent and purpose as it did before, *though* the name be altered.' Referring to Haddock's case, T. Raym. 439, where it is said that the new 'charter does not merge or extinguish any of the ancient privileges, but the corporation may use them as before.' And to the same effect is Rex vs. Pasman, 3 T. R., 199, and opinion of Ld. Kenyon, p. 241. These are, it is true, cases of royal charters of incorporation, but the same principles apply, whether the creation or removal is by the Legislature, or by a general act of incorporation. Angel & Ames on Corp., 513. The question of identity; that is, whether the new act creates a new body politic or corporate, or merely revives an old one, is one of intention. 'To ascertain whether a charter creates a new corporation, or merely continues the existence of an old one, we must,' says Story, Judge, 'look to its terms, and give them a construction consistent with the legislative intent, and the intent of the incorporators.' Bellows vs. Hallowell and Augusta Bank, 2 Mason R., 43."

In the case of Blanc vs. The Paymaster Mining Co., supra, the facts were substantially as follows: That the Esperanza Company, a foreign corporation doing business in Arizona, became, in February, 1884, indebted to plaintiff upon two promissory notes, one for \$1000, payable on demand, and the other for the sum of \$5000, payable February 12, 1885; that thereafter the Esperanza Company became indebted to various stockholders and a pretended assignment was made of all its property to its managing officer and agent, one Blaisdell, for the alleged purpose of paying the debts of such corporation, and the said Blaisdell made a pretended sale of such property at public auction, at which sale he claims to have become the purchaser of the tools, machinery, stamp-mills, engines, and boilers belonging to the Esperanza Company, all of the value of \$75,000, at a purely nominal sum, to wit: the sum of fifty dollars; and thereupon said Blaisdell, together with the principal officers, agents and stockholders of the Esperanza Company, proceeded to organize the defendant Paymaster Mining Company and turned over to it all of the said property for the purpose of cheating and defrauding plaintiff and other creditors of the Esperanza Company; that the said Paymaster Mining Company, the defendant, was so organized by the said Blaisdell, the officers and agents and stockholders of the said Esperanza Company, with a view of taking and receiving said property as a part of the said plan for defrauding the creditors of the Esperanza Company, and particularly the plaintiff, etc. (See statement of the pleadings, 29 American State Reports, pp. 150 and 151.) In passing upon this case, the Supreme Court of California said:

"We think, upon this state of facts, a court of equity will regard the defendant as a mere continuation of the former corporation under a different name, and will hold it liable for the indebtedness of the Esperanza Company, at least to the extent of the value of the property which it received from it without consideration, and under the circumstances stated. Nominally, the two corporations may be different, but, as viewed in equity, they are the same, and

the plaintiff is not prevented from asserting such identity in fact. This was so, substantially, held in the case of *Hibernia Ins. Co. vs. St. Louis, etc., Trans. Co.*, 13 Fed. Rep., 816. In that case, upon a state of facts similar to that disclosed by this record, McCrary, Circuit Judge, after referring to the fact that it was doubtful whether any service or process could be made upon the old company so as to secure a judgment at law against it, proceeded to say: 'A distinction with respect to transactions of this character exists between a corporation and a natural person. A natural person may sell all his property for a fair consideration, if the transaction is bona fide, and the buyer will not be required to take care that the seller provides for and pays all his debts. A corporation, unlike a natural person, by disposing of all its property, may not only deprive itself of the means of paying its debts, but may deprive itself of corporate existence, and place itself beyond the reach of process of law. At all events, equity can not permit the owners of one corporation to organize another, and transfer from the former to the latter all the corporate property, without paying all the corporate debts.'

"Treat, District Judge, in a concurring opinion in that case, said: 'A mere change of name can not avoid obligations. The new corporation took all the property of the old, went forward with its business, had the same stockholders, except a few formal ones,—was, in short, the old corporation,—and now seeks to escape the obligations of the old, rescuing the property of the latter from the demands the former was bound to meet. Can this be so? The old corporation and its property were liable to the demands of the plaintiff. The new corporation must respond to the extent of the property acquired, and possibly to the full extent—that is, if property sufficient therefor is in its possession. This is a proceeding in equity, wherein mere colorable pretenses are to be disregarded. Shiftings of corporate names can not defeat positive rights, any more than the change of the name of a natural person can absolve him from his personal obligations.'

"The principle of this decision, which we regard as eminently just, was also approved by the Supreme Court of Pennsylvania in *Montgomery Webb Co. vs. Dienett*, 133 Pa. St., 585. 19 Am. St. Rep., 663.

"It follows, from these views, that plaintiff is entitled to satisfy the demand against the *Esperanza Company* out of its property now held by the defendant, and that, too, without first recovering a nominal judgment against the *Esperanza Company*."

In the case of *Grand River College vs. Robertson*, cited above, an action was brought by the college on a promissory note for \$1000 made payable to Grand River College, located at Edinburg, Grundy County, Missouri. At the time of the institution of the suit, the plaintiff was an educational corporation, located at Gallatin, in Daviess County, Missouri, but the petitioner alleged that the defendant promised to pay to plaintiff by the name and description of Grand River College, located at Edinburg, Grundy County, Missouri. The defendant in his answer alleged that the plaintiff was a corporation organized under the laws of the State of Missouri long after the execution of the note sued on; that the note was given to Grand River College, a corporation located and existing at the time at Edinburg, in Grundy County, Missouri. Upon the trial of the case the defendant submitted in evidence the articles of association and decree of incorporation of Grand River College organized at Edinburg, Grundy County, Missouri, in 1876, this being the College to which his note was made payable. He also introduced the certificate and articles showing the incorporation of Grand River College as located at Gallatin in Daviess county in 1893, together with a written agreement between the trustees of the first Grand River College at Edinburg and certain citizens of Gallatin, dated in 1892, providing for the aban-

donment of the college at Edinburg and its removal to Gallatin. It was also shown that the original incorporation at Edinburg disposed of all of its property and abandoned the latter place and the new organization accepted other property and buildings at Gallatin and conducted a college at that place. The Grand River College of Gallatin did not bring the suit as an assignee of the defunct Grand River College at Edinburg, but brought the action on the note as an original payee. At the trial the defendant sought to prove by a witness on the stand that the suit was being prosecuted by the Grand River College located at Gallatin, but the evidence was not admitted. However, the Supreme Court in passing upon the question stated that no harm could come from this action of the court, since the record clearly showed that that was a fact and further that the College at Edinburg had closed and its property conveyed away or turned over to the plaintiff, the Grand River College at Gallatin. The question before the court for determination then was clean cut and was whether or not the Grand River College at Gallatin was the same corporation as the Grand River College at Edinburg. In passing upon this question, the Court of Appeals of Missouri said:

"The question, then, is whether or not the plaintiff is the same or a different corporation from the Grand River College formerly located at Edinburg. We think it must be treated as the same corporate entity; that the Grand River College at Gallatin has its corporate existence by virtue of a charter merely amendatory of the Edinburg charter. Both were organized under the same general law. Art. 8, Chap. 36, 1 Wag. Stat.; Art. 10, Chap. 42, R. S., 1889. The main purpose of the two were identical; they were organized, fostered, and managed by the same persons; and from the evidence it is entirely clear that the purpose of the last organization was to supplant and take the place of the original as a mere amendment or reorganization. Under Section 2826 of the Revised Statutes amendments to such charters were authorized. It is sufficient under that statute merely to submit to the court the new features or amendments to be added or changed from the old charter and have an order thereon. But because the parties unnecessarily included in the amendments the entire articles of association (as was done in this case) ought not to destroy the intended identity of the new with the old. The alteration of a charter may as well be effected by the substitution of a new charter which is germane to the old as by the adoption of mere amendments. 1 Thomp. Corp., Section 103; *Ins. Co. vs. Beckman*, 47 Mo., 93; *Railroad vs. Hughes*, 22 Mo., 291. We are of the opinion, then, that plaintiff is the same corporation to which defendant made the note and is, therefore, the proper party plaintiff in the action."

In the case of *Coffey vs. The National Bank of Missouri*, supra, one of the questions at issue was whether or not when the bank of the State of Missouri reorganized under the Act of Congress of 1863 as a national bank, there was created a new corporation or a continuation of the old one. In passing upon this question the Supreme Court of the State of Missouri said:

"By the act of Congress making provision for a national currency (U. S. Stat. at Large, Chap. 106, p. 112, Paragraph 44) it is provided 'that any bank incorporated by special law, or any banking institution organized under a general law of any State, may, by authority of that act, become a national association under its provisions, by name prescribed in its organization certificate; and in such cases the articles of association and the organization

certificates required by the act may be executed by a majority of the directors of the bank or banking institution; and that said certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate, and to change and convert the said bank or banking institution into a national association under said act; and a majority of the directors, after executing said articles of association and organization certificate, shall have power to execute all other papers, and do whatever may be required to make its organization perfect and complete as a national association. The shares of any such bank may continue to be for the same amount each as they were before said conversion; and the directors aforesaid may be the directors of the association until others are elected or appointed in accordance with the provisions of said act.' Under the legislation of the State and of Congress, the Bank of the State of Missouri became a national banking association, as the evidence tended to show and as the jury found the fact to be. It thus passed from one jurisdiction to another; but its identity was not thereby necessarily destroyed. It remained substantially the same institution under another name. The transition did not disturb the relation of either the stockholders or officers of the corporation, nor did it enlarge or diminish the assets of the institution. These all remained the same under the national as they were under the State organization. The bank neither lost any of its assets nor escaped any of its liabilities by the change. The change was a transition, and not a new creation. (See *Grocers' National Bank vs. Clark*, 48 Barb., 26; *Thorp vs. Wegefarth*, 56 Penn. St., 82.)

It appears to us that these authorities are conclusive of the question that the Pierce Oil Corporation is merely a transition of the Waters-Pierce Oil Company, and as such, is subject to all the liabilities of the Waters-Pierce Oil Company. It appears that this is the intention of the incorporators, or rather that the intention of the incorporators is to place the assets of both the Waters-Pierce Oil Company and of the Pierce-Fordyce Company into the new corporation for the purpose of continuing the business in which the Waters-Pierce Company and the Pierce-Fordyce Association are engaged. Mr. H. C. Pierce, as shown by the list of stockholders before us, owns substantially all the stock in the Waters-Pierce Oil Company and owns substantially all the shares in the Pierce-Fordyce Association. Both the corporation and the partnership are under his control and management by reason of his ownership of stock and shares. If the assets of the partnership and the corporation are transferred to Pierce Oil Corporation of Virginia, there will be no substantial change in the stock ownership and no substantial change in the potential management. The assets of the Pierce Oil Corporation will be the same assets as those previously owned by the Waters-Pierce Oil Company and the Pierce-Fordyce Association, or, as we might correctly say, will be the assets owned and previously owned by the Waters-Pierce Oil Company. The evident intent and purpose of the incorporators, and the Pierce Oil Corporation, is to engage in the identical business and cover the same territory as that engaged in and covered by the Waters-Pierce Oil Company and the Pierce-Fordyce Association. To determine the question of identity of one corporation with another, an examination of the constituent elements of each would be of assistance. We will examine the Pierce Oil Corporation and the Waters-Pierce Oil Company with this end in view.

(a) The Waters-Pierce Oil Company and the Pierce Oil Corporation are or would be engaged in identically the same business.

(b) The present capital stock and assets of the Waters-Pierce Oil Company would become the principal capital stock and assets of the Pierce Oil Corporation.

(c) The business of the Pierce Oil Corporation would be conducted substantially by the same management as that of the Waters-Pierce Oil Company.

(d) The methods of operation if the assets and business of the Waters-Pierce Oil Company should be taken over, would be substantially the same at the time they are taken over by the Pierce Oil Corporation; that is to say, if there are any changes in the methods of operation, such changes would be made by the Pierce Oil Corporation after it had absorbed the business of the Waters-Pierce Company, the Pierce Oil Corporation not having any separate business of its own or any established system of business.

(e) The intangible, yet valuable assets of the Waters-Pierce Oil Company, known as its "business" or "good will" or "system" of buying, manufacturing and marketing its products would be transferred with the physical assets to the Pierce Oil Corporation.

(f) No interruption or break in the business affairs of the Waters-Pierce Oil Company as contemplated would take place in the transfer of its assets and business to the Pierce Oil Corporation. This statement may be to a certain extent an assumption on our part, but such was the method of transfer when the old Waters-Pierce Oil Company was dissolved and the present Waters-Pierce Oil Company came into possession of its properties and business.

(g) The stockholders of the Pierce Oil Corporation would be substantially the same as the stockholders of the Waters-Pierce Oil Company.

(h) To paraphrase the title of a work of current fiction, it will be seen that so far as the Waters-Pierce Oil Company is concerned, the Pierce Oil Corporation is "a change in name only."

We, therefore, conclude that because the Pierce Oil Corporation would be substantially the same corporation as the Waters-Pierce Oil Company, it comes within the letter and spirit of the injunction issued by the District Court of Travis county, perpetually enjoining the Waters-Pierce Oil Company from transacting business in Texas.

The second proposition (b) embraced within the first of our two reasons why a permit can not be issued to the Pierce Oil Corporation, is that the Pierce Oil Corporation would be the successor to the Waters-Pierce Oil Company, and as such, bound by the judgment of ouster and subject to the penalties of the injunction. We have heretofore in this opinion shown that the real meaning of Articles 7803 and 7805 is, that not only is the offending corporation subject to the injunction, but that its successor, as defined in Article 7805, comes also within the meaning, terms and intent of the law, and the judgment predicated thereon. If this construction be correct, then it must follow that the Pierce Oil Corporation as such successor would be bound by the terms

of the judgment, although the Pierce Oil Corporation was not in existence at the time of the rendition of the judgment.

State of Iowa vs. Iowa Central Railway Co., Vol. 83, p. 721 et seq.

High on Injunctions, Sec. 1440a, p. 1450.

Aplers vs. Thomas, 77 Am. St. Rep., 820.

This Iowa case was upon an application on behalf of the State for an order against the Iowa Central Railway Company to show cause why it should not be compelled to obey the decree of the Supreme Court entered against the Central Iowa Railway Company, and why a writ of mandatory injunction should not issue against it. The application on behalf of the State set out a decree rendered by the court in the case of the State vs. Central Railway Company, 71 Iowa, 410, which decree is substantially as follows:

"And it is further ordered, adjudged and decreed that the said Central Iowa Railway Company, its officers, agents and servants, its successors, assigns, grantees and lessees, and each and every one thereof, are directed and commanded, until otherwise ordered, to forever maintain and operate that certain piece and part of railroad lying and being between the depot building in Northwood, Iowa, and Manly Junction, Iowa, and will run its and their trains, engines, cars, both passenger and freight, according to regular and public schedule time, etc."

The defendant in the case, the Iowa Central Railway Company which is another and a different corporation to the Central Iowa Railroad Company, made answer and said that it was not the successor, assignee or grantee of the Central Iowa Railway Company; that it had never been adjudged to be such and that no judgment or decree had ever been rendered against it, commanding it to perform any of the acts directed in the decree above referred to. The answer also alleged that at the time of and long prior to the rendering of the decree quoted, all the property of the Central Iowa Railway Company had been taken possession of by the Circuit Court of the United States for the Southern District of Iowa through a receiver; that in said Circuit Court a decree of foreclosure of a mortgage was rendered and all the property of the Central Iowa Railway Company was sold thereunder to James Thompson, which sale was duly confirmed and the conveyance ordered and made; that James Thompson assigned all his right, title and interest so purchased to the Iowa Railway Company, which company subsequently conveyed it to the defendant in this case. In other words, the property of the Central Iowa Railway Company was sold under a decree of the Federal Court to James Thompson and James Thompson then sold the property to the Iowa Railway Company and the last named company sold it to the defendant in the case we refer to known as the Iowa Central Railway Company. The defendant further alleged that it had no existence and was not organized until subsequent to the rendering of the decree upon which the State predicated its rights.

Upon the foregoing state of facts, the Supreme Court of the State of Iowa held that the Iowa Central Railway Company was the successor of the Central Iowa Railway Company, and that as such, the decree quoted by us was applicable to it, saying:

"There can be no doubt but that the facts stated do show that this company is the successor of the Central Iowa Railway Company, within the meaning of the decree. This fact being thus established, it requires no adjudication. The relation exists, and with it the duties and obligations imposed by the decree."

The proposition is, then, that although the Waters-Pierce Oil Company's properties within the State of Texas were purchased by Sam Fordyce and H. C. Pierce, and although they afterwards conveyed the property to the Pierce Oil Corporation, yet, under these facts and under these circumstances, in the light of the Iowa case above referred to, the Pierce Oil Corporation would be the successor of the old Waters-Pierce Oil Company in Texas, and as such corporate successor, it would be under the same disability as the original Waters-Pierce Oil Company, and the decree of the District Court of Travis county would be applicable to it. But the case actually before us for consideration is much stronger than we have stated it. The fact is, the Pierce Oil Corporation has, or will become, the successor of the entire Waters-Pierce Oil Company's properties, including the properties of the present existing Waters-Pierce Oil Company and the Texas properties of that company heretofore purchased by Pierce and Fordyce, so that in every sense the Pierce Oil Corporation would be the successor of the Waters-Pierce Oil Company, and being a corporation, comes clearly within the inhibition, that the properties of a corporation ousted from the State for violation of the anti-trust laws can not be operated by another corporation.

We, therefore, conclude that should the properties of the Waters-Pierce Oil Company and of the Pierce-Fordyce Oil Association pass into the hands of the Pierce Oil Corporation, as is proposed, then that the Pierce Oil Corporation would come within the terms and provisions of Article 7805 and of the injunction granted in the Waters-Pierce Oil Company case by virtue of Article 7803.

We will now discuss (c) the third subdivision of the original proposition now under discussion, to wit: That to permit the Pierce Oil Corporation, after having taken over the assets of the Waters-Pierce Oil Company and the Fordyce Company to enter the State to transact business, would be an evasion of the injunction issued against the Waters-Pierce Oil Company and a constructive fraud on the court issuing the same and upon the laws of the State.

It will be noted in this connection that our anti-trust statute not only gives the State the legal remedy of an action for damages, but it gives the State an equitable remedy as well, in that it authorizes the court to cancel the permit granted the offending corporation and issuance of an injunction enjoining its further operation within the State. The State being authorized to invoke the powers of an equity court, it seems to us it is entitled to the full relief which a court of equity may grant. The Legislature no doubt had in mind that the legal remedy of a suit for damages or for penalties would not be sufficient to accomplish the purpose and intent of the law, which was to protect the people of the State from conspiracies in restraint of trade and from monopolies, and it, therefore, sought to confer upon the State the additional equita-

ble remedies referred to. It is a well established maxim of equity that wherever a legal right has been infringed, a remedy will be given. (Pomeroy's Equity Jurisprudence, Sec. 423.)

In attempting to determine the effect of the proposed acts of the Pierce Oil Corporation in absorbing the Waters-Pierce Oil Company and the Pierce-Fordyce Association, it should therefore be borne in mind that equity looks to the intent rather than to the form.

"The principle involved in this maxim, which is one of great practical importance, pervades and affects to a greater or less degree the entire system of equity jurisprudence, and is inseparably connected with that which forms the subject of the preceding section. * * * Equity always attempts to get at the substance of things and to ascertain, uphold, and enforce rights and duties which spring from the real relations of parties. It will never suffer the mere appearance and external form to conceal the true purposes, objects, and consequences of a transaction." (Pomeroy's Equity Jurisprudence, Sec. 478; *Heinze vs. Consol. Min. Co.*, 129 Fed., 274.)

It is an elementary principle that acts in evasion of an injunction are acts in violation of the injunction; that no subterfuge amounting to a substantial violation of an injunction will be allowed to succeed.

22 Cyc., page 1016.

High on Injunctions, Sec. 1433, page 1444.:

Ex parte Miller, 87 Amer. St. Repts., 50.

Jewelers Mercantile Agency vs. Rothschild, 39 N. Y. Supp., 700 et seq.

Societe vs. Distilling Co., 42 Fed., 96.

Westerveldt et al. vs. National Manufacturing Co., 33 Ind., 18.

In re Tift, 11 Fed., 465.

Morton vs. Court of Tulare Co., 65 Calif., 496.

Chapman vs. Mad River, etc., 1 Ohio Dec., 559.

We will call attention to the holdings in some of the foregoing cases as illustrative of the principle above invoked, and as showing its application to the proposed actions of the parties under consideration.

In the case of *Jewelers Mercantile Agency vs. Rothschild*, 39 N. Y. Supp., page 700, the facts briefly were: That the Mercantile Agency was engaged in the business of obtaining from various sources information in regard to names, places of business, street addresses, particular kinds of business, and other information, as to individuals, firms, and corporations, engaged in the jewelry trade throughout the United States and Canada, and in furnishing confidentially for the use of the subscribers, the information thus obtained. The defendant Alonzo Rothschild and Albert Ulmann were engaged in the publication of a weekly called the *Jewelers' Weekly*. In the course of their business they obtained the information gathered by the Jewelers Mercantile Agency from the subscribers to that agency and republished this information in the *Weekly*, thereby furnishing it to their own subscribers. An injunction suit was brought against Rothschild and Ulmann for the conduct, and upon trial of the case, the injunction was made perpetual. After this judgment enjoining them, Rothschild and Ulman employed one Kellar to make up a directory which contained the information which they had been enjoined from disseminating. After the employment of Kellar

the contract with Kellar and the entire publishing business of Rothschild and Ulmann were sold to a corporation. The corporation then proceeded to publish the book made by Kellar. The corporation was under the exclusive control and management of Rothschild and Ulmann. In passing upon the question, the Supreme Court of New York, said :

“The transfer of this book or publication by the defendant to Kellar and the defendant authorizing the corporation to public the book, which Kellar had prepared and superintended and their being engaged in its manufacture and sale were in violation of the injunction; and the transfer of their business to the corporation, so that to protect the plaintiff it was necessary that the corporation should be enjoined from the publication, were acts of the defendants which tended to render the injunction nugatory, and in consequence of these acts of the defendants, which were violations of the injunction, it was necessary for the plaintiff to commence a new action, and obtain an injunction against the corporation. By this misconduct of the defendants, the plaintiff's right was defeated, impaired, impeded, or prejudiced, and the damages which it sustained in consequence of such conduct were the expenses in prosecuting the new action, and were what the court was justified in compelling the defendants to pay.”

The court held the defendant had violated the injunction and adjudged against them a large fine as a punishment.

This case is not unlike the state of facts under consideration here. The Waters-Pierce Oil Company is enjoined from transacting business in Texas. This injunction not only binds the corporation as such, but binds, as we have heretofore shown, its officers, agents, employes, etc. Now the proposition is that these officers, agents, stockholders, etc., shall form a new corporation, which shall take over the identical property of the Waters-Pierce Company and perform the identical acts which can not be performed by that company. It seems to us that this would be a clear evasion of the law, and of the injunction, as it was held to be an evasion of the injunction granted in the Mercantile Agency case, just above quoted from.

In the case of Morton vs. Tulare County, cited above, the principle invoked by us is referred to in the following terms :

“The effect of an injunction restraining any acts of a corporate body, and addressed to it and its agents, etc., is to bind not only the intangible artificial being, but also the individuals who act for the corporation in the transaction of its business to whose knowledge the decree comes. Unless this be so, it would be necessary in order effectually to bind a corporation by an injunction, to make every person a party to a suit who could by any possibility be its agent in doing the prohibited act. * * * Injunction orders must be fairly and honestly obeyed, and not be defeated by subterfuges and tricks on the part of those bound to obey them. They may be violated by aiding, countenancing, and abetting others in violation thereof as well as doing it directly; and courts do not look with indulgence upon schemes, however skillfully devised, designed to thwart their orders.”

It seems to us that it is too clear for argument that to permit the Pierce Oil Corporation, after it had absorbed the assets of the Waters-Pierce Oil Company and the Pierce-Fordyce Association, for which purpose it is to be organized, to come into the State and transact business, would be a palpable evasion of the decree of ouster and injunction rendered against the Waters-Pierce Oil Company and would be a constructive

fraud upon the court entering such order and upon the laws of this State. The contention of the Waters Pierce Oil Company is, that it is now free from any connection with the Standard Oil Company or other company, and that it is in no sense violating the anti-trust laws of the State or of the National Government, and that the Pierce Oil Corporation would be equally free from any connection with any other company or corporation whose conduct could be construed to be a violation of any of the anti-trust laws. This is not the issue. The Waters-Pierce Oil Company had entered against it the judgment of ouster and under the statutes of this State that corporation and its properties, as well as the properties and business owned by the Pierce-Fordyce Association, have become tainted in law by the reason of the previous contamination which arose out of the association of the Waters-Pierce Oil Company with the Standard Oil Company, and the laws of this State appear to visit their punishment further even than "unto the third and fourth generations," in so far as the ownership of the property and business of the offending corporation is concerned. It matters not that the Waters-Pierce Oil Company may have reformed, or that it may not be now guilty under the law, as it once was adjudged to be. The taint of its association and its condemnation still attaches, and so far as we know, there has been designed no plan of salvation by which its innocence may be restored, or by which it may be relieved from the penalty and punishment imposed for its violations of the law in the past. The Texas law was evidently drawn from the theory that when a corporation once becomes a public leper and has been so adjudged by the courts, it can not at any time afterwards in any shape or form whatsoever enter within the boundaries of the State. We are construing the law as it is written. If this law be too harsh in its penalty and too far reaching in its effect, then it is a matter for the Legislature to remedy and not for the executive department of the government.

The second objection made by us in beginning this analysis of the objections, to wit: That the Pierce Oil Corporation, after having taken over the properties of the Waters-Pierce Oil Company and of the Pierce-Fordyce Association, would come within the terms of inhibition shown in Article 7805 of the Revised Statutes, has already been, in substance and in effect, stated in this opinion, and it is not necessary now to restate the same.

Upon a consideration of this matter, we therefore advise you that should the Pierce Oil Corporation become incorporated in the State of Virginia, and should it tender you a certified copy of its charter, together with an application for a permit to transact business, and a proper anti-trust affidavit, and comply in all other respects with the technical requirements of our law, yet you are advised that it can not be granted a permit to transact business in this State, in the event it has become the owner of the property and business of the Waters-Pierce Oil Company or of the property and business of the Pierce-Fordyce Association, or of the property and business of both the corporation and the partner-

ship named, but you should decline to grant the permit to the Pierce Oil Corporation under such circumstances.

Respectfully submitted,

C. M. CURETON,

First Assistant Attorney General.

NOTE.—The Secretary of State followed the views expressed in this opinion. The Pierce Oil Corporation filed its motion for leave to file a petition in mandamus against the Secretary of State, in the Supreme Court, and the issue was there tried out. The Supreme Court declined to permit the petition to be filed and sustained the action of the Secretary of State taken under the foregoing opinion. (See *Pierce Oil Corp. vs. Weinert*, 167 S. W., 808.) —W. P. Dumas, Chief Clerk.

CONSTRUCTION OF LAWS—IMMIGRATION—CORPORATIONS—CHARTERS.

1. The general rule is that the purpose for which a corporation is to be created should be sufficiently stated to enable the Secretary of State to see that the purpose specified is one provided for by the statute, and to define with some certainty the scope of the business or undertaking to be pursued.

2. An immigrant is defined to be one who quits his country for any lawful reason with a design to settle elsewhere and take his family and his property with him.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, APRIL 22, 1914.

Hon. F. C. Weinert, Secretary of State, Building.

DEAR SIR: We have examined the charter and other instruments accompanying the same of the C. W. Hahl Company tendered you for approval and filing. Your communication accompanying the charter and enclosures is as follows:

"I am in receipt of the enclosed brief from Messrs. Moody & Boyles, concerning the incorporation of a company under Subdivision 19 of Article 1121, Revised Civil Statutes. It is the contention of these gentlemen that they have a right to buy, own and sell real estate under this subdivision. The department contends they have not such right. This has been the holding of this department for a number of years, contending there is no provision of law authorizing in general the purchase, sale and subdivision of real estate without the limitations contained in Subdivision 17. Will you kindly advise this department as to whether the proposed charter should be filed or not?"

Directly answering your inquiry, we beg to advise you that this proposed charter should not be filed. The reasons which lead us to this conclusion will now be stated:

The purpose clause of the charter reads as follows:

"The purpose for which it is formed is the promotion of immigration."

This statement of the purpose of the corporation is substantially in the language of Subdivision 19 of Article 1121, Revised Civil Statutes, but we do not believe that it sufficiently states the purposes of the incorporators. The general rule is that the purpose for which a corporation is to be created should be sufficiently stated to enable the Secretary of State to see that the purpose specified is one provided for by the

statute, and to define with some certainty the scope of the business of undertaking to be pursued (*Johnson vs. Townsend*, 124 S. W., 418).

◦ The charter tendered in this case is so general and indefinite in its language that it is impossible for the Secretary of State to know the scope of the contemplated business of the corporation. What is to be done, should be stated, and then you will be able to determine whether or not its intended business is the promotion of immigration. The statement in the charter that the purpose of the corporation is to promote immigration is the mere conclusion of the incorporators that what they intend to do is the promotion of immigration in a way and manner authorized and permitted by the laws of Texas, but it is a conclusion merely and not a statement of fact as to the intended business.

It is the duty of the Secretary of State, when a charter is presented to him, to inquire into the object of the proposed corporation, and even in States where the written consent and approbation of a judge is required before the certificate may be presented for filing, this rule obtains (7th Am. and Eng. Ency. of Law, page 649).

People vs. Nelson, 10 Abb. Pr. N. S. (N. Y.), 200.

People vs. Rice, 68 Hun. N. Y., 24.

It has been held that under statutes which require the purpose of a corporation to be stated in the charter, it is not always sufficient to state that purpose merely in the words of the statute (7th Am. and Eng. Ency. of Law, page 653).

In re McKees Rocks Vol. Firemen's Relief Association, 6 Pa. Dist. Rep., 477.

A substantial compliance with the requirements of the governing statute is necessary in order to obtain a charter of a corporation (10 Cyc., page 224).

The proposition we invoke arises out of the principle that the charter of a corporation is a contract, binding not only upon each of the signers thereto, but, to a limited extent, upon the State, and it is essential that the purpose of the corporation should be so plainly stated that the stockholders would know the exact business in a portion of which the capital invested by them would be used and that the State might know that the business to be conducted is one permitted and authorized by its laws.

A third element enters into the reason for requiring a definite statement of the objects of a corporation and that is, that those who deal with a corporation may have the opportunity of knowing the kind and character of business it is authorized to transact and the extent and limitations of its corporate authority. These several suggested necessities for a definite statement of the corporate purpose of a charter are not to be lightly regarded, and while the details of the proposed business are not required to be stated, the statement should be definite enough to enable all interested to determine the scope of the corporation's authority.

• Mr. Frost, in the Fourth Edition of his work on "The Incorporation and Organization of Corporations," concerning corporate purposes, says:

"By corporate purposes is meant the specific declaration in the articles of incorporation of the nature of the business which the corporation is authorized to carry on. Such statement is a matter which primarily concerns the stockholders, and to a less degree the State under whose authority the corporation is created.

"In the granting of corporate privileges it is important to specify the purposes and objects because the courts shall have some guide in keeping them within the powers granted and conveyed. Unless they be specified with particularity in the petition or in the granting thereof, they might do as they pleased and the law be powerless to restrain them. The purposes enumerated in the articles of association, read in connection with the general laws under which the charter is procured, is the measure of the powers of the corporation.

"It must be remembered that articles of association under general acts are the productions of private citizens gotten up in the interest of the parties who propose to become incorporated, and who are stimulated by their zeal for personal advantage rather than for the general good. They are, so far as permitted in accordance with the law, substitutes for legislative action in the place of the will of the people of the State as formerly expressed by the acts of the Legislature.

"* * * The statutes of the various States differ of course with respect to the character of the purposes for which corporations may be formed. Some of them permit incorporation for any lawful business, without any limitations whatsoever. The phrase 'other lawful business,' found in so many of the statutes, is, according to the weight of authority, held not to be subject to the *noscitur a sociis* rule, and is used as a 'catch-all' for the purpose of including any kind of business for pecuniary profit not otherwise provided for. In setting out the purposes, this must be done with reasonable certainty and definiteness. For example an application for a charter was refused in Pennsylvania, where it was stated that, in addition to certain enumerated objects, the corporation was organized for 'such other purposes as might be agreed upon in the future.' "In many of the States express mention is made of the various specific purposes for which corporations may be created. As a general rule the incorporators are required to set out in their articles of association the specific purpose or purposes for which the proposed corporation is to be organized." (Pages 15-17.)

The situation which now confronts us with reference to this charter illustrates the necessity of a more definite statement of the purpose of the corporation than that contained in this charter. The real purpose of the incorporators, as disclosed by them to you, is the subdivision and sale of real estate and the purchase of real estate to be subdivided and sold, it being contended that this is one method of promoting immigration. If the contention of the incorporation in this respect should be conceded it but enforces the rule we have suggested that the scope of the business of the proposed corporation should be definitely stated, and the business of the corporation should be stated in its purpose clause so that you may determine whether or not the method of promoting immigration intended to be used is an authorized or unauthorized or illegal one.

We have gone into this matter somewhat at length rather for your future guidance, and not for the mere matter of passing upon this charter because the defect in the purpose clause of this charter could be readily corrected by the incorporators stating exactly what they intend to do. However, there is a more fundamental reason why this charter should not be filed, the discussion of which will be taken up in the next paragraph of this opinion.

It appears from the exhibits attached to the charter that nearly all of

the capital stock of the corporation is to be paid up in lands, said lands consisting of 3040 acres in McMullin County, Texas, in sections 82, 78, 56, 17, 15, 80, 54, 45 and 48 in the C. W. Hahl & Company's subdivision in Lorenz's ranch; also 1049 acres of land in Bee county, Texas, in sections 8, 21, 9, 30, 2, 16 and 1 of the C. W. Hahl & Company's subdivision of the W. G. Ragley subdivision of the Chittim-Miller ranch; also 5650 acres of land in Harris county, and a large number of lots and blocks in the town of Satsuma and the town of Fairbanks, all in the State of Texas, and which are more or less definitely described in the instruments attached to the charter.

The incorporators contend that they have a right to pay the capital stock of this proposed corporation in these lands, because, they say, a corporation chartered for the promotion of immigration is authorized to buy and to sell lands. We quote the following from the brief filed with the Department as indicative of their contention:

"Mr. Gregg takes the position that lands can not be received in payment of the capital stock of this company, because, in his opinion, a corporation formed for the purpose of promotion of immigration is not authorized to buy and sell lands. If he is correct about this, we are wholly unable to imagine what such a corporation could do. Certainly no one could be expected to expend money in inducing immigrants to come to Texas, unless the law would permit him to reimburse himself by selling them lands after their arrival here; furthermore, it is manifest that the strongest inducement which could be offered prospective immigrants would be the assurance of being furnished with homes at low prices, and on easy terms, and few people would care to move to this State unless they had some previous assurance concerning the securing of a home here. * * * It is manifest that the main purpose of the proposed corporation is the *sale* of lands, and not the *ownership* thereof, and that the acquisition of lands is entirely incident to such main purpose of business. Evidently it can not sell the lands to prospective immigrants until it has first acquired them. In conclusion, it seems clear to us that the sale of lands at low prices, and on long time, is practically the only feasible means of promoting immigration to this State, and if a corporation chartered for the purpose of promoting immigration is not permitted to make such sales, the question for which we have been unable to find any answer is, what would such a corporation have power to do?"

In other words, it is admitted that the real estate sought to be used as the capital stock of this corporation is not to be used for the corporate purposes of the company, except in the sense that it expects to promote immigration by selling these lands at low prices on long time and easy terms, and if this method of promoting immigration is not one within contemplation of Subdivision 19 of Article 1121, then such lands can not be received as the capital stock of this corporation.

It is, we believe, well settled in this country that while a corporation may receive property in payment for its capital stock, yet it would, under the expressed or implied powers conferred upon it by its charter, have the power to purchase the property or incur a debt for the labor or services, and provided the transaction is in good faith, and no fraud is perpetrated upon other stockholders or creditors.

Clark & Marshall on Private Corporations, Sec. 384.

10 Cyc., page 474.

Conyngton on Corporate Organization, page 246.

It is also well settled that when a corporation is not organized to deal in land, the purchase of land not needed in its business for the mere purpose of holding and selling it again is *ultra vires*; nor can such corporation purchase for any other purpose that does not tend directly to carry out its own legitimate objects (7th Am. & Eng. Encv. of Law, page 718). It has been held, for example, that a railroad company can not purchase land not needed for the construction of its road, to hold or sell again on speculation.

Case vs. Kelly, 133 U. S., 21.

Pacific R. Co. vs. Seely, 100 Am. Dec., 369.

Nor has a railroad company the power to purchase and permanently hold surplus lands not needed for the construction or operation of its road, though it may thereby be enabled to purchase the right-of-way through such lands at less than it could otherwise be obtained for (Boston, etc., Air Line R. Co. vs. Coffin, 50 Conn., 150).

A banking corporation, given the power by its charter to take and hold lands for the convenient transaction of its business and to secure debts, but for no other purpose, a power which would be implied if not expressly conferred, has no right to purchase lands for the purpose of selling them again (State Bank vs. Niles, 41 Am. Dec., 575; Thweatt vs. Hopkinsville Bank, 81 Ky., 1).

A railroad company can not purchase or acquire land for dwelling-houses for employes, for car or locomotive factories, or coal mines, nor can it, without an express grant of power, purchase mineral interests in lands, since such property is neither necessary nor proper for carrying out the purposes of the corporation (Wilkes vs. Ga. Pac. Ry. Co., 79 Ala., 181).

A corporation organized for the purpose of constructing and maintaining a turnpike road can only purchase such land as is reasonably necessary for the construction and maintenance of the road (Coleman vs. San Rafael Turnpike Road Co., 49 Cal., 517).

The authorities cited are some of those used as the basis for the text of the American and English Encyclopedia of Law, and have been examined by us and found to sustain the provisions stated.

We are confronted, therefore, with the broad question as to whether or not Subdivision 19 of Article 1121, authorizing the chartering of corporations for the promotion of immigration means that such corporations are authorized, either expressly or by necessary implication, to acquire in payment for stock, or otherwise, large bodies of land for the purpose of subdivision and sale, because it is clear that if such is not the meaning of this statute, the lands tendered by the incorporators in payment of the capital stock of this proposed corporation can not be so received, and the charter must be rejected.

You state, in your communication, that it has been the holding of your department for a number of years that there is no provision of law authorizing in general the purchase, sale and subdivision of real estate beyond the limitations of Subdivision 17 of Article 1121, providing

for the purchase, sale and subdivision of real property in cities, towns and villages, and their suburbs, etc.

An immigrant has been defined to be one who quits his country for any lawful reason with a design to settle elsewhere and takes his family and his property with him (10 Am. and Eng. Ency. of Law, page 1042).

Varner vs. State, 36 Southern, 93.

Williams vs. Fears, 50 L. R. A., 687.

Webster's International Dictionary defines "emigration": "The act of emigrating: removal from one country or State to another, for the purpose of residence, as from Europe to America, from the Atlantic States to the Western."

The same authority defines "immigration" as the act of immigrating; the passing or coming into a country for the purpose of permanent residence.

Immigrant is defined to be one who immigrates; one who comes to a country for the purpose of permanent residence; the correlative of *emigrant*.

The several definitions of the two words are given in Webster's Dictionary, which authority also states that the words are synonymous.

"Promotion" is defined in Webster's International Dictionary as follows: "The act of promoting, advancing or encouraging." This definition is one which has been followed by our courts which have occasion to construe the word particularly in connection with the organization of corporations.

Pittsburg vs. Steel Mer. Co., 75 Mo. App., 320.

Ex Mission Land Co. vs. Flash, 92 Cal., 610.

So it may be said that taking the ordinary meaning of the words "promotion of immigration," the statute would mean that a corporation could be formed for the purpose of encouraging those who reside in one country or State to quit that country or State with a design to settle elsewhere and take their families and properties with them.

As to whether or not a corporation may be chartered for the purpose of promoting immigration, as that phrase has been here defined, by the subdivision and sale of lands, will involve a construction not only of the phrase as used in Subdivision 19 of Article 1121 but of various articles and sections of the statutes.

In the first place, Subdivision 4 of Article 1140, in enumerating the powers of every private corporation declares that such corporation shall have the power "to purchase, hold, sell, mortgage or otherwise convey such real and personal estate as the purpose of the corporation shall require, and also to take, hold and convey such other property, real, personal, or mixed, as shall be requisite for such corporation to acquire in order to obtain or secure the payment of any indebtedness or liability due, or belonging to, the corporation."

Article 1164 (Revised Civil Statutes) declares that "no corporation, domestic or foreign, doing business in this State, shall employ or use its stock, means, assets, or other property, directly or indirectly, for any

other purpose whatever than to accomplish the legitimate objects of its creation or those permitted by law.”

Articles 1175, 1176, 1177, 1178 and 1179 (Revised Civil Statutes) read as follows:

“Art. 1175. No private corporation shall be permitted to purchase any land under the provisions of this chapter, unless the lands so purchased are necessary to enable such corporation to do business in this State, or except where such land is purchased in due course of business, to secure the payment of debt.

“Art. 1176. All private corporations authorized by the laws of Texas, as provided in Article 1121, to do business in this State; whose main purpose is not the acquisition or ownership of lands, as mentioned in the preceding articles, which have, heretofore, or may hereafter, acquire by lease, purchase or otherwise more land than is necessary to enable them to carry on their business, shall, within fifteen years from the time this law takes effect or the date said land may be hereafter acquired, in good faith, sell and convey in fee simple all lands so acquired, and which are not necessary for the transaction of their business.

“Art. 1177. No private corporation heretofore or hereafter chartered or created whose main purpose of business is the acquisition or ownership of land by purchase, lease or otherwise shall hereafter be permitted to acquire any land within this State by purchase, lease or otherwise.

“Art. 1178. All private corporations whose main purpose of business is the acquisition or ownership, by purchase, lease or otherwise, of lands in this State, within fifteen years from the time this law takes effect, make an actual bona fide sale of all lands, or interest therein acquired, before this law takes effect, and shall, within said fifteen years, by proper deed, convey in good faith all their right and title to said land. And lands acquired by corporations in payment of debts due such corporations shall be sold and conveyed as herein provided, within fifteen years from the date of the acquisition of such land.

“Art. 1179. Nothing in this chapter shall be construed to prohibit the lease, purchase, sale or subdivision of real property within incorporated towns, cities or villages, and their suburbs not extending more than two miles beyond their corporate limits, by corporations whose charters authorize them to lease, purchase, sell and subdivide real estate, within towns, cities and villages, and their suburbs whether their suburbs be stated to be measured from the limits, merely, or the corporate limits, of such towns, cities and villages; and provided, further, that all such corporations now existing, or which may be hereafter created, shall be authorized to lease, sell, or subdivide real property in any unincorporated city, town or village, or the suburbs thereof, within this State; provided, if there be a courthouse in such city, town or village, such lease, sale or subdivision may extend two miles in any direction from such courthouse. If there be a depot or depots, and no courthouse, then the two miles shall be measured from the depot nearest the center of such city, town or village; and, in case there be neither courthouse nor depot, then the two miles shall be measured from the center of such city, town or village.”

These provisions of our corporation laws were originally enacted in 1893, and were amended by the Acts of 1897. The caption of the Act of 1897 reads as follows:

“An Act to define perpetuities and prevent land monopolies; to limit and regulate the use and ownership of lands by corporations, and to provide for the alienation, forfeiture and escheat of lands held in violation of the laws of Texas.”

It would seem that the statutes just quoted are a sufficient answer to the proposition that a corporation chartered for the promotion of immigration would have the right to accept land tendered in this

instance in payment of its capital stock. It is noted that Article 1176 expressly provides that all corporations authorized by the laws of Texas, as provided in Article 1121 (and at the time of the passage of this act, Subdivision 19, under which it is proposed to charter this corporation, was a part of Article 1121), to do business in the State, whose main purpose is not the acquisition or ownership of lands, and which had therefore acquired more land than was necessary to enable them to carry on their business, were required to alienate the land within fifteen years. Following this article comes Article 1177 which expressly declares that no corporation which might thereafter be chartered whose main purpose of business is the acquisition or ownership of land by purchase, lease or otherwise shall hereafter be permitted to acquire any land within this State by purchase, lease or otherwise.

However, if it be contended that this proposed corporation is not to be principally engaged in the ownership of lands, but that its purpose is to buy, own and sell lands in this State as a means of promoting immigration, then as persuasive that it was not the intention of the Legislature to authorize corporations to be chartered in this State to promote immigration in this manner, we direct your attention to Subdivision 39 of Article 1121. This subdivision specifies the purposes for which corporations may be chartered to engage in business in foreign countries but not within the State of Texas. It declares that corporations may be chartered for "the establishment of land companies to buy, own, sell and convey real estate and minerals, and engage in mining, agriculture and stock raising, etc." A part of the same section reads as follows:

"* * * Provided, that any corporation organized under the provisions of this subdivision shall only own such real estate in this State as may be necessary for its office."

It is clear from this subdivision that the Legislature did not intend to authorize the creation of a corporation which would be authorized to buy, own, sell and convey real estate within the State of Texas; having expressly provided that only corporations whose purpose was to engage in business in a foreign country could be chartered by the laws of the State of Texas to engage in the occupation of buying, selling, owning and conveying land, and having prohibited even this class of corporation from owning land, except such as was necessary for their office building, within the State of Texas, we would not be warranted in concluding that corporations chartered under any other subdivision of a statute would have the right to buy, own, sell and convey real estate within the State of Texas. The statute having authorized the creation of corporations for this purpose by permitting them to transact this character of business only in foreign countries evidences the intent of the Legislature to confine the transacting of this character of business exclusively to corporations operating in a foreign country.

If this was the intention and purpose of the Legislature that purpose would be rendered ineffective were we to construe Subdivision 19 as permitting corporations to do within this State those very things which

Subdivision 39 prohibits them from doing. The various subdivisions of Article 1121 are part and parcel of the same law and concern the same subject, in that they set forth the rights and limitations of private corporations; and being in *pari materia* these subdivisions should be construed so that the total and concurrent meanings of the several prohibitions will be harmonious and not ineffective or absurd. (Black on Interpretation of Laws, Sections 32, 44, 48, 49 and 86.)

It is elementary that statutes should be so construed, if possible, as to give effect to all their clauses and provisions, and that each statute should receive such a construction as will make it harmonize with the existing body of the law. It is always to be presumed that the Legislature does not intend to be inconsistent with itself, and, in cases of doubt and ambiguity, the statute is to be so construed as to be consistent with itself throughout its extent so as to harmonize with other laws relating to the same or kindred matters. Says Mr. Black:

"It is not permissible, if it can reasonably be avoided, to put such a construction upon a law as will raise a conflict between different parts of it, but effect should be given to each and every clause and provision. But when there is no way of reconciling conflicting clauses of a statute, and nothing to indicate which the Legislature regarded as of paramount importance, force should be given to those clauses which would make the statute in harmony with the other legislation on the same subject." (Supra, Section 32.)

Again Mr. Black lays down the rule:

"The mind of the Legislature is presumed to be consistent; and in case of a doubtful or ambiguous expression of its will, such a construction should be adopted as will make all the provisions of the statute consistent with each other and with the pre-existing body of the law. An author must be supposed to be consistent with himself; and therefore, if, in one place, he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed. In this respect, the work of the Legislature is treated in the same manner as that of any other author." (Section 44.)

Mr. Black again states the rule:

"It is presumed that the Legislature intends to impart to its enactments such a meaning as will render them operative and effective, and to prevent persons from eluding or defeating them. Accordingly in case of any doubt or obscurity, the construction will be such as to carry out these objects. In construing a statute, of whatever class it may be, an interpretation must never be adopted which will defeat the very purpose of the act, if it will admit of any other construction. * * * And on the same principle, the construction should not be such as will enable persons to elude the provisions of the law, or escape its consequences, or defeat the objects for which it was ordained, if this can be avoided." (Section 49.)

It seems to us that were we to construe Subdivision 19 as permitting corporations to buy, own, sel land convey real estate within the State of Texas. we would be giving the subdivision a construction entirely in-harmonious with the inhibitions of Subdivision 39 which prohibits the doing of these very things by a corporation within this State, although such corporation is permitted to exercise these powers in a foreign country. It would, nevertheless, make the two subdivisions inconsistent

with each other, and would indicate that the Legislature was of one mind when it passed one of the subdivisions and of an inconsistent and different view when it passed the other subdivision. Such construction would be absurd and, as suggested by the rules referred to, will not be indulged in where consistent and harmonious construction may be given the act.

Again the express delegation of the right to buy, own, sell and convey real estate being confined as to domestic corporations to their operation in foreign countries appears to us to be within itself an exclusion of the exercise of this right by any corporation within the State of Texas, unless expressly authorized so to do by some other subdivision of the statute. It is a familiar rule of construction that the expression of one thing in a statute of granted rights (and all corporate statutes are of this character) indicates that it is not intended that this particular granted right shall be embraced within the general terms of other parts of the statute (Black on Interpretation of Laws, Sec. 64).

It is in this matter now under examination an application of the familiar maxim *expressio unius est exclusio alterium*; that this rule, although not a hard and fast one, is a Procrustean standard to which all statutory language must be made to conform, and is a sound one based upon the rules of logic and the natural workings of the human mind. It means that in a statute the express mention of one thing or consequence is tantamount to an express exclusion of all others.

Black on Interpretation of Laws, supra.

Lewis' Sutherland on Statutory Construction, Sec. 492, 493 and 494. Mr. Sutherland variously states the rule as follows:

"Where authority is given to do a particular thing, and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded. Such affirmative legislation, and any other which introduces a new rule, implies a negative. * * * Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others; there is then a natural inference that its application is not intended to be general. Thus, where a statute enumerates the cases in which a married woman may sue, she is limited to those cases. An act providing for levying the poor rate specified coal mines only, and it was therefore held that no other mines were ratable. An act allowed a house and land to be joined together for the purpose of conferring a qualification; it was held that two different buildings could not be joined for the same purpose. The enumeration of powers granted to national banks in the eighth section of the national bank act is exclusive; being granted the power to loan money on personal security, such banks are precluded from loaning money on real estate mortgages; and mortgages to such banks to secure prior loans being expressly permitted, it was held that none given to secure future loans are valid. * * * An express exemption, or saving excludes others. Where a general rule has been established by statute with exceptions the court will not curtail the former nor add to the latter by implication. Exceptions strengthen the force of a general law, and enumeration weakens it as to things not expressed. Power of eminent domain was granted to a railroad company to enter on the land and appropriate as much of it, except timber, as might be necessary for its purposes. 'Why an exception,' asked Gibson, C. J., 'if the word "land" was not supposed to embrace everything else? The expression of one thing is the exclusion of another; and consequently no further exception was intended.' A statute declared that all offices, posts of profit, professions, trades and occupations, except the occupation of farmers, shall be valued and assessed and subject

to taxation. It was held that the exception of farmers excluded any other, and that the calling of a minister of the gospel was a *profession* and taxable." (Sutherland, *supra*, Sections 492, 493 and 494.)

This rule illustrated by Mr. Sutherland is applicable here. Subdivision 17 of Article 1121, expressly grants to certain classes of corporations the right to subdivide and sell real estate in town lots where the same is located within a certain distance of any town or village. This, of course, may be done within the State of Texas. Subdivision 39 permits the creation of corporations who may do this same character of business as well as deal in the business of subdividing and selling real estate generally in foreign countries. Under this rule of construction invoked above, it must be presumed that the Legislature had exhausted the subject of creating corporations for the subdivision and sale of lands in the second subdivision of Article 1121, just mentioned. It especially pointed out and defined these two classes of corporations and set the limitations of their rights. When the Legislature expressly authorized the creation of a corporation with authority to subdivide and sell real estate in the form of town lots near towns and villages within the State of Texas, and when it expressly authorized the creation of a corporation to engage in the sale and subdivision of real estate in foreign countries, it is to be presumed that the subject of creating corporations for the ownership, sale and subdivision of real estate was exhausted and that the exercise of this right must be limited to those special instances expressly authorized by the statute. What right have we to go further and extend this delegated and granted right to corporations created in Subdivision 19 when the Legislature has not expressly done so? Do not the specific grants under narrow limitations of this right to corporations created under Subdivisions 19 and 39 necessarily mean that the right is denied to all other corporations created under Article 1121? We think it does. Any other construction would render the article and other statutes relative to the land ownership inconsistent and inharmonious.

But, of course, some meaning and purpose must be attached to the provisions of Subdivision 19. The Legislature undoubtedly meant that corporations chartered thereunder should have something to do. We will now enter upon a determination of the meaning of this statute, finding, if we can, that which was intended by the Legislature.

The meaning of the subdivision as shown by incorporating therein the definition of immigration as given in the dictionaries, as we have heretofore seen, would be that corporations may be formed for the purpose of encouraging those who reside in one country or State to quit that country or State with a design to settle elsewhere and take their families with them. But this is somewhat indefinite and does not assist materially in determining whether or not such corporation may become a land owning and vending corporation. We will go back to the history of the statute and of those conditions of which it is a product, and from that source we can light upon its meaning.

The occasion and necessity of a law and the objects and remedy in view are proper subjects of consideration in ascertaining its meaning.

In this instance to define these, we must go back to the point of time when this subdivision became a part of our statute.

Canon vs. Vaughn, 12 Texas, 399.

Walraven vs. National Bank, 96 Texas, 331.

We may likewise examine with the economical conditions of which the law is a manifestation as showing its necessity and purpose and consequent meaning. (Ry. Co. vs. State, 95 Texas, 507.)

In construing laws the courts also consider the facts to which the law was intended to apply: whether the acts of persons or the habits of business.

Higgins vs. Rucker, 47 Texas, 393.

Republic vs. Skidmore, 2 Texas, 1.

El Paso vs. Conklin, 91 Texas, 537.

When we examine the history of this particular act and look to the economical conditions prevailing at its origin, the occasion and necessity out of which it arose and the habits of business of which it is a product, its reason, purpose and object will appear and a plain meaning will be found at once consistent with its literal definition, and all our corporate statutes including those relating to the ownership of lands by corporations.

The Constitution of the State formed and submitted by the constitutional convention of 1869 in Article 11 thereof contained the following provisions:

"Section 1. There shall be a bureau, known as the Bureau of Immigration, which shall have supervision or control of all matters connected with immigration. The head of this bureau shall be styled the 'Superintendent of Immigration.' He shall be appointed by the Governor, by and with the advice and consent of the Senate. He shall hold his office for four years, and until otherwise fixed by law, shall receive an annual compensation of two thousand dollars. He shall have such further powers and duties connected with immigration as may be given by law.

"Sec. 2. The Legislature shall have power to appropriate part of the ordinary revenue of the State for the purpose of promoting and protecting immigration. Such appropriation shall be devoted to defraying the expenses of this bureau, to the support of agencies in foreign seaports, or seaports of the United States, and to the payment in part or in toto of the passage of immigrants from Europe to this State, and their transportation within this State." (Vol. 7, p. 420, Gammel's Laws of Texas.)

Upon an examination of Section 2 of this article of the Constitution of 1869, it will be seen that the Legislature authorized the appropriation of a part of the ordinary revenues of the State for the purpose of *promoting and protecting immigration*. In the same section the manner in which immigration was thus to be *promoted and protected* by the expenditure of revenue is set forth, and, in substance, provides that such expenditure shall be devoted to:

- (a) Defraying the expenses of the Immigration Bureau;
- (b) The support of agencies in foreign seaports;
- (c) The support of agencies in seaports of the U. S.;
- (d) The payment of the passage of immigrants to the State of Texas; and,
- (e) The transportation of immigrants within the State of Texas.

In this manner the makers of the Constitution and the people of the State by its adoption defined what was meant by the phrase "promotion of immigration," as used in Section 2 of Article 11 of the Constitution of 1869. It meant clearly, as there used, those things just above enumerated and specified by us.

On the 23rd day of May, 1871, in compliance with the foregoing constitutional provision, the Legislature of the State passed an act to organize the Bureau of Immigration, which law read as follows:

"Art. 6995. In accordance with Article 11 of the Constitution, there shall be created a bureau of immigration, which shall have the supervision and control of all matters connected with immigration.

"Art. 6996. The Governor, by and with the advice and consent of the Senate, shall appoint a superintendent of immigration, who shall be at the head of said bureau, shall hold his office for four years, and receive an annual compensation of two thousand dollars.

"Art. 6997. It shall be the duty of said superintendent of immigration (1) to take all the steps which he may deem advisable and proper for the encouragement of immigration and for the protection of immigrants, especially in the procurement of their transportation from the coast into the interior; (2) in the guarding them against fraud, chicanery, and speculation; (3) in their temporary location in proper and reasonable places of board and lodging on their arrival; (4) and in making all such regulations and provisions as may be in any manner necessary and conducive to their welfare; (5) and all officers of the State are hereby required and commanded to aid and assist him in the objects aforesaid whenever requested.

"Art. 6998. It shall be the duty of the superintendent to collect and compile from all the sources within his reach such suggestions, references, and statistics as are best calculated to give a correct idea of the material and social condition of our State, and to diffuse correct information of the advantages of this State to immigrants.

"Art. 6999. To this effect he shall from time to time prepare, or cause to be prepared, published, and translated into one or two of the principal languages of Europe, pamphlets (with maps of the State), essays, and articles treating on and describing in a true light the developed and undeveloped agricultural and mineral resources of the State of Texas; the nature of her (its) climate, soil, geographical features and advantages; her (its) manufacturing capacities; her (its) public improvements; and every other local information of interest and utility to the immigrant; such pamphlets to be distributed in such localities wherever, in his opinion, they may be useful and beneficial for the promotion of immigration into our State.

"Art. 7000. Furthermore, it shall be the duty of the superintendent to forward to the Governor, to be by him laid before the Legislature, at each session, a full report of his transactions, stating all the means and channels employed by him in the accomplishment of his mission, the results attained, or expected to be attained, through his efforts, the statistics of immigration and other kindred information calculated to suggest further legislation on the subject.

"Art. 7001. (1) Said superintendent shall have the power to appoint, with the consent of the Governor, an agent or agents for the United States and for Europe, not more than two agents, one for the northern and one for the southern States of the United States, and two for Europe; of the latter, one for Great Britain and one for the continent, for the purpose of aiding or advising immigration. (2) And such agent or agents shall act under the instruction of the superintendent of immigration, who shall also fix and allow their compensation for their services, to be paid out of the fund created as hereafter provided, said salary not to exceed thirty-five hundred dollars per annum. (3) And the Governor (shall) have power to authorize or accredit persons as agents or lecturers, other than the commissioners herein named, so as to represent abroad the claims of Texas as a field for immigrants for each separate State, country or sovereignty: *Provided*, That such agents are not to receive compensation from

the State for such services." (Laws of Texas, Vol. 2, Paschal's Annotated Digest, Article XI, page 1427.)

This law being the enabling act under Article 11 of the Constitution heretofore quoted must be regarded as the legislative interpretation of that provision of the Constitution providing for the promotion and protection of immigration. The acts succinctly set forth those things which might be done for the promotion of immigration, and which collated in the several articles thereof briefly are: (1) the procurement of the transportation of immigrants from the coast to the interior of the State; (2) the guarding of immigrants against fraud, chicanery and speculation; (3) locating the immigrants temporarily in proper and reasonable places of board and lodging on their arrival; (4) the making of such regulations and provisions as may be conducive to the welfare of the immigrants; (5) the collection of the superintendent of immigration from all sources within his reach such suggestions, references and statistics as were best calculated to give a correct idea of the material and social condition of our State and a diffusion of this information to immigrants; (6) the preparation, publication and translation into one or two principal languages of pamphlets, essays and articles treating on and describing in a true light the developed and undeveloped resources of the State, the nature of its climate, its geographical features and manufacturing capacities, its public improvements and every other local information to immigrants; and (7) the act likewise provided that the superintendent of immigration should have power to appoint agents in the United States and in Europe for the purpose of aiding and advising immigration, the compensation of which agents was to be paid out of the State's funds.

The Governor was likewise empowered to accredit persons as agents so as to represent abroad the claims of Texas as a field for immigrants for each separate State, country or sovereignty, provided, that such agents should not receive compensation from the State for such services.

Within a few months after the passage of the foregoing law, to wit: on December 2, 1871, the Legislature passed an Act concerning private corporations which formed the basis of the present corporation laws, and by Subdivision 22 thereof (Article 5935, Sub. 22, Paschal's Digest, supra), corporations were authorized to be created for "the promotion of immigration." This corporate purpose has continued in our laws from that time until the present, but it took its meaning from the economical condition from which it arose and the industrial habits of that age.

In the first place, it is clear from the constitutional provision and the two statutes treating on the subject that the promotion of immigration was a subject uppermost and important in the minds of the public. The well-known facts of history are consonant with the condition assumed from the existence of these laws and the constitutional provision referred to. The war had ended but a short time before and the State was on the road to recovery of the devastation of property and loss of men suffered by the conflict. Business and commerce were beginning to take

on some degree of advancement and progress. The natural resources of the State were unlimited, but additional population, as well as wealth, to develop these resources was one of the needs of the hour. As to additional population the Constitution of 1869, in the article referred to, reflected this need and the Legislature, in the two acts discussed, responded to and sought to remedy this condition. Slavery was at an end, yet plantations were to be tilled, railroads built, public and private improvements of all characters were to be constructed, in the consummation of which labor was necessary, and its obtaining was one of the problems of the citizens and of the Legislature. It was to obtain this population and labor to supply these existing needs that brought about the adoption of the constitutional provision, above referred to, the creation of the Bureau of Immigration and the enactment of a law providing for the creation of corporations to promote immigration. The phrase "promotion of immigration," as used in the corporate statutes, is the same as that used in the Constitution with reference to the same subject, and, unless the context should show otherwise, must be held to mean substantially the same thing. (Black on Interpretation of Laws, Secs. 82 and 83.)

The phrase, therefore, as used in the corporate act of 1871, must be held to take color from the meaning of the same phrase as used in the constitutional provision, and evidently meant the promotion of immigration by establishing agencies to obtain immigrants in Europe and in the United States, and providing various facilities for obtaining immigrants, including the payment of passage and transportation, if need be. This would in fact become a business within itself. The business world responded to the opportunities and necessities of the undeveloped West and immigration agents became a familiar figure and factor in the Southern States and in European countries, whose business was inducing immigrants to this State and to other western States. This is a matter of history reflected in the statutes of the southern States and of the United States. The business of obtaining immigrants became a paying one evidently for those who employed agents for such purpose.

Certain of the southern States felt the inroad of the immigration agent and sought, by various statutes, to safeguard or restrain their operations, and while Texas and the other western States passed laws of further promotion of immigration, the southern States passed laws for its demotion and the United States for its regulation and restraint.

In 1879, the State of Alabama passed an act requiring a person who employed or in any way engaged laborers in certain counties of the State for the purpose of removing said laborers from the State to pay a license tax of \$100. This act was amended in 1880 so as to increase this license to \$250. The act, among other things, provided:

"No persons, whether for himself or for other persons, shall be permitted to employ, engage, contract or in any other way induce laborers to leave the counties of Dallas, Perry * * * Montgomery * * * for the purpose of removing said laborers from this State, without first paying to each of said coun-

ties in which such person shall so operate a license tax of two hundred and fifty dollars, such license tax to be collected as other license taxes, etc." *Joseph vs. Randolph*, 45 Am. Repts., 348.

The Act of 1879 has been preceded by a similar act passed in 1876 (same authority, page 350). On February 16, 1876, the State of Georgia enacted a law requiring any person engaged in hiring laborers for employment beyond the limits of the State to procure a license and pay therefor \$100, and made it penal to carry on the business without such license (59 Ga., 535). This law was still in effect in May, 1900, and persons were being prosecuted thereunder for employing persons in Georgia to go to the State of Florida and there engage in the turpentine trade (*Varner vs. The State*, 36 S. E., 93). In this case immigrant agents were defined to be "persons engaged in hiring laborers in the State to be employed beyond the limits of the State."

Varner vs. The State, 36 S. E., 93.

Williams vs. Fears, 35 S. E., 699.

An immigrant agent as thus defined, meaning the person engaged in hiring laborers in the State of Georgia beyond the limits of that State, was held to be a proper subject for taxation by the Supreme Court of the United States (*Williams vs. Fears*, 35 S. E., 699).

That persons were still engaged in this business as late as 1898 is shown by the general tax act for that year of the State of Georgia. Under the provisions of that act each immigrant agent was taxed the sum of \$500 in each county in the State of Georgia in which his business was conducted (179 U. S., 272).

The Supreme Court of the United States, speaking through Chief Justice Fuller, with reference to the position of immigrant agent, as above referred to and defined, in speaking directly with reference to the extent and importance of that subject, said:

"It would seem, moreover, that the business itself is of such a nature and importance as to justify the exercise of the police power in its regulation. We are not dealing with single instances, but with a general business, and it is easy to see that if that business is not subject to regulation, the citizen may be exposed to misfortunes from which he might otherwise be legitimately protected." 179 U. S., 275.

As late as 1905, the State of Alabama was enforcing its laws against immigration agents (*Kendrick vs. State*, 39 So., 203).

In 1891, the Legislature of the State of North Carolina passed an act imposing a license fee of \$1000 for the occupation of an immigrant agent, which act, however, the Supreme Court of that State held unconstitutional because of the excessive amount of the license fee. In this act the failure to obtain this license by one engaged in the occupation of immigrant agent was made a criminal offense, punishable by fine of not less than five hundred dollars nor more than five thousand dollars, or by imprisonment in the county jail not less than four months, or confinement in the State prison not exceeding two years (*State vs. Moore*, 22 L. R. A., 472).

In presenting the case to the court, Mr. Junius Davis, attorney for the appellee Moore, stated :

"The reason of the act is public history. For it is notorious that its openly avowed purpose was to prevent negro laborers from leaving the State. It is a bold and patent attempt to accomplish an unlawful object in an alleged lawful way." 22 L. R. A., 272.

In discussing the case at the time, the Chief Justice who wrote the opinion made some remarks which showed that the court took judicial knowledge of the existence of the business of immigration agents in the State of North Carolina. He said :

"While the probable harm and inconvenience of immigration. to the public, may not be averted by such legislation, it is of the greatest importance to all of the citizens of the State that the inexperienced and artless laborer may not be imposed upon by the false representations and other fraudulent practices of an emigrant agent; and it is one of the highest duties imposed upon the lawmakers to prevent such abuses by prescribing rigid and appropriate regulations, under which the said occupation can alone be followed. Regulations of this nature may be made in a variety of ways, but that which is most commonly adopted is the requirement of a license fee, which is exacted for the purpose of defraying the probable expenses of ascertaining the moral and other qualifications of the proposed licensee, and the proper inspection or other necessary police supervision under which the particular business is to be conducted. 22 L. R. A., 475.

In 1898, the Legislature of South Carolina passed an act to prohibit immigrant agents from plying their vocation within that State without obtaining a license therefor "and for other purposes." This act provided, in substance, that no person should carry on the business of an immigrant agent in that State without first obtaining a license therefor from the State Treasurer, which license should be given for one year and obtainable upon the payment by such agent to the State Treasurer of \$500 for each county in which he operates or solicits immigrants. Immigrant agent was defined in the act as follows :

"A person engaged in the business of hiring laborers and soliciting immigrants to be employed beyond the limits of the State."

The penalties prescribed for a failure to obtain the license and yet engage in the business was the same as prescribed in the North Carolina act. The Act of 1898 was evidently an amendment of a pre-existing law, as Section 5 of the bill provided for the repeal of all inconsistent acts, but this matter is not discussed fully in the opinion from which we gathered the foregoing information (State vs. Napier, 41 S. E., 13 et seq.).

The business and occupation of immigration agents became of such importance and the abuses growing out of it developed such a character that the United States Congress felt impelled to pass "The Contract Labor Law," and on February 26, 1885, passed a law entitled "An Act to prohibit importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, etc." The main provisions of the act are (1) that the prepayment of transportation or the assistance or encouragement of the migration of aliens or

foreigners under contracts to labor in the United States is unlawful; (2) that such contracts made previous to their migration are void; (3) that every person or corporation guilty of unlawfully assisting or encouraging the migration of such laborers shall be subject to a penalty and (4) that the master of any vessel knowingly bringing such laborers is deemed guilty of a misdemeanor.

This law since its passage has been supplemented by several subsequent enactments, among others, one making it an offense to encourage migration by circulating in foreign countries advertisements containing promises of employment, and forbidding owners of vessels, either directly or by their agents, to solicit immigration, except by ordinary commercial advertising. (7th Am. and Eng. Ency. of Law, p. 83.)

It is noted that the inhibitions of this statute apply to corporations as well as individuals from which circumstances we must conclude corporations were following the business inhibited as well as individuals.

Previous to the passage of the Act of 1885, it had become the practice for large capitalists in the United States to contract with their agents abroad for the shipment of great numbers of an ignorant, servile class of foreign laborers, under contract by which the employer agreed upon the one hand to prepay their passage, while on the other hand the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market, and to reduce other laborers engaged in like occupations to the level of the assisted immigrant. This evil finally became so flagrant that the "Contract Labor Law," was, under the influence of the trade-unions and labor associations, introduced into Congress and passed, with the design of protecting the interests of the laboring class; of raising the standard of foreign immigrants; and of discontinuing the migration of those who had not sufficient means to pay for their own passage (7th Am. and Eng. Ency. of Law, p. 84).

A very good history of this subject is also found in the cases of *In re Ellis* and *In re Charalambis*, 124 Fed. Rep., p. 637.

The authorities cited and the statutes referred to are merely in support of the matters of history stated by us, that the promotion of immigration beginning about the time of the passage of our statute providing for the creation of a Bureau of Immigration and authorizing the chartering of corporations for the promotion of immigration became an existing fact, a business condition and an occupation to be controlled and regulated by law. But at no time was the subdivision and sale of real estate an incident to the business. The immigrant was a *laborer* on the soil and not its *purchaser*, and was sought by immigration agents not to *sell* lands to but to *labor* on lands or works of others.

The business of the immigration agent was to supply those who desired laborers with the same for a compensation. It was out of these conditions that the statute in question arose, and those who desired then to go into the business of supplying laborers to other States and other countries to those desiring such immigrants could incorporate and engage in that business for pay, and they may yet do so. This was

the clear purpose of the law, plain enough, we think, for the history of the legislation as well as the common history of the country.

This conclusion is borne out by the history of other laws. The Legislature, as a part of the Act of 1871 and as a part of the same article of the statute which authorized the creation of corporations for the promotion of immigration, in Section 7 thereof authorized the chartering of corporations for "the purchase, location and subdivision of land, and the sale and conveyance of same in lots and subdivisions, or otherwise." (Vol. 2, Paschal's Annotated Digest, Laws of Texas, Art. 5935, p. 1215.)

Would the Legislature have incorporated this subdivision in the article if the same thing could be done under Subdivision 22, providing for the chartering of corporations to promote immigration? We think not. As heretofore suggested, we must presume that the Legislature did not intend a useless or foolish thing. Evidently, authority to purchase, subdivide and sell lands in lots, subdivisions or otherwise was not included either as an implied or expressed power in the terms "promotion of immigration," or else it would have been necessary to have made provision for corporations with this authority in a separate subdivision of the act.

Subdivision 7 of the Act of 1871 was carried into and became a part of the Revised Statutes of 1879. The Nineteenth Legislature, however, in 1885, amended the subdivision just quoted, so that it then read:

"For the purchase, subdivision and sale of lands in cities, towns and villages,"

eliminating from the subdivision as enacted in 1871 and as carried forward into the statutes in 1889, that part of the same granting corporations the privilege of purchasing, locating, subdividing, selling and conveying lands in lots, subdivisions or otherwise generally. (9 Gammel's Laws of Texas, 679.)

When the Twentieth Legislature met in 1887, it amended our corporation laws and left out altogether the subdivision just referred to relating to the purchase, sale and subdivision of lands by corporations (9th Gammel's Laws of Texas, p. 838). But Subdivision 19, providing for the creation of corporations to promote immigration, was carried through all the amendments as a part of the law and yet remained so. These several legislative acts clearly show the growing antipathy in the public mind to corporations owning, selling and dividing lands, resulting first, in limiting the exercise of these powers to lands within cities and towns, and finally abolishing the right altogether.

It is hardly reasonable to suppose that if this character of business could be conducted under the provisions of Subdivision 19, providing for the organization of corporations to promote immigration, that the Legislature would have been so careful to limit and then finally annul the statutory authority for the creation of corporations to engage in this express and particular business. The rising tide of opposition to corporate ownership of land resulted finally in the Acts of 1893 and 1897, which we have heretofore quoted in this opinion, and construing the

whole together, we are firmly convinced that corporations whose business is the purchase, subdivision and sale of real estate can not be created under the provisions of Subdivision 19 of Article 1121, authorizing the chartering of corporations for the promotion of immigration.

Article 1177, referred to in the brief filed by the attorneys for the incorporators of the proposed corporation, providing "no private corporation heretofore or hereafter chartered or created whose main purpose of business is the acquisition or ownership of land by purchase, lease or otherwise shall hereafter be permitted to acquire any land within this State by purchase, lease or otherwise," is entirely applicable to this proposed corporation. The article refers clearly to corporations whose main purpose is dealing in lands, and that is the main purpose of this proposed corporation, for, as stated in the brief referred to, "it is manifest that the main purpose of the business of the proposed corporation is the sale of lands." The brief goes further and states that the ownership of lands is not the main purpose of the corporation but that the acquisition thereof is merely an incident to the main purpose of selling land. We are at a loss to understand how the corporation can sell the lands without acquiring and owning them, and such ownership and acquisition would be just as much a part of its business as a sale of the lands, because manifestly nobody would care to acquire lands or own lands merely for the pleasure of acquiring and owning the same; they must acquire them either for sale or for use in some other line of business.

Our attention has been directed to the case of Colorado Springs Co. vs. American Pub. Co., 97 Fed., 345. The case does not appear to us to be decisive of the question here at issue. The statutes of Colorado, under which the case arose, expressly provided that corporations could aid, encourage and induce immigration into the territory by dealing in lands, but our statutes make no such provision, and its history, taken in connection with the general policy of our laws with reference to a corporation's ownership of real estate, clearly shows that it has no such meaning. However, even under the Colorado Act of 1871, some doubt seems to have arisen as to the powers of corporations chartered thereunder, and the Legislature of that State passed, in 1872, an act which ratified and confirmed any territorial laws theretofore enacted, which authorized the formation of corporations for colonization purposes and improvements of lands in connection therewith so that, as a matter of fact, on this score, there was nothing for the Federal court to determine.

The incorporators in this instance, in tendering their charter, state that they are at a loss to know what a corporation to promote immigration would have power to do, unless it may buy lands and sell the same at low prices, on long time, etc. We have already answered this question. Such corporation would have authority and power to engage in the business of immigrant agents, as that term has been defined heretofore, that is, of employing immigrants for all persons, firms and corporations who desire labor brought to them from other States or from foreign countries. This business was clearly within the contemplation

of the Legislature at the time of the enactment of the law and one yet being engaged in generally throughout the country.

You are advised therefore that, inasmuch as the corporate purpose of this corporation is not sufficiently stated in its charter, and inasmuch as its real purpose is the ownership, subdivision and sale of real estate, and inasmuch as the real estate shown to be paid in as a part of its capital stock is not such property as is capable of being used for the lawful purposes of the corporation, you should decline to approve and file the charter.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

OPINIONS CONSTRUING EMPLOYEES' COMPENSATION ACT.

**EMPLOYEES COMPENSATION LAW—INDUSTRIAL ACCIDENT BOARD—
COMPENSATION—MEDICAL AID.**

Chap. 179, Part 1, Sec. 7, Acts 33rd Legislature.

Section 7, Part 1, Chap. 179, Acts Thirty-third Legislature means that the Texas Employer's Insurance Association is to furnish medical aid, hospital service and medicine for one week after the accident, and that after the expiration of one week the injured employees must pay their expenses.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, SEPTEMBER 3, 1913.

The Industrial Accident Board, Capitol.

GENTLEMEN: We are in receipt of a letter from Messrs. Hiegel and Ryan of Galveston, Texas, which is in substance as follows:

"Section 7 of Part 1 of the compensation act provides that during the first week of the injury the Association shall furnish reasonable medical aid, hospital service and medicines when needed. Please advise if this means that the Association will cover such expenses for the first week *only* and that the employer is compelled to pay out of his own pocket for subsequent medical expense."

The answer to this question involves a construction of the act, and we desire therefore to make the answer in the form of an opinion to your board, two copies of which we enclose you, one for your files, and one for transmission to Messrs. Hiegel and Ryan, if you desire to transmit the same to them. We assume that these gentlemen wrote this Department because of the fact that your department was not organized until the day this letter was written.

The inquiry, however, should have come through your department in order that the construction of this law as made by your department and this Department should be one and the same. It is for this reason that we enclose you the copy of the opinion instead of mailing it direct, so that should you not agree with us as to the construction here placed on the section referred to we may further discuss the same with you before the opinion is sent out. On the other hand if you do agree with this construction then you may mail the opinion direct to these gentlemen without further reference to us.

Section 7 of the act reads substantially as stated by Messrs. Hiegel and Ryan, but this section must be construed with other sections of the act.

Section 6, of Part One, reads as follows: "No compensation shall be paid under this act for an injury which does not incapacitate the employe for a period of at least one week from earning full wages, but if the incapacity extends beyond one week compensation shall begin on the 8th day after the injury." By construing these two provisions together it is apparent that the purpose, meaning and intent of the

act is that medical aid and hospital service for one week's time is in lieu of any other compensation for that period of time, but that after the expiration of one week then the general compensation provided for by the act begins and after the injured employee begins to draw or becomes entitled to the compensation provided for by the act, then the duty devolves upon him and not upon the association nor the employer to pay for the continuance of medical aid, hospital service and medicines.

Our construction of the act is that the reasonable medical aid, hospital service and medicines provided during the first week of disability due to the accident is in lieu of any other compensation during such period of time, and that after the expiration of one week, at the time the regular compensation provided for by the act begins, then the compensation in the nature of reasonable medical aid, hospital service and medicines ends so far as the association is concerned and that the duty then devolves upon the employee to pay for his own medical aid, hospital service and medicines.

In passing upon this section of this act this Department desires to be understood as expressing no opinion concerning the constitutionality of the law, nor the legal effect of any other of its provisions.

Respectfully submitted,

C. M. CURETON,

First Assistant Attorney General.

EMPLOYEES' COMPENSATION ACT—REPORTS OF ACCIDENTS—CONSTRUCTION OF LAWS.

Acts Thirty-third Legislature, Chapter 179, Part 2, Sec. 7.

1. The provisions of Sec. 7, Part 2, Employees' Compensation Act, apply only to employers who have accepted the benefits of the act by becoming subscribers.

2. The law, being penal in its nature, must be strictly construed.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, SEPTEMBER 6, 1913.

Industrial Accident Board, Capitol.

GENTLEMEN: In your letter of September 5th you direct the attention of this Department to Section 7, Part 2, of the Employees' Compensation Act, passed by the Thirty-third Legislature, and propound to us the following interrogatory:

"Does the proper construction of said act require that all employers of labor should make the reports of injuries of employees prescribed by said section of said act; or is the proper construction thereof that said reports must be made only by employers who are entitled to accept the provisions of said act and to become subscribers thereunder; or is the proper construction of said act that said reports must be made only by such employers as are eligible to accept the provisions of this act and who have in fact become subscribers thereunder?"

The section referred to is shown on pages 433 and 434 of the General

Laws passed by the Regular Session of the Thirty-third Legislature, and reads as follows:

"Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within eight days after the occurrence of an accident resulting in a personal injury to an employee, a report thereof shall be made in writing to the Industrial Accident Board on blanks to be procured from the board for that purpose. Upon the termination of the disability of the injured employee, or if such disability extends beyond a period of sixty days, the employer shall make a supplemental report upon blanks to be procured for that purpose. The said report shall contain the name and nature of the business of the employer, the location of the establishment, the name, age, sex and occupation of the injured employee, and shall state the date and hour of the accident, and the nature and cause of injury, and such other information as the board may require. Any employer failing or refusing to make any such report within the time herein provided, or failing or refusing to give to said board any information demanded by said board relating to any injury to an employee which information is in the possession of, or could have been ascertained by the employer by the use of reasonable diligence shall be liable for and shall pay to the State of Texas a penalty of not more than one thousand (\$1000) dollars for each and every offense, the same to be recovered in a suit to be instituted and prosecuted by the Attorney General, or under his direction, either in the district court of Travis county, or in the county in which any defendant resides at the option of the said Attorney General."

It will be noted from a reading of this section that its provisions are penal in their nature, that is, they impose a penalty of forfeiture for a failure to make the reports provided for in the section, which character of provision makes the law a penal one just as though it were a criminal law, and subject, therefore, to the same rules of construction.

Sutherland on Statutory Construction, Sec. 531.

The law being penal in its nature and intended to regulate the conduct of people of all grades of intelligence within the scope of responsibility, it can be held obligatory only in the sense in which all can and will understand it. Hence every provision in the law is subject to the strictist interpretation. The reason of the rule has been thus stated:

"The rule that penal laws must be construed strictly is not much less old than construction itself. It is founded on the tenderness of the law to the rights of the individual and upon the same principle all power of punishment is vested in the Legislature, not in the judicial department. It is the Legislature, not the court, which is to define a crime and ordain its punishment. * * * Penal law must be construed strictly according to its letter. Nothing is to be regarded as included within them that is not within their letter as well as their spirit; nothing that is not clearly and intelligibly described in the words of the statute as well as manifestly intended by the Legislature. And where a statute of this kind contains such an ambiguity as to leave reasonable doubts of its meaning, where it admits of two constructions, that which operates in favor of life or liberty should be presumed."

Sutherland on Statutory Construction, Sec. 520.

U. S. vs. Wilberger, 5 Wheat., 76.

Ex parte Bailey, 39 Fla., 734.

G., C. & S. F. Ry. Co. vs. Dwyer, 84 Texas, 194.

Austin & N. W. Ry. Co. vs. Slator, 26 S. W., 233.

Missouri, etc., Ry. Co., 100 Texas, 420.

Bearing in mind, therefore, the rules of construction applicable to a law of this character, we will proceed to examine the act and determine, if we may, the intention of the Legislature.

In the first place, it will be observed that Part 2 of the act which prescribes the duties of the Industrial Accident Board in no manner makes the board a rate-making body, and therefore the bare statistics as to accidents and their causes would not be necessary as information for the purpose of enabling the board to make and promulgate insurance rates, as this board is not concerned with the making of insurance rates. The law therefore provides no general reason why industrial accident boards should be apprised of all accidents. The reason, therefore, that the law provides for the character of reports described in Section 7 must be other than that of insurance or rate-making purposes. Upon an examination of the various provisions of Part 2 of the act, it is found that Section 5 as well as other sections prescribed certain duties of the Accident Board, which make it necessary that they shall have descriptive reports of all accidents which occur to those whose employers have accepted the provisions of the act. All questions of the kind and character of liability are to be determined by the Industrial Accident Board in the event they are not settled by the parties directly at interest. A submission of the matters in controversy to the Industrial Board is a prerequisite to the right of a claimant to bring suit for the collection of compensation, and it is very clear that unless the board did have the visitorial authority prescribed in Section 7 enforced by the penalty of forfeiture therein provided for, its ability to justly determine the matters within its jurisdiction would be seriously impaired, if not destroyed. We think, therefore, that the purpose of Section 7 is to enable the Accident Board to determine the facts necessary for the decision of any question which may lawfully come before it, and the penalty therein prescribed is a penalty prescribed against those employers only who have accepted the provisions of the act. This view of the matter is consistent also with other provisions of the act. For example, Section 4 provides that the Accident Board may require any employee claiming to have sustained an injury to submit himself for examination before such board or some one acting under its authority, and that if the employee refuses, then during the period of his refusal he shall be deprived of the right of compensation. It is thus seen that in imposing a penalty upon employees the act is made to apply only to those employees whose employers are members of the association, and the penalty imposed is one directly made for the purpose of enabling the Accident Board to enforce the provisions of the act. The provisions of Section 7 were made evidently for the purpose of enabling the board to determine the facts from the employer as the provisions of Section 4 were made for the purpose of enabling the board to determine the facts from the employee.

The view here expressed is one in line with laws of this character which have been enacted in other States. For example, the Illinois Act specially provides that it shall be the duty of every employer with-

in the provisions of the act to make the character of reports referred to in Section 7 of our own act. The provisions of the same law in Kansas and New Hampshire are to the same effect. Some of the statutes are similar to our own in this respect, but we think that the meaning and intention of all statutes of this kind is that reports are required only from those who have accepted the provisions of the act. This view is further sustained when we consider the history and general purpose of acts of this character.

It will be recalled that the employees' compensation law of New York was held unconstitutional in the case of *Ives vs. South Buffalo Ry. Co.*, 201 N. Y., 271, because it was compulsory on employers. Since that time all subsequent legislative acts adopting the compensation principle, except that of the State of Washington, contain some kind of an option which the employer may exercise or not, as he chooses. Following this principle, some twelve of the States out of thirteen, aside from Texas, which have enacted compensation laws, have made the laws wholly optional with the employers except in so far as the abolition of the common law defenses may be regarded as a compulsory process. The Texas act is wholly optional as to the acceptance of its provisions so far as employers are concerned. It may be said therefore that the governing spirit of the act, or the theme which runs through all of its provisions, is that the act shall be optional as to all employers of labor except those who accept its provisions. The only provisions in the act which are not optional are those abolishing the common law defenses, and it is very clear from the provisions of the act that it was intended that the abolition of the common law defenses should apply to all employers of labor except those specified in Section 2 of Part 1.

Considering the act, therefore, as a whole, and having in mind its general optionary feature, and having in mind the rule of construction applicable to Section 7 of the act and the manifest specific and necessary purpose of Section 7 as an aid to the Accident Board in performing their specified duties, we have reached the conclusion, and so advise you, that "every employer" referred to in Section 7 of the act should be construed to and does mean "every employer who has accepted the provisions of this act," etc., and that therefore the reports required to be made are required only of those employers of labor who have accepted the provisions of the act or who may hereafter accept its provisions.

Yours very truly,

C. M. CURETON,

First Assistant Attorney General.

EMPLOYEES' COMPENSATION ACT.

Chapter 179, Acts Thirty-third Legislature.

1. An employer in order to receive the benefits of the compensation act must either become a member of the Texas Employees Insurance Association or carry a policy in some insurance company which has been licensed under the act.

2. An employer has the right of election to either become a member of the

Employers Insurance Association or to take out a policy with a licensed company.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, SEPTEMBER 8, 1913.

The Industrial Accident Board, Capitol.

GENTLEMEN: In your communication of September 5th, you request the opinion of this Department in answer to the following questions:

1. Is an employer who desires to become or who is a subscriber under the Employees' Compensation Act required to become a member of the "Texas Employers Insurance Association" as provided for in Part 3 of said act;
2. Or to insure as provided in Section 2, Part 4 of the act;
3. Or may he become a subscriber under the act without being a member of the Texas Employers Insurance Association or without taking out an insurance policy;
4. If the employer insures under the provisions of Section 2, Part 4 of this act, must the company in which he insures file with the Commissioner of Banking and Insurance its classification of premiums and have the approval of the Commissioner of Banking and Insurance in order to enable the employer to receive the benefits of a subscriber under the act or to enable the insurance company to have and exercise the rights and powers of the Texas Employers Insurance Association as provided in Part 3 of the act?

We will answer these questions in the order named.

1. Sections 3 and 4 of Part 1 of Chapter 179, Acts of the Thirty-third Legislature, generally known as the Employees' Compensation Act, provide in substance that the employees of a subscriber, as that term is defined under the provisions of the act, shall have no right of action against their employer for damages for personal injuries, but must look alone to the compensation provided for by the act, while employees whose employers are not at the time of injury subscribers, as that term is defined therein, are not permitted to participate in the benefits of the Compensation Act, but are entitled to bring suits and may recover judgments against their employers. It is very clear, therefore, from these two sections of the act, as well as various other provisions that in order for an employer of labor to receive the benefits of this act and receive immunity from liability for personal injuries that he must become a "subscriber" as that term is defined; but he is not required to become a member of the Texas Employers' Insurance Association, nor is he required to take out insurance as provided in Section 2 of Part 4; but he is required to either become a member of the Texas Employers' Insurance Association or to take out the insurance as provided for in Section 2, Part 4, of the act. In other words, in order to become a subscriber and receive the benefits of the act, he has the right of election as to whether he will become a member of the Texas Employers' Insurance Association or take out insurance as provided for in Section 2, Part 4, but he is compelled to do one or the other, and he can not become a subscriber under the act without becoming a member of the Association or without taking out insurance. This is made very clear by the last sentence in Section 1, Part 4 of the act, which reads as follows:

"Subscriber" shall mean any employer who has become a member of the Association by paying a year's premium in advance and received the receipt of the association therefor, provided that the association holds a license issued by the Commissioner of Banking and Insurance as provided for in Part 3, Section 12, of this act."

Just preceding the above sentence in the section referred to is the definition of association as used in the sentence just quoted and throughout the act, the said definition being as follows:

"Association" shall mean the Texas Employees' Insurance Association or any other insurance company authorized under this act to insure the payment of compensation to injured employees or to the beneficiaries of deceased employees."

The statute having thus defined "subscriber" and stated how one may become a subscriber, the statutory method is exclusive and must be followed, and therefore the only way by which an employer may become a subscriber is by becoming a member of the Texas Employers Insurance Association or by taking out an insurance policy issued by some company authorized under this act to insure the payment of compensation to injured employees or to the beneficiaries of deceased employees.

The foregoing answers three of the questions propounded by you.

2. In reply to the other two questions, we beg to say that in order for an employer to become a subscriber and receive the immunity provided for in the compensation act, if he takes out a policy in an insurance company, then such company must theretofore have filed with the Commissioner of Insurance and Banking its classification of premiums and have had the same approved by the Commissioner and have had issued to it a license as provided for in Section 12, Part 3 of this act; that it is absolutely necessary for the insurance company to have filed its classification of premiums, received the approval of the Commissioner thereon and have been issued a license under Section 12 aforesaid to enable such insurance company to have and exercise the rights and powers of the Texas Employers' Insurance Association as provided for in Part 3 of the act, and that an insurance policy issued to an employer by an insurance company which has not been licensed under the provisions of the act would not make such employer a subscriber and would not give to him the immunity of this act, but he would remain liable for damages personally for injuries to his employees.

We answer your two questions directly, therefore, and say that if the employer insures under Section 2, Part 4, of this act, the company in which he insures must file with the Commissioner of Banking and Insurance his classification of premiums and have the same approved by the Commissioner in order to enable the employer to become a subscriber under the act and in order to enable such insurance company to have and exercise the rights and powers of the Texas Employers Insurance Association as provided in Part 3 of the act.

Yours very truly,
C. M. CURETON,
First Assistant Attorney General.

EMPLOYERS' LIABILITY ACT—INSURANCE COMPANIES—RULES OF
CONSTRUCTION.

Section 10, Part 3, and Section 2, Part 4, Chapter 179, Acts Thirty-third Legislature.

1. The provisions of Section 10, Part 3 of the Employees' Compensation Act do not apply to stock insurance companies, and such companies in order to be authorized to write insurance under the act are not required to show they have 50 subscribers with 2000 employees.

2. In construing a law, the intent, when found, must govern, and the letter of the statute will not be followed when it leads away from the true intent and purpose of the Legislature or to conclusions inconsistent with the general purpose of the act.

3. Section 17, Part 3, does not apply to stock insurance companies, but Section 21, of Part 3, does so apply.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, SEPTEMBER 12, 1913.

Hon. W. W. Collier, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: In your letter of September 11th you direct the attention of this Department to Section 2, Part 4, and Section 10, Part 3, of the Employers' Liability Act. Then you make the following request:

"Please advise me if a stock company with a permit to do business in the State and which has complied with all other provisions of the act is entitled to a license under Section 10 of Part 3 without filing a list of subscribers and the affidavit required by said Section 10."

Section 2 of Part 4 reads as follows:

"Any insurance company, which term shall include mutual and reciprocal insurance companies, lawfully transacting a liability or accident business within this State shall have the same right to insure the liability to pay the compensation provided for by Part 1 of this act, and when such company issues a policy conditioned to pay such compensation the holder of such policy shall be regarded as a subscriber so far as practicable under this act; and when such company insures such payment of compensation it shall be subject to the provisions of Parts 1, 2 and 4 and of Sections 10, 17 and 21 of Part 3 of this act, and shall file with the Commissioner of Banking and Insurance its classification of premiums, none of which shall take effect until the Commissioner of Banking and Insurance has approved same as adequate to the risk to which they respectively apply and not greater than charged by the association, and such company may have and exercise all rights and powers conferred by this act on the association, created hereby, but such rights and powers shall not be exercised by a mutual or reciprocal organization unless such organization has at least fifty subscribers who have not less than two thousand employees."

Section 10 of Part 3 provides as follows:

"No policy shall be issued by the association until a list of the subscribers, with the number of employees of each; together with such other information as the Commissioner of Banking and Insurance may require, shall have been filed with the Department of Banking and Insurance, nor until the president and secretary of the association shall have certified under oath that every subscription on the list so filed is genuine and made with an agreement with every subscriber that he will take the policy so subscribed for by him within thirty days of the granting of a license to the association by the Commissioner of Banking and Insurance to issue policies."

In construing this act under consideration it is well enough to bear in mind the general rules laid down by the courts for interpreting laws.

The first thing to consider is the subject of the law and the object intended to be accomplished by it. When the subject-matter is once clearly ascertained and its general intent, the key is found to all its intricacies. General words may be restrained to it and those of narrower import may be expanded to embrace and to effectuate that intent. When the intention can be collected from the statute, words may be modified, altered or supplied so as to obviate any repugnancy or inconsistency with any such intention. (Sutherland on Statutory Construction, Sec. 347.)

The following is an elementary rule:

"If a statute is valid it is to have effect according to the purpose and intent of the lawmaker. The intent is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that intent. 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. *Courts will not follow the letter of the statute when it leads away from the true intent and purpose of the Legislature and to conclusions inconsistent with the general purpose of the act.* The intent is the spirit which gives life to a legislative enactment. In construing statutes the proper course is to start out and follow the true intent of the Legislature and to adopt that sense which harmonizes best with the context and promotes in the fullest manner the apparent policy and object of the Legislature."

Sutherland on Statutory Construction, Section 363.

Edwards vs. Morton, 92 Texas, 152.

St. L. & S. F. Ry. Co. vs. Gracey, 29 S. W., 579.

Manhattan Co. vs. Kaldenberg, 165 N. Y., 1.

It must be borne in mind also that when we come to interpreting the doubtful provisions of the statute that it is our duty to examine the context of the entire act and to construe the doubtful words or phrases with reference to the leading idea or purpose of the whole instrument. A statute is passed as a whole and not in parts or sections, and is animated by one general purpose and intent. Consequently each part of section should be construed in connection with every other part or section so as to produce an harmonious whole. We must bear in mind also that the natural import or literal meaning of the words may be greatly varied to give effect to the fundamental purpose of the statute, and any interpretation or construction placed upon particular words and phrases which would do violence to the general intent of the statute or which would make it unreasonable would be an incorrect construction.

Sutherland on Statutory Construction, Sections 368, 374.

Mr. Sutherland thus lays down the rule:

"The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the Legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction, it is to be adopted to effectuate that intention. The intention prevails over the letter, and the letter, if possible, will be so read as to conform to the spirit of the act. While the intention of the Legislature must be ascertained from the words used to express it, the manifest reason and obvious purpose of the law should not be sacrificed to a literal interpretation of such words. Words or clauses may be enlarged or restricted to effectuate the intention or harmonize them with other express provisions. Where the general language construed in a

broad sense would lead to absurdity it may be restrained. The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense they are intended to be used as they are found in the act."

Sutherland Statutory Construction, Sec. 376.

The various rules to which we have heretofore made reference are very clearly summarized in the case of *Edwards vs. Morton*, 92 Texas, page 152 et seq., in an opinion rendered by Judge Brown, who at that time was associate justice but who is now Chief Justice of the Supreme Court of Texas. In the opinion referred to Judge Brown said:

"The intention of the Legislature in enacting a law is the law itself and must be enforced and ascertained although it may not be consistent with the strict letter of the statute. Courts will not follow the letter of the statute when it leads away from the true intent and purpose of the Legislature and to conclusions inconsistent with the general purpose of the act. * * * If the courts are in all cases to be controlled in their construction of statutes by the mere literal meaning of the words in which they are couched, it might well be admitted that appellant's objection to the evidence was well taken, but such is not the case. To be thus controlled, as has often been held, would be for the courts, in a blind effort to refrain from an interference with the legislative authority by their failure to apply well established rules of construction, to, in fact, abrogate their own power and usurp that of the Legislature, and thus the law would be held directly the contrary of that which the Legislature had in fact intended to enact. While it is for the Legislature to make the law, it is the duty of the courts to try out the right intendment of statutes upon which they are called to pass and by their proper construction to ascertain and enforce them according to their true intent. For it is this intent which constitutes and is in fact the law, and not the mere verbiage used by inadvertance or otherwise by the Legislature to express its intent, and to follow which would pervert that intent."

Edwards vs. Morton, 92 Texas, 154.

Russell vs. Farquehat, 53 Texas, 355.

Bearing in mind the foregoing rules of construction, we will now address ourselves to the question at issue. It is apparent from a consideration of this entire act, and particularly Parts 3 and 4, that the real purpose and intention of the Legislature was that there should be four agencies by which employers could obtain insurance against the liability imposed by this law. These four agencies are as follows, towit:

- (a) The Texas Employers' Insurance Association.
- (b) Mutual insurance companies.
- (c) Reciprocal insurance associations; and
- (d) Old line or stock insurance companies.

When we come to examine these several insurance organizations we find that they fall into two classes, which classification is based upon different methods and principles of maintaining the solvency of the companies and enabling them to fulfill their insurance contracts. The first three companies named, that is to say, the Texas Employers' Insurance Association, the mutual insurance companies and the reciprocal insurance associations, belong to one class, and seek to protect themselves and their policyholders upon the mutual plan or co-operative plan, while the fourth class of companies, to which we refer, that is, to the

stock company, protect themselves and their policy holders by a capital stock and by such surplus or undivided profits as may have been or may be provided by their own charter and by-laws or by the laws of the State under which they operate. As to the last class of companies, that is to say, the stock companies, the State has heretofore provided ample machinery through its insurance department for ascertaining their solvency and for maintaining the ability of such companies to respond to the lawful demands of all their policyholders. It is unnecessary for us to enter upon a review of the laws of this State governing stock insurance companies, because these laws are in a general way familiar to all persons having to do with the subject of insurance, and are of course familiar to you, who have the administration of them. But as to the three first classes of companies the laws of the State heretofore enacted either have no application or are more or less inefficient. For instance, this law now under consideration creates the Texas Employers' Insurance Association and provides within itself the only method which the State has of seeing that the company is capable of fulfilling its contracts; the same thing is substantially true as to the reciprocal concerns, for our reciprocal law is a mere skeleton law and worth very little so far as protecting the policyholders is concerned. Our mutual insurance laws are somewhat better than the reciprocal laws, but it is elementary that the State should go further in regulating the affairs of a mutual company than it goes in regulating the affairs of a stock company. Of course, Section 10 is clearly applicable to the first three classes of companies named, that is, it is applicable to the Texas Employers' Insurance Association, the reciprocal companies and the mutual companies. This is strictly within the letter of the statute and certainly within its spirit and general intent. The intent of the Legislature was that the employer should be protected in whatsoever company he carried his liability insurance. As one of the methods of making safe this insurance the law required that the Texas Employers' Insurance Association or a reciprocal company or a mutual company, before it may issue policies under this act, shall have not less than fifty policyholders who are employers and that insurance shall be carried on not less than two thousand employees. To any one who understands at all the principle of mutual insurance, which is the basic part of each of the three classes of companies named, the reason is apparent why the law required as many as fifty employers and as many as two thousand employees. The purpose of the law was one of safety. The requirement named was for the purpose of causing the company at the time it issues a policy to have a sufficient number of different businesses covered by a policy and a sufficient number of individuals covered to establish a general average and make applicable the elementary laws of insurance. The whole principle of insurance is based on the law of averages, and the Legislature, by Section 9 of Part 3, has determined that fifty different employers and not less than two thousand employees is sufficient to bring into existence the law of averages and to make safe the issuance of policies. We do not care to enter into a long discourse upon

this elementary principle of insurance, but content ourselves with the foregoing suggestions, which will be readily understood by any insurance man or by anyone acquainted with the very basic principles and foundation of every character of insurance, whether it be fire, marine, life, casualty or indemnity insurance. Insurance which is not based on the law of averages becomes a mere gamble and in the end must fail. Therefore the Legislature, in its wisdom, before permitting the mutual companies to issue policies under this act, requires of them that they shall have sufficient business apparent to bring into existence the law of averages and make them safe. These companies which operate on the mutual plan, and the three first companies named by us operate on this plan alone, can only operate safely under the law of averages, because they have neither capital stock nor surplus to fall back upon. It is therefore very clear that the 'Texas Employers' Insurance Association or mutual companies and all reciprocal companies must comply with Sections 9, 10 and 11 of Part 3.

We will now address ourselves to the question as to whether or not the intention of the law is that stock companies shall also comply with Section 10 of Part 3.

We do not think that stock companies are required to comply with Section 10 of Part 3. The reasons which lead us to this conclusion may be briefly summarized as follows:

In the first place, there exists no reason why a stock company should be compelled to have a list of fifty subscribers with not less than two thousand employees or that it should be inhibited from issuing a policy until it has filed a list of its subscribers as provided for in Section 10, because the solvency of a stock company is assured by its capital, its surplus and the various and sundry rules and regulations provided for by the laws of this State for maintaining the solvency of such companies and for maintaining their capital unimpaired. Therefore the safety of the policyholder does not require a compliance with Section 10 of the act. It is all very true that Section 2 of Part 4 declares that any insurance company, which term it is declared shall include mutual and reciprocal companies, shall be subject to the provisions of Section 10, but the last phrase in Section 2 of Part 4 shows that it was not the intention of the Legislature that the ordinary stock company should be compelled to have fifty subscribers with not less than two thousand employees, for mark the language:

"And such company may have and exercise all the rights and powers conferred by this act on the association created hereby, but such rights and powers shall not be exercised by a mutual or reciprocal organization unless such organization has at least fifty subscribers who have not less than two thousand employees."

Why the last phrase, which provides that mutual and reciprocal organizations must have the fifty subscribers with not less than two thousand employees? If it was intended as declared in Section 2 that Section 10 of Part 3 should apply to all companies, then why was it necessary to add the final clause and specifically mention that mutual and reciprocal companies must have the fifty subscribers and two thousand em-

ployees? We think the specific language in Section 2 of Part 4 making the requirement of fifty subscribers and two thousand employees applicable to mutual and reciprocal organizations makes it clear that such a requirement is not made of stock insurance companies; otherwise the language used with reference to reciprocal and mutual organizations was and is without purpose, because but for this language the section would have been broad enough to have included all classes of insurance companies.

We think, therefore, that it was not the intention of the Legislature that Section 10 should apply to stock companies, and we advise you that when a stock company has complied with all other provisions of the act except Section 10 of Part 3 that it is entitled to a license or certificate showing its compliance with the provisions of the act and that it is not required to comply with Section 10 of the act.

Section 2 of Part 4 is poorly drawn and not very clear, but we have given it, we think, a reasonable and practical construction and one which carries into effect the specific purpose of the law.

II.

In a letter accompanying your letter of September 11th, our attention is also directed to that portion of Section 2, Part 4, which declares that Sections 10, 17 and 21 of Part 3 are applicable to any insurance company, etc., as described in Section 2. You desire to know whether or not the sections referred to, that is, Sections 10, 17 and 21 of Part 3, are applicable to stock insurance companies.

We have just answered one of these questions in the first part of this opinion, in which we have held that Section 10, Part 3, has no application to stock insurance companies. We answer the second question and state also that Section 17 of Part 3 has no reference to stock insurance companies. This section reads as follows:

"Any proposed premium, assessment, dividend or distribution of subscribers shall be filed with the Commissioner of Banking and Insurance and shall not take effect until approved by him after such investigation as he may deem proper and necessary."

When you read this Section 17 in connection with the balance of Part 3 it is very clear that Section 17 applies only to the Texas Employers' Insurance Association, to reciprocal companies and to mutual companies, if indeed it applies to the last two character of companies named. It is true that Section 17 requires the filing of any proposed premiums before the same shall take effect, but we are inclined to think that the section as written is made to apply only to the class of companies above referred to and not to stock companies, because Section 2 within itself provides in effect that stock companies must file their classification of premiums with the Commissioner of Insurance and we take it that that provision is a continuing one, so that when any change is made in the premiums of a stock company such classification of premiums must be filed from time to time. If we should be wrong in this, then it is possible that Section 17 would apply to

stock companies in so far as it requires the filing of its schedule of premiums, but no further,

Section 21 of Part 3 in effect provides that if a subscriber is compelled to pay any sum of money to an employee then that such sum may be recovered from the association to which such subscriber belongs. The word "association" in Section 21 means either the Employers' Insurance Association or any other insurance company which has issued to him a liability policy, and therefore said Section 21 is applicable to the Texas Employers' Insurance Association and is also applicable to reciprocal, mutual and stock insurance companies.

III.

Another question submitted in the letter attached to your communication of September 11th relates to Section 7, Part 2, of the act. The question there asked has already been answered by us in an opinion heretofore rendered the Industrial Accident Board, and we enclose you a copy of that opinion in answer to the question there suggested.

Respectfully submitted,

C. M. CURETON,

First Assistant Attorney General

EMPLOYEES' COMPENSATION ACT—INSURANCE COMPANIES—CONTRACTORS AND SUB-CONTRACTORS.

(Chapter 179, Acts Thirty-third Legislature.)

1. Section 3, Part 1, of Chapter 179, of the Employees' Compensation Act is applicable to stock insurance companies writing insurance under this act.

2. Section 5, Part 2, of the act is also applicable to stock insurance companies.

3. If a subscriber under the act enters into a contract with an independent contractor to do any particular work, and the work is of such a character that the employees, if injured, would be entitled to compensation had they been directly employed by the subscriber, then they are entitled to compensation.

4. This is true also even though such employees were employed by a sub-contractor instead or by the independent contractor directly.

5. The independent contractor, however, is not liable under the act for compensation to employees of his sub-contractor.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, SEPTEMBER 23, 1913.

Industrial Accident Board, Capitol.

GENTLEMEN: Some days ago this Department received a letter from Hon. C. B. Hudspeth, attorney for the Maryland Casualty Company, which is a stock company, in which letter he asked, among others, three questions in effect as follows:

"1. Is Section 3, Part 1, of Chapter 179, Acts of the Thirty-third Legislature, applicable to stock insurance companies, doing the class of business provided for in this act?

"2. Is Section 5, Part 2, of the same act, also applicable to stock companies?

"3. According to Section 6, Part 2, of the act under consideration, are contractors liable for employees of sub-contractors, and to what extent?"

Senator Hudspeth asked two other questions, but since we had heretofore written opinions answering his other questions, copies of the opinions were forwarded directly to him.

With reference to the three foregoing questions, we have thought it best that we answer the questions in an opinion addressed to you and then if you approve of the opinion, we will appreciate it if you will forward the extra copy of the same enclosed to Senator C. B. Hudspeth, Mills Building, El Paso, Texas. We take this course in order to keep the rulings of this Department in harmony with the rulings of your Department.

We will now answer the questions suggested in the order above stated:

The first question is, whether or not the provisions of Section 3, Part 1, apply to stock insurance companies engaged in liability insurance?

Our answer to this question is, that Section 3, Part 1, does apply to stock companies. Section 3, in substance, provides that the employees of a "subscriber" shall have no right of action against their employer for damages for personal injuries, and that the representatives and beneficiaries of deceased employees shall have no such right of action for injuries resulting in death, but that such employees and their representatives shall look alone for compensation to the Texas Employees Insurance Association. This section of the act must, of course, be construed with reference to the entire act. By referring to Section 1, Part 4, of the act, we find that the word "association" is defined to mean the Texas Employees Insurance Association, or any other insurance company, authorized under the act to insure the payment of compensation to injured employees or to the beneficiaries of deceased employees, while the term "subscriber" is defined to mean any employee who has become a member of the association by paying a year's premium in advance and received the receipt of the association therefor, provided the association holds a license issued by the Commissioner of Insurance and Banking, etc.

Looking at these two sections, therefore, as well as other provisions of the act, it is apparent that the words "The Texas Employees' Insurance Association," as used in Section 3, means any association which is defined in Section 1, Part 4, to be either the Texas Employees Insurance Association, or any other insurance company authorized under the act to insure the payment of compensation, etc.

The next question is whether or not Section 5 of Part 2, applies to stock companies?

We answer that Section 5 of Part 2 does apply to stock companies and that the word "association," as used in Section 5, means a stock company authorized to insure the payment of compensation, as well as the Texas Employees Insurance Association. This construction is a correct one, as will be seen from the definition of "association," as given in Section 1, Part 4, of the act, which definition has just above been referred to.

The third question is one of greater difficulty. The intent and mean-

ing of Section 6, Part 2 of this act, is very hard to determine. This section reads as follows:

"If a subscriber enters into a contract, written or oral, with an independent contractor to do such subscriber's work, or if a contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contract with the subscriber, and the association would, if such work was executed by employees immediately employed by the subscriber, be liable to pay compensation under this act to such employees, the association shall pay to such employees any compensation which would be payable to them under this act if the independent or sub-contractors were subscribers. The association shall, however, be entitled to recover indemnity from any other persons who would have been liable to such employees independently of this section, and if the association has paid compensation under the terms of this section, it may enforce in the name of the employees, or in its own name, and for its own benefit the liability of such other persons. This section shall not apply to independent or sub-contractors on any contract which is merely auxiliary and incidental to, and is no part of or process in, the trade or business carried on by the subscriber."

Our construction of the section is that it means:

1. That if a subscriber enters into a contract with an independent contractor to do any particular work and the work is of such character that the employees, if injured, would be entitled to compensation had they been directly employed by the subscriber, then the fact that they are employed by the contractor instead of the subscriber would not prevent them from receiving compensation; on the contrary, they would be entitled to compensation under the act. The association, however, would have a right to be indemnified from the contractor in the event the injury to the employees was due to an actionable default or negligence on the part of the contractor.

2. The same rule as to the right of the employees to be compensated would obtain, even though the employees referred to were working for a sub-contractor instead of the contractor; that is to say, if the subscriber lets his work out to an independent contractor, and such independent contractor in turn lets out the work to a sub-contractor and the employees are injured, still they are entitled to compensation; of course, the provision still obtains that in the event the association is compelled to compensate such employees, then the association has the right of action for indemnity against the sub-contractor, where such employees have been injured through his actionable default or negligence. We do not think that the contractor is liable for compensation to the employees of a sub-contractor; we mean to say that the contractor is not liable for compensation under the provision of this act to the employees of his sub-contractor. As a matter of fact, a contractor might be liable to the employees of a sub-contractor for any damages arising from an actionable default or negligence, but such contractor is not liable to such employees under this compensation act.

We can not be sure that this construction of Section 6 is a correct one. Section 6 is a substantial copy of Section 17 of the Massachusetts act (see Boyd on Workmen's Compensation, Sec. 303, page 760), but the Massachusetts section is no clearer than is Section 6. Whoever drew the section originally seemed to have an unusual talent for concealing his meaning, purpose and intention, but the foregoing construction of

this section is the best that we can get out of it, and we submit it to you as our interpretation of that section of the act.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

MUNICIPAL CORPORATIONS—EMPLOYEES' COMPENSATION ACT—CONSTITUTIONAL LAW—RULES OF CONSTRUCTION.

(Chapter 179, Acts Thirty-third Legislature; Revised Statutes, Article 1118; Constitution, Article 11, Section 3.)

1. The Employees' Compensation Act is not applicable to municipal corporations, and municipal corporations can not become "subscribers" under the act.

2. The word "corporation" is a technical word, which has, however, a common meaning, and, therefore, inasmuch as there is nothing in the act to indicate to the contrary, it will be given its common meaning, which is "private corporation."

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, SEPTEMBER 23, 1913.

Industrial Accident Board, Capitol.

GENTLEMEN: In your communication of September 12th you desire this Department to advise you whether or not a municipal corporation can become a subscriber under the Employees' Compensation Act of this State.

In reply to your question, we beg to advise you that a municipal corporation can not become a subscriber under said act.

Section 6, Part 3 of the act, provides that any employer of labor in the State may become a subscriber.

An employer is one who employs; one who uses or engages the services of another. The words "employer" and "employment" are not of the technical language of the law or of any science or pursuit and must be construed according to the context and the approved usage of the language. An employer is one who employs, one who engages or keeps in service.

In re Courtland Manufacturing Co., 45 N. Y. Supp., 630.

State vs. Foster, 37 Ohio, 404.

It is noted from the authorities cited that the meaning of the word "employer" is to be determined according to the context of the act and the approved usage of the language. While it is true that a municipal corporation may employ labor, yet as a matter of fact, according to the general usage of the language, one would hardly say that a municipal corporation was an "employer" of labor in the same sense that one would say that individuals, partnerships and corporations are employers of labor. The emergency clause of this section, which is Section 7 of Part 4, reads as follows:

"There now being no adequate law on the statutes to protect the rights of industrial employees who may be injured in industrial accidents, and the bene-

ficiaries of such employees who may be killed in such accidents, creates an emergency and an imperative public necessity, etc.”

It is thus seen from the emergency clause that the Legislature had in mind a remedy for the evils due to industrial accidents. It can hardly be said that municipal corporations are primarily engaged in industrial enterprise. Their business is rather to administer some portion of the government. Industrial enterprises under our form of government are left exclusively to private enterprises, which manifests itself or exercises its rights through individuals, partnerships, joint stock companies and private corporations. Of course, “industry” or “industrial enterprises” are terms of very broad meaning, but primarily any business or enterprise which may be termed an industrial enterprise, is one which combines labor and capital for the purpose of ultimate gain to those interested directly or indirectly in enterprises. Such is not the purpose of a municipal corporation. The statute has defined “municipal” or public corporations as those which have as their object the government of a portion of the State. (R. S., Art. 1118.) The statute likewise defines “private” corporations by stating that they are such corporations as are engaged in either religious work, charitable or benevolent work, or corporations for profit. And while we think that the act applies to private corporations, yet we do not believe that it has any reference or application to municipal corporations. This view is apparent from a good many sections of the act and we will not attempt to notice but a few of those sections which we think support our view of the matter. We will call attention, however, to Section 7. The last sentence in Section 7 is the penal portion of the same and provides a penalty of one thousand dollars to be recovered by the Attorney General for the failure of any employer, subject to the provisions of the act, to give any information to the Industrial Accident Board which that board may deem necessary in determining the questions before it. It can hardly be imagined that the Legislature would require the Attorney General to bring penalty suits against the municipal corporations of the State for penalties payable to the State for any alleged breach of duty on their part. Such is not the character of remedy for breaches of corporate duty on the part of municipal corporations. It is contrary to the genius of our Constitution and government that a law should be made which provides in effect that the State shall sue a portion of its sovereignty. The municipalities of the State are mere agencies of the State, administering the government, and it is not conceivable that the State would undertake to sue agencies created by itself for the purpose of administering its own affairs.

Municipal corporations are mere agencies of the State for the purpose of administering a portion of the government.

Lander vs. Victoria County, 131 S. W., 823.

City of Victoria vs. Victoria Co., 100 Texas, 451.

Loramie Co. vs. Albany Co. et al., 92 U. S., 312.

Mayor of Baltimore vs. The State, 74 Amer. Dec., 572.

Russell vs. Reed, 27 Penn. St. Rep., 170.

We think the penal provision is persuasive of our construction that the act is not applicable to municipal corporations, which are mere govern-

mental agencies of the State. In a case of a municipal corporation upon which rested the obligation to make reports to the Industrial Accident Board, the usual and proper remedy would be a mandamus either against some officer of the corporation or against its governing body and such undoubtedly would have been the remedy prescribed by the Legislature in the event it had been intended that this act should apply to municipal corporations. When one refers to Sections 2 and 5 of Part 1 of the act, it will be found that employees of persons, firms and corporations are in so many words referred to as either being within the provisions of the act or without the provisions of the act, depending on the reading of the two sections referred to. When reference is made to corporations, unless the context of the act clearly shows that it is intended to include municipal corporations, only private corporations will be considered as within the purview of the act. The word "corporation" is a technical word, but one, however, which has a common use and common meaning, and the rule is words in common use which also have a technical meaning will, in acts intended for general operation, and when not dealing with subjects to which such words in their technical sense apply, be understood primarily in their popular sense.

Sutherland on Statutory Construction, Sec. 395.

The popular meaning of the word "corporation" is private corporation, and unless there should be language used which clearly evidences the intention that the word "corporation" shall embrace municipal corporations as well as private corporations, then the word "corporation" should be confined in its meaning to private corporations.

Cedar Co. vs. Johnson, 50 Mo., 225.

East Oakland T. P. vs. Skinner, 94 U. S., 255.

Commonwealth vs. Beamish, 81 Penn., 389.

The case of East Oakland Township vs. Skinner, cited above, seems to be directly in point. The case arose out of an action on certain coupons clipped from bonds issued by the township of East Oakland, Illinois, in payment of its subscription of \$70,000 to the capital stock of a railroad company. One of the questions at issue was whether or not the township, which was a municipal corporation, had authority under the law to subscribe to the capital stock of the corporation,—the validity of the coupons and the bonds being attacked on the ground that the township at the time had no authority to become a subscriber to the capital stock of the corporation. It was contended, however, that the act of the Legislature authorizing the incorporation of the railroad company conferred this authority upon municipal corporations of the kind and character of the East Oakland township. The fifth section of this act reads as follows:

"Said corporation shall cause books to be opened for subscription to the capital stock thereof, to be divided into shares of fifty dollars each, at such times and places as they may choose, and shall give at least thirty days notice thereof by publication in a newspaper published in the town or city where said books may be opened; and if there be no newspaper published therein, then in the nearest newspaper thereto. *It shall be lawful for all persons of lawful age or for the agent of any corporate body to subscribe any amount to the capital stock of said company.*"

It was upon the authority of this section that the subscription was made and the bonds and coupons issued in payment therefor. The question for determination was: Did this language "the agent of any corporate body" give power to a municipal corporation to subscribe and to issue its bonds as was here done? In passing upon the question, the Supreme Court of the United States, quoting with approval the decision of the Supreme Court of Illinois, said:

"This is the only provision in the charter in reference to subscriptions of either persons or corporations. It confers no power on municipal corporations to subscribe to such stock. The provision manifestly refers to private corporations when it authorizes agents to subscribe. It does not refer to counties, cities, towns or townships and can not be held to embrace them."

The Supreme Court then adds in its own language:

"We think the authority to the agent of any corporate body to subscribe for stock in the railroad company was not intended to include and did not include municipal corporations. It would provide a money making trading or business corporation. It did not intend to give authority to any township, however remote from the road, to become one of its stockholders."

It is apparent, we think, from the authorities cited, that the use of the word "corporation" in an act of this character is to be given its usual and ordinary meaning, which is "private corporation." Again, and in this connection it is well enough to consider that this act in its inception, either abolishes or modifies the common law defenses, and we take it that the remedy provided is intended mainly to compensate the employers of labor, whose defenses are thus modified or abolished as well as to provide a remedy for employees whose right to bring suits is likewise abolished or modified. When we come to consider the question of its applicability to municipal corporations, we are confronted at the outset with the fact that municipal corporations in this State are not made liable by statute or by the Constitution for torts and injuries due to their default or negligence; but that such liability as exists against them arises under the common law and that even under the common law it is very limited indeed; that is to say, that municipal corporations are not liable for any act or thing done by them or neglected to be done by them, in the administration of their division of the government proper. The case of the City of Galveston vs. Ponninsky, 62 Texas, 118, is one of the most thorough cases on the question in this State or elsewhere, and without undertaking to analyze this case, or to quote its holdings to you, it is sufficient to say that the liability of municipal corporations under the law is much more restricted than that of private corporations. It is a general rule that counties or other municipal corporations which are created and restricted in the exercise of their powers to those powers pertaining solely to the administration of the general laws and the policy of the State, are mere agencies of the State and not liable to be sued for the exercise of such powers, unless the right to sue is expressly given by statute, which is not the case in this State, but, of course, there are instances where cities chartered by special act of the Legislature and existing

more for the benefit of the incorporators, which is to say, the citizens of the place, than for the benefit of the State generally, may be held liable for certain instances of negligence, but not in all cases. We only refer to the law regarding municipal corporations to show that they are not embraced within the class to which the common law defenses apply as completely as are private corporations, and that therefore the act would not operate as completely for their relief as it does in the case of private corporations.

City of Galveston vs. Posnainsky, 62 Texas, 118, et seq.

Dillon on Municipal Corporations, Secs. 1625, 1626, 1634, 1638.

Heigle vs. Wichita County, 84 Texas, 392.

Again, it will be noted when we come to review the history of this class of legislation, that the usual practice of legislative bodies, both in this country and in foreign countries, has been to specially include municipal corporations when it was desired that the act should cover municipal corporations. The compensation acts of Austria, Belgium, British Columbia, Cape of Good Hope, Denmark, Finland, France, Germany, Great Britain, Hungary, Italy, Luxemburg, Netherlands, New Zealand, Norway, Queensland, Russia, South Australia, Sweden, Spain, and West Australia, all provide that the acts shall be applicable to government employees or to the employees of municipal corporations.

Boyd on Workmen's Compensation, pp. 207 to 257.

The acts of the States of Washington, Wisconsin, California, Michigan and possibly some of the other States, expressly provide that employees of municipal corporations shall be protected by the act, but the Massachusetts Act, of which the Texas Act is a substantial copy, does not so provide. The point is, that in the foreign countries and in the acts of a good many of the States, express provision is made for taking care of the employees of municipal corporations, and that the Texas Act was deliberately framed from the Massachusetts Act which did not provide for the taking care of employees of municipal corporations. We think this persuasive that our proposition that the Texas Act does not apply to municipal corporations is a correct one. In other words, the Legislature having before it the acts of the various countries of the world and the various States of the Union deliberately omitted a provision which is contained in most of them, making the act applicable to employees of municipal corporations. The omission, it appears to us, is one that is significant and worthy of consideration. It must be borne in mind also that this employees' compensation act is somewhat at variance with the original principles of our government, and that it ought not to be construed to extend to any class of people or any class of employers, unless its terms clearly include such a class. It is a matter of historical knowledge that Germany was the pioneer in the realm workmen's insurance legislation and that the laws preceding the law under consideration here, are probably a direct outgrowth of the socialistic philosophy of Fichte, Hegel, Lasalle and others.

Boyd on Workmen's Compensation, Secs. 21 to 22, 23 and 24.

It is unnecessary to go into a history of the origin of the principle

which is the basis of this measure. Suffice it to say, that its basis is that it is the duty of the government to protect the weak against the strong; that it rests largely upon a conception of society which is sharply opposed to what is loosely called "individualism" or *Laissez faire*. Our government, of course, was based upon the original proposition that the business of the government was to umpire the game and see that every player gets a square deal. We are not undertaking to say which of these two principles is the better. All that we are undertaking to say is that the government having been based originally upon the second one named, we think it a proper rule that no law putting into effect the ideas of the former should be extended any further than the letter of the law necessarily implies. Again, and in this connection, it will be noted that Section 1 of Part 3, declares: "The Texas Employers' Insurance Association is hereby created a body corporate with the powers provided in this act and with all the general corporate powers incident thereto." Then follows the various provisions relative to the organization and management of the Texas Employers Insurance Association. It clearly shows that the Texas Employers Insurance Association in its final analysis and considering the result, is a mere mutual employers liability insurance company, in which each subscriber becomes a member entitled to exercise all the authority of a stockholder in the corporation and entitled to such part of the dividends as may be declared and awarded to him. For instance, Section 14 of Part 3, says:

"The association may in its by-laws and policies fix the mutual contingent liability of the subscribers for the payment of losses and expenses not provided for by its cash fund, but such contingent liability of a subscriber shall not be less than an amount equal to and in addition to the cash premium."

Section 15 clearly contemplates that the Employers Insurance Association may accumulate a cash reserve fund, which reserve fund shall be used for the payment of the policies issued by it.

Section 16, as well as other sections, provides for the government of corporations by boards of directors, etc.

In fact when you consider it as a whole, it will become apparent that the Texas Employers Insurance Association is a corporation engaged in the insurance business on the mutual plan, and that therefore any one who becomes a subscriber in fact becomes a member or stockholder in such mutual insurance company. We call attention to this because Section 3 of Article 11 of the Constitution of this State provides:

"No county, city or other municipal corporation shall hereafter become a subscriber to the capital stock of any private corporation or association or make any appropriation or donation to the same, or in any wise loan its credit, etc."

Upon a consideration of this constitutional provision it is at once apparent that it is extremely doubtful whether or not, under the Constitution of this State, the Legislature could empower a municipal corporation to become a member of, or a subscriber to, The Texas Employers Insurance Association, because, in order to become a subscriber

or member of that association, one must become a subscriber to its reserve or cash fund held for the payment of liabilities, which is of the same nature and for the same use as capital stock. We do not say absolutely that a municipal corporation is inhibited from becoming a subscriber by this constitutional provision, because it is not now necessary to determine that, but we do say that the question is of such a doubtful character, that we do not believe it was the intention of the Legislature to attempt to make this law applicable to municipal corporations. It may be that it was because of this constitutional provision that the Legislature deliberately left without the terms and provisions of this law municipal corporations.

Upon a consideration, therefore, of the whole law and viewing it from every standpoint, this Department is of the opinion that Chapter 179, Acts of the Thirty-third Legislature, has no application whatever to municipal corporations created under and existing by virtue of the laws of the State of Texas.

Yours very truly,
C. M. CURETON,
First Assistant Attorney General.

OPINIONS RELATING TO LABOR LAWS.

EIGHT-HOUR LAW—HOUSE BILL No. 98 (32ND LEGISLATURE) AND
HOUSE BILL No. 683 (33RD LEGISLATURE)—OLD AND NEW
LAWS, RESPECTIVELY—CONSTRUCTION.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 11, 1913.

Hon. J. A. Starling, Commissioner of Labor, Capitol.

DEAR SIR: We have your communication of recent date enclosing a letter from Mr. Chas. Murphy, an attorney, in charge of certain prosecutions for violation of the eight-hour law, wherein he requests an opinion from this Department as to the effect upon pending cases of that portion of House Bill No. 98 passed by the recent Legislature, wherein the former eight-hour law is expressly repealed.

Article 16 of the Penal Code of this State provides that the repealing of a law, where the repealing statute substitutes no other penalty, will exempt from punishment all persons who may have offended against the provisions of such repealing law, unless it be otherwise declared in the repealing statute.

Article 15 of the Penal Code provides for a modification of the penalty by a new law, and Article 17 provides that, when by the repealing statute a new penalty is substituted for an offense punishable under the act repealed, such repealing statute shall not exempt from punishment a person who has offended against the repealed law while it was in force.

Article 18 of the Penal Code provides that no change in the definition of the offense shall effect offenses already committed, but all offenders against the first law shall be tried, and their guilt or innocence determined in accordance with the provisions thereof.

From a consideration of these articles of the Penal Code, it follows that if the effect of the new law is simply to modify the punishment, or to substitute a new penalty for the same act denounced as penal, by the first law, or if the new law has simply changed the definition of the offense denounced by the old law without in its real effect repealing the old law, then pending cases should be prosecuted to final judgment. On the other hand, and if the effect of the new law is not simply to modify or substitute a new penalty for the same act denounced by the first law, or if the new act simply changes the definition of the offense denounced by the first law without really repealing the old law, then in that event, under Article 16 of the Penal Code, it must be held that pending prosecutions are at an end and pending cases must be dismissed.

Section 4 of House Bill No. 683 (the new law) expressly repeals the former eight-hour statute.

The punishment provided in the old law is denounced against any individual, partnership, superintendent, foreman, engineer, or other person having the direction, supervision, charge, care, management, or control of any public works undertaken by or for account or on behalf and benefit of the State of Texas, or any subdivision thereof, or any municipal corporation, as well as against any contractor. It will be noted that this penalty is directed against the employees of the contractor, or of the State, having the work done. The penalty provided is a fine not to exceed \$500 for each violation, and each day is made a separate offense.

Now, by Section 2 of the new law it is made unlawful for any corporation, person or association of persons, *having a contract* with the State, or any political subdivision, to require or permit its laborers to work more than eight hours per day, except in emergencies, and the penalty provided for is a fine of not less than \$50 nor more than \$1000, or by imprisonment not to exceed six months, or by both such fine and imprisonment—each day constituting a separate offense. It will be noted also that by Section 1, the specific character of work to which the bill applies is stated, while, under the old law, this is not done. Also, Section 2 requires that all contracts made by, on or in behalf of the State, or any subdivision, for the performance of any work should be determined and considered as made upon the basis of eight hours constituting a day's work.

In our opinion the new law does not define the same offense as was defined by the old law, neither does it simply change the definition of the offense dealt with in the two laws, but that the offense denounced by the new law is made up of different elements and acts from that included in the definition of the offense denounced by the old statute, for the same reason, in our opinion, the new statute does not simply substitute a new penalty, nor does it constitute a modification of the penalty—for this would presuppose that the offense dealt with by the two statutes would be in substance the same. This requires the conclusion that the legislative intent was as stated in the bill to repeal the offense as denounced in the old statute and the penalty therefor, and to write an entirely new law upon the subject, both as to the ingredients of the offense and the punishment therefor, and having expressly declared the repeal of the old law, and not having made provisions for the prosecution of pending cases under Article 16 of the Penal Code; those who may have offended against the provisions of the old law are henceforth exempt from punishment therefor.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

EIGHT HOUR LAW.

Firemen and engineer at city water plant do not come within the provisions of the law.

Laws: House Bill No. 683, Thirty-third Legislature.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JUNE 6, 1913

Hon. John W. Culp, City Attorney, Gainesville, Texas.

DEAR SIR: This Department is in receipt of your communication in which you state that the city of Gainesville owns and operates its own water plant. There are three men employed at the plant, two firemen and the chief engineer. The firemen work twelve hours each, and the engineer superintends and is on hand whenever necessary.

You wish to know if what is known as the "Eight Hour Law" enacted by the Thirty-third Legislature would apply to the above state of facts, making necessary the employment of three firemen to work eight hours each, and if the engineer could continue to work as he does now, or would it be necessary for the city to employ three engineers.

Replying thereto, we beg to call your attention to Section 1 of the Eight Hour Law, as follows:

"Eight hours shall constitute a day's work for all laborers, workmen or mechanics, now employed or who may hereafter be employed by or on behalf of the State of Texas, or by or on behalf of any county, municipality, or political subdivision of the State, county or municipality in any one calendar day, where such employment, contract or work is for the purpose of constructing, repairing or improving buildings, bridges, roads, highways, streams, levees or other work of a similar character, requiring the service of laborers, workmen or mechanics."

It will be noted from a reading of the above section that eight hours shall constitute a days work for all laborers, workmen or mechanics now employed by any municipality where such employment or work is for the purpose of constructing, repairing, or improving buildings, bridges, roads, highways, streams, levees or other work of similar character. The employment of a fireman at your municipal water plant could not be construed to be work "of a similar character" as those classes of work enumerated by Section 1, above quoted.

Section 2 of the law provides against contractors with the State or political subdivision thereof, requiring or permitting laborers from working more than eight hours per calendar day in doing such work, except in cases of emergency, and does not apply to employment by the State, county or municipality, and therefore would not apply in the present case.

We are therefore of the opinion and so advise you, that neither the firemen at your municipal water plant, nor the engineer thereof, come within the meaning of the law, and it would not be a violation of the law on the part of the manager of the water plant to require the firemen

to work twelve hours per day, and the engineer to be on hand whenever necessary.

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

EIGHT HOUR LAW.

The eight-hour law can not be evaded by entering into a contract with laborers to work ten hours a day, and receive pay by the hour. Chapter 68, Acts of the Thirty-third Legislature.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MAY 13, 1914.

Hon. Merton L. Harris, County Attorney, Comanche, Texas.

DEAR SIR: The Department is in receipt of your communication of the 9th instant, reading as follows:

"Please give me your opinion as to whether the late law making it a violation for a county to work hands over eight hours a day can be evaded by contracting with the work hands by the hour. The hands in this county seem to want to put in ten hours a day and receive their pay by the hour. State whether this can be lawfully done."

Replying thereto beg to say that Chapter 68 of the Acts of the Thirty-third Legislature, known as "the Eight-Hour Law," Section 1, provides as follows:

"Eight hours shall constitute a day's work for all laborers, workmen or mechanics now employed or who may hereafter be employed by or on behalf of the State of Texas, or by or on behalf of any county, municipality, or political subdivision of the State, county or municipality in any one calendar day, where such employment, contract or work is for the purpose of constructing, repairing or improving buildings, bridges, roads, highways, streams, levees, or other work of a similar character, requiring the service of laborers, workmen or mechanics."

We think the suggestion made by you would be an evasion of this law, and any contract made along the lines suggested by you would be in violation of the law and the parties entering into the same would be subject to the penalty prescribed in Section 3 of the act.

The only instance wherein more than eight hours per day is allowed is that set out in Section 2, which is as follows:

"* * * except in case of emergency, which may arise in times of war, or in cases where it may become necessary to work more than eight hours per calendar day for the protection of property, human life or the necessity of housing inmates of public institutions in case of fire or destruction by the elements."

The case presented by you is clearly not within this exception, and we have to advise you, therefore, that in our opinion your county authorities could not lawfully contract with the county hands to put in ten hours per day and receive their pay by the hour, and that such contract would be a violation of this law.

At first blush we are prone to look askance upon legislation of this character imputing to it on an abridgment of the right of contract, an infringement upon the personal liberty of the citizen, and tending to check the laudable thrift and energy of the people, but such misgivings as we may have along those lines are instantly set at rest by a perusal of the opinion of the Supreme Court of the United States by Mr. Justice Harlan in *Atkin vs. Kansas*, 191 U. S., 207, wherein the principles upon which the law is upheld are so clearly and undisputably set forth. He says:

"We have no occasion here to consider these questions, or to determine upon which side is the sounder reason; for, whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the State to declare that no one undertaking work for it or for one of its municipal agencies, should permit or require an employee on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them. It can not be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the State. On the contrary, it belongs to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such conditions the courts have no concern.

"If it be contended to be the right of every one to dispose of his labor upon such terms as he deems best—as undoubtedly it is—and that to make it a criminal offense for a contractor for public work to permit or require his employee to perform labor upon that work in excess of eight hours each day, is in derogation of the liberty both of employees and employer, it is sufficient to answer that no employee is entitled, of absolute right and as a part of his liberty, to perform labor for the State; and no contractor for public work can excuse a violation of his agreement with the State by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do.

"So, also, if it be said that a statute like the one before us is mischievous in its tendencies, the answer is that the responsibility therefor rests upon legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution. It can not be affirmed of the statute of Kansas that it is plainly inconsistent with that instrument; indeed its constitutionality is beyond all question.

"* * * We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the State and its municipal agents acting by its authority, it is for the State to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not, by its regulations, infringe the person's rights of others; and that has not been done."

The statute of Kansas under discussion was substantially the same as the Texas statute.

You are therefore advised that, in the opinion of this Department, the law is a valid one and can not be evaded.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

EIGHT HOUR LAW DOES NOT APPLY TO FARM LABORERS ON STATE
EXPERIMENTAL FARMS.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JUNE 17, 1913.

Hon. Will H. Mayes, Lieutenant-Governor, Austin, Texas.

DEAR SIR: Replying to your verbal request for an opinion from this Department as to whether or not the eight hour law enacted by the Thirty-third Legislature would apply to the working of farm hands on the State experimental farms, we beg to say that in the opinion of this Department such law is not applicable to work of that character and does not inhibit the working of farm hands on such farms for more than eight hours in any one day.

Section 1 of said law reads as follows:

"Eight hours shall constitute a day's work for all laborers, workmen or mechanics now employed or who may hereafter be employed by or on behalf of the State of Texas, or by or on behalf of any county, municipality, or political subdivision of the State, county or municipality in any one calendar day, where such employment, contract or work is for the purpose of constructing, repairing or improving buildings, bridges, roads, highways, streams, levees, or other work of a similar character, requiring the service of laborers, workmen or mechanics."

It will readily be seen that this section applies only to such work by the State, counties and municipalities as constructing, repairing or improving buildings, bridges, roads, highways, streams, levees or other work of similar character. It could not be contended that farm work was of like character as the work enumerated by said Section 1.

Section 2 of the act is not applicable in the present case, for the reason that it deals with contracts on behalf of the State, county or municipality, and prohibits the contractors in such work from working their employes more than eight hours in any calendar day.

We, therefore, advise you, in the opinion of this Department that the law does not prohibit the working of farm hands on State experimental farms more than eight hours in any one day.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

EIGHT HOUR LAW—TO WHAT PERSONS AND WORK APPLICABLE.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JUNE 27, 1913.

Hon. J. A. Starling, Labor Commissioner, Capitol.

DEAR SIR: We have your request for a construction of the eight-hour law passed by the Thirty-third Legislature with reference to its application to persons and to classes of work.

Section 1 of the act declares that eight hours shall constitute a day's work for all laborers, workmen or mechanics now *employed* or who may hereafter be employed by or on behalf of the State of Texas or by or on behalf of any county, municipality or political subdivision of the State, county or municipality in any one calendar day where such employment, contract or work is for the purpose of constructing, repairing or improving buildings, bridges, roads, highways, streams, levees or other work of a similar character.

As to the character of work to which the provisions of Section 1 are applicable, it is plain that the work done must be "for the purpose of constructing, repairing or improving buildings, bridges, roads, highways, streams, levees or other work of a similar character."

It is true that the caption of the act declares its purpose to be to fix "the number of hours that shall constitute a legal day's work on *all* work being performed by or on behalf of the State of Texas or by or on behalf of any county, municipality or other legal or political subdivision of said State." It is manifest that the caption of the act is broader than its body; this may or may not constitute a material discrepancy between the caption and the body of the act, but with this question in this connection we have nothing to do. This being a penal statute, we must look to the absolute provisions of the body of the act, and its application can not be extended beyond the express or necessarily implied purport of such provisions.

As to the persons against whom the provisions of the act are applicable, it is clear that the provisions of the act apply to any officer or agent of the State, county, municipality or political subdivision who employs laborers, workmen or mechanics on behalf of the State, county, municipality or political subdivision. In fact, the language of the act is broad enough to make it applicable against the State itself or the county, municipality or political subdivision, but since the State, county, municipality or subdivision can act only through its officers or agents, the legislative intent is that the provisions of the act are to be made applicable against such officers or agents. For instance, if some officer of the State government were to employ a laborer, workman or mechanic on some work of the classes named in Section 1 on behalf of the State and should cause such laborer, workman or mechanic to labor for more than eight hours in a calendar day according to the legislative intent he would be subject to the penalties denounced by Section 3 of the act, or if a county commissioner or other officer of the county should employ a laborer, workman or mechanic for the purpose of constructing or repairing a public road or a public building, etc.,

and should cause him to labor for more than eight hours in a calendar day, he would be subject to the penalties denounced by Section 3 of the act, according to the legislative intent. The same would be true of any officer of a city government or of any other political subdivision who should employ a laborer, workman or mechanic for the purpose of doing the class of work specified in Section 1.

The penalties denounced by Section 3 of the act are applicable as against "any person or any officer, agent or employee of any person, corporation or association of persons or any officer, agent or employee of the State, county, municipality or any legal or political subdivision of the State, county or municipality who shall fail or refuse to comply with the provisions of this act, or who shall violate any of the provisions of this act.

We do not believe that the penalties denounced by the act can be enforced against any person or officer for causing an employee to labor for more than eight hours on any one character of work than that specifically named in the body of the bill. For instance, the duties of an engineer or fireman at a municipal light plant, waterworks, etc., would not be such work as is embraced within the description contained in Section 1 of the act, nor would the duties of a policeman, watchman or a school teacher fall within the description of the work to which the act is applicable, although such work might be covered, and probably would be covered, by the act if its provisions were as broad as its purpose is indicated to be by the caption.

In our opinion the provisions of Section 2 of the act apply alone to contract work "by or on behalf of any county, municipality or other legal or political subdivision of the State." By said section it is made unlawful for any corporation, person or association of persons *having a contract* with the State or any political subdivision thereof to require or permit any such laborers, workmen, mechanics or other persons to work more than eight hours per calendar day in doing *such work*.

We are of the opinion that the rule of *ejusdem generis* must be applied in construction of this statute and that the term "such work," as used in Section 2, refers to and must be construed to mean the kind of work enumerated in Section 1. That is to say, the facts necessary to set the provisions of Section 2 in operation are (1) that a person, firm or corporation shall have a contract with the State or political subdivision of the State to do work; (2) that the kind of work covered by the contract is the construction, repair or improvement of buildings, bridges, roads, highways, streams, levees, or other work of a similar character.

The provisions of Section 2 are not applicable where contract work is done in the case of an emergency, such as may arise in times of war "or in cases where it may become necessary to work more than eight hours per calendar day for the protection of property, human life or the necessity of housing inmates of public institutions in cases of fire or destruction by the elements"; nor are the provisions of the act applicable to any work done by county convicts while serving their sen-

tences as such under law existing at the time of the enactment of this bill.

Yours truly,

LUTHER NICKELS,
Assistant Attorney General.

FEMALE EMPLOYEES—LIMITING HOURS OF WORK—CERTAIN EMPLOYMENTS.

A law limiting the hours of labor for female employees in certain named classes, but not generally limiting the hours of labor for female employees, would be constitutional.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 29, 1913.

Hon. Q. U. Watson, Senate Chamber, Capitol.

DEAR SIR: In your letter of January 27th, you request the opinion of this Department on substantially the following question:

Would a law limiting the hours of labor for female employees in certain named classes, but not generally limiting the hours of labor for female employees, be constitutional?

The Supreme Court of the United States, in a very interesting opinion written by Justice Brewer, in the case of *Muller vs. Oregon*, 208 U. S., 412, sustained the constitutionality of an Oregon statute, limiting the hours of work of female employees in mechanical establishments, factories and laundries to ten hours a day. The court held that the physical well-being of the women of a State or nation was an object of public interest, and that the preservation of the health of female employees was a proper object for the exercise of the police power of the State and that on these grounds the law was constitutional, even though it interfered in a measure with the constitutional right of freedom of contract.

Similar laws limiting the hours of labor of women and children have been sustained by the courts of last resort of several States.

See *Commonwealth vs. Hamilton*, 120 Mass., 383.

Withey vs. Bloom, 163 Mich., 419; 35 L. R. A., N. S., 628.

State vs. Storey (Or.), 24 L. R. A., N. S., 1121.

Inland Steel Co. vs. Yedinak (Ind.), 87 N. E., 229.

Ritchie vs. Wayman, 244 Ill., 509, 27 L. R. A., N. S., 994.

Wenham vs. State (Neb.), 58 L. R. A., 825.

In view of the above authorities and others, there can now hardly be any doubt as to the constitutionality of a law limiting the hours of labor of women or children, provided the primary purpose of the law is the preservation of health, and provided the provisions of the law do not arbitrarily or unreasonably interfere with the freedom of contract, and provided there is no violation of the rule against class legislation.

The prohibition against class legislation does not mean that the Legislature may not enact one law applicable to one class of people and

another law applicable to another class. It means that a law must be applicable alike to all people in one class, and the Legislature in making the laws can classify persons, organizations and corporations, according to their business, and may apply different rules to those who belong to different classes. It is enough that the classification is not arbitrary and unreasonable. To quote from the case of Texas Company vs. Stephens, 100 Texas, 628, 103 S. W., 481:

"The courts, under the provisions* relied on, can only interfere when it is made clearly to appear that an attempted classification has no reasonable basis in the nature of the business classified and that the law operates unequally upon subjects between which there is no real difference to justify the separate treatment of them undertaken by the Legislature."

See the following Texas cases for a thorough discussion of the rule against class legislation:

Campbell vs. Cook, 86 Texas, 630, 26 S. W., 486.
 Union Central Insurance Co. vs. Chowning, 86 Texas, 654.
 Supreme Lodge, etc., vs. Johnson, 98 Texas, 1, 81 S. W., 18.
 Needham vs. State, 103 S. W., 857.
 Peacock vs. Limburger, 67 S. W., 518.
 McLauray vs. Waltelsky, 87 S. W., 1045.

In the following cases which held constitutional laws of different States, regulating the working hours of women and children in certain named employments, the rules above discussed were applied and such laws were held not to be class legislation, to wit:

Wenham vs. State (Neb.), 58 L. R. A., 825.
 Withey vs. Bloom, 163 Mich., 149, 35 L. R. A., N. S., 628.
 Ritchie vs. Wayman, 24 Ill., 509, 27 L. R. A., N. S., 994.
 Inland Steel Co. vs. Yedinak (Ind.), 87 N. E., 229.

See also the United States Supreme Court case, Holden vs. Hardy, 169 U. S., 366, which sustains a law restricting the working hours of laborers in mines.

The further rule is enunciated by the above cited cases, that it is within the power of the Legislature in enacting such laws to define classes upon which the law shall operate and that, in the absence of apparent abuse of such power, this action should not be disturbed.

To quote from the case of Wenham vs. State, *supra*:

"The members of the Legislature come from no particular class. They are elected from every portion of the State and come from every avocation and from all walks of life. They have observed the conditions with which they are surrounded and know from experience what laws are necessary to be enacted for the welfare of the communities in which they reside. They determined that the law in question was necessary for the public good and for the protection of the health and well being of women engaged in labor in the establishments mentioned in the act. That question was one exclusively within their power and jurisdiction and their action should not be interfered with by the courts, unless their power has been improperly or oppressively exercised."

In view of the rules and authorities above referred to, we are of the opinion that a bill reasonably limiting the hours of labor of women in certain named employments and leaving unlimited the hours of labor of women in employments not named in the bill would be constitu-

tional, provided the classification made the Legislature in determining what employments should come within the scope of the law did not appear on the face of the bill to be an arbitrary or unreasonable classification.

Yours very truly,
G. B. SMEDLEY,
Assistant Attorney General.

CHAPTER 175, ACTS OF THE REGULAR SESSION OF THE THIRTY-THIRD
LEGISLATURE (54-HOUR LAW), APPLIES TO A "WORKSHOP"
OR PLANT WHERE FLOUR SACKS AND BURLAP OR
JUTE BAGS ARE MANUFACTURED.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, FEBRUARY 13, 1914.

Hon. J. A. Starling, Labor Commissioner, Capitol.

DEAR SIR: Your communication requesting the construction of certain phases of Chapter 175, Acts of the Regular Session of the Thirty-third Legislature, and bearing date some days ago, has just been referred to my desk for attention.

The question propounded by you involves the determination of whether or not the business or industry described in the letter submitted by you, which is copied below, comes within the provisions of said act of the Legislature in so far as to limit the hours of female labor employed.

"Our business comprises the manufacturing of all kinds of cotton and burlap or jute bags. This does not mean the manufacturing of such goods from the raw material, but from the cloth itself. In other words, we receive the cloth, cut it up into different sizes as required by the trade, sew and print the bags. We also manufacture articles from cotton duck; such as tents, wagon covers, cotton picker bags, etc. We do not manufacture tent poles or stakes, but, of course, handle them in connection with the tent business. We also patch new and second-hand bags that require mending. This, however, might be considered the same as sewing of bags as above mentioned."

Section 1 of said act, so far as it is pertinent to the present inquiry, reads as follows:

"No female shall be employed in any manufacturing or mercantile institution engaged in the manufacture of clothing, shirts, overalls, jumpers or ladies' garments or any mercantile establishment or work shop or printing office, dress-making or millinery establishment, hotel, restaurant or theatre or telegraph or telephone office or establishment for more than fifty-four hours during any one week."

According to the language of this provision the following classes of establishment are subject to the provisions of this section:

1. Manufacturing or mercantile institution which is engaged in the manufacture of clothing, shirts, etc.
2. Any mercantile establishment.
3. Any printing office, etc.

The language of this section manifestly is well calculated to create confusion in the mind of the casual reader, because the language "any mercantile establishment or workshop" as used in the act under modern definitions of these terms is broad enough to include the language which preceded this phrase in the act. The word workshop in its modern signification includes "manufacturing or mercantile institutions engaged in the manufacture of clothing, shirts," etc. If this latter language is also given its modern meaning,—and of course if this is true, then the language used by the Legislature creates an ambiguity in the statute which is hard to resolve by the application of any well-established rules of construction. We can think of but two courses of reasoning which will leave the statute free of ambiguity and at the same time give effect to each portion of its provisions, and these constructions we will set out at some length.

1. The etymological significance of the term "manufacture" is the process of making anything by art or reducing materials into form fit for use by the hand or by machinery (Webster's Dictionary).

One definition of manufacture followed by the courts in many jurisdictions is that it denotes the art of working raw materials into wares suitable for use, and a manufacturer is one who does this. *People vs. New York Floating Dry Dock Company*, 11 Abbott N. C., 40; *Consumers Brewing Co. vs. City of Norfolk*, 43 S. E., 336; *State vs. Dupree*, 7 Southern, 727; *New Orleans vs. La Blanc*, 34 La. Ann., 596; *State vs. American Sugar Refining Co.*, 32 Southern, 965.

On the other hand, it has been held that one who sets up the component parts of articles, which parts have already been prepared from the raw materials, is not a manufacturer, but is a workman, and his plant is not a manufacturing establishment but a workshop. *Chicasaw Cooperage Co. vs. Police Jury*, 19 So., 476; *People vs. Holdridge* (N. Y.), 4 Lans., 511.

If these definitions are followed, then any manufacturer or mercantile institution engaged in the manufacture of clothing, etc., from the raw materials would be subject to the provisions of this act under the language first used in Section 1, and also any proprietor of a workshop which takes cloth already prepared from the raw material and works it into clothing, etc., would be subject to the act, and as to the proprietor of a workshop the provisions would apply whether he were working cloth into clothing, etc., or whether he were working pig iron into machinery or taking any other material which has already been worked out of its raw state and changing it into another form suitable for use, and of course under this construction the industry described above would be subject to the provisions of the act. This construction also is aided by the application of the general rules hereafter referred to.

2. The only other method of taking the ambiguity out of this act known to us is by a reasonable application of the rule *ejusdem generis*. This rule was described by the court in the case of *Ex parte Leland* (S. C.), 1 Nott and M. C. C., 460, as follows:

"When an author makes use first of terms, each evidently confined and limited to a particular class of a known species of things, and then

after such specific enumeration subjoins a term of very extensive signification, this term, however general and comprehensive in its possible import, yet, when thus used, embraces only things *ejusdem generis*,—that is of the same kind or species,—with those comprehended by the preceding limited and confined terms.”

If this rule is applied to this statute the word “workshop” as used in the act must be held to refer to a workshop of the same general class as those in which clothing, etc., is manufactured.

The case of *Ritchie vs. People*, 155 Ill., 98, 29 L. R. A., 79, is an authority for the application of this rule to this statute, and when the object sought to be attained by the Legislature in the enactment of this act is borne in mind, we believe that a correct application of this rule to the statute will bring the industry described above within the operation of the act.

One of the cardinal rules of interpretation of statutes is that the caption may be looked to to explain the meaning of an ambiguous term used in the body of the act. *City of Austin vs. McCall*, 95 Texas, 575; *Sutherland on Statutory Construction*, Section 210.

In *United States vs. Fisher*, 2 Cranch, 358, it is said: “While the caption can not control the plain words of the statute it can be resorted to in cases of doubt for aid in removing the ambiguities.” See also *Ogden vs. Strong*, 2 Paine, 584; *U. S. vs. Palmer*, 3 Wheat., 610; *Dedrick vs. Wood*, 15 Pa. St., 9; *Insurance Company vs. Stokes*, 9 Phil., 80; *Cochran vs. Library Company*, 6 Phil., 492.

Another rule of construction generally accepted is that statutes remedial in their nature should receive a liberal construction so as to effectuate the general purposes for which they were enacted. *Dewey vs. Railway Co.*, 142 N. C., 399.

Mr. Sutherland in Section 240 of his work on *Statutory Construction* says:

“The presumption is that the lawmaker has definite purpose in every enactment, and has adopted and formulated the subsidiary provisions in harmony with that purpose; that these are needful to accomplish it; and that, if they have the intended effect, they will, at least, conduce to effectuate it. That purpose is an implied limitation on the sense of general terms, and a touchstone for the expansion of narrower terms.”

And in Sections 107 and 108 of *Endlich’s Interpretation of Statutes* it is said:

“Of such statutes, as distinguished from penal statutes, more especially it is said that they are to be construed liberally to carry out the purpose of the statute, to suppress the mischief, and advance the remedy contemplated by the Legislature.”

And the same authority says further:

“The object of this kind of statute being to correct a weakness in the old law, to supply an omission, to enforce a right, to redress a wrong, it is but reasonable to suppose that the Legislature intended to do so effectually, broadly and completely, as language used, when understood in its most extensive signification, would indicate.”

The general intent of the Legislature in the enactment of the stat-

ute being a key to the correct interpretation, let us refer to the caption of this act for a description of its object. In the caption,—whose function it is to epitomize the thought of the Legislature,—the purpose of the act is described as one “to regulate the hours and safeguard the health of females employed in *any* manufacturing, mechanical or mercantile establishment or workshop, laundry, printing office,” etc. It will be noted that no limitation is placed upon the terms “manufacturing, mechanical or mercantile establishment or workshop” as used in the caption; these limitations are placed on the terms as used in the body of the act; and since there is an apparent conflict between the language of the body of the act and its caption, and since the general intent of the Legislature as described in the caption is the touch-stone for the expansion of narrow terms so as, as far as possible, to effectuate the general purposes, we must give the term “workshop” as used in the body of the act the broadest possible interpretation so as to bring it into harmony with the express purpose of the Legislature.

Applying these rules of construction at the same time that we apply the rule of *ejusdem generis* to the word “workshop,” as used in the statute, we must hold that the industry described by your correspondent is subject to the operation of this law. This construction may be given with due regard to the facts appertaining to the various industries. It is a matter of common knowledge that in the manufacturing of clothing, shirts, overalls, jumpers and ladies’ garments the employees in a general way take piece goods, cut them into shapes and patterns and sew them together so as to produce the clothing, etc.

We think it is not indulging in strained construction to say that the character of labor performed in the manufacture of flour sacks and bags out of cotton cloth, burlap and jute is the same in a general way as of that demanded in the manufacturing of clothing, etc. In the making of a flour sack or other bags the employees must take the piece goods, cut it into shapes and forms and stitch these pieces together in such a way as to create the bag. Neither do we regard it as an aspersion upon the clothing industry, and especially clothing designed for feminine wear, to place it in the same category with the flour sack. Many well-ordered minds have come to the conclusion that a vast improvement might be wrought by a change from the regnant fashions in wearing apparel to the use of the old Greek tunic for which a small sized tent might be used, or modern garments in the form of enlarged flour sacks.

The point is that female laborers who are required to bestow their services in the manufacture of these various articles is of one and the same general class, and this being true we think that the plant of the Fulton Bag & Cotton Mills as described above is a workshop within the meaning of this act, and that the employment of female labor therein for a longer period than 54 hours in any one week is a violation of the law.

Yours truly,
LUTHER NICKELS,
Assistant Attorney General.

LEGAL DAY'S WORK—54-HOUR LAW—TELEPHONE COMPANIES—TELEPHONE OPERATORS.

Telephone operator can not make contract with management so as to eliminate the fifty-four hour proposition.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, OCTOBER 10, 1913.

Hon. Tom Whipple, County Attorney, Waxahachie, Texas.

DEAR SIR: The Department is in receipt of your letter of the 8th instant, in which you submit the following:

"The Independent Telephone Company places an operator on duty at 9 o'clock at night, and she and another girl have a bed there, but the operator remains up until midnight answering calls. At midnight she retires with a night bell and answers such calls as come in until 4 o'clock at which time she goes to work regularly and remains on duty until 8 o'clock in the morning. This operator is practically on duty all during this period of time.

"Under the law * * * can this operator contract with the management so as to eliminate the fifty-four hour proposition?"

Chapter 175, Acts of the Thirty-third Legislature, Regular Session, page 421, provides:

"No female shall be employed in any * * * telephone office or establishment for more than fifty-four hours during any one week, the hours of such employment to be so arranged as to permit the employment of such females at any time so that she shall not work more than the maximum of ten hours during the twenty-four hour period for one day."

It will appear from the above that this is an absolute prohibition for the violation of which a penalty is to be visited, and the only exception to the general rule announced above; that is to say, the only circumstances under which a female may be employed for a longer period than fifty-four hours per week, is provided for as follows:

"Provided, however, that at the time of great disaster, calamity or epidemic, telephone establishments may work their operators, with their consent, a greater number of hours in any one day than above stated, said operators to be paid not less than double their regular compensation for such extra time."

You are, therefore, advised that the only circumstances under which a female telephone operator could consent to labor more than ten hours in any one day are at times of great disaster, calamity or epidemic, and we do not believe the facts stated in your letter would bring the case within either of the exceptions mentioned.

Yours very truly,

B. F. LOONEY,
Attorney General.

FEMALE EMPLOYEES—54-HOUR LAW—TELEPHONE OPERATORS—
PRIVATE EXCHANGES.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, SEPTEMBER 16, 1913.

Hon. Robert McKinley, Acting Commissioner of Labor, Capitol.

DEAR SIR: In your communication of the 13th instant, you submit the following:

"This department is in receipt of inquiry from industrial and other concerns asking if the fifty-four hour law enacted by the Regular Session of the Thirty-third Legislature applies to telephone operators in private exchanges. In many instances such operators are employed during the day while not busy at the private exchange as stenographers are at other duties. * * *"

Replying, I respectfully direct your attention to Section 1, Chapter 175, General Laws of the Thirty-third Legislature, which provides:

"No female shall be employed in any manufacturing or mercantile institution engaged in the manufacture of clothing, shirts, overalls, jumpers or ladies' garments or *any* mercantile establishment or work shop or printing office, dress-making or millinery establishment, hotel, restaurant or theatre or telegraph or *telephone office* or establishment for more than fifty-four (54) hours during any one week, the hours of such employment to be so arranged as to permit the employment of such females at any time so that she shall not work more than a maximum of ten (10) hours, during the twenty-four (24) hour period for one day; provided, however, that at the time of great disaster, calamity or epidemic, telephone establishments may work their operators, with their consent, a greater number of hours in any one day, than above stated, said operators to be paid not less than double their regular compensation for such extra time; provided this act shall not apply to females who are registered pharmacists; provided this act does not apply to cities containing a population of 5000 or less as shown by the last Federal census."

It is, therefore, the opinion of this Department, and you are so advised, that the fifty-four-hour law applies to telephone operators who are employed in private exchanges. The language of the above quoted section provides that "no female shall be employed in *any* manufacturing or mercantile institution * * * or *telephone office* or *establishment* for more than fifty-four hours during any one week. * * *" If, however, such private telephone exchange is situated in a city containing 5000 in population, or less, as shown by the last Federal census, then such act would not apply.

Yours very truly,
B. F. LOONEY,
Attorney General.

FIFTY-FOUR-HOUR LAW—HOTELS AND BOARDING HOUSES.

A boarding house at which meals are served to others than those stopping in the house could not be held to be a hotel within the meaning of the fifty-four hour law. The fifty-four hour law prohibits requiring females to work more than fifty-four hours per week with a further inhibition against requiring them to work more than ten hours in any one day. This includes Sundays

where the occupation is permitted to be pursued on Sunday under the law. (Chapter 175, Acts of the Thirty-third Legislature.)

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, OCTOBER 6, 1913.

Hon. Lewis Rogers, County Attorney, Gainesville, Texas.

DEAR SIR: This Department is in receipt of your communication of October 1st, reading as follows:

"Please advise me whether or not a private boarding house having from thirty to forty regular boarders furnishing rooms to a part of them, and also serving meals to all comers, is a hotel under the provisions of the new law affecting the hours of labor of female employees. The act provides for not more than 54 hours work in any one week—which is nine hours per day for six days. Hotel and telephone employees have to work on Sunday. Can they work more than 54 hours per week, or will they have to so arrange the hours of work so as not to be over the 54 hours for seven days?"

We will reply to your questions in the order in which they are propounded.

1. Section 1 of Chapter 175, known as the 54-hour law enacted by the Thirty-third Legislature, provides that no female shall be employed in any hotel among other occupations and industries for more than 54 hours during any one week, and further provides that the hours of such employment shall be so arranged as to permit the employment of such females of not more than ten hours during any one day.

It will be noted that in connection with the word hotel in the above cited statute that the word restaurant is used, but no mention whatever is made of boarding houses. There is a well recognized distinction in the law between a hotel and a boarding house, which distinction in the law follows that in every-day use and understanding of the two terms as applied to such institutions. The general rule of construction as laid down by our statute is that words used in the statute unless their meaning shall be specially defined are to be taken and construed in the sense in which they are understood in common language. There is a well recognized distinction between a hotel and a boarding house in the every-day use of those terms, a boarding house being understood to be a place where people lived and ate in pursuance of a contract made and entered into by them with the keeper of such boarding house, which contract usually runs by the month or longer. The hotel is an institution where the traveler stops and is furnished with lodging and meals by the day and not necessarily upon a contract, but the law will imply a contract at fixed rate established by such institution.

The most recent case we have found dealing with the question of boarding houses and hotels is that of *Petit vs. Thomas*, 148 S. W., 501. That case quoting from the case of *Fay vs. Pacific Improvement Company*, 16 L. R. A., 1872, says: "The fact that the house is open for the public, that those who patronize it come to it upon the invitation which is extended to the general public and without any previous agreement for accommodation or agreement as to the duration of their stay,

marks the important distinction between a hotel or inn and a boarding house."

This case further quoting from the case of *Bostick vs. State*, 14 S. W., 476, says: "The testimony tends to prove that her house was a public house and intended for the reception and entertainment of all comers, and not a mere boarding house where the boarder is elected and received into the house upon an expressed contract for a certain period of time."

The words inn, tavern and hotel are used synonymously to designate what is ordinarily and properly known as an inn or tavern or place for the entertainment of travelers and where all their wants can be supplied.

People vs. Jones, 54 Barb., 311.

A lodging house keeper is not an inn keeper because he may send out and procure cooked food for his guests. A mere lodging house in which no provision is made for supplying the lodgers with meals wants one of the essential elements of an inn.

Kelly vs. New York Excise Commissioners, 54 How. Prac., 327.

A public house is for the entertainment of all who come lawfully and pay regularly. A boarding house is for the accommodation only of those who are accepted as guests by the proprietor. Such an establishment is as much a private house as if there were no boarders.

Commonwealth vs. Concannon, 3 Brewst., 344.

The distinction between an inn and a boarding house is that into the former all travelers have a right to enter and demand accommodation, but the keeper of a boarding house has a right to select his guests.

Beall vs. Beck, 3 Cranch, cc., 666.

As was said in the case of *Petit vs. Thomas*, above cited, the question of whether the house is a hotel or boarding house is one of fact to be determined by the manner of the operation of each particular institution. We can see how a hotel might in some instances be termed a boarding house in that it might accept certain boarders upon a contract for a certain sum by the month, but the mere fact that a person running what is commonly called a boarding house, served meals occasionally to those who were not regular boarders in the institution, would not establish that as a hotel within the legal or commonly accepted meaning of the word hotel.

From the facts stated in your letter, we are of the opinion and so advise you that a person running a boarding house with thirty or forty boarders who occasionally serve meals to people who did not board there regularly would not be a hotel within the meaning of Chapter 175, Acts of the Thirty-third Legislature, prohibiting employment of females for more than 54 hours in any one week.

Replying to your second question, we beg to say that the inhibition in this law as to the employment of females is against such employment for more than 54 hours in any one week, and this law does not relate or have any bearing upon the number of days such females are to be employed during the week. There is a further inhibition, however, against the employment of females in hotels and telephone offices among other institutions for more than ten hours during the twenty-

four-hour period for one day. The fact that the usual business is operated for only six days in the week does not carry with it or engraft upon the law the idea that nine hours is a legal day's work under the law in question, merely because a division of 54 by 6 would result in 9. The purpose of this law is to prevent requiring of females to work more than 54 hours per week, and further to prevent their employment for more than ten hours in any one day. Of course, an institution that does not operate on Sunday could only require its female employees to work 54 hours, which would average nine hours per day, and they could not under the law require them to work more than 10 hours in any one day but should they require 10 hours in any one day, then that 10 hours must be deducted from the 54 hours, and on the remaining five days there could only be required a total of 44 hours of work. Those institutions which the law permits to be run upon Sunday would, therefore, have a smaller average number of hours per day which they could require females to work for the reason that they are in operation for seven days during the week.

You are, therefore, advised that where an institution is operated on Sunday, as well as the other days of the week, they can not compel female employees to work more than 54 hours during any one week or in cases mentioned by you more than ten hours in any one day, which must be taken into consideration in computing the number of hours worked during the week.

With respect, I am,

Very truly yours,

C. W. TAYLOR,
Assistant Attorney General.

OPINIONS CONSTRUING INSURANCE LAWS.**INSURANCE—CONSTRUCTION OF LAWS.**

A mutual life insurance corporation can not, without a vote of the stockholders, liquidate its affairs and consolidate with another company.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, DECEMBER 10, 1913.

Hon. W. W. Collier, Commissioner of Insurance, Capitol.

DEAR SIR: We have examined the copies of the minutes of the Board of Directors of the Bankers and Citizens' Co-operative Life Insurance Company relative to and concerning the consolidation of the affairs of that company with the Southern Co-operative Life Insurance Company.

We are of the opinion that the Board of Directors of the Bankers and Citizens' Co-operative Life Insurance Company has no authority to consolidate this company with any other insurance company and liquidate its affairs as is sought in this instance to be done. The real purpose of the Bankers and Citizens' Co-operative Life Insurance Company is to reinsure the policies of this company in the Southern Co-operative Life Insurance Company and to liquidate the affairs of the first named company. The Bankers and Citizens' Co-operative Life Insurance Company was organized pursuant to an act of the First Called Session of the Thirty-first Legislature, the same being Chapter 16 of the published laws of that session of the Legislature and known as Chapter 13 in the Digest of the Insurance Laws issued by your Department. Upon an examination of the act we find that the authority of the board of directors of a company of this character is set forth in Section 2 of the original act, or Section 275 of your insurance digest, as follows:

"The business of a co-operative life insurance company shall be controlled and directed by a board of directors consisting of not less than five nor more than nine members, who shall be elected annually as provided in this act, those to serve until the first annual election to be named in the charter and who shall hold office until their successors shall be elected and qualified or until they shall be removed for improper practices. Such board of directors shall elect the officers of the company, which shall be a president, and such number of vice-presidents as the by-laws may provide, a secretary, a treasurer, a medical director, and such other officers as the by-laws of the company may provide for, and shall fix the compensation of all such officers. The duties of all officers shall be prescribed by the by-laws. The by-laws governing the society until the date of its first annual meeting, as provided by this act, shall be adopted by the board of directors at their first meeting after the certificate of authority shall be issued authorizing the company to transact the business of a co-operative life insurance company. There shall be an annual meeting of all the policyholders of each co-operative life insurance company at the home office of such company on the second Tuesday in January after it shall have received a certificate of authority to transact the business of life insurance and annually thereafter at which the directors shall be elected for the succeeding year and at

which by-laws for the government of the company not inconsistent with the provisions of this act or with the laws of this State may be adopted, and at which the existing by-laws may be repealed or amended. At such annual meeting every policy holder shall be entitled to one vote for each \$500 of insurance held by him, and any policyholder may execute his proxy authorizing and entitling the holder to exercise his voting powers, unless such proxy shall be revoked previous to such annual meeting. The president, secretary and treasurer shall each give a bond for the protection of the company and its policyholders in amount and with securities to be approved by the Commissioner of Insurance and Banking, conditioned for the faithful performance of their respective duties."

It is noted that by this section the business of the company is controlled and directed by the board of directors, and that the act gives the board of directors no greater authority than that ordinarily exercised by similar boards of other corporations; that is to say, they may do whatever is consistent with the prudent management and continuation of the business of the corporation. No authority is given the board to liquidate the affairs of the corporation nor to reinsure all the policies of the company as one of the processes of liquidation. It is noted from this section that the policyholders are made members of the corporation with authority to perform the duties and privileges of a stockholder in an ordinary stock company, which is to vote at the meetings of the policyholders either in person or by proxy. In fact, the ordinary rule is that a member or policyholder in a mutual insurance company is synonymous with stockholder in an ordinary company having capital stock.

21 Am. and Eng. Encyc. of Law, p. 269.

Berry vs. Anchor Mutual Fire Ins. Co., 94 Iowa, 135.

State vs. Mfg. Mutual Fire Ins. Assoc., 53 O. St., 145.

However, a policyholder or member of a mutual life insurance company differs somewhat from that of a stockholder in a stock company in that the members of a mutual insurance association necessarily occupies the anomalous position of being both an insurer and an insured, and his rights are dual in that he is entitled to protection as a policyholder and entitled to certain property rights as an actual shareholder in the corporation.

21 Am. and Eng. Encyc. of Law; 267, 269.

The assets of a mutual company belong to the members as in a stock company they belong to the stockholders, the members being interested therein in proportion to their several contributions.

21 Am. and Eng. Encyc. of Law, 269.

Carlton vs. Southern Mutual Ins. Co., 72 Ga., 371.

We have made the foregoing general observations merely to show the relationship of a member or a policyholder in a mutual life insurance company to the company. No provision seems to be made in the law for the liquidation of a company chartered as is the one under consideration here except that made in Section 289 of your insurance digest, which provides for the liquidation of the company through the courts, but we believe that this method is exclusive. On the contrary, we are of the opinion that the general corporation laws govern mutual companies where the special provisions with reference to mutual companies do not conflict with the general corporation laws of the country.

Article 4723, Revised Statutes, especially provides:

"The laws relating to and governing corporations in general shall apply to and govern insurance companies incorporated in this State in so far as the same may not be inconsistent with the provisions of this title." (Having reference to Title 71, of which the act under consideration is part.)

When we turn to the general corporation laws of the State we find that provision is made for the dissolution of private corporations. It is unnecessary to notice the various methods by which a corporation may be dissolved, except Subdivision 3 of Article 1205, Revised Statutes, which provides as follows:

"Where four-fifths in interest of all the stock outstanding shall vote in favor of a dissolution at a stockholders' meeting called for that purpose on notice signed by a majority of the directors, stating time, place and object of the meeting, served personally, or by mail, at least thirty days next before the meeting. If, at said meeting, four-fifths in interest of all the stockholders of said company shall signify their consent in writing to the dissolution of the corporation, such consent in writing, together with a list of the directors and officers of the company, giving postoffice address and place of residence of each, certified by the president and secretary and treasurer as true and correct action of the stockholders, shall be filed with the Secretary of State; or when, without a stockholders' meeting, all the stockholders of the corporation consent in writing to a dissolution, the same shall be certified to as above and filed with the Secretary of State. When any such certificate as above mentioned is filed with the Secretary of State, he shall issue a certificate that such consent has been filed and that the corporation is dissolved; and said officer shall so vote on the ledger in his office."

It is noted that this provision provides in substance that where four-fifths of all the stock shall vote in favor of the dissolution at a stockholders' meeting called for that purpose on a notice signed by a majority of the directors, stating the time, place and object of the meeting, served personally or by mail at least thirty days next before the meeting; that if at said meeting four-fifths in interest of all the stockholders of said company shall signify their consent in writing to the dissolution of the corporation, such consent in writing together with a list of the directors and officers of the company, giving postoffice address and residence of each, certified by the president and secretary and treasurer as true and correct action of the stockholders, shall be filed with the Secretary of State; or, when without a stockholders' meeting, all the stockholders consent the same shall be certified and filed with the Secretary of State; that, when such certificate has been filed with the Secretary of State, he shall issue a certificate that such consent has been filed and that the corporation is dissolved, etc.

Now, as a matter of fact, the present corporation may be dissolved, but it is necessary to construe that section of the statute quoted and make it applicable to this insurance company. In the first place, if a stockholders' meeting should be called then the policyholders should vote at the meeting in accordance with the authority given them by Section 275 of your digest, which is that each policyholder shall be entitled to one vote for each five hundred dollars of insurance held by him, or if the policyholders signify their consent in writing as provided for in the article of the statute quoted, considered on the basis of one vote for five hundred dollars insurance, it may be dissolved. It is not necessary that the certificate referred to in the article of the

statute quoted shall be filed with the Secretary of State, but the same must be filed with the Commissioner of Insurance and Banking, who issued the charter of the company, and that officer upon the receipt of the certificate showing the dissolution of the corporation shall issue certificate to the effect that the consent of the stockholders as provided for in the statute has been given to the dissolution and evidence thereof filed with him.

We are of the opinion, however, that before the dissolution is made by the stockholders that all the outstanding policies of the company and all its obligations should be taken over by the Southern Co-operative Life Insurance Company, if the parties desire to make a contract to that effect. But in our opinion it will be necessary for the directors to have authority from the policyholders of the Bankers and Citizens' Co-operative Life Insurance Company before this can be done, given at a meeting called for that purpose, as this general act of reinsurance amounts to an abandonment of the corporate purpose of the original corporation, and is really one step in the process of liquidation. After the board of directors have received authority from the policyholders to reinsure all the policies in the Southern Co-operative Life Insurance Company, and such last named company has assumed all obligations of the Bankers' Company, then the Bankers and Citizens' Co-operative Life Insurance Company may liquidate its affairs under the provisions of Article 1205, Revised Statutes, as suggested.

We, therefore, advise you that the dissolution of the Board of Directors of the Bankers and Citizens' Co-operative Life Insurance Company submitted to us is insufficient, and that before this company can transfer its business to the Southern Co-operative Life Insurance Company and liquidate its affairs that a meeting of its policyholders must be called and the action taken, in so far as the liquidation of its affairs are concerned, under the provisions of Article 1205, Revised Statutes; that inasmuch as the question of reinsurance is a part of the process of liquidation, Article 1205, Revised Statutes, would govern that also. If the question of reinsurance was not a part of the process of liquidation, then it is probable that a majority of the policyholders would govern the company on the question of reinsurance. The fundamental rule is that the majority of the members of a corporation of this character can bind the minority.

Bacon on Benefit Societies, Sec. 64.

But, inasmuch as this is a question of winding up the affairs of the corporation and a dissolution and surrender of its corporate franchise, we are of the opinion that Article 1205, Revised Statutes, must govern instead of the general rule.

It will be noted also that in the instance of the Paris Co-operative Life Insurance Company, when its affairs were taken over by the Southwestern Life Insurance Company, that the action was had by virtue and under the authority of a policyholders' meeting of the Paris Company. The agreement showing these facts is now on file in your Department, having been received and filed by you on January 26, 1912.

Yours very truly,
C. M. CURETON,
First Assistant Attorney General.

CONSTRUCTION OF STATUTES—STATE FIRE INSURANCE COMMISSION—
MEANING OF WORDS "FIREPROOF CONSTRUCTION."

While the Legislature undoubtedly meant fire-proof construction as contained in the General Basis Schedules, yet, under the decisions of the courts of the State, the law should be liberally construed and so long as the construction does not primarily endanger the entire building, other than non-combustible materials may be used for certain necessary and appropriate purposes.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, DECEMBER 1, 1913.

The State Fire Insurance Commission, Capitol.

GENTLEMEN: Your Department, as well as those at the head of various Departments of the State government who have buildings to construct under the recent appropriation bill, have requested a construction of that particular clause found on page 167 of the General Laws of the State passed at the First Called Session of the Thirty-third Legislature, reading as follows:

"* * * Provided, that all buildings to be erected under and by virtue of the appropriations herein made, shall be of fire-proof construction and all plans and specifications for the erection of fire protection shall be subject to the approval of the State Fire Insurance Commission."

Your specific inquiry requests our opinion as to the meaning of the words "fireproof construction," and also as to the extent of the jurisdiction of your body over the plans and specifications of buildings to be constructed under the appropriation act referred to.

We will answer the second question first; that is to say, we will give our opinion as to the meaning of the phrase, "and all plans and specifications for the erection of fire protection shall be subject to the approval of the State Fire Insurance Commission." Our opinion is, that the plans and specifications for the erection of fire protection, as used in the act, are so intimately connected with the question of fire-proof construction that the jurisdiction of your Board extends over the entire plans, in so far as the fire protective features are concerned; that is to say, it is with you to determine whether the materials used and the manner of their use constitute a fireproof construction or fire protection; your duties in the premises also extend to approving or disapproving the methods provided for extinguishing fires within or without the building. It is at once apparent that this conclusion is correct when you consider the term fire protection embraces not only actual plans for extinguishing fires but that it necessarily embraces fire prevention, which is the more valuable item in fire protection, and, of course, the principal method of fire prevention is in the construction of the building and the use of either non-combustible or fire-resistant materials as well as the manner of the use of these materials.

We do not mean to imply that you have jurisdiction to determine the architecture of the building, or the arrangement of its rooms or floor space, or anything of that character, but your jurisdiction is confined exclusively to the question of fireproof construction, fire prevention and method of extinguishing fires.

The first question as to the meaning of "fireproof construction" is one of more serious difficulty. The term "fireproof" is one which has heretofore in this State had a general as well as technical meaning, and the courts in construing the term have been inclined to give it its general or usual accepted meaning, as applied to the construction of buildings, instead of technical meaning, so that it may be said that up to the time of the adoption of the General Basis Schedules, promulgated by your Board, that the technical and strict meaning of the term "fireproof" had been construed away by the courts, and it was left to mean merely the class of buildings usually and ordinarily termed fireproof throughout the country. This is apparent from an opinion of the Court of Civil Appeals of this State in the case of Chimine vs. Baker, 75 S. W., 330, in which that court, among other things, said:

"The terms 'fireproof' and 'combustible materials,' used in the charter and ordinance, should not be given a literal construction, but a liberal and reasonable one, and the meaning assigned to them in the ordinary and common acceptation of the terms. Experience has shown that during great conflagrations, such as swept the cities of Chicago and Boston a number of years ago, buildings of granite, marble and steel crumbled into dust before the intense heat, and met with absolute destruction. And yet those buildings were known and accepted as being composed of incombustible material or fireproof material. The term 'fireproof,' in insurance cases, where used in connection with safes in which books and inventories are to be kept, has been defined as being of materials that will usually resist the action of fires, and not those that will successfully withstand fires under all circumstances. *Ins. Co. vs. Hird* (Texas Civ. App.), 23 S. W., 393; *Underwriters' Fire Ass'n. vs. Palmer* (Texas Civ. App.), 74 S. W., 603; *Sneed vs. Assurance Co.* (Miss.), 18 South., 928. As said by the Supreme Court of Mississippi in the last cited case: 'To impart to the words "fireproof safe" such signification as would require a safe incapable of injury by fire, to itself or its contents, or one which by the action of any fires could not be rendered useless as a safe, and whose contents, under any combination of circumstances, should and could never be destroyed by the intensity of heat to which the safe and its contents might be exposed, would be to require of the insured, in the vast majority of insurance cases, that which could not have been in the contemplation of the parties in entering into the contract of insurance.' The words 'fireproof' and 'incombustible materials' are often used in connection with houses that are not absolutely proof against fires, but are intended as referring to houses built of brick, stone, iron, or other materials, on the outside, so as to form barriers that will resist the action of ordinary fires." (75 S. W., 331.)

The same liberal construction of the term "fireproof" appears also in the case of *Underwriters' Fire Ass'n vs. Palmer and Co.*, 74 S. W., 603. In this case the insurance company resisted the payment of the policy on the ground that the iron safe clause had been violated in that, although the plaintiff had his papers in an iron safe yet they were destroyed, and, therefore, that the warranty in the policy, that he would keep his papers in a fireproof safe, had been violated, and no recovery could be had. The court decided contrary to this contention, and held, in substance, that inasmuch as the papers were in an iron safe, ordinarily termed and regarded as fireproof, the warranty contained in the policy had not been breached, and, therefore, the plaintiff could recover. In this connection, the court said:

"From the fact that they were so destroyed, the appellant contends that they were not kept in a fireproof safe, within the meaning of the iron safe clause contained in the policy. The same contention, under similar facts, was made in

Knoxville Fire Ins. Co. vs. Hird (Texas Civ. App.), 23 S. W., 393, in which case it was said by Mr. Justice Head: 'By "fireproof safe," within the meaning of an insurance policy such as this, we think, is intended a safe constructed of incombustible material, for the purpose of resisting fire, and commonly regarded as sufficient for this purpose. In other words, it is an article of furniture, the distinctive name of which well conveys the idea that the purpose for which it was intended is the preservation of its contents from the effects of fire. If the safe in which Meyers kept his books, etc., was constructed for this purpose, and was commonly known as a "fireproof safe" among those acquainted with such articles, we think it was a fireproof safe, within the meaning of the policy, though it may have proven insufficient in this instance; he not being negligent in its selection. If he kept his books in a place commonly known as a "fireproof safe," he complying with the letter of that part of his contract, and if he acted in good faith, and was not guilty of negligence, in making the selection, he complied with its spirit.' Again, in Sneed vs. British Am. Assur. Co. (Miss.), 18 South., 928, in which the same question was under construction, it is said: 'The words "fireproof safe," in this policy, in view of the situation of the small country merchant, and his needs for the employment of an iron safe, can only mean the usual fireproof safe used by the country merchant generally—a safe composed of incombustible material, and fitted to protect, to the usual extent and in the ordinary way, papers deposited therein, and not that rare and costly structure—if, indeed, such there be—which is capable of withstanding the action of fire altogether, and of preserving its contents from harm absolutely.' (74 S. W., 604.)

The opinion of the Texas courts is one approved generally throughout the country by both the courts and text-writers. Concerning this matter, Mr. Cooley, in his "Briefs on the Law of Insurance," Volume II, page 1826, says:

"A safe such as is commonly used, and such as, in the judgment of prudent men in the locality of the property insured, is sufficient, is 'a fireproof safe,' within the meaning of the clause (Liverpool & London & Globe Ins. Co. vs. Kearney, 21 Sup. Ct., 326, 180 U. S., 132, 45 L. Ed., 460, affirming 94 Fed., 314, 36 C. C. A., 265). The insured does not warrant the safe to be fireproof (Knoxville Fire Ins. Co. vs. Hird, 4 Texas Civ. App., 82, 23 S. W., 393); and he has complied with the condition if he in good faith buys a safe represented and sold on the market as a fireproof safe, believing it to be such (Fire Ass'n. of Philadelphia vs. Short, 100 Ill. App., 553). Consequently his *right to recover is not affected, though the safe and its contents are destroyed by fire.*"

However, the term "fireproof" has not always been as liberally construed as suggested in the foregoing opinions. On the contrary, the following is the substance of other authorities on the question:

"To say of a building that it is fireproof excludes the idea that it is of wood, and necessarily implies that it is of some substance fitted for the erection of fireproof buildings." (55 Am. Reps., p. 826.)

Hickey vs. Morrall, 55 Am. Reps., p. 824.

Deits vs. Yetter, 54 N. Y. Supp., 258.

However, the opinion of the Texas courts construing the iron-safe clause can not be altogether followed in construing the clause here under consideration, for the reason that in July, 1911, the State Insurance Board of this State, which is now the State Fire Insurance Commission, promulgated what is known as the Texas General Basis Schedules, with document forms the basis for all insurance rates and standards of fire prevention and construction in use throughout the

State. While these schedules are not the law within themselves, yet they are the instruments which the law has provided, and in the schedules referred to a standard for fireproof and a standard for semi-fireproof construction is given. It may be stated without controversy that the Legislature, by using the terms "fireproof construction" in the measure under consideration, meant what it said and did not, by that term, intend semi-fireproof construction, because both the standard for fireproof construction and for semi-fireproof construction were matters of general knowledge throughout the State. The General Basis Schedules are in use in the thousands of insurance offices of the State, and are in daily use by the officers of the State government. They were promulgated by the State, and all who buy insurance, or sell insurance, are compelled to abide by these schedules. That the Legislature had these schedules in mind in the passage of these acts is a matter of current history. Within comparatively few months prior to the meeting of the extra session of the Thirty-third Legislature the State had lost many hundreds of thousands of dollars from fire, and there existed, at the time of the enactment of this law, a general determination on the part of the people that the State should improve in the character of construction of its buildings. In fact, it is a matter of history that the legislative committee, having in charge the measure here under consideration, consulted the State Insurance Board and were furnished the standard for fireproof construction as contained in the General Basis Schedules, which standard is as follows:

"Building to be built throughout of brick, concrete or reinforced concrete, or of steel frame covered with concrete or hollow tile; concrete, brick or tile floors; all structural steel or iron work to be protected by at least four inches of well made and well set concrete, or by brick or hollow tile; roof to be of reinforced concrete, brick or hollow tile and protected steel; partitions to be of brick, hollow tile, concrete or cement plaster on expanded metal or on metal laths, or of approved fireproof material; no woodwork to be used in construction of the building, neither floors, trim, window or door frames; all outside openings on exposed sides to be protected by approved labeled metal frames. Interior finish of building to be non-combustible and of slight degree of damageability. All vertical openings to be in brick, concrete or tile shafts, cut off from main building by approved labeled automatic fire doors." (Page 78.)

So it may be said that, by the use of the term fireproof construction in the appropriation bill, the Legislature had reference to the standard of fireproof construction as contained in the General Basis Schedules. However, following the lines of construction laid down in the Texas authorities referred to, we believe that the application of this standard of fireproof construction to governmental buildings should be liberal, and that the location, occupancy and use of the building should be material factors entering into the construction of the building. Of course, the standard laid down in the General Basis Schedules is that intended for a perfect building, but we do not think the Legislature meant by the terms "the construction of a perfect building"; that is to say, one which had no combustible material whatever in it, but rather do we believe that what is intended is the construction of a building as is ordinarily constructed throughout the country in an attempt to comply with the standard of fireproof construction as

laid down in the General Basis Schedules. In this connection, we are inclined to the opinion that your Board would have the right to permit the use of some wood in the material construction of the building so long as the use of wood was confined to a single room or space; that is to say, so long as the wood used in one room would not connect up with that used in another, so that in the event of a fire, it would necessarily be confined to a room or point of origin. This seems to be the usual method of construction of buildings at the present time as an attempted compliance with fireproof construction as laid down in the General Basis Schedules; it will also at once appear plain to you that the use of wood, even in this manner, means but small in quantity, for otherwise the heat might become sufficient to communicate through to adjoining rooms. In other words, the use of wood under this construction for public buildings should be limited to an absolute minimum, and where other material may be used with the same degree of efficiency and at a reasonable cost, it ought to be used.

This is about as plain as we can make ourselves, unless we had before us some particular plan or specification. Our opinion, when reduced to a few words, means simply this: that while the Legislature undoubtedly meant fireproof construction as contained in the General Basis Schedules, yet, under the decisions of the courts of the State, we feel that the act should be liberally construed, and, that so long as the construction does not primarily endanger the entire building, other than non-combustible materials may be used for certain necessary and appropriate purposes.

Our attention has been called to the fact that if fireproof construction is required that the amount appropriated will not be sufficient to construct as large buildings as those at the head of certain institutions desired and as large as named in the appropriation bill.

In response to this, we beg to advise that the provision with reference to the fireproof construction comes in that part of the act referred to subsequent to those parts of the same providing for the appropriation and size of the building, and, therefore, in the event of any conflict, the last provision must control. This is a general rule of statutory construction.

Sutherland on Stat. Const., Sec. 349.

Bank vs. Hale, 59 N. Y., 53.

Weaver vs. Davidson Co., 59 S. W., 1107.

Therefore, it follows that even though the buildings may not be constructed as large as the Legislature desired, yet the provision for fireproof construction must be followed in accordance with the rules here given.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

INSURANCE—AUTOMOBILES—TAXATION.

1. Insuring automobiles against the hazard of fire is fire insurance and must be written in accordance with our laws governing fire insurance.
2. A company engaged exclusively in writing this class of insurance must make the bond required of any other company writing fire insurance policies.
3. Such a company must pay all taxes required of fire insurance companies, including the tax for the support and maintenance of the State Fire Insurance Commission.

Section 3, Chapter 106, General Laws Regular Session Thirty-third Legislature.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MARCH 14, 1914.

Hon. W. W. Collier, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: In reply to your inquiry as to whether or not insurance against the hazard of fire on automobiles is subject to the laws regulating fire insurance in this State, including the rates promulgated by the State Fire Insurance Commission, we beg to advise you:

1. That all insurance written in this State against the hazard of fire is subject to the rates made by the State Fire Insurance Commission, and that all insurance companies writing insurance of this character must comply with all the fire insurance laws of this State the same as companies which write the ordinary fire policy on buildings and other property. This is very clear from Chapter 106 of the General Laws passed by the Regular Session of the Thirty-third Legislature. Section 3 of this act reads:

"Every fire insurance company, every marine insurance company, every fire and marine insurance company, every fire and tornado insurance company, and each and every insurance company of every kind and name issuing a contract or policy of insurance, or contracts or policies of insurance against loss by fire on property within this State, whether such property be fixed or movable, stationary or in transit, or whether such property is consigned or billed for shipment within or beyond the boundary of this State or to some foreign country, whether such company is organized under the laws of this State or under the laws of any other State, territory or possession of the United States, or foreign country, or by authority of the Federal government, now holding a certificate of authority to transact business in this State, shall be deemed to have accepted such certificate and to transact business thereunder upon condition that it consents to the terms and provisions of this act and that it agrees to transact business in this State, subject thereto; it being intended that every contract or policy of insurance against the hazard of fire shall be issued in accordance with the terms and provisions of this act, and the company issuing the same governed thereby, regardless of the kind and character of such property and whether the same is fixed or movable, stationary or in transit, including the shore end of all marine risks insured against loss by fire."

It is noted from the concluding portion of the foregoing section of the law that it is intended by the law that every contract or policy of insurance "against the hazard of fire" must be written in accordance with the terms and provisions of the act, and this regardless of the kind and character of the property and whether the same is fixed or movable, stationary or in transit, and including the shore end of all marine risks insured against loss by fire. It would follow from this that where an automobile is insured against the hazard of fire that the policy must be issued in accordance with the fire insurance laws

of the State, and the company issuing the same must be governed with reference thereto by these laws.

2. The next question which naturally suggests itself is what is meant by the hazard of fire or loss by fire. We think that the Texas Standard Fire Policy taken in connection with Amendment No. 4 of the General Basis Schedules, with reference to automobile insurance, very well points out or defines what is meant by the hazard of fire as applied to automobile insurance. The Texas Standard Fire Policy insures "against all direct loss or damage by fire," with certain exceptions. From lines 31 to 35 are specified some of the exceptions. These are as follows:

"This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war, or commotion, or military or usurped power or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and in that event for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damages by lightning may be assumed by specific agreement hereon."

Amendment No. 4 to the General Basis Schedules, providing the automobile floater policy form, in so far as here relevant, is as follows:

"It is the purpose of this insurance to cover all direct loss or damage by fire arising from any cause whatsoever, including explosion (if fire ensues), self-ignition and lightning, but this policy does not cover and shall not be construed to cover damage by collision nor any hazards of shipment nor while the property insured is in the custody of any common carrier or other bailee, nor shall this policy inure to the benefit of any common carrier or other bailee."

The words "direct loss or damage by fire," as used in the standard fire policy, mean loss or damage occurring directly from fire as the destroying agency in contradistinction to the remoteness of the fire as such agency.

Clement on Fire Insurance, Vol. 1, p. 85.

California Ins. Co. vs. Union Compress Co., 133 U. S., 387.

19 Cyc., p. 827.

Joyce on Insurance, Sec. 2837.

You are advised, therefore, that insurance against the hazard of fire means under the laws of this State and under the policy forms prescribed by the State Fire Insurance Commission, loss or damage occurring directly from the fire as the destroying agency; that is to say, where the fire is the efficient cause of the damage, and that any company writing insurance against the hazard of fire must bring itself within the terms and provisions of the laws of Texas governing fire insurance companies. It is immaterial that such company may provide that the policies shall be effective regardless of the location of the automobile. If the policy is written while the property is in this State, it must be written in accordance with the laws of this State.

3. The position of one of the companies, that the policies issued by it covering automobiles wherever located within the United States is marine insurance, is incorrect. A contract of marine insurance is a contract of indemnity whereby the insurer undertakes to indemnify the

insured in the manner and to the extent thereby agreed against marine losses; that is to say, the losses incident to marine adventures.

19 Am. and Eng. Encyc. of Law, p. 940.

Matheson vs. Equitable Marine Ins. Co., 19 Am. Rep., 43.

However, in order for it to be a contract of marine insurance, it is not necessary that the risk should be at all times at sea or upon the water, but the insurance applies, or may apply, to any land risk which may be interposed in or subsidiary or incident to a sea voyage.

19 Am. and Eng. Encyc. of Law, p. 950.

Cooley's Briefs on Insurance, Vol. 1, p. 108.

Chapter 106, General Laws of the Thirty-third Legislature, page 196, clearly recognizes that there is a "shore end" of marine risks, which is in line with the current law on the question. In other words, in order for an insurance risk to be a marine risk, it must be within the contemplation at the time the insurance is effected that the risk itself will become in fact subject to marine hazards, and the insurance applicable between the point and time where and when the policy is taken and the seashore is the *shore end* of a marine risk, but clearly unless there is to be an actual exposure to a marine hazard there can be no *shore end*. It follows from this that insurance on automobiles such as is referred to by you in the letter before us is not marine insurance in any sense of the word. However, if it was marine insurance, the *shore end* of the policy must be written in accordance with the terms and provisions of our fire insurance laws, and any company writing the shore end of marine risks against the hazard of fire insurance must comply with the laws.

4. It would follow from the foregoing:

(a) That insuring automobiles against the hazard of fire is fire insurance, and must be written in accordance with our laws governing fire insurance.

(b) That a company engaged exclusively in writing this class of insurance must make the bond required of any other company writing fire insurance policies.

(c) Such a company must pay all taxes required of fire insurance companies, including the tax for the support and maintenance of the State Fire Insurance Commission.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

CORPORATIONS—INSURANCE—FOREIGN MUTUAL CASUALTY INSURANCE COMPANY.

Inasmuch as the statutes of this State have provided the terms and conditions on which corporations may be permitted to transact the business of insurance in this State, and inasmuch as a mutual casualty insurance company does not come within the terms of these provisions, such a company can not obtain a permit or license to transact business within this State.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 12, 1914.

Hon. W. W. Collier, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: In response to your inquiry as to whether or not a foreign mutual casualty insurance company may be licensed to transact business in this State, we beg to advise you that you have no authority to grant a license or issue a permit to a company of this character.

Subdivision 50 of Article 1121, Revised Statutes, grants authority for the organization of mutual fire or storm or lightning insurance companies, which grant of authority is further defined and regulated by Chapter 29, General Laws passed by the Thirty-third Legislature. Chapter 22 of the same session acts of the Legislature provides for the organization of mutual hail insurance companies. Chapter 5 of Title 7 of the Revised Statutes provides for the organization of accident insurance companies upon the co-operative or mutual assessment plan. There are perhaps other classes of mutual insurance companies provided for in the statutes not necessary here to notice, but in no part of the statute do we find any provision made for the organization in this State of mutual casualty insurance companies or the admission of mutual casualty insurance companies chartered under the laws of another State. Chapter 4 of Title 71 provides that companies or associations organized under the laws of any other State of the United States carrying on the business of life or casualty insurance on the assessment or mutual premium plan having cash assets of not less than a hundred thousand dollars invested as required by the laws of this State regulating other insurance companies shall be licensed by the Commissioner of Insurance and Banking to do business in this State, but it does not appear that this provision applies to the character of companies described in your inquiry.

Chapter 113, Acts of the General Laws of the Thirty-second Legislature, provides for the organization of casualty insurance companies, but makes no provision for the organization of casualty insurance companies of this character to transact business in this State.

From an examination of all the statutes of the State, it is clear that provision is not made for the incorporation of domestic companies to transact the business of mutual casualty insurance, and that no provision is made for companies to be admitted to the State for the transaction of this class of business.

Article 4972, Revised Statutes, provides that the provisions of Title 71 are conditions upon which foreign insurance companies shall be permitted to do business in this State, and inasmuch as this title does not contain any provisions for admitting companies such as is described

in your question, such companies can not be admitted into the State for the purpose of transacting business, and you can not issue a certificate or permit to such company.

The matter is not aided by reference to Chapter 26 of Title 25, Revised Statutes, governing the admission of foreign corporations generally into the State. In the first place, Article 1519, one of the articles of this chapter, states that the provisions of the chapter shall not apply to corporations required by law to procure certificates of authority from the Commissioner of Insurance and Banking, and, therefore, it may be said that said chapter and title have no reference to insurance companies, as under Title 71 all insurance companies are required to obtain a permit from the Commissioner of Insurance and Banking. But if it should be conceded for the purposes of the discussion merely that Chapter 26 of Title 25 was applicable to insurance companies, still the very provisions of this chapter would forbid the admission of a mutual casualty insurance company to transact business in this State, because Article 1514, a part of this chapter, provides that only corporations having a capital stock may be permitted to transact business in the State.

It is an elementary rule of law that the State has the right to exclude entirely any foreign corporation from doing business within its limits. It follows from this that the right of a corporation to engage in business within a State other than that of its creation depends solely upon the laws of such other State, and that they have no right to exercise their franchises in another State except upon the assent of such other State and upon such terms as may be imposed by the State where its business is to be done.

S Am. and Eng. Encyc. of Law, p. 860.

Beale on Foreign Corps., Sec. 201.

It would follow from this that since a State has the power to set the terms on the right of a foreign corporation to enjoy the benefit of its laws that a corporation which has not complied with these laws or which can not comply with these laws can not avail itself of the privileges thereunder, nor can such a corporation obtain a mandamus to the Secretary of State or other commission of insurance to compel the issuance to it of a license.

Beale on Foreign Corporations, Sec. 211.

English and Scottish American Mortgage & Investment Co. vs. Hardy, Secretary of State, 55 S. W., 169.

Inasmuch as the statutes of this State have provided the terms and conditions on which corporations may be permitted to transact the business of insurance in this State, and inasmuch as a mutual casualty insurance company does not come within the terms of these provisions, such a company can not obtain a permit or license to transact business within this State.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

INSURANCE—CORPORATIONS—TAXATION.

Chapter 106, Section 29, Acts Thirty-third Legislature.

1. Section 29, Chapter 106, General Laws Thirty-third Legislature, has reference only to gross premiums collected on fire insurance policies, and not to gross receipts from other lines of insurance, even though received by a company engaged in the fire insurance business.

2. This tax is a license or occupation tax and is within the terms of Section 2, Article 8 of the Constitution providing that occupation taxes shall be equal and uniform.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 25, 1914.

Hon. W. W. Collier, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: In response to your inquiry requesting a construction of Section 29, Chapter 106, General Laws of the Thirty-third Legislature, we beg to advise you as follows:

Section 29 of said act reads:

"There shall be assessed and collected by the State of Texas, an additional one and one-quarter (1¼) per cent of the gross premiums on all fire insurance companies doing business in this State, according to the reports made to the Commissioner of Insurance and Banking as required by law; and said taxes when collected shall be placed in a separate fund with the State Treasurer to be expended during the current year, in carrying out the provisions of this act; and should said amount collected be more than necessary to pay all expenses, the State Fire Insurance Commission may reduce the rate for the next succeeding year, so that no more money will be collected than is necessary to pay all necessary expenses of maintaining the commission, which funds shall be paid out on requisitions made out and filed by the Commissioner when the Comptroller shall issue warrants therefor." (Page 206.)

It is noted that this section provides for the collection of an additional tax, the purpose of which is to provide a separate fund with the State Treasurer to be expended during the current year in carrying out the provisions of the act, of which this section is a part. The section further provides that should said amount collected be more than necessary to pay all expenses, the State Fire Insurance Commission may reduce the rate for the next succeeding year, so that no more money will be collected than is necessary to pay all necessary expenses of maintaining the commission.

The direct question propounded is whether or not this tax authorized in the foregoing section of the law should be leveled against the gross premiums of fire insurance companies on all lines of business, or whether the same should be assessed against the gross premiums received on fire insurance policies issued.

An examination of the act discloses that its entire tenor and purpose is to control fire insurance rates in the State, and the State Fire Insurance Commission is not given authority to make rates or transact any business with reference to any other class of insurance than fire insurance. The caption of the act, among other things, provides that one of the purposes of the act is to provide conditions upon which fire insurance companies may transact business in the State, and to provide that the rate of premiums to be charged by fire insurance companies in the State shall be fixed and determined and promulgated exclusively by said Fire Insurance Commission, and to prohibit any fire insurance

company from collecting or receiving any premiums on account of policies of fire insurance issued by them, unless the rates of such premiums have been so fixed and determined and promulgated by said State Fire Insurance Commission; to provide certain conditions and limitations on fire insurance contracts or policies, and providing penalties for violations of provisions of the act, and appropriating money necessary to carry out its provisions, and declaring an emergency.

The caption very well states the purpose of the act, and it is clear from the caption, as it is entirely clear from the reading of the body of the act, that the entire purpose and tenor of the act was to govern fire insurance companies only in so far as they wrote policies of fire insurance. Section 3, after having stated the class of companies which are deemed to have accepted the provisions of the act, contains a general yet definite clause, as follows:

"It being intended that every contract or policy of insurance against the hazard of fire shall be issued in accordance with the terms and provisions of this act, and the company issuing the same governed thereby, regardless of the kind and character of such property and whether the same is fixed or movable, stationary or in transit, including the shore end of all marine risks insured against loss by fire."

Upon the whole it is apparent that the entire purpose of the act was to provide a system of rate making for fire insurance hazards and to collect from the fire insurance end of the companies writing fire insurance a sufficient tax on the gross premiums to pay the expenses of the maintenance of the State Fire Insurance Commission.

We, therefore, advise you that the tax referred to in Section 29 should be assessed against the gross premiums collected for issuing fire insurance policies or policies against the hazard of fire; that such tax should be collected against the gross premiums on every contract or policy of insurance against the hazard of fire issued in accordance with the terms and provisions of the act regardless of the kind and character of such property and whether the fixed or movable, stationary or in transit, including the shore end of all marine risks insured against loss by fire. The term "gross premiums on all fire insurance companies doing business in this State," as used in Section 29, has reference only to gross premiums collected for writing fire insurance policies and which are collected on property, the rate of insurance on which is governed and controlled by the provisions of the act.

It may be seriously doubted whether the Legislature could in any event have authority to levy a special tax to support the State Fire Insurance Commission against classes of insurance other than fire insurance for the very reason that the essence of a just and constitutional tax measure is that the tax collected must bear some reasonable relation to the object sought to be attained by the act. In this particular instance the object sought to be attained is securing and maintaining a fund to pay the expenses of a department of government whose duty it is to fix fire insurance rates, and it seems to us that should the Legislature attempt to levy a tax on the gross premiums received by an insurance company for doing any class of insurance other than fire insurance business that the tax thus levied would bear no reasonable re-

lation to the object sought to be attained by the act and would be taking property without due process of law, and the act would, therefore, be unconstitutional. It is clear that this tax is not a general revenue measure, but is in the nature of a license tax, because Section 29 provides in effect that no larger an amount shall be collected than is sufficient to maintain the State Fire Insurance Commission, and this in effect makes it a license tax measure; the basis of license fees or taxes being to some extent the desire of the government to cause corporations coming within the terms of the act to pay a sufficient fund to the government for maintaining the police regulation necessary for the operation of the class of business to which the corporation belongs. Mr. Thompson, in his work on Corporations, Sec. 8116, states:

“The taxes levied in the form of percentages against gross receipts are in some instances license taxes, and the payment of such a tax for stated periods of time forms a condition precedent to a renewal of the license of those coming within its terms and provisions.”

This is true with reference to companies transacting the business of fire insurance. The act itself, in Section 3, declares that companies desiring to write fire insurance must comply with all the provisions of this act, and it is clear that if a company should fail to pay the tax or comply with any other provision of this law that the Commissioner of Insurance would decline to issue it a certificate of authority to transact business or would cancel its existing certificate. So the tax may be regarded as a license tax rather than a revenue measure. The principle we suggest is all the more applicable by reason of the nature of this tax.

It has been frequently held that taxes on gross receipts of insurance companies are in the nature of business or occupation taxes.

21 Am. & Eng. Encyc. of Law, p. 775.

Atlanta Natl. Building, etc., Assoc. vs. Stewart, 109 Ga., 80.

Western Union Tel. Co. vs. Mayer, 28 O. St., 521.

Ex parte Cohn, 13 Nev., 424.

The tax imposed in this instance being essentially an occupation tax, the power of the Legislature to impose it is limited by Section 2 of Article 6 of the State Constitution, which provides:

“All occupation taxes shall be equal and uniform upon the same class of subjects within the limitation of the authority levying the tax. * * *”

This limitation in the Constitution, however, still permits the Legislature to classify occupations for the purpose of taxation, but such a classification must have a reasonable basis.

The Texas Company vs. Stephens, 100 Texas, 640.

If we should hold that the tax specified in Section 29 could be assessed against the gross receipts of a fire insurance company engaged in various lines of insurance instead of against the gross receipts from its fire insurance business, then the law would clearly not operate equally and uniformly upon corporations engaged in the same line of business, to wit, the fire insurance business, because we could readily have two corporations, one of which had a small amount of gross receipts from a fire insurance end of its business and a large amount of

gross receipts from other insurance written by it, while the other might have a large amount of gross receipts from its fire insurance premiums and a small amount from its other lines of insurance. It would clearly be in violation of the Constitution to require the company writing only a small amount of fire insurance to pay the same tax for the support of the State Fire Insurance Commission as would be required of the company which writes a large amount of fire insurance. In other words, if the construction suggested should be given this statute, then the statute would be in violation of the Constitution of the State, which provides that occupation taxes must be equal and uniform. We would prefer, therefore, to give it the construction which makes it constitutional.

We, therefore, advise you that the tax specified should be assessed and collected against only the gross receipts from the fire insurance premiums, and that the gross receipts collected by a fire insurance company from other lines of insurance should not be considered.

Yours truly,

C. M. CURETON,

First Assistant Attorney General.

INSURANCE—CORPORATIONS—LIFE INSURANCE.

1. It is proper to issue renewal license to a life insurance company which has purchased its own stock and resold and reissued same to subscribers to a proposed increase of its capital stock which has never been made.

2. An existing corporation may take subscriptions to its proposed increased capital stock, but the money received does not become the property of the corporation, until the stock has been lawfully issued, and ought not to be classed among its assets.

3. As an elementary proposition a corporation has no lawful right to purchase shares of its own stock, but it may do so for the purpose of saving a debt, or under other circumstances where it is clearly beneficial to the corporation to do so.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 19, 1914.

Hon. W. W. Collier, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: In your letter of February 10th, you state that it appears from examination of the annual statement of a certain life insurance company which is applying to your Department for renewal of its license that among its assets is shown a certain sum of money representing subscriptions to unissued and unauthorized capital stock. You state further that it appears that out of the money thus collected the company has paid out for issued and outstanding stock in the Amicable Company a certain amount of money, and on the books of the company this stock outstanding and bought by the company itself has been transferred to certain parties who subscribed for the stock in the company, the payment of these subscriptions being included in the said sum collected from subscriptions to unissued and unauthorized capital and surplus. You desire to know whether, under the circumstances, you should issue a renewal license to the company.

In response to your inquiry, we beg to say that we believe it would

be proper for you to issue the renewal license. The transactions appear to be somewhat irregular, but possibly this irregularity arises from a lack of exacting commission on our part. Of course, an existing licensed corporation is authorized to take potential subscriptions for unissued stock, provided its purpose is to amend its charter and issue the stock therefor. The money thus received, however, would be no part of the assets of the corporation, in the usual sense of that term. The funds thus received would be simply money paid in to become the property of the corporation only when its capital stock had been increased and the shares issued therefor, and, until this is done, the money thus received by the corporation would not be the property of the corporation, and ought not to be classed among its assets. However, in the particular instance referred to by you, the company took this money and reissued therefor shares of stock which it had purchased from its stockholders. Upon the delivery of this stock to the subscribers, the money, of course, became the property of the corporation, provided the subscriber understood the transaction.

The other question suggested by you is, whether or not the company had the right to purchase its own shares of stock.

It is an elementary principle that a corporation has no inherent power to purchase shares of its own stock, the general rule being that a corporation can not buy or sell its own shares, unless the power to do so is conferred by its charter or governing statute; but in the absence of a statutory provision, and there does not appear to be any statutory provision in this State, it may buy in its shares for the purpose of saving a debt or under other circumstances where it is clearly beneficial to the corporation so to do.

Thompson on Corporations, Sec. 8352.

St. Louis Rawhide Co. vs. Hill, 72 Mo. App., 142.

In the Hill case cited above the court says:

"The assets of a corporation are expressed by its certificates of capital stock. These assets of whatever they may consist are available to meet the demands of creditors. To permit the corporation to buy in its own stock, would permit it to take a corresponding amount of assets and distribute them among the stockholders and thus reduce its capital to the prejudice of creditors. But it seems that where a corporation buys in its stock for the purpose of saving a debt and with a view of reissuing the same, or under circumstances where the transaction is fair on its face, is not tainted with fraud, and is clearly to the interest of the corporation, the transaction will be upheld, unless prohibited by its charter. 2 Thompson on Corporations, Sections 2062, 2068 and 2069, and cases cited in Note 2. Chitland vs. Ins. Co., 86 Ill., 220; Eggman vs. Blanke, 40 Mo. App., 318 (under laws of Illinois); 1 Morawetz on Private Corporations. Sections 114 and 434."

It may be said, therefore, that if the insurance company bought its own shares of stock for the purpose of collecting a debt or avoiding litigation in order to collect a debt, or under circumstances where the transaction was fair and not tainted with fraud, and clearly in the interest of the corporation, and that after the purchasing of the shares it resold the same and thus put back into the assets of the corporation the money received from the resale of the shares, and in that manner in no way lessened the amount of the assets, or the capital stock of the corporation, then the transaction would probably not be *ultra vires*; and

in this instance anyway we would say it would not be sufficient ground to warrant you in denying a renewal of the permit. We would suggest, therefore, that the permit be renewed, but that you require this company to file with you a transcript of its minutes and all papers, correspondence and records showing how and in what manner these transactions were accomplished, together with a full and complete explanation of the reason for conducting its business in the manner stated. Of course, you may require all this before you renew the license if you desire to do so.

We say, therefore, that an insurance company has ordinarily no power to purchase and resell its own shares of stock, but that it can do so only in cases of necessity or where it is clearly to the interest of the corporation and fair to its stockholders and creditors. In other words, where an insurance company buys its own stock, the right must arise from the exigencies of the circumstances and not either from the law or its charter powers. This is in line with the authorities.

Very truly yours,

C. M. CURETON,
First Assistant Attorney General.

EXCERPTS FROM OTHER OPINIONS CONSTRUING THE
INSURANCE LAWS.

By C. M. Cureton, First Assistant Attorney General:

A fraternal benefit society incorporated under the insurance laws of the State can not by bringing itself within the terms of Section 29, Chapter 113, Acts of the Thirty-third Legislature, exempt itself from the supervision of the Insurance Department.

A corporation can not be chartered to do any insurance business except under the supervision of the Department of Insurance and Banking, and such society, so long as it remains a corporation, must submit itself to the Insurance Department. (Opinion Book 30, page 306.)

By C. M. Cureton, First Assistant Attorney General:

An accident and health insurance company organized under the laws of Texas, whose officers and directors, or any of them, are likewise officers or directors of a loan and trust company, can not make such loan and trust company its fiscal agent.

The fact that the officers and directors of an accident and health insurance company are stockholders in loan and trust companies would not prevent the insurance company from appointing and employing the loan and trust company as its fiscal agent. (Opinion Book 37, page 78.)

By C. M. Cureton, First Assistant Attorney General:

An automobile accident insurance policy which provides that the notice referred to in Revised Statutes, Article 5714, shall be delivered

to an agent authorized to receive the same, is too restrictive, and should not be approved.

An automobile accident insurance policy which contains a provision requiring notice of the accident to be given the company five days after occurrence thereof, is in violation of Article 5714, Revised Statutes, and should not be approved. (Opinion Book 37, page 93.)

By C. M. Cureton, First Assistant Attorney General:

A reserve represents what an insurance company must have in hand to meet its ultimate liabilities upon its policies. It should have assets enough at any time which invested at the minimum statutory rate of interest, reckoning the lives of its policyholders by the actuary tables of mortality, together with the future premiums payable to it under its policies, as will enable it to meet all its policy obligations.

In determining the percentage of total Texas reserves which must be invested in Texas real estate securities to secure any certain reduction in taxes as authorized by Revised Statutes, Article 4779, deduction from the amount of legal reserve on Texas policies should not be made for the amount of Texas policy loans. (Opinion Book 37, page 172.)

By C. M. Cureton, First Assistant Attorney General:

The charter and by-laws of a mutual fire insurance company must state definitely the number of directors of the corporation.

The by-laws must conform to Section 379, Texas Insurance Laws, and provide that the additional liability of members shall be assessable at the discretion of the Insurance Commissioner when the company's funds become impaired.

The by-laws of a mutual fire insurance company can not provide that the funds of the corporation upon its dissolution shall be divided among its then existing members.

Mutual insurance is that system of insurance by which the members of the association mutually insure each other. A mutual company, therefore, is one in which the members are both the insurers and the insured. The premiums paid by them constitute the fund, which is liable for the losses and expenses, and in them is vested the control and regulation of the affairs of the company. The mutuality of obligation, of insurance, and all the advantages is the main and essential feature of such corporation that must not in any respect be superseded or impaired. When this principle of mutuality is violated in any sense or particular of its business management, it so far ceases to be a mutual company.

21 Am. & Eng. Encyc. of Law, p. 253.

Kennan vs. Rundle, 81 Wis., 212.

Carlton vs. Southern Mutual Insurance Co., 72 Ga., 400.

A mutual insurance company is somewhat in the nature of a partnership business. The insured becomes a member of the corporation by

virtue of his policy. He is entitled to a share of the profits and is responsible for the losses to the extent of his premium paid or agreed to be paid. (Opinion Book 37, page 1178.)

INSURANCE—AGENTS—INSURANCE COMPANIES—INSURANTS—DISCRIMINATIONS.

It is a discrimination prohibited by the law regulating insurance companies for a company to require one insurant to pay a cash premium whilst credit is extended, without interest, to another of the same class and of equal expectation of life; or when under same circumstances one insurant is charged a higher rate of interest than another.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, DECEMBER 20, 1913.

Hon. Chas. V. Johnson, Chief Clerk and Acting Commissioner, Department of Insurance and Banking, Capitol.

DEAR SIR: Under date of the 15th inst., you make the following statement and propound to this Department the following questions:

"It has been reported to this Department that certain agents of life insurance companies in this State have been accepting notes without interest in payment of the premium of a life insurance policy. Please advise this Department at your earliest convenience as to whether this practice on the part of any life insurance company, or any officer, agent, solicitor, or representative thereof is a rebate or discrimination under the provisions of Article 4954 R. S. If it is a rebate, then would it not also be a discrimination or rebate for a life insurance company or any of its officers, agents, solicitors, or representatives to charge one rate of interest to one policyholder giving such note, and another rate to another policyholder giving such a note? If in your judgment, the above questions are answered to the effect that to give a note without interest or accepting notes at different rates of interest constitutes a violation of the said law, this Department should at once make a ruling to that effect notifying all life insurance companies doing business in this State of the same, because it is charged in the attached letter of Mr. Orville Thorp that it is almost a universal practice of the life insurance agents in this State, and the companies and their agents should at once be notified to stop the practice if it is in violation of the law."

Your questions call for the construction of the following provisions of Article 4954, Acts of 1911:

"No insurance company doing business in this State shall make or permit any distinction or discrimination in favor of individuals between insurants (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 contract of insurance. * * * 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; provided, 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 above quoted provisions of the statute prohibit an insurance company from making or permitting any distinction or discrimination in favor of individuals between insurants of the same class and of equal expectation of life in the following particulars:

- (a) In the amount of premiums or rates paid for insurance.
- (b) In the payment of premiums or rates.

Also, such company is prohibited from making any contract of insurance or agreement other than is expressed in the policy; nor shall said company or any officer or agent allow or give directly or indirectly as an inducement any valuable consideration or inducement not specified in the policy.

We assume that where credit is extended without interest in favor of an insurant that it is or can be so expressed in the face of the insurance contract as not to violate the statute in this respect. Hence your inquiry reduced is, whether or not to require one insurant to pay the premium in cash and to extend to another insurant of the same class and of equal expectation of life, credit for the premium without interest, or, under like circumstances, to charge one insurant a higher rate of interest than is charged to another,—whether in either case this would constitute such a distinction or discrimination between insurants in the amount of premiums or rates paid or in the payment of premiums or rates, as is prohibited by the statute.

We believe a clear understanding of the meaning of the terms used will furnish a clue to a correct answer to your questions.

"Discrimination" is defined by Webster to be:

"A distinction in treatment, as with common carriers the arbitrary imposition of unequal tariffs for substantially the same service; a difference in treatment made between persons, localities or classes of traffic in respect of substantially the same service."

The term "interest" has been variously defined, among others the following:

"Interest is the compensation which is paid by the borrower of money to the lender for its use and generally by a debtor to a creditor in recompense for the detention of the debt."

"Interest is defined to be a profit or recompense allowed to be taken from the borrower by the lender as a charge for the loan."

"Webster defines interest as a premium paid for the use of money and a profit, or per cent, derived from money lent or property used by another person or other debts remaining unpaid."

"Interest is the compensation which may be demanded by the lender from the borrower or the creditor for the use of money."

"Interest is the compensation allowed for the use or forbearance or detention of money or its equivalent." (Words and Phrases, Vol. 4, page 3706.)

From the above it will be readily seen that interest is a thing of

value; in fact, it is a matter of common knowledge that it furnishes the only consideration for some of the largest business transactions of the country.

Therefore, it is not difficult to conclude that it is a distinction between insurants and a discrimination against the one who pays cash for the premium or the one who pays a higher rate of interest, in favor of an insurant of the same class and of equal expectation of life who pays no interest or a lesser rate of interest.

In construing similar statutes courts have held that discriminations existed under the following circumstances:

"An agreement to make an insured a member of the advisory board whereby he is to receive advantages over other members not belonging to such board, is within the prohibition of the statute when it forms part of the same transaction in which a premium note is given for the insurance." (State Life Insurance Co. vs. Strong, 127 Mich., 346, 86 N. W., 825.)

It was held in *Robinson vs. Wolfe*, 27 Ind. App., 683, 62 N. E., 74:

"That a contract by a mutual accident insurance company reciting that in consideration of the full annual premium the company selected the insured as one of five hundred policyholders to participate in a special renewal dividend on all insurance written during certain years, the dividends to be credited on his ensuing premiums, is void as conferring unequal rights on the selected members."

"In *Equitable Life Assurance Society vs. Commonwealth*, 113 Ky., 126, 67 S. W., 388, it was held that notwithstanding a statute against rebates a company may discharge its debts to its agents by issuing a policy on his life, provided he is charged the same rate that is charged other insurance of the same age and equal expectation of life, but it is said that the statute would be violated if an agent or company should pay more for property than a fair value in accepting it in the payment of premiums or should agree to pay one more for his services than they were worth to solicit business for the company and either was done with a design to give insured a rebate on premiums."

The only case the writer has been able to find, in which the question of taking a note for a premium without interest was involved, arose in New York, and is reported in 135 N. Y. Supp., page 268.

It was an action on a premium note given by an insurant upon which no interest was charged for the period of eighteen months. The policy was issued on the execution of the note. It was pleaded in that case that the waiving of interest for eighteen months was an inducement offered in violation of the statute of New York, which is almost identical with the statute of this State in this respect. This defense was not sustained; the court held that the same did not constitute a deduction by way of rebate, and even assuming that the taking of the note without interest would constitute a consideration or inducement within the meaning of the statute, the same was not shown to have been omitted from the contract; the court holding that the feature of the statute as pleaded was directed only against considerations or inducements not specified in the policy, and as the defendant in his answer made no allegation that this inducement offered to defendant was not specified in the policy, he was not entitled to insist upon these facts as a defense to the action on the note.

The question whether or not the taking of the note without interest

for eighteen months was a prohibited distinction or discrimination between insurants was not before the court, and the court nowhere discussed the case with reference to this view; hence the same is in no sense an authority on the question here under consideration.

From these adjudications we may deduce the rule, that any material benefit or advantage given one insurant over another of same class and expectation of life, whether the benefit or advantage is remote or immediate, direct or indirect, and without regard to the form the transaction may assume, is such a distinction or discrimination as is prohibited by these statutes.

In view of the foregoing, it is the opinion of this Department, and you are so advised, that to require one insurant to pay a cash premium whilst credit is extended to another of the same class and of equal expectation of life without interest, or where under the same circumstances one insurant is charged a higher rate of interest than another, either case constitutes a distinction and a discrimination within the meaning of the statute hereinbefore quoted.

Yours truly,

B. F. LOONEY,
Attorney General.

CORPORATIONS—MUTUAL FIRE INSURANCE COMPANIES—BY-LAWS—
EXECUTIVE COMMITTEE.

By-laws of a Mutual Fire Insurance Company must conform to the laws of the State.

An executive committee must be composed of members of the board of directors; but the committee can not be substituted for the board of directors, and its duties must be defined in the by-laws.

The board of directors can not amend the by-laws after their adoption by the stockholders. (Acts Thirty-third Legislature, Chapter 29, Section 7. Revised Statutes, Articles 1154, 1155 and 1159.)

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JUNE 27, 1913.

Hon. B. L. Gill, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: We herewith return you the charter and by-laws of the United Mutual Fire Insurance Company.

The charter appears to be in proper form, and we have attached our certificate to the same, but since the by-laws are not in proper form, we request that the charter be not issued until the by-laws have been corrected in accordance with the suggestions contained in this opinion.

The second section or article of the by-laws reads as follows:

"Should the company's funds become impaired, every member of the company shall be liable, in addition to the annual premium on his policy for a sum not to exceed the amount of such annual premium, the whole of such sum to be paid in shall be such amount only as will rebuild said impaired fund, no part of which shall be used as expense account, such further sum to be assessed against the members at the discretion of the Commissioner of Insurance and Banking, or the company's board of directors, which shall be the limit of liability to the company by policyholders."

Section 7 of Senate Bill No. 256 reads as follows:

"The by-laws of every company organized under this act shall provide that every member, in addition to his annual premium paid in cash, or in cash and premium notes, shall be liable for a sum equal another annual premium; or it may provide, a sum equal to three or five annual premiums. Such additional liability being assessable at the discretion of the Insurance Commissioner or the company's board of directors, for the member's proportionate share of losses and expenses should the company's fund become impaired."

By reading the section of the by-laws referred to, in connection with the foregoing section of the law, it is apparent that there is a conflict between the by-laws and Section 7 of the law, in that the assessment of the additional premium provided for is limited to the payment of losses, while, under the foregoing Section 7, such assessment may be made for expenses as well. The by-laws should be drawn to conform to said Section 7.

Section 9 of the by-laws provides, in substance, that the officers of the company shall consist of a president, vice-president, secretary, treasurer, superintendent of agents, and such other officers as are necessary to conduct the business of the company, and provides, further, that these officers shall constitute an executive committee, which shall, subject to the directions and control of the board of directors, have general control of the affairs and management of the company.

Section 12 provides that the president, vice-president, secretary, treasurer and superintendent shall constitute an executive committee, which committee shall have, subject to the direction of the members and agreeable to the law, general charge and management of the affairs of said company, and that, in the event of difference of opinion, a majority of such committee shall be authorized to give directions in respect to any matter affecting the business of the company which is authorized and permitted by law. It appears to us that these provisions are an attempt on the part of the corporation to place the management of the company in the hands of the executive committee instead of the board of directors, and that the same are, therefore, in conflict with Article 1159 of the General Corporation Laws of the State, which article reads, in part:

"The directors or trustees shall have the general management of the affairs of the corporation. * * *"

The appointment of an executive committee in addition to the board of directors is not expressly authorized by our statutes, as it is by the statutes of many of the States, but still an executive committee may be appointed from the board of directors to perform certain duties, the same as the performance of certain duties may be delegated to or placed upon other officers, but we do not believe that, under our law, the entire authority of the board of directors may be delegated to an executive committee, but that the duties of the executive committee must be clearly defined by the by-laws, and while the executive committee may be permitted to perform acts requiring judgment and discretion, yet the limits of their authority should be stated in the by-laws and the

entire authority of the board of directors can not be conferred upon the executive committee.

Temple vs. Dodge, 32 S. W., 514, 515.

The president and vice-president of the corporation are required under the laws of this State to be members of the board of directors. Revised Statutes, Article 1154. The other officers of the corporation are not required by the laws of the State to be members of the board of directors. Therefore, if any of the other officers of this corporation, other than the president and vice-president are to be members of the executive committee, the by-laws of the corporation must require that these other officers shall be members of the board of directors, because only members of the board of directors can serve as members of the executive committee, the rule being that the discretionary powers of the board itself can be delegated to standing committees only when such committees are composed of members of the board.

Conyngton on Corporate Management, Sec. 138.

Frost on Organization of Corporations, Sec. 95, page 108.

Section 13 of the by-laws provides, in substance, that the by-laws may be amended at any meeting of the board of directors after notice given to each of the directors of the proposed change, and after fifteen days shall have elapsed after such notice and shall be changed whenever directed by a meeting of the members of the company and in accordance with a majority vote of such members. The substance of this section of the by-laws is that the by-laws may be changed (a) by the directors, and (b) by the members of the corporation.

Article 1155, Revised Statutes, provides that the directors or trustees may adopt by-laws for the government of the corporation, but such by-laws may be altered, changed or amended by a majority vote of the stockholders at any election or meeting ordered for that purpose, etc.

It will be noted that Section 13 of the by-laws is not in harmony with this article of the statute, because Section 13 undertakes to give to the board of directors plenary powers to change the by-laws at their will. This can not be done. The statute means that the directors, as an original proposition, may adopt by-laws for the management of the corporation, but after these by-laws have been approved, altered or changed by the stockholders or members of the corporation in their meeting, then these by-laws become the governing rules of the board of directors, and may not be amended or changed by the directors except upon approval of the members of the corporation. In other words, when once the members of the corporation have adopted the by-laws, then the board of directors have no authority to repeal or change these by-laws.

Conyngton on Corporate Management, Sec. 119, page 157.

The by-laws should also be certified to, which certificate seems to have been omitted from the copy of the by-laws before us for examination.

When the foregoing corrections have been made in the by-laws of this corporation, you will be authorized to issue a charter to the corporation.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

OPINIONS CONSTRUING BANKING LAWS.

BANKS—AUTHORITY OF PRESIDENT TO VOTE AT DIRECTORS' MEETING.

The president of a State bank, who is also chairman of the board of directors, has a right to vote on all questions before the board, the fact of his being chairman not being a limitation upon any of the rights as a director. (Revised Statutes of 1911, Article 374.)

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JUNE 16, 1913.

Hon. B. L. Gill, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: In a recent communication you enclose to us a letter from Mr. Word, cashier of the First State Bank at Mathis, Texas, in which letter is stated that at a regular meeting of the directors of this bank the question of a location for a bank building was submitted to the board, that there were six directors present, the president being one and chairman of the meeting; that when the vote was put three of the directors voted for one location and the other two directors with the president voted for another location; the question propounded by you is whether or not the president had a right to vote on this question.

In reply to your communication, we beg to advise you that, in the opinion of this Department, the president would have a right to vote. The affairs and business of every banking corporation must be managed by its board of directors (Revised Statutes, Article 374). One of the methods of managing a banking corporation is to permit the directors to vote upon such questions as may come before the board concerning the management of the bank, and we can not see how the election of one of the directors as chairman of the board would deprive him of his statutory authority or relieve him of the statutory duty to participate in the management of the affairs of the bank. In other words, when he is elected chairman of the board such action can not be construed as a limitation upon his authority as a director, but rather as an enlargement of his duty to the extent that he must perform the additional duties and functions devolving upon that officer.

Respectfully,

C. M. CURETON,

First Assistant Attorney General.

BANKS—STATE BANKS—BOARDS OF DIRECTORS—CORPORATIONS.

The regular meeting of the board, as used in R. S., Art. 530, means a meeting of the board of directors held pursuant either to the statutes of the State or to the by-laws of the corporation.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, AUGUST 30, 1913.

Hon. W. W. Collier, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: In your letter of August 29th you call our attention to

Section 72, Digest of the State Banking Laws, Article 530, Revised Statutes, which in part reads as follows:

"The officer or employee shall have no power to endorse, sell, pledge or hypothecate any note, bond or other obligation received by such corporation for money loaned until such power and authority shall have been given such officer or employee by the board of directors in a regular meeting of the board, etc."

You then state:

"This section has been confusing since the law first went into effect to those banks who have made loans and rediscounts for our Texas State banks; some arguing that it was absolutely necessary that action be taken by the directors at a regular meeting or the monthly meeting provided for in the by-laws, while others have construed it to mean at a meeting regularly held. During the administration of my predecessor I note that this Department ruled that in view of the fact that no matter what date the meeting was held if the bank got the proceeds of the loan it was bound by its obligation, etc."

You ask for a construction of that section of the law referred to. Your request, in effect, is for a determination as to the meaning of the words "regular meeting of the board." The common law rule, or rather the rule which has been adopted by the courts without any statutory enactment, is that individual directors or a majority, however great, of the stockholders, acting separately, can not bind a corporation, or that a corporation is not bound by the acts of its directors in a casual uncalled meeting of a majority thereof nor by all of such directors acting personally and not in an official meeting.

Nickelstone City Co. vs. Smalley, 51 S. W., 521.

Austin City R. Co. vs. Swisher, 1 White & Willson, Sec. 77.

Kolp vs. Specht, 33 S. W., 714, 93 Texas, 665.

The rule is thus laid down by Mr. Thompson in his work on Corporations:

"We may settle down with confidence upon this principle, that in all matters involving the exercise of what might be termed legislative or judicial discretion and which the directors can not therefore delegate to others, as elsewhere shown, they can only bind the corporation by acting together as a board. A majority of them can not undertake to act in their individual names for the board itself, and no act can be done affecting the ownership of property except by resolution of the board when legally constituted and sitting in consultation." (Thompson on Corporations, Sec. 3905.)

We take it that our statute is merely declaratory of the general and common law as stated by Mr. Thompson and as stated in the Texas cases above referred to; that is to say, that in order for the officer or employee to have authority to endorse, sell, pledge or hypothecate any note, bond or other obligation received by such corporation, etc., such officer or employee must have been authorized so to do by the board of directors. However, the law carries with it a further limitation that it must be a regular meeting of the board. But we think the words "regular meeting of the board" should be also interpreted as meaning the mere general or common law rule with reference to regular meetings or assemblages of corporate boards and organizations of similar character or for similar purposes. The word "regular" means: "Conformable to a rule; methodical; periodical."

Zulick vs. Bowman, 42 Pa., 83.

"Regular" is derived from "regula," meaning rule, and its first and large signification, according to Webster, is "conformable to a rule; agreeable to an established rule or principle, to a prescribed mode, or according to established customary forms."

Myers vs. Rashback, 4 How. Prac., 83.

State vs. Cobb, 2 Kan., 32.

"Regular election," as used in the Kansas Constitution, providing that in case of vacancy in any judicial office it shall be filled by appointment by the Governor until the next "regular election," that shall occur more than thirty days after such vacancy shall have happened, should be construed the next election held conformable to established rule or law; that is to say, the next regular election prescribed by law for the election of a particular officer to be elected.

Ward vs. Clark, 35 Kan., 315.

"Regular election," as used in the Constitution of Texas, providing that in case of vacancy the judge of the district court shall have power to appoint a clerk until a regular election be held, means any election by the people which is provided for by law.

Banton vs. Wilson, 4 Texas, 400.

"A regular meeting of town trustees" is such a meeting as the law requires to be held at a stated time and place.

State vs. Trustees of Wilkesville, 20 Ohio St., 288.

The word "regularly" is defined as meaning in a regular manner; in a way or method accordant to rule or established mode; in uniform order; methodically; in due order. Such is its signification in an ordinance requiring a railroad company to operate the road regularly, etc.

City of Bellville vs. Ry., 26 L. R. A., 681.

The theme or controlling feature of each and all of the foregoing definitions is that the word "regular" as applied to any assemblage or meeting of persons or to any act similar in purpose or effect is that the meeting or assemblage must be one provided for by law or by some rule or method prescribed or permitted by law. We are, therefore, of the opinion that the terms "regular meeting of the board" mean a meeting of the board prescribed by law or provided for in the by-laws of the corporation. It does not mean a casual assemblage of those who compose the membership of the board of directors. It embraces two concrete and definite ideas:

1. Those who compose the membership of the board of directors must assemble at a place and a time prescribed either by the by-laws of the corporation or by the law itself; and

2. They must meet as a board of directors to act officially as a board.

The meaning is not limited to the mere monthly meeting provided for in the by-laws, but is applicable to any meeting which assembles in accordance with the provisions of the by-laws.

The by-laws may provide monthly meetings or they may provide weekly or daily meetings, or the by-laws may provide for special meetings to be called by the president or in some other manner, or the by-laws may provide that meetings may be held at any time without previous notice by unanimous consent or by the unanimous participation of

the board membership; any and all such meetings would be regular; provided, the by-laws provided for meetings of the character suggested. But any meeting at which such authority is granted an officer or employee must be a meeting provided for by law or by the by-laws of the corporation, and the action taken must be an official action taken by the members of the board sitting as a board, and the mere unanimous consent of each of the individual members of the board or the mere consent of a majority of the board, expressed in writing or otherwise, given in their individual capacity, would be insufficient to confer authority for the purposes specified upon an officer or employee. But when the board meets and acts as a board at a meeting assembled in accordance with the by-laws of the corporation, whether it be a monthly meeting, a weekly meeting, a daily meeting or a meeting by unanimous consent, or whether it be a special meeting or a general meeting, is a regular meeting of the board, the sole and only requirement being that it be a meeting of the board provided for in the by-laws of the corporation or by the State law. In effect, the words "regular meeting of the board" mean a meeting of the board assembled under the terms and provisions of the by-laws of the corporation or in accordance with the statute. It is apparent from the foregoing that it does in fact mean a meeting of the board regularly held.

We note that you state that the Department has heretofore ruled that no matter on what date the meeting was held if the bank got the proceeds of the loan it was bound by its obligation.

This construction would be doubtless correct in nearly all instances which might arise, because it is ordinarily true that where a corporation receives benefits of any irregular act on the part of its officers, and after knowledge of the irregular act retains the benefits, that the corporation is thereby bound.

Merchants Cotton Oil Co. vs. Lufkin National Bank, 79 S. W., 651.

First National Bank vs. Greenville Oil Co., 60 S. W., 828.

Panhandle National Bank vs. Emory, 78 Texas, 498.

But this rule is one which arises under the law of estoppel and is not one which it is safe for the officers of a banking corporation to indulge in or for their creditors to depend upon, because the application of the rule and the results flowing from it must depend upon each individual state of facts; so with reference to the matter under consideration there is but one safe course for banking corporations to take, and that is to see that the authority referred to in Section 72 is only conferred at meetings held in accordance with the by-laws of the corporation or in accordance with the State law. If the by-laws of the corporation do not provide for sufficient elasticity in the calling of meetings other than the statutory monthly meetings, then the by-laws should be amended making it easy for special meetings of the board to be called; in fact, the boards of directors of banking corporations are usually so small that we think it would be advisable for the by-laws to provide that meetings may be held at any time and without previous notice by unanimous consent of the members of the board, and that such a by-law would be entirely lawful and meetings held thereunder "regular meetings of the board."

Connington on Corporate Organization, Sec. 168.

"Consent meetings" of the board of directors are those meetings of the board of directors where all agree to hold a special meeting, and at such meetings any desired business may be transacted without further formality; these meetings have been recognized by the statutes of New York and some few of the other States, but have not been recognized in this State by statute; however, they are valid and legal meetings under the common law.

Connington on Corporate Management, Sec. 131.

Minneapolis Times Co. vs. Nimocks, 53 Minn., 381.

Bank vs. Johnson, 60 Pac. Rep., 776.

However, we think it advisable for the by-laws themselves to provide for these consent meetings, and then there can be no question about such meetings being "regular meetings."

The following is a by-law approved by the author of Connington on Corporate Management, and which appears to us to be very good:

"Special meetings of the board of directors, to be held in the principal office of the corporation in _____ City, may be called at any time by the president or by any three members of the board, or may be held at any time and place, without notice and for the transaction of any business, by unanimous written consent of all the members or by the presence of all the members at such meeting." (Connington on Corp. Management, p. 247.)

We, therefore, answer your question directly, and state that the words "regular meeting of the board" mean a meeting of the board held pursuant either to the statutes of the State or to the by-laws of the corporation.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

BANKING—UNINCORPORATED BANKS.

Held: The penalty of one hundred dollars prescribed for failing to use the word "unincorporated" after the name is in the nature of a continuous offense and does not subject the institution to a penalty of one hundred dollars per day. (Statutes construed: Articles 558 and 557, R. S., 1911.)

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, MAY 24, 1913.

Hon. W. C. Shults, County Attorney, Decatur, Texas.

DEAR SIR: In your letter of May 20th you ask if the penalty mentioned in Article 558, Revised Statutes, 1911, providing that private individuals or firms doing a banking business shall use after the name the word "unincorporated" in parenthesis, and prescribing a penalty of one hundred dollars for violation of such article, constitutes a continuous offense or is it intended to prescribe a penalty of one hundred dollars per day?

Replying thereto, we beg to say it will be noted from reading Article 558 that the penalty clause therein reads as follows:

"and failure to comply with this article shall subject the offender to a penalty of one hundred dollars, to be collected in the manner provided in Article 557."

It will be noted that certain regulations are prescribed in Article 557 referred to, and it is provided that any offense against those provisions will subject the institution to a penalty of one hundred dollars per day for each day such offense shall be continued, and of course for those offenses it is clear that the penalty shall be for each and every day that the offense is continued, but no such language is used in Article 558 covering the use of the word "unincorporated."

The reference in Article 558 to Article 557 is only that the penalty prescribed in Article 558 shall be in the same manner as the penalties prescribed in Article 557, but it does not say that it shall be collected in the same amount or upon the same basis as the penalties prescribed in Article 557. If it had so intended that each day should constitute a separate offense, the Legislature would have used appropriate words to convey that idea, as it did in Article 557.

We think that the reference in Article 558 to Article 557 merely means that the same procedure shall be invoked to collect the penalty prescribed in Article 558 as is laid down for the collection of penalties under 557. That is, that same shall be sued for and recovered in the name of the State by the prosecuting attorneys of the several counties in any court cognizant thereof, and that it is clearly the intention of the Legislature that the offense defined in Article 558 should be a continuous one and not a separate and distinct one upon each and every day.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

BANKS—CORPORATIONS—STOCK AND STOCKHOLDERS.

Under the laws of this State stock in a banking corporation can not be disfranchised. (R. S., Arts. 383, 532, 535, 536, 561, 562, 563.)

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MARCH 17, 1914.

Hon. W. W. Collier, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: You request the opinion of the Attorney General as to whether or not a trust company may be organized under the banking laws of this State with a capital stock of \$110,000, of which stock \$100,000 is to be preferred without voting privilege, and \$10,000 common stock, the latter carrying control of the company. That in the organization of such corporation it is to be provided that the dividend on the preferred stock shall be cumulative and that a stipulated 1 per cent shall be paid on it before any dividend accrues to or may be paid upon the common stock, and, furthermore, that the parity between the preferred and common stock shall forever be maintained in the ratio of ten to one, and finally that the legal responsibility of the owners of the common stock shall be ten times that of the owners of the preferred stock.

In response to your question, we beg to advise you that a corporation of the character you suggest can not be organized under the banking laws of this State.

Under the plan of organization suggested in your question there would be \$100,000 in shares of the stock which would have no voting privilege and could not participate in the affairs of the corporation. It is apparent from a very casual examination of the banking statutes of this State that they contemplate that each shareholder must exercise the right of voting. Article 383, Revised Statutes, provides, in substance, that the board of directors of a bank and trust company shall be "elected by ballot by the shareholders of such corporation for one year," etc. Article 532, Revised Statutes, providing for the increase of the capital stock of bank and trust companies, states, in effect, that the capital stock of any such corporation may be increased in accordance with the provisions of the chapter of which this article is a part, "with the consent of the persons holding a majority of the stock of such corporation, which shall be obtained at a meeting of the shareholders, called for that purpose." The same article further provides that after the meeting has been called and the shareholders have met and considered the issue the result shall be determined "upon a canvass of the votes of such meeting," etc.

Article 535, Revised Statutes, reads:

"An affirmative vote of the same persons holding the larger amount in value of all the shares of stock shall be necessary to increase or diminish the amount of its capital stock, or to extend or change its business as aforesaid, or to enable a corporation to avail itself of the provisions of this title."

Article 536, Revised Statutes, sets forth the statutory method of procedure at each meeting. It provides substantially as follows:

"If, at any time and place specified in the notice provided for in Article 534, stockholders shall appear in person or by proxy, in number representing not less than a majority of all the shares of stock of the corporation, they shall organize, by choosing one of the directors chairman of the meeting, and a suitable person for the secretary, and proceed to a vote of those present, in person or by proxy," etc.

Article 561, Revised Statutes, specifying how the business of solvent banking corporations may be closed, among other things, states:

"Whenever the board of directors of any solvent corporation, organized under, or subject to, the provisions of this title, shall deem it necessary, expedient or desirable, to close the business of the corporation, they shall call a meeting of the stockholders to vote upon the proposition to close the business of the corporation, first having given sixty days notice thereof. * * * The vote upon such proposition shall be taken by ballot, and the resolution and vote thereon shall be recorded in the minutes of the board of directors. *If, at such meeting, at least two-thirds of the shares of the corporation are voted in favor of such proposition, the board of directors shall proceed to wind up the business of such corporation, etc.*"

Article 562, in part, reads:

"Any bank, trust company, or savings bank organized under the general or any special laws of this State, whose capital is fully paid up and unimpaired,

may, with the consent of a majority of the stockholders, accept the provisions of this title, by filing with the Secretary of State a certificate of such acceptance signed by its president and secretary. *The consent of the stockholders of such acceptance may be in writing, or by a vote of the stockholders, at any meeting at which all of the stockholders have due notice, and vote in favor of such acceptance.*"

Article 563, in part, is as follows:

"Any private corporation now incorporated under the laws of Texas, possessing banking powers or privileges, or any of the powers or privileges by this title conferred upon savings banks or upon trust companies, may, *by a vote of the majority of its capital stock, accept the provisions of this title, and amend its charter, etc.*"

It is unnecessary for us to refer to or quote from the statutes further, because it is very clear that the banking laws of this State require the control of the corporation to be ultimately and finally vested in each and all of the stockholders. Such being the statutory method, it becomes exclusive, and the incorporators would not have the right either in their charter or by-laws to disfranchise any of the stock of a banking corporation.

It is unnecessary for us to express an opinion on the other questions suggested in your communication, because we have already determined one of the suggested questions adversely to your inquiry, and we assume it would be unnecessary for us to pass upon the other question submitted by you.

You are, therefore, advised that the character of corporations described in your communication can not be chartered under the bank and trust company laws of this State.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

OPINIONS CONSTRUING LAND LAWS.

PUBLIC SCHOOL LANDS—TIME WITHIN WHICH APPLICATION TO REPURCHASE MUST BE FILED—ACT OF GOD.

(Act of April 18, 1913, General Laws of Regular Session, Thirty-third Legislature, page 336.)

An application to repurchase under the provisions of the Act of April 18, 1913, must be filed in the General Land Office within 90 days after notice of classification and appraisalment of the land, and, under ordinary conditions, if the application is not filed in the General Land Office within that time, the land should not be awarded to the applicant.

The extraordinary rains and floods in this State during the last days of November and the early days of December, resulting in the complete demoralization of railroad transportation and delivery of the mails, were, within the legal sense, an act of God; and when an application to repurchase land, under the Act of April 18, 1913, was mailed in such time that it would under ordinary conditions have reached the General Land Office within the 90 days allowed by law, but was prevented from so reaching the General Land Office within the said time by the act of God aforesaid, the land should be awarded to the applicant.

An owner of school land at the time of its forfeiture is entitled under the act to 90 days after the date he receives the notice of classification and appraisalment of the land within which to repurchase it.

When an applicant to repurchase school land under the Act of April 18, 1913, filed his application in the General Land Office within the time required by law but the money sent as first payment on the land did not reach the General Land Office until a day or two after the expiration of the 90 days, the land should, nevertheless, be awarded to the applicant.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, DECEMBER 20, 1913.

Hon. J. T. Robison, Commissioner General Land Office, Austin, Texas.

DEAR SIR: In your letter to this Department of December 13th, you state that many persons who were entitled to repurchase school land under the preference right given them by the Act of April 18, 1913, waited until a few days prior to the expiration of the ninety days given them by the law within which to file their applications after notice of classification and appraisalment, and that on account of the unusual and unprecedented rains in this State at about the time the applications were mailed and the subsequent washout in the means of transportation many of these applications did not reach the Land Office until after the expiration of the ninety days. You desire to know whether or not you would be authorized, under the law, to accept such applications as did not reach your office until after the expiration of the ninety days and to award the lands.

Section 1 of the Act of April 18, 1913, provides that the owner of the land at the date of forfeiture "shall have the right for a period of ninety days after notice of classification and appraisalment of his land, as herein provided for, to repurchase any of such tracts, not to exceed one complement of sections."

Section 3 of the act contains the following:

"If such forfeiting owner desires to repurchase the land at the appraised value placed thereon by said board, he shall file his application therefor in the General Land Office within 90 days after the date of appraisalment."

It appears that it was the purpose of the Legislature in enacting this law to fix a certain and definite time within which the owner of the land at the time of forfeiture might exercise the prior right to repurchase given by the act, and the Legislature placed this time at ninety days after notice of classification and appraisalment. This is a special privilege and right which was given to the owners at the time of forfeiture, and, in order to enjoy the privilege thus given them, they must perform the conditions of the law according to its terms. We conclude, therefore, that under ordinary conditions an owner at the time of forfeiture would not be entitled to an award, unless his application was filed in the Land Office within the ninety days after notice of classification and appraisalment, and that under ordinary conditions an application filed after the expiration of ninety days after notice of classification and appraisalment should be rejected.

The question then presents itself whether the occurrence of the unusual and unprecedented flood with its disastrous consequences will excuse the applicant from the operation of this rigid rule when the application was mailed in such time that it would have reached the General Land Office within the ninety days but for the occurrence of the unprecedented flood. It is a matter of common knowledge that the rains, especially at this season of the year, were unprecedented in their magnitude, and that the floods which resulted from the rains inundated and destroyed many miles of railroad track and thoroughly demoralized transportation and caused the complete suspension of the mail service into Austin. The rains and the floods were such as no man could have foreseen, and the destruction of railroads and the demoralization of railroad transportation was general throughout the State. These rains and the floods which followed them come, in our opinion, well within the definition of the legal phrase, "act of God." Lord Mansfield defines "an act of God" as "a natural necessity, which could not have been occasioned by the intervention of man, but proceeds from physical causes alone, such as the violence of the winds or seas, lightning, or other natural accident." (Vol. 1, Am. & Eng. Encyc. of Law, p. 584.) For other definitions of the phrase, "act of God," see Vol. 1, Words and Phrases, page 118. In a number of cases, it is held that an unexpected and unprecedented rain or flood is an act of God in the legal sense.

In the case of the I. & G. N. Ry. Co. vs. Bergman, 64 S. W., 999, the Galveston flood of 1900 was held to come well within the strictest definition of the act of God. In the case of Wald vs. Pittsburg, etc., Ry. Co., 162 Ill., 545, 35 L. R. A., 356, the court held that the Johnstown flood was an act of God.

In the case of Railroad vs. Halloren, 53 Texas, 46, an extraordinary and unexpected rainfall which caused water so to collect along the embankment of a railroad as to soften it, resulting in the wreck of a train and injury of a passenger was held to be such inevitable accident

as to exempt the carrier from liability for the injury. In the opinion of the Supreme Court, in the case of Gleeson vs. Virginia Midland Railroad Co., 140 U. S., 439, we find the following:

"Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths and illness, have been held to be 'acts of God.'"

See also:

Bachus vs. Start, 13 Federal, 69.

Lovering vs. Buck Mt. Coal Co., 54 Pa. St., 291.

We are of the opinion that on the authorities above cited the unusual rains and floods of November and December of this year come well within the definition of the "act of God." To use the language of Chief Justice Gaines, in the case of T. & P. Ry. Co. vs. Bigham, 90 Texas, 223, nothing short of prophetic ken could have anticipated the happening of such violent and general rains and of the complete destruction of the means of transportation between Austin and other parts of the State from which the applications to purchase were mailed.

Having determined that the unusual rains and floods were an act of God, the next question presented is whether the interposition of this act of Providence will excuse the failure of the applicants to file their applications in the General Land Office within the time fixed by law. As shown by the sections of the law above quoted, the owners at the time of forfeiture were given ninety days after notice of classification and appraisal within which to repurchase the land. This period of time is an arbitrary period, and we know of no reason why it was fixed at ninety days, except that it was necessary that a certain time be fixed in order that the lands might not be kept off the market for any unreasonable time. The period could as well been one hundred and twenty days, as ninety days, and if the period had been as long as one hundred and twenty days, or perhaps longer, such longer period would not be in violation of any policy of our school land laws and would have worked an injury to no one except that the State might perhaps have lost the interest for a few days on the deferred payments evidenced by the obligations executed at the time of the purchase of the land.

Since the applicants were allowed ninety days, they certainly were allowed all of the ninety days, and they were under no obligation to file their applications in the General Land Office at any time prior to the last day allowed them under the law. It is also to be observed that the law requires that applications to purchase school land be sent by mail. There is no special requirement to this effect in the Act of April 18, 1913. The act does not state whether the application shall be sent by mail or delivered in person to the Land Office, but Section 3 of the act contains the following provision:

"All terms, conditions and penalties now provided for the sale of public free school lands shall apply, govern and control all sales made under this act, except as otherwise provided herein."

Where the terms, conditions, etc., therefore, are not fixed by the Act of April 18, 1913, we must look to the General School Land Law for

such terms, etc., and we find that Article 5410 of the Revised Statutes, 1911, contains the following:

“Said application, affidavit and obligation shall be filed in the Land Office through due course of mail and not by any one in person. * * *”

The person, therefore, who desires to exercise the right to repurchase is forced by the law to avail himself of the United States mail as the means of filing his application in the General Land Office. Transportation and mail service have reached such a high state of efficiency that the people have learned to rely upon the mail service with almost implicit confidence. We conclude that any person who mailed his application within time, under ordinary conditions, to reach the General Land Office before the expiration of the ninety days allowed by law must have acted with at least ordinary diligence and prudence. The unusual and far-reaching results of the rains could not have been anticipated by any man, and we think that this “act of God” should excuse the applicant for his failure to file the application within the time fixed by law, if it was mailed in such time as that it would have reached the General Land Office in the ordinary course of mail and under ordinary conditions prior to the expiration of the ninety days.

It is suggested that perhaps the applicants, by waiting until a few days before the expiration of the ninety days before mailing their applications, were guilty of contributory negligence, and that, therefore, they can not use the occurrence of the unusual rains as an excuse for their failure to file their applications in the time fixed by the law. We think that it is a sufficient answer to this suggestion to say that the land owners who desired to repurchase under the law were given ninety days, and that they were entitled to all of the ninety days within which to file their applications. These men may not have been guilty of negligence. In fact, we have been informed that some of them at least on account of their financial condition had great difficulty in securing the money with which to make their first payments on the land, and it is doubtless true that it was this difficulty which prevented many of them from mailing their applications at an earlier date. In addition to this, even though there may have been negligence on the part of some of the applicants in waiting for, say, eighty-five or eighty-six days, before mailing their applications, it is not chargeable to them if the interposition of the act of God and *not* the act of negligence was the proximate cause of the failure of the applications to reach the General Land Office in proper time. In testing most legal rights and liabilities, the law looks to the proximate and immediate cause, and not to remote or indirect causes. As said by Bacon: “It were infinite for the law to consider the causes of causes and their impulsions one of another, therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking for any further degree.”

The case of the I. & G. N. Rv. Co. vs. Bergman, 64 S. W., 999, is a good illustration of this rule. In that case cotton entrusted to the care of a railway company was lost in the Galveston flood: the railway company pleaded the act of God in defense of a suit for its value; in reply to this defense the contention was made that the railway company was negligent in the transportation and delivery of the cotton, and that if

the cotton had been transported and delivered with diligence it would not have been lost in the Galveston flood. The court held that the flood was the proximate cause of the loss, and that, by reason of the fact that the flood was the proximate cause of the loss, the railway company was not liable for the loss of the cotton.

The purchase of school land under the Act of April 18, 1913, is a contract between the applicant for the land and the State. The effect of said act is to give the person who owns the land at the time of its forfeiture a prior right or an option to buy the land from the State. The first step in the exercising of this option is the notice which the former owner of the lands sends to the Commissioner of the General Land Office in accordance with Section 2 of the act that he desires to repurchase the land. The next step is the appraisal of the land and the sending of the notice of appraisal to the former owner. This amounts to an offer on the part of the State to sell the land at the appraised price. The filing of the application by the former owner is the acceptance of this offer. There is a well established general rule of law that, when a person undertakes by contract to do a certain act, he is not excused for his failure to perform the act in strict accordance with the terms of his contract, even though he is prevented from doing so by the act of God. The reason for this rule is, that if he desired to be absolved from liability for non-performance according to the terms of the contract under any circumstances he should have so stipulated in his contract. There is another rule, however, that, where a duty or obligation is imposed upon a person by law, he will be absolved from liability for non-performance if such non-performance is occasioned by the act of God. The reason for this distinction is plain; it is that where the obligation or duty is imposed or fixed by law the person affected has no opportunity to stipulate in his contract against the occurrence of the act of God. (See Elliott on Contracts, Sec. 1892; 9 Cyc., pp. 628-29.)

The facts of the case as presented by you, if they do not fall within the rule above referred to, that one is relieved of his obligation where the duty is imposed by law, are at least within the reason for the rule. The former owner of the school lands, when he undertook to exercise his option to repurchase by notifying the Commissioner of his desire, had no opportunity to stipulate against the occurrence of an act of God which might prevent his full performance according to the strict letter of the law. In order to purchase the land he must purchase it on the terms and conditions of the law and on none other. The obligation to file his application in the Land Office within ninety days is an obligation fixed by law, and if, in the exercise of proper diligence, he is prevented by an act of God from performing this obligation within the time as fixed by law, he should not be held to the strict letter of the law.

There is another rule of law which has some bearing upon the question under consideration. It is, that where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of a person or thing to which the contract relates, the subsequent destruction of the person or thing will excuse the performance of the contract. See

9 Cyc., page 631.

Butterfield vs. Byron, 152 Mass., 517, 25 Am. St. Repts., 654.

Cook vs. McCade, 53 Wis., 250, 40 Am. Repts., 765.

The facts of the case of *Lovering vs. Buck Mt. Coal Company*, 54 Pa. St., 291, are very similar to the matter under investigation. In that case the Buck Mt. Coal Company entered into a contract to sell and deliver a certain amount of coal to a purchaser within a certain time; the coal company owned a line of railroad connecting with what was known as the Leigh Coal & Navigation Works, being a line of railroad, and this line of railroad, owned by the Leigh Coal & Navigation Company, was the only means whereby the coal company could deliver the coal according to its contract. An unprecedented freshet in the river Leigh swept away all of the Leigh Navigation Works and completely stopped all transportation of the coal to the market, and the coal company was, therefore, unable to deliver the coal within the time fixed by its contract. The court held that because the contract was made with reference to a delivery of the coal over the line of railroad which had subsequently been destroyed by an unexpected and unprecedented flood, and since the parties had in mind at the time the contract was made the continued existence of this line of railroad as a means for the performance of the contract, the coal company was absolved from liability for its failure to deliver the coal within the time fixed by the contract. In the matter under investigation, at the time the prior right was granted by the Legislature to the owner of the land at the time of forfeiture and at all times since then, both parties to the contract had in mind as a means for the performance of the contract the continuance of the regular operation of the railroads and the mails which would carry the applications to Austin, and since this means of the performance of the contract was thoroughly destroyed for the time being by an act of God, it would be inequitable and out of harmony with all the rules of contract law to hold the applicant to the strict letter of the law with reference to the time within which the application should be filed.

We are not unaware of the case of *Good vs. Terrell*, 99 S. W., 641, and the case of *Brown vs. Terrell*, 99 S. W., 542, which followed the *Good* case. Those cases construed that portion of the school land Act of 1905, which requires a purchaser, on condition of settlement, to file an affidavit of settlement within one hundred and twenty days from the date of his award, and which contains the following provision:

"A purchaser shall not transfer his land prior to his actual settlement thereon, and evidence of that fact filed as herein provided and any attempt to so transfer by deed, bond for title, or other agreement shall operate as a forfeiture of the land to the fund to which the same belonged together with all the payments made thereon, and when sufficiently informed of the facts which operate as a forfeiture, the commissioner shall note the fact of forfeiture upon the application and proceed to place the land on the market by notice to the proper county clerk and advertisement in the manner provided for cancelled leases."

In the *Good* case the affidavit of settlement was made and was mailed in ample time to have reached the General Land Office before the expiration of the one hundred and twenty days and in ample time for it to have reached the General Land Office before a conveyance of the

land by the purchaser to another, but the letter apparently was lost in the mail and did not reach the General Land Office, and thereafter the purchaser from the State conveyed the lands to another. The court held that the language of the act required a forfeiture if a conveyance was made before the affidavit was filed in the General Land Office, and that the statute was imperative and should be followed according to its letter. This decision is perhaps one of the very strictest constructions of the law according to its very letter that can be found in the books. A reason for this rather unusual decision may be found in the necessity for strict regulation to enforce the policy of the school land law, which is to secure personal settlement and actual settlers, and to prevent collusions in purchases from the State.

It is to be observed also that in the Good case and in the Brown case, which followed it, there was no interposition of an act of God, but the failure of the affidavit to reach the Land Office in the time fixed by the law was in all probability the result of human frailty; that is, the negligence of some person who handled the mail.

The case of *Byrne vs. Robison*, 122 S. W., 256, and the case of *Hobbs vs. Robison*, 124 S. W., 89, which follows the *Byrne* case, approach the question under investigation. The *Byrne* case involved the purchase of a section of land for sale under the system of competitive bidding. The land came upon the market on August 1, 1908, and a Mrs. Williams filed an application to purchase the land and mailed it in accordance with the law. The application reached the postoffice in Austin in due time and would have reached the General Land Office in due time but for the absence of an employee of the Land Office, whose duty it was to convey the mail from the postoffice to the Land Office. On this account the application did not reach the Land Office until August 4, 1908. On August 3, 1908 (August 2d being Sunday), the bids which had been received by the Commissioner were opened. The facts show that the land would have been awarded to Mrs. Williams but for the failure of the employee of the Land Office to convey the mail to the Land Office. The court held that the land should have been awarded to Byrne. One reason assigned for the opinion of the court was that ample time was afforded to allow the applicant not only to make his application but to see that it had been received in the Land Office, and that Mrs. Williams could have ascertained whether or not her application had been received in the Land Office by August 1, 1908. The real reason for the decision seems to be that the land was for sale by competitive bids and that the bids should be opened at a certain time and that the highest of said bids so opened should obtain the land.

In the matter under consideration, we do not have a case of competitive bidding. Only the former owner at the time of forfeiture has the right to repurchase the land (unless, of course, he does not exercise this right within the ninety days). There is only one application that can be made to repurchase and that is the application of the former owner. In addition to this, there was no opportunity for the applicant to ascertain whether or not his application had reached the General Land Office within the ninety days, and, if he had ascertained that it had not, there was no means whereby he could get another application mailed and filed in the Land Office within the time fixed by law.

The case presented by your letter is one in which no question can arise as to the rights of third parties. There can be no intervening rights for the reason that the land does not come on the market for purchase by persons other than the owner at the time of forfeiture until the Commissioner of the General Land Office again places the land on the market, as provided by Section 4 of the Act. Since this is true, and there are no persons who have any interest in the transaction except the applicant and the State, there is no reason why the State should insist upon the strict letter of the law. The applicant has done everything that a reasonable and prudent man could be expected to do, and he is not at fault since he could not have anticipated the extraordinary floods. He has complied with the spirit of the law, and this is a proper case, if there ever was one, for the application of the maxim, "The spirit maketh but the letter killeth the law."

We, therefore, advise you that in those cases in which the applications were mailed in such time as they would have reached the General Land Office in the ordinary course of mail and under ordinary conditions within the time fixed by law but the applications were prevented from reaching the Land Office by the occurrence of the extraordinary floods with their disastrous results, the applications should be filed and the land should be awarded to the applicants.

We have not, heretofore, in this opinion undertaken to discuss the question as to when the time begins to run within which the applicant must file his application to repurchase under the Act of April 18, 1913. The language of the act is somewhat indefinite. Section 1 of the act, which gives the owner at the time of forfeiture the preference right, declares that he shall have this right "for a period of ninety days after notice of classification and appraisement of his land, as herein provided." Section 3 of the act provides that the board of appraisers shall ascertain the reasonable values of the land and appraise it accordingly; that the board shall prepare triplicate notices of the appraisement and classification, sending one to each of the forfeiting owners, etc. In the same section, we find the following:

"If such forfeiting owner desires to repurchase the land at the appraised value placed thereon by said board, he shall file his application therefor in the General Land Office *within 90 days after the date of notice of appraisement.*"

The language of these two sections of the act is somewhat inconsistent. The first section clearly indicates that the owner shall have his prior right for a period of ninety days after he receives the notice of classification and appraisement, for the words "after notice" certainly convey this idea. The words "after the date of notice and appraisement," as contained in the third section of the act, taken in connection with the preceding provision of the act, that the board shall prepare notices and send them to the forfeiting owner, may be taken to refer to the date which is placed on the notices which are sent out by the board, but this is not necessarily the only meaning of the words. They may as well refer to the date when the owner gets the notice. There is nothing in the act requiring that the board shall date the notices which they send out, and there is nothing in the act fixing any certain time within which the land shall be appraised by the board. There is no

fixed place in which the sessions of the board shall be held, and no place in which the proceeds of the board shall be kept until after their work has been completed. The board might prepare the notices at any place, and give them a date showing the date when they were prepared and then might delay for many days in mailing them out, or the notices might be misdirected by the board and they might never be received in some instances by the owner. In either of these instances, the owner would be deprived of at least a part of the ninety days which he is given by Section 1 of the act.

We are inclined to the opinion that the whole act clearly contemplates that the owner shall be notified and that he shall receive the notice and that he is entitled to a full period of ninety days from the date on which he receives the notice within which to file his application in the General Land Office. As above stated, the law, as written, is indefinite and unsatisfactory in this respect, but after a careful consideration of the matter we are of the opinion, and so advise you, that the forfeiting owner is entitled to a full period of ninety days from the time he receives the notice of classification and appraisalment within which to purchase the land.

We understand, of course, that under this construction the Commissioner of the General Land Office might not be able to tell positively from his records just when the forfeiting owner received the notice, but, if the records of the board show the dates on which the notices were mailed, the Commissioner would be justified in presuming, in the absence of evidence to the contrary, that the notices were received by the owners in due course of mail. Where these notices were delayed for any reason, and in case of any controversy as to the date on which the notices were received, the Commissioner of the Land Office could require an affidavit or other satisfactory evidence showing the date on which the notices were received.

In your second question, you state that some of the applicants, under the preference right given them by the act above referred to, succeeded in getting their applications filed in the Land Office in proper time, but their money for the first payment and the additional \$7.50, which they are required to pay under the law, did not reach the Land Office until one or more days after the applications were filed. Your letter does not state whether or not the money reached the Land Office after the expiration of the ninety days allowed by the act for filing the applications.

We advise you that in those cases in which the money was forwarded by the land owner in the form required by law and forwarded in such time as it would have reached the General Land Office before the expiration of the ninety days but the money was delayed by reason of the unprecedented floods, the land should, nevertheless, be awarded to the applicants for the reasons which have been more fully stated in our answer to your first question.

The exact question presented by your letter is whether the failure of the applicant to have the money in the Land Office at the time the application is filed would require you to refuse to award the land.

Section 3 of the act requires that the application shall be filed within the ninety days after the notice of appraisalment, "together with one-

fortieth of the appraised value and his obligation for the remaining portion of the purchase price, bearing 3 per cent interest per annum. The said one-fortieth cash payment shall conform to the requirements now prescribed for the first payments on applications for the purchase of other public free school lands. Before any application shall be accepted, and the award issued thereon under the right herein given, the applicant shall deposit in the General Land Office for the use of the general fund a sum of money equal to \$7.50 for each section of land awarded herein for the purpose of reimbursing said fund for the moneys drawn therefrom under the provisions of this act."

As to the sum of \$7.50, it clearly appears, from the wording of the act, that all that is required is that the money be deposited in the General Land Office before the award is issued. This clearly indicates that it is not absolutely necessary that this sum of \$7.50 accompany the application. It is enough if it be sent to the Land Office within a reasonable time after the application is filed. The language of the act with reference to the payment of the one-fortieth of the purchase money clearly contemplates that the one-fortieth should accompany the application.

In the case of *Rawls vs. Terrell*, 105 S. W., 488, and in the case of *Fitzhugh vs. Johnson*, 148 S. W., 286, which followed the *Rawls* case, where land was for sale on competitive bidding, and the applicant whose application was filed in the General Land Office failed to have his money on deposit at the time the application was filed and the right of a third person intervened, the Supreme Court held that the first applicant, on account of his failure to have his money on deposit, was not entitled to the land.

The case of *Buckley vs. Terrell*, 109 S. W., 861, was a case in which the land was not sold on competitive bidding, and the applicant filed his application in the Land Office before his money for the payment had been deposited. The court held that the applicant was, nevertheless, entitled to receive an award of the land, and distinguished the case from the *Rawls* case on the ground that in the *Buckley* case the land was not sold on competitive bidding, and there was no intervention of a third person. We are of the opinion that the question propounded by you comes within the *Buckley* case, for the reason that the land was not for sale on competitive bidding and there was no intervention of the rights of a third person, and there could have been no such intervention. We do not mean to say that there should be any unreasonable delay on the part of the applicant in depositing his money in the General Land Office. The money should, in fact, accompany the application, and it should, in any event be deposited in the General Land Office within a reasonably short time after the application is filed. What is a reasonably short time, of course, depends upon the facts of each particular case, and, in the event a delay was occasioned by the flood above referred to, this should certainly be taken into consideration, and the applicant should be given the benefit of his own diligence and should not be held responsible for a delay occasioned by the flood.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

PUBLIC LANDS—SALE OF WHOLE TRACTS.

(Articles 5418, 5422, 5435, and 5432, Revised Civil Statutes of 1911.)

When a section of land surveyed for the public school fund under an alternate certificate is unsold and a pre-emption is thereafter surveyed and patented, so as to cover part of the school section, the remainder of the school section not in conflict with the patented pre-emption may be treated as a whole tract and may be sold as such under existing laws.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 5, 1914.

Hon. J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: In your letter of January 2d, you state, in substance, that section number 2 in Llano and Mason Counties was surveyed for the school fund under a certificate issued to the T. C. Ry. Company, and that thereafter a pre-emption survey was made and patented which included a part of Section 2 theretofore surveyed for the school fund. It appears that no part of Section 2 has been sold as school land. You call our attention to that portion of the School Land Law of 1907 which forbids sale of land in less than whole tracts or whole surveys. You desire to know whether that part of the school section, with which the patented pre-emption does not conflict, may now be sold as public school land under the existing laws. You accompany your letter with a copy of a letter written by you as Acting Commissioner of the General Land Office to the Hon. R. V. Davidson, Attorney General, on November 13, 1908, in which letter you call this situation to the attention of the Attorney General. You do not state whether any action was taken by General Davidson in response to your letter, but we presume that none was taken.

Section 6 of the School Land Law of 1907, which is now Article 5418 of the Revised Statutes, contains the following:

"No survey shall be sold in any county, except as a whole, notwithstanding it may be leased in two or more parts."

Section 6b of the same act, which is Article 5422 of the Revised Statutes, and which relates to the sale of surveyed school land, without settlement, contains the following:

"Said land shall be sold in whole tracts only without condition of settlement."

Section 6d of the same act, which is Article 5435, Revised Civil Statutes, prohibits the transfer of land, except as a whole.

Section 6e of the act, which is Article 5432 of the Revised Statutes, contains the following:

"All surveys and unsold portions of surveys shall be sold as a whole."

These clauses of the School Land Law of 1905 were discussed and construed by Justice Williams in the case of *Ford vs. Terrell*, 101 Texas, 327, 107 S. W., 40. In that case a portion of a survey was under a valid unexpired lease and a petition for mandamus was filed

to compel the Commissioner to accept an application to purchase that portion of the survey which was not included in the lease. The Supreme Court held that that portion of the survey not included in the lease could not be sold until the expiration of the lease on account of those portions of the School Land Law of 1907, which have been above quoted, saying in the opinion:

"The fact that part of a section may be under lease and is thereby temporarily kept off the market is not made to take it out of the rule. The entire section in such case still belongs to the school fund and can eventually be sold in its entirety."

The facts presented in your letter, while somewhat similar to those in the Ford case, are not the same. In the Ford case the land being under the lease, which lease would expire within a definite time, was, as stated by the court, but temporarily kept off the market and was still the property of the school fund, and the entire section could be sold and would be for sale as soon as the lease expired. In the case stated in your letter, the portion of the survey is covered by a patent issued by the State and by the officers of the State authorized to issue such patent. It is true that before the issuance of the patent the land included within the patent had theretofore been set apart and appropriated to the public school fund, but the patent was, nevertheless, not void. It was only voidable at the instance of the State, or, at the instance of some individual, if any, having an interest in the land accruing prior to the issuance of the patent. See the following authorities:

Von Rosenberg vs. Cuellar, 80 Texas, 349, 16 S. W., 59.

Greenwood vs. McLeary, 25 S. W., 708.

Burnett vs. Powell, 25 S. W., 1030.

Miller vs. Ward, 124 S. W., 440.

Bunnell vs. Sugg, 135 S. W., 701.

Winson vs. O'Connor, 69 Texas, 571.

Horton vs. Halff, 147 S. W., 735.

Gullett vs. O'Connor, 54 Texas, 408.

Under the decision of the Supreme Court of Texas in the case of Jueneke vs. Terrell, 82 S. W., 1025, if the land under the pre-emption is held or claimed by a person or persons asserting title to the land under the pre-emption and under the patent, it is not within the scope of the functions and duties of the Commissioner of the General Land Office to pass upon and to determine the dispute between the school fund and such claimants to the land, and the Commissioner could not be required to sell such land, and in fact should not sell it, until the dispute is determined in favor of the State by suit.

Since a patent issued by the State is the final title and is the most solemn act of the State with reference to its lands, it should be treated and regarded by all persons as valid and binding until the contrary has been determined by the courts. The land covered by the patent is not temporarily off the market as is land covered by a lease, and it will not necessarily come upon the market for sale at a time certain, as does land covered by a lease. We assume from your letter that Attorney General Davidson for some reason (doubtless out of respect for the rights of citizens of the State who were relying upon the State's

patent) declined to file the suit for the recovery of this land for the school fund, and it may be that every other Attorney General of the State will decline to file suit for the land under such circumstances. In this connection, we call your attention to our opinion to you of date May 31, 1913, with reference to a tract of land in Wichita county very similarly situated to the land in question, in which this Department held that, while such land might be recovered for the school fund by a suit filed by the Attorney General, yet it would be inequitable and unfair for the State to recover such land from citizens who had purchased it and improved it on the strength of the State's patent. After this Department declined to file suit for the land in Wichita county, certain persons who had attempted to acquire an interest in it sought to obtain from the Supreme Court a writ of mandamus to require the Attorney General to file suit for the recovery of the land, but the motion for leave to file the petition for mandamus was refused by the Supreme Court. We call your attention to these facts merely to show that that portion of the school survey covered by the patented pre-emption will not necessarily come upon the market at a time certain, but that in fact it may never come upon the market.

For the reasons above stated, and on the authorities above cited, we advise you that in our opinion the patent which includes part of the land which had been surveyed for the school fund should be treated as valid and respected until it is avoided by the judgment of a court and that, this being true, the balance of the survey should be treated as a whole tract or survey and that such balance of the survey can now be sold as public school land under the terms and conditions of the existing law.

Very truly yours,

G. B. SMEDLEY,
Assistant Attorney General.

PUBLIC SCHOOL LANDS—SALE OF LAND UNDER LEASE—RIGHT OF COMMISSIONER TO FORFEIT SALES.

(Articles 5453, 5458, and 5459, Revised Statutes of 1911.)

An award of public school land in Reeves county while under a valid lease is invalid.

After an award of public school land has stood for a year, the Commissioner of the General Land Office is without authority to cancel the award on account of its original invalidity.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MAY 21, 1914.

Hon. J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: In your letter of May 2d you state that, since the passage of the School Land Act of 1907, a tract of school land in Reeves county was leased for a term of years, and that a short time thereafter application was made to purchase the land, and that, through error, the application was accepted; that the purchaser completed the three years'

occupancy and then sold the land to the original lessee, who filed his deed and substitute obligation in the General Land Office and became substituted on the records of the Land Office as the owner. You further state that, when the error was discovered, the sale was cancelled on the theory that the award was void, and you desire to know whether the cancellation should be allowed to stand or whether the sale should be reinstated.

Replying to your letter, in the first place, no valid sale was made of the land to the person who applied to purchase it after the execution of the lease. Being under lease, the land was not subject to sale.

See Article 5453, Revised Statutes of 1911.

Valentine vs. Sweatt, 78 S. W., 385.

Ford vs. Terrell, 101 Texas, 327, 107 S. W., 40.

The contention is made that because the original lessee, who purchased the land after the original purchaser had resided upon it for three years, filed his deed in the General Land Office, together with his substitute obligation to pay for the land, he became a purchaser direct from the State and that his purchase was valid under the doctrine of the cases of Johnson vs. Bibb, 75 S. W., 71, and Reininger vs. Pannell, 101 S. W. 816. In this connection, it is also argued that the lessee had, under the law, a preference right to purchase and that, on this account, he became, when he filed his deed and obligation, a purchaser from the State under his preference right. In answer to this suggestion, it is enough to say that leases executed subsequent to April 15, 1905, carry no preference right of purchase. See Trezevant vs. Terrell, 99 S. W., 94.

To the suggestion that the lessee, by filing his deed and obligation in the General Land Office, became a purchaser direct from the State in spite of the invalidity of the original purchase, we are not prepared to agree. The land in question is in Reeves county, where public school land is sold on condition of settlement. We take it from your letter that the lessee, when he filed his deed and obligation in the Land Office, did not file a formal application to purchase, together with his affidavit that he was a settler on the land and that he in fact did not settle on the land, since he doubtless assumed that the occupancy had been completed by the original purchaser.

In the Johnson-Bibb case and the Reininger-Pannell case, above cited, the substitute purchaser was in fact a settler on the land and filed his affidavit showing such settlement. If the original purchase from the State, in the case under investigation, was invalid, it must, for the purpose of this discussion, at least, be treated as no purchase, and we can hardly see how the occupancy of the original purchaser under an invalid sale can inure to the benefit of a substitute purchaser who does not become himself a settler.

We are of the opinion, however, that on account of the provisions of Articles 5458 and 5459 of the Revised Civil Statutes of 1911, being what is commonly known as the one-year statute of limitation, the sale should not have been canceled after the original award was allowed to stand for a year, and the sale should now be reinstated. In other words, we are of the opinion that the Commissioner of the General Land Office, after an award of public school land has stood for a year,

is without authority to cancel the sale on account of invalidity in the original purchase. The articles above referred to are as follows:

"Art. 5458. All persons claiming the right to purchase or lease any public free school lands, or any lands belonging to the State University, or either of the State asylums, which have been heretofore, or which may be hereafter, sold or leased to any other person under any provision of the law authorizing the sale or lease of any of the said lands, shall bring his suit therefor within one year after the date of the award of such sale or lease, and not thereafter.

"Art. 5459. If no suit has been instituted by any person claiming the right to purchase or lease any of said land within the period of time limited in the foregoing article, it shall be conclusive evidence that all the requirements of the law with reference to the sale or lease of such lands have been complied with; provided, that nothing in this and the preceding articles shall be construed to affect the State of Texas in any action or proceeding that may be brought by it in respect to any of said lands."

Until the decision of the Supreme Court in the case of *Erp vs. Tillman*, 103 Texas, 574, 131 S. W., 1057, was made, the full force and meaning of the above quoted articles was not fully appreciated by the lawyers of the State. The statute had been regarded merely as an ordinary statute of limitation, but the Supreme Court held that it was more,—that it was also a rule of evidence and a rule of substantive law. In the case of *Erp vs. Tillman*, the Supreme Court expressly held that the application and award of the land to *Erp* did not constitute a sale for three reasons, one of which was that the land was not on the market at the time, but the court held that *Erp* was, nevertheless, entitled to recover the land in an action of trespass to try title on the theory that, after the elapse of a year from the date of the award the statute above quoted made the award conclusive evidence of title against everyone but the State, and the court even held that it was not necessary for *Erp* to plead that a year had elapsed since the date of the award. To quote from the opinion:

"The answer is that the award and its recognition by the officers of the State for a year constituted title sufficient for such a controversy, and to these facts the statute gives conclusive effect as evidence of title, precluding inquiry as to antecedent defects. * * * In addition to fixing a time for suit, it contains both a rule of substantive law and a rule of evidence which the courts must take notice of and be guided by in the decision of such causes. * * * It was not so much to protect purchasers who had not complied with the law as it was to prevent such interferences with sales and to reserve to the State the election to abide by or repudiate them, that this statute was adopted. A year was deemed sufficient time in which to allow awards to be put to the tests previously applied at the instance of intending purchasers and lessees and after which only the State could interfere. This seems to make it sufficiently evident that this is not an ordinary statute of limitation. The award in such a contest as this constitutes the title of the purchaser which may be produced in evidence without special pleading, and when it is produced and shown to have stood for a year, this statute, of which the court must take notice, makes it conclusive evidence of a sale valid against everyone but the State."

It clearly appears from the above quotation that, as has been above stated, the court held that the statute was not one of ordinary limitation but that it was a rule of evidence and a rule of substantive law, and that an award, after the expiration of a year without attack, ripens into title (that is, of course, a school land title) as against everyone

with the single exception of an action or proceeding brought by the State.

In *Wyerts vs. Terrell*, 100 Texas, 409, the court said:

"The statute removes all questions which can thus be raised as to sales which have stood for a year without being attacked by suit."

In *King vs. Robison*, 103 Texas, 390, 128 S. W., 369, the court, speaking of an invalid lease, said:

"That it would have been declared void upon an attack made in time does not deprive it of the protection of the statute, which was designed to meet just such objections."

We are aware that, after the judgment in the case of *Erp vs. Tillman* became final, the sale to Erp was canceled by the Commissioner of the General Land Office and that Erp filed in the Supreme Court a petition for mandamus to compel the reinstatement of his purchase, and that he made in that case the contention that he was entitled to the writ because his award had stood for a year, but that the Supreme Court had refused the writ. See *Erp vs. Tillman*, 155 S. W., 180. The opinion in that case, however, contains no discussion of the right of the Commissioner to cancel a sale after an award has stood for one year, and the court, in refusing the writ, did not necessarily hold that the Commissioner had such right after the expiration of the year. We are speaking, of course, of the right to cancel for invalidity in the original purchase. What the Supreme Court did hold was, that Erp was not entitled to the extraordinary relief prayed for, for the reason that "a mandamus must be founded upon a clear, legal right," and that in the case before the court the right of the relator rested upon a sale invalid in its inception.

In our opinion the language of the articles of the statute above quoted is hardly susceptible of any other construction than that after an award of public school land has stood for one year, the Commissioner of the General Land Office has no authority to cancel the same on account of the invalidity of the sale. To repeat a portion of the language used in Article 5459, if no suit had been instituted within a year from the date of the award, "it shall be conclusive evidence that all the requirements of the law with reference to the sale or lease of such lands have been complied with; provided, that nothing in this and the preceding article shall be construed to affect the State of Texas in any action or proceeding that may be brought by it in respect to any of said lands."

The use of the words *action* or *proceeding* that may be brought by the State, in our opinion, clearly conveys the idea that the words refer to a suit in the name of the State to set aside the sale, and that they do not refer to the summary and ex parte action on the part of an officer of the State in cancelling the sale.

An examination of the definition of the word "action," found in *Words and Phrases*, shows that all of the definitions construe the word as referring to a suit in court. (See 1st *Words and Phrases*, pages 129-130.)

The Supreme Court of this State, in the case of *Coleman vs. Zapp*,

151 S. W., 1040, had before it the construction of the word "action," and held that it means a proceeding in court by a party asserting or seeking to enforce a right. See also:

Cape vs. Cape (Ky.), 124 S. W., 869.

Reyburn vs. Nanvlow (Mo.), 147 S. W., 846.

In the case of Strom vs. Montana Central Ry. Co., 81 Minn., 346, 84 N. W., 46, we find the following definition of the word "proceeding":

"In its most comprehensive sense, the term 'proceeding' includes every step taken in a civil action, except the pleadings."

Most of the other definitions of the word "proceeding" appearing in Vol. VI, page 5632 of *Words and Phrases* show that the word, as ordinarily used, relates to judicial transactions. The ordinary meaning of the word "brought," as used in the statute, also indicates that the exception in the statute does not include the action on the part of the Commissioner in cancelling sales, for it can hardly be that the act of the Commissioner in writing the word "forfeited" across the obligation is an action or proceeding *brought* by the State.

The courts of this State, especially of late, have very narrowly confined the authority of the Commissioner to cancel sales of school lands. See:

Baldwin vs. Salgado, 152 S. W., 165.

Harper vs. Terrell, 96 Texas, 479.

Mitchell vs. Robison, 132 S. W., 465.

In accordance with the doctrine of these cases, the language of the statute under construction ought not to be held to make an exception of the action of the Commissioner in forfeiting a sale, unless it clearly indicates such intention on the part of the Legislature, and the ordinary meaning of the words used, as above discussed, excludes the idea that the Legislature intended to make an exception in favor of the action of the Commissioner in cancelling sales, as well as in favor of suits brought by the State for the purpose.

In some of the early cases, among which may be mentioned the case of Slaughter vs. Terrell, 100 Texas, 600, 102 S. W., 399, the suggestion was made that the one-year statute of limitation had no application to sales, which had been canceled by the Commissioner of the Land Office; or, in other words, that only those sales which were in good standing in the General Land Office were entitled to the benefit of the statute. This suggestion, however, is out of harmony with the later decision of the Supreme Court in the case of Exp vs. Tillman, holding that the one-year statute has the effect of giving title.

In the case of King vs. Robison, 103 Texas, 390, 128 S. W., 369, a second lease was made while the original lease was unexpired and in good standing, but the second lease was not attacked until after the expiration of a year. The contention was made in that case that it was the first lease which was entitled to the protection of the statute, rather than the second lease, because the first lease had not been formally canceled and because the second lease was void. The Supreme Court, however, held that the second lease was entitled to the protection of the statute for the reason that it was made and was recognized

and acted on by the authorities of the State, the first lease being disregarded. So in the case under investigation it appears that the lease which was executed was disregarded by the Commissioner, and the land was sold and awarded, in spite of the lease, and the sale was recognized by the Commissioner and the purchaser completed the three years' occupancy required by law. It appears, therefore, that under the doctrine of the case of *King vs. Robison* the purchaser in this case is entitled to the protection of the statute.

The one-year statute of limitation was intended as a statute of repose and was for the purpose of giving assurance to the purchasers to whom land had been awarded and who believed that they were complying with the law, that their titles would not be subject to attack after the expiration of a year, except by suit in court brought in the name of the State. The construction which we have placed upon the statute is in harmony with its purpose. Moreover, this construction will prevent the recurrence of the very remarkable situation in the *Erp* case. In that case, as has been shown, *Erp*, by reason of the fact that his sale had stood for a year without attack, was able to go into court and obtain judgment for title and possession of the land against any person claiming it, but he was not able to compel the Commissioner of the General Land Office to recognize and respect his sale.

We, therefore, advise you, as has been above stated, that the cancellation of the sale referred to in your letter was erroneously made, and that the sale should be reinstated.

Very truly yours,

G. B. SMEDLEY,
Assistant Attorney General.

PUBLIC SCHOOL LAND—BOND FOR TITLE.

(Revised Statutes of 1911, Articles 5419, 5424, and 5435.)

A bond for title whereby the owner of school land purchased on condition of settlement, agrees after the completion of the three years occupancy as required by law, and the issuance of certificate of said occupancy, to convey the land to another person for valuable consideration, is not necessarily contrary to the school land law, and if the bond for title is executed in good faith for the purpose of evidencing the agreement of the owner of the land to convey it after the completion of the occupancy, and is not in fact intended at the time of its execution and delivery to vest in the obligee in the bond the title or interest in the land, the Commissioner of the General Land Office would not be warranted in forfeiting the sale of the land for the failure of the obligee in the bond to settle and reside upon the land.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 26, 1914.

Hon. J. M. Melson, Chief Clerk of the General Land Office, Austin, Texas.

DEAR SIR: This Department is in receipt of your letter of March 3d, containing a copy of a contract or bond for title executed by C. J. Campbell in favor of J. W. Shipman. Since your letter requests an

opinion bearing upon the validity and construction of this instrument, we find it necessary to set it out in full. It is as follows:

"The State of Texas. County of Reeves. This contract made and entered into by and between C. J. Campbell of Reeves county, Texas, and J. W. Shipman of Hamilton county, Texas.

Witnesseth: Whereas, the said C. J. Campbell is the owner of Section No. 38, Township 5, Block 55 of the T. and P. R. R. Co. surveys situated in Reeves county, Texas, being about eight miles of Toyah, and about five or six miles N. W. of the town of Hermosa in said county which said land has not been occupied and improved for the length of time and in the manner required by law.

And, whereas, the said J. W. Shipman desires to purchase the said land and have agreed to pay to the said Campbell the sum of \$3350 for same in property of what value fully described in deeds of even date herewith which deeds have been delivered.

Now, therefore, in consideration of the conveyances by the said Shipman to the said Campbell of property of the value of \$3350 the said Campbell hereby agrees and binds himself to convey to the said Shipman by special school land deed the land above mentioned which deed is to be executed as soon as the period of occupancy required by law is complete conveying to said Shipman a good and sufficient title to said land subject only to the claim of the State of Texas for the purchase money of same and to procure from the General Land Office a certificate of occupancy certifying that said land has been occupied for the length of time required by law and that the improvements required by law have been made, the said Campbell to furnish all necessary proof and to bear all the expense necessary to perfect his title in order to procure said certificate. The said Campbell is to pay all taxes and interest for the year 1909.

And upon a failure or default upon the part of said Campbell to comply with this contract within a reasonable time after the period of occupancy has expired the said Campbell and his sureties whose names are signed hereto agree, obligate and bind themselves to pay to the said Shipman the sum of \$5000, which sum shall be considered as liquidated damages and is not to be disputed by the said Campbell or his sureties. It being understood that the trade made this day between said parties and fully executed on said Shipman's part is reasonably worth said sum to said Campbell.

Witness our hands at Pecos, this the 1st day of November, 1909.

(Signed) C. J. CAMPBELL,
 (Signed) FRANK T. COPELAND,
 (Signed) B. W. CLAYTON."

You state that the section of land referred to in the bond for title was purchased by Campbell from the State on February 19, 1909, on condition of settlement as additional to a home tract which he had bought in the year 1907. It thus appears, and in fact the instrument above set out so recites, that the three years occupancy required of purchasers of school land was not yet completed at the time the instrument was executed, but that such occupancy would be completed some time in the year 1910. You state that the obligee in this instrument did not go into possession of the land, but that it appears that the obligee has been paying the interest to the State on the land since November 1, 1909. You do not state whether proof of occupancy has ever been made or whether the obligor in the bond has ever executed a deed conveying the land to the obligee.

You desire to know whether the instrument above set out is such a transfer as would authorize the Commissioner of the General Land Office to cancel the sale of the land in view of Articles 4218f and 4218fff of the Revised Statutes of 1895. These articles are those portions of the School Land Law of 1895 as amended in 1897, which required set-

tlement and three years occupancy of all original purchasers of school land, and also of all substitute purchasers becoming such before the completion of the three years' occupancy. The law in force at the time the section of land referred to in your letter was sold by the State is contained in the following articles of the Revised Statutes of 1911: Article 5419 (which is a part of the School Land Law of 1907), and in Article 5422 (which is a part of the School Land Law of 1901), and in Article 5435 (which is a part of the School Land Law of 1907), by which settlement and occupancy is required both of the original applicant and his vendee, and by which it is provided that the Commissioner may forfeit the sales of the land in the event the original purchaser or the vendee fails to occupy the land as required by law.

The question which you present is whether the instrument above set out amounts to a transfer of the title to the land to such an extent as that the obligee in the instrument becomes at the time of its execution and delivery in fact the purchaser of the land, and whether on account of his failure to settle upon and occupy the land the Commissioner would be authorized to forfeit the sale. Generally speaking, the instrument above set out comes in that class of contracts which are commonly called "bonds for title" or "executory contracts for the conveyance of land." These instruments are contracts whereby the owner of land agrees in writing for a consideration already paid or to be paid to convey the land to another person at some future time.

The question of the validity and legality of a bond for title to convey school land executed before the completion of the three years' occupancy was before the Supreme Court of this State in the case of Redwine vs. Hudman, 133 S. W., 426. That court, however, refused to pass directly on the question, saying, in that connection:

"We are not prepared to hold that the contract between Henderson and Hudman was illegal, in that it was necessarily violative of the provisions or policies of the statutes, under which the former held. The instrument contains no stipulation that, so far as we can now see, would necessarily contravene any of the purposes disclosed in the statutes; and, if Henderson had retained the section in question until he completed his occupancy, it may be that there would be no obstacle to the enforcement of his agreement. It is well, however, to proceed with caution in dealing with this subject, and we find it unnecessary to determine this question definitely. Conceding that the contract is a lawful one, it by no means follows that it is one to which the remedy of specific performance can be applied. That it is not will, we think, appear from a proper consideration of the facts stated."

What the Supreme Court held in that case was that a bond for title of this character was an instrument, the specific performance of which could not be decreed for the reason that the court could not have required the purchaser to settle upon the land and complete the occupancy. The same case was before the Court of Civil Appeals of the Second District and is reported on page 187 of 124 S. W. In discussing the validity and legality of the contract in question, Justice Speer said:

"We know of nothing in our school land law, either statutory or otherwise, that would prohibit a contract such as that entered into between appellant and Henderson."

This same question was before the Court of Civil Appeals for the Second District in the case of *Witcher vs. Wiles*, 33 Texas Civ. App., 69, 75 S. W., 889. The instrument involved in that case is very similar in language to the one above set out. The contention was made in that case that the instrument was in effect a conveyance of the land, and that because the obligee in the instrument failed to settle upon the land at the time of its execution he had abandoned it and forfeited his rights to it. Justice Speer rendered the opinion in that case also, and in discussing the contract said:

"The contract between himself and Wiles contemplates that Bayless will continue to occupy the land in compliance with law for the full period of three years, at the end of which time he will make a sufficient school land deed conveying the property to Wiles. The Legislature has never seen fit to proscribe such contracts, and the courts can not do so."

Justice Speer on account of his long experience in school land questions is recognized as an authority on the School Land Law, and his opinions in the two cases referred to are the only opinions which we have been able to find directly upon the question, and they hold that such instrument as that above set out is not necessarily in violation of the School Land Laws. In the case of *Williams vs. Finley*, 90 S. W., 1087, Justice Williams of the Supreme Court, in discussing the legality of contracts with reference to the acquisition of public school lands, said:

"That contracts between individuals having for their direct object the acquisition of public lands in a lawful manner are not void, as against public policy, is also held in *Miller vs. Roberts*, 18 Texas, 16, 67 Am. Dec., 688, and such contracts have often been enforced in this State. Of course, a contract might be held void because it tended to the violation, evasion, or hindrance of laws for the disposition of public lands, such as those regulating the sale of school land, and perhaps those which formerly regulated the acquisition of homestead donations and pre-emptions; but this would be true, not because of the mere fact that the contracts related to lands of the State, but because of their opposition to the law controlling the subject."

The cases of *Mahoney vs. Tubbs*, 34 Texas Civ. App., 96, 77 S. W., 822, and the case of *Brown vs. Brown*, 132 S. W., 887, are cases in which instruments similar to the one under investigation were held to be illegal, but the reason for the decision in those two cases was that the instrument in each case was executed before the obligor in the instrument acquired from the State the title to the land, and the execution of the instrument under such circumstances required the obligor to make a false affidavit at the time of his application to purchase the land, to the effect that no other person was at that time interested in the purchase of the land. The facts in the case of *Witcher vs. Wiles*, above referred to, and the facts submitted in your letter, show that at the time the instrument in each case was executed the obligor had already acquired the title to the land, and the execution of such instrument did not, therefore, require the making of a false affidavit.

It is true that a bond for title or executory contract to convey real estate does give, generally speaking, to the obligee in the bond the equitable title to the land. At least the equitable title vests in the ob-

ligee in the bond upon the payment of the purchase money by him and the performance of any other condition imposed by the bond. See the following cases:

Scarborough vs. Arrant, 25 Texas, 131.

Elliott vs. Mitchell, 47 Texas, 445.

Vardman vs. Lawson, 17 Texas, 15.

Newsom vs. Davis, 20 Texas, 419.

Stipe vs. Shirley, 76 S. W., 307.

Angier vs. Coward, 79 Texas, 551.

It is shown, however, by the opinion in the case of *Brown vs. Brown*, 132 S. W., 887, that this rule does not strictly apply to a bond for title to convey school land when the occupancy has not been completed, for the reason, as said in the opinion in that case, "The only way by which title to school lands can be secured is by an original or substitute purchase from the State accompanied with actual settlement and continued occupancy." The instrument above set out does not contemplate that the obligee in the bond occupy the land, but, on the contrary, it contemplates that no deed shall be made and that the transaction shall not in fact become complete until the obligor in the bond has completed the occupancy and procured a certificate of that fact from the General Land Office. In other words, the instrument imposes upon the obligor in the bond the obligation of completing the occupancy and seems to indicate the intention of both parties that the obligee acquire no interest in the land until the obligor shall have performed this condition of the bond.

There is no fact stated in your letter which shows that the parties to the instrument did not execute it in good faith and did not intend that the instrument in fact represent the real agreement made by them. We do not think that the fact of itself that the obligee in the bond paid the interest due the State after the first day of November, 1909, is sufficient to show that the bond was intended in fact to vest in the obligee at the time of its execution the title to the land. Of course, an instrument of this character may be used as a sham or device to hide the real intention of the parties and as a method of making in fact a present sale of the land. If it could be shown that the instrument was so intended and that it was executed in evasion of the law which requires the substitute purchaser to settle upon and live upon the land; in other words, if it could be shown that the instrument in fact, so far as the agreement of the parties is concerned, operated to transfer the land from the obligor to the obligee, the Commissioner of the Land Office would be authorized on that account to forfeit the sale of the land.

It is our opinion, therefore, that the instrument of itself does not necessarily amount to an evasion of the School Land Law and does not of itself have the effect of conveying the land at the time of its execution and delivery to the obligee and that, this being true, the Commissioner, in the absence of satisfactory evidence showing that the instrument was intended by the parties to it as an immediate conveyance of the land, would not be authorized in cancelling the sale for the failure of the obligee in the instrument to settle upon the land. The question resolves itself largely to one of fact, and the legality or illegality

of each instrument of this character depends upon the particular facts and circumstances surrounding its execution and the real intention of the parties to it.

You state that the attorney for Mr. Shipman, the obligee in the instrument, raises the following question:

"In case the decision of this office is that the tract of land in controversy is not subject to forfeiture by reason of the transaction between Campbell and Shipman on November 1, 1909, can the matter be reopened by any successor in this office."

In reply to this question, we advise you that, if the owner of the land files his proof of occupancy and a certificate is issued thereon by the Commissioner of the Land Office, neither the Commissioner who issues the certificate of occupancy, nor any successor of such Commissioner, will have the authority to cancel the sale of the land for the failure of the purchaser to reside upon it. See the case of *Mitchell vs. Robison*, 132 S. W., 465.

Until such certificate is issued, however, it is our opinion that the Commissioner or any successor of the Commissioner would have the authority to cancel the sale for the failure of the purchaser (or substitute purchaser) to occupy it as required by law.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

MINERAL RIGHTS IN PUBLIC LAND.

(Act of April 9, 1913, General Laws of the Regular Session of the Thirty-third Legislature, page 409.)

When two separate permits to prospect for oil, each covering a tract of 200 acres, the one contiguous to the other, have been issued and thereafter acquired by one person or corporation and oil is developed on the land covered by one of the permits, one lease can not be issued covering both tracts, even though they are contiguous, and, under such instances, both tracts must be developed, as provided by law.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 17, 1914.

Hon. J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: In your letter of January 15th, you state, in substance, that on October 21, 1913, a permit to prospect for oil was issued to M. P. Turner and another to A. D. McPhial, each for two hundred (200) acres within ten miles of a producing well, the said tracts being contiguous, and that both of said permits and the rights acquired under the same have been conveyed by the persons to whom they were issued to the Providence Oil Company and that such deed of conveyance has been filed in the General Land Office. You further state that oil has been developed on the tract covered by the permit issued to Turner, but that no oil has been developed on the tract covered by the permit issued to McPhial. You state that the owner of the two permits has applied

for an oil lease, and you desire to know whether one lease can be issued to the Providence Oil Company including both tracts, and also whether the development of one of these tracts without the development of the other will be a sufficient compliance with the law.

Section 3 of this act as amended at the Special Session of the Thirty-third Legislature contains the following:

"The said 1280 acres in undeveloped territory, or the 1000 acres within ten miles of any producing oil or gas well, may be in as many different tracts of land or fresh water lakes as the applicant may desire, provided the applicant correctly describes the land of fresh water lakes desired for development purposes."

This section shows that the limitation placed on the amount of land to which one person or corporation may acquire rights, under the law, is a limitation of acreage and *not* a limitation of the number of tracts.

Section 5 of the act, which relates to the issuance of the permit to prospect on the land applied for, contains the following: "* * * and if the status of the area applied for is within the provisions herein, the applicant shall be entitled to the right to prospect for and develop the petroleum oil or natural gas that may be under the surface embraced in the application and field notes, and as evidence of such right the Commissioner shall issue to each applicant a permit after the applicant shall have complied with the conditions hereinafter imposed," describing the lands to be covered by the permit by the use of the word "area."

In Section 6, also, the land is described as "designated area."

Section 7, which requires development under the permit, also uses the word "area," and in the latter portion of said Section 7 appears the following with reference to the development which is required by said section:

"The expenditure herein required for development purposes may be made upon one or more contiguous tracts embraced in a permit and shall be sufficient for the entire area embraced in one such permit. The amount herein required to be expended in development purposes shall be required on each and every non-contiguous area. A separate permit shall be issued for each non-contiguous area, but may contain an entire contiguous area of two or more adjacent tracts of land. An application may embrace contiguous portions of different tracts or surveys."

Section 8, which provides for the issuance of the lease after the development of oil or natural gas under the permit, contains the following:

"* * * and thereupon the owner of the permit shall have the right to lease all or part of *the area included in the permit* upon the following conditions: * * *"

And the first of the conditions imposed upon the applicant for a lease is that he must pay two dollars (\$2.00) per acre for a lease "of the area included in a permit."

A reading of the entire act shows that the steps contemplated for the development of oil on the lands included in the act are as follows:

First. The person desiring to develop the oil makes his application for a permit authorizing him to develop or undertake to develop oil on the land described in his application.

Second. The permit is issued covering the land applied for and requiring development under said permit within a time certain and the expenditure of a certain sum of money in such development; and

Third. The issuance of a lease covering the land included in the permit after the development of oil on such land under the permit.

It appears that the act contemplates that a separate lease shall be issued covering the land included in each separate permit. In other words, that there shall be a uniformity in the permits and the leases, or, rather, an identity of the lands covered by the permits and the leases. The language of Section 8, which has been above quoted, supports this construction since it expressly provides that, if at any time within the life of the permit oil shall be developed, the owner of the permit shall have the right to lease all or any part of the area included in the permit, and that he shall pay for a lease of the area included in the permit a first payment of two dollars (\$2.00) per acre.

It is true that under our opinion to you of December the 17th (1913) one person or corporation can own the rights acquired in lands covered by one or more permits; provided, the total of the acreage is not greater than the limitation fixed in the law. This does not necessarily mean, however, that the lands covered by such several permits where the rights under the permits are owned by one person or corporation may all be included in one lease. The language of Section 8, above referred to, on the contrary, seems explicit enough to preclude any such construction. It is by virtue only of the express authority conferred by this act that the Commissioner of the General Land Office is authorized to lease for mineral development the lands included in the act, and it follows that leases can be made only in the instances specified by the act and only under the terms and conditions prescribed by it.

In response to your second question as to whether the development of one of the tracts owned by the Providence Oil Company would be a sufficient compliance of the law, we advise you that, in our opinion, the language of Section 7 of the act appears very clearly to require that the lands embraced in each permit shall be developed as required by the law. It is true that the two tracts owned now by the Providence Oil Company might have been included in one permit, after the amendment of the act, as they are contiguous tracts, but your letter shows that separate permits were issued on the two tracts to separate persons, and the law plainly requires that the area covered by each permit shall be developed. It is expressly specified that the expenditure required for development purposes may be made upon one or more contiguous tracts embraced in one permit and that such development shall be sufficient for the entire area embraced in the permit. This language seems to exclude the idea that the Legislature could have intended that the expenditure on land covered by one permit would be sufficient for lands covered by another permit where such lands are contiguous and where they are owned by one person or corporation.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

PUBLIC LANDS—PAYMENT OF INTEREST.

Exchange on a Chicago bank should be accepted by Land Commissioner in payment of interest on school lands.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MAY 17, 1913.

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

DEAR SIR: In your letter of May 14th to this Department, you state, in substance, that one J. M. Davis, the owner of Section 14, Certificate 1029, Block M— 23, T. C. Ry. Co., in Hutchinson county, which was originally purchased from the State on August 18, 1899, on November 14, 1912, through his agent, C. J. Gafney, of Chicago, Ill., wrote to your office asking for the total amount of interest due on the above described land, and that he was, a short time thereafter, duly advised by your office that the amount of interest due was \$37.44, and that on February 16, 1913, the said Mr. Gafney for the said J. M. Davis wrote a letter enclosing Chicago exchange for the sum of \$37.44, which letter was received in your Department on February 20th, but the remittance was returned to Mr. Gafney by your office on the 24th of the month, with the explanation that your Department was unable to accept it for the reason that it was not Austin exchange, postoffice or express money order or cash. You further state that on the 21st day of February the above described section of land was forfeited on account of the non-payment of the interest and the land again placed on the market, and was awarded to W. E. Craddock and Ben Allen on their application filed in your office on February 24, 1913. You further state that on the 7th of April the said Mr. Gafney sent your Department an express money order for \$37.44, which was transmitted to the State Treasurer, where it is now held, and that Mr. Gafney, since being advised of the forfeiture of the land, has requested the reinstatement of the original purchase. You desire to know whether the facts stated authorize a cancellation of the sale to Craddock and Allen and the reinstatement of the original sale.

The forfeiture of the sale of public school land in a summary proceeding by the General Land Office Commissioner on account of the failure of the owner to pay the interest due the State as it matures is an unusually harsh remedy, and, in our opinion, the forfeiture should not be made if the purchaser has substantially complied with the law, and, in arriving at the meaning of the law, it should not be construed so as to authorize a forfeiture, unless its language clearly requires such construction. The method of the payment of interest on public school land is prescribed by Chapter 16 of the Acts of 1909 (Acts of 1909, p. 429). By Section 1 of the act the first payment for public school land is required to be made "in the form of money or remittance collectible on demand in Austin, and convertible at par into money on the order of the State Treasurer, without liability." In Section 4 of the act, it is provided that "all payments on account of interest, lease rentals or the balance of principal due on lands treated of in this act shall be transmitted to the Commissioner of the General Land Office,

and shall be payable to the State Treasurer and be in form the same as is herein provided for first payments and subject to the same rules for collection as are remittances for first payments." It follows, therefore, that interest payments are required, by law, to be made "in the form of money or remittance collectible on demand in Austin, and convertible at par into money on the order of the State Treasurer, without liability."

In general terms, it appears to be the purpose of the law that interest payments shall be made either in money or in such form that they can be collected on demand in Austin and at par and without the incurring of any liability by the State Treasurer in their collection. We are strongly inclined to the opinion that the remittance as originally made by the owner of the land in Chicago exchange was a substantial compliance with the law. It is, as we understand it, a matter of common knowledge that exchange on a New York or Chicago bank is readily accepted by the banks in Austin at par and that such exchange can be converted into money by the State Treasurer by cashing the same at one of the Austin banks without his incurring any personal liability by the endorsement of same. The purchasing of exchange on New York, Chicago, St. Louis, and other of our larger cities, is a common method used in the payment of debts at a distance in cases in which the person to whom the debt is paid demands the equivalent of money and is unwilling to accept a personal check. If we are correct in these statements, we are of the opinion that the purpose of the law was met by the remittance in Chicago exchange, as it was collectible in Austin without discount and without the necessity for the incurring of any liability by the State Treasurer. It is true that the remittance was not technically "collectible in Austin" in that it was not a draft drawn on an Austin bank, but we believe that in construing this law a technical construction should not be placed upon its language in order to enforce a forfeiture.

Again, in arriving at a proper answer to your question, we may consider certain rules of construction and apply the same to the language above quoted defining the form of the remittance of interest. In the case of *St. Louis, etc., Ry. Co. vs. Todd*, 94 Texas, 632, 64 S. W., 778, the court said:

"It should not be held that the Legislature intended to do an unreasonable thing, unless the language of the statutes compel such construction."

It would be unreasonable to conclude that the Legislature, in the act under consideration, intended that the Commissioner of the General Land Office should refuse to accept a remittance of interest made in the form of New York or Chicago exchange and should cancel the sale for non-payment of interest because the form of remittance was not technically included within the language of the law, when all of the purposes of the law are met by the remittance as made. In the case of *the State vs. Delesdenier*, 77 Texas, 76, 105, the court said:

"May we not, from the whole purview of the law and giving effect to the words used fairly, give it a construction, if possible by which these unjust and inconvenient consequences may be avoided."

It appears that your Department in construing the language above quoted; that is, "in the form of money or remittance collectible on demand in Austin, and convertible at par into money on the order of the State Treasurer without liability," has construed this language as meaning that a remittance in the form of money must be both collectible and on demand in Austin and convertible at par into money; that is, that the remittance must be both "collectible" and "convertible" in Austin. An instrument is *collectible* at a given place when it is to be paid at that place and the instrument canceled; while an instrument is *convertible* at a certain place when it may be at such place exchanged for money without the cancellation of the instrument. In other words, the words "collectible" and "convertible" have a different meaning, and, technically, an instrument can not be at the same time collectible and convertible, so that the language used is almost meaningless unless we substitute the word "or" for the word "and" and make the statute read, "in the form of money or remittance collectible in Austin or convertible at par into money on the order of the State Treasurer, without liability." This construction makes the statute clear and intelligible and does no violence to the apparent purpose of the law. In construing a statute the word "and" is often substituted for the word "or" and vice versa.

In the case of *Witherspoon vs. Jernigan*, 97 Texas, 98, 76 S. W., 445, the Supreme Court, in construing a statute, held that the word "and" in the statute should be read "or," quoting in the opinion from *Sutherland on "Statutory Construction,"* as follows:

"The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactment. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in the place of the other in deference to the meaning of the context."

In the case of *Ross vs. Terrell*, 99 Texas, 502, 90 S. W., 1093, the Supreme Court, in order to prevent a manifest incongruity in construction of a statute, substituted the word "and" for "or." In the case of *Adams vs. Terrell*, 107 S. W., 537, in order to avoid holding that the failure of a purchaser of school land to reside on the land as required by a law resulted in the *ipso facto* forfeiture of the land, the Supreme Court, in effect, construed the words "to the same extent" to mean "in the same manner."

If the phrase of the act under construction is read as above quoted with "or" substituted for "and," three forms of remittances can be made in payment of the interest; that is, first, money or, second, a remittance collectible on demand in Austin, as, for example, a draft drawn on an Austin bank or a postoffice money order or an express money order, or, third, a remittance convertible at par into money on the order of the State Treasurer, without liability, as, for example, exchange on Chicago or New York when such exchange is accepted by the Austin bank at par and without the personal endorsement of the State Treasurer.

Section 4 of the act contains also the following provisions referring to remittances for the payment of interest, etc.:

"Immediately on receipt thereof the Commissioner shall list in triplicate separate from first payments all money and other form of remittances received for the purposes stated in this section and in such form as to show the amount of each remittance, the name and address of the remitter, and the probable fund to which the remittance should be deposited. The remittances and two of the lists aforesaid shall be transmitted to the Treasurer. On receipt thereof the Treasurer shall check the remittances with the list and if found to be correct he shall receipt one of the lists and return it to the Commissioner and retain the other list and thereupon the Commissioner shall deliver the third list retained by him to the Comptroller. The Treasurer shall at once collect all collectible remittances and report to the Commissioner and the Comptroller all remittances not collectible in Austin. The items not collected shall be returned to the Commissioner."

It appears from the foregoing quotation that all remittances received by the Commissioner of the General Land Office, whether cash or other form, are required to be transmitted by him to the Treasurer after the same have been properly listed by the Commissioner, and the Treasurer is, by the language of the act, required at once to collect all collectible remittances and report to the Commissioner and the Comptroller all remittances "not collectible in Austin" and that the items not collected shall be returned to the Commissioner. The act appears to contemplate that it shall primarily be the duty of the Treasurer to pass upon the remittances, and it contemplates that some of the remittances will be found by the Treasurer to be uncollectible, and it provides that, when so found, they shall be returned to the Commissioner. From the language above quoted, we conclude that it is the duty of the Commissioner to pass upon the remittances in determining whether or not they are collectible in Austin, unless, of course, they are obviously of a form not collectible in Austin, as, for example, personal checks on banks outside the city of Austin. We do not mean to say that the Commissioner should transmit to the Treasurer all forms of remittances, but we do mean to say that when a remittance is in a form which is ordinarily collectible in Austin or convertible at par without liability, the Commissioner should transmit the same to the Treasurer and let him determine whether he can collect it in full and without incurring personal liability.

We, therefore, conclude, first, that the remittance in this case substantially complied with the law as it is written; second, that the word "and" in the phrase which directs the form of remittance should be read "or," and that the remittance in this case was convertible at par into money on the order of the Treasurer without liability; and, third, that since the remittance in this case was in a form which is ordinarily accepted at par by the various banks of the country and treated as the equivalent of cash, the Commissioner of the General Land Office should have transmitted it to the State Treasurer and should not have forfeited the sale, unless the State Treasurer returned the remittance with the advice that he could not collect it.

In view of the above conclusions, we advise you that, in the opinion of this Department, the facts stated in your letter authorize a cancellation of the sale to Craddock and Allen and the reinstatement of the original purchase.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

SCHOOL LAND—REPURCHASE—FORFEITURE—TAXES.

When the owner of public school land at time of forfeiture repurchases it from the State, a lien exists against the land for taxes assessed prior to the forfeiture, and the land can be subjected to such taxes. This is limited, however, to cases where land is repurchased from State by person who owned it at time of forfeiture.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 14, 1913.

Mr. Thomas J. Coffee, Colorado, Texas.

DEAR SIR: This Department is in receipt of your letter of the 10th instant, in which you desire to know whether public school land is subject to taxes assessed and levied against it prior to its forfeiture to the State for non-payment of interest, when the owner of the land at the time of the forfeiture repurchased it from the State.

Section 15 of Article 8 of the Constitution provides that the annual assessment upon landed property shall be a special lien thereon. This lien attaches to the land as of January 1st of the year for which it is levied, and such lien attaches to all real estate for the taxes assessed and levied against it.

(See Harris' Constitution of Texas, pp. 606 to 608.)

It is apparent that the lien attaches to the public school land for the taxes and that you can subject such property to the payment of the taxes, unless the lien was destroyed when the land was forfeited to the State.

It is true that the forfeiture of the land by the Commissioner amounts to an election on the part of the State to rescind the contract made by the State with the purchaser on the failure of the purchaser to perform his part of the contract; that is, to pay the interest, and it would appear that, when the State rescinded its contract, all title to the land was again vested in the State and that all liens thereon were destroyed. This is undoubtedly true of those cases in which the land is subsequently sold by the State to a purchaser other than the owner who allowed the sale to be forfeited. However, it is our opinion that a different rule should be applied in those cases in which a purchaser allows his land to be forfeited and then repurchases it. It has been held that the effect of such action on the part of a purchaser of school land is not to destroy a lien in favor of an individual which existed against the land prior to the forfeiture, provided such purchaser himself repurchases the land. A different rule, however, is applicable when a person other than the original owner repurchases the land after the forfeiture. Such purchaser takes the property free from liens which existed against it prior to the forfeiture.

See *Clark vs. Altizer*, 145 S. W., 1041.

Since the Constitution so clearly provides that a special lien shall exist against landed property for the taxes assessed against it, we can see no reason why such lien should not remain in force when the purchaser, who allowed the land to forfeit after the taxes became a lien, again purchases the land from the State. The taxes are unpaid, they were assessed and levied against the very land repurchased, and the land is purchased with full notice of the assessment of such taxes.

We are, therefore, of the opinion that, in the case stated by you, the lien exists against the land for the taxes assessed prior to the forfeiture, and that you can subject the land to such taxes, this opinion being limited, however, to those cases in which the land is repurchased from the State by the man who owned it at the time of the forfeiture.

Very truly yours,

G. B. SNEDLEY,
Assistant Attorney General.

STATE LANDS—INTEREST—NON-PAYMENT.

Where land was sold in 1883 and purchase was forfeited for non-payment of interest February 21, 1913, the land reappraised and February 24 land sold again to another party, and the former owner seeks to repurchase under Article 5428, R. S., accompanying his application with cash, etc., the Land Commissioner should award the land to the former owner, cancelling the award of February 24.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MAY 9, 1913.

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

DEAR SIR: We are in receipt of your letter of May the 8th as follows:

"The west part of the E. $\frac{1}{2}$ of Sec. 14, Cert. 780, Blk. 1, T. & N. O. Ry. Co., containing 80 acres and situated in Jones county, was sold July 20, 1883. This purchase was forfeited for nonpayment of interest February 21, 1913, and the tract reappraised at \$5 per acre and placed on the market for sale February 22. At 10:00 a. m., February 24, an application to purchase it was filed in this office and the land has been awarded to the applicants. Now comes the former owner seeking to repurchase the land under the provisions of Article 5428 of the Revised Statutes of 1911 at the appraisalment fixed February 21, this year, plus the interest accrued on his former purchase.

"Shall I cancel the outstanding award or sale of February 24th and award to the former owner under his application to purchase, in accordance with the provisions of Article 5428?"

Article 5428 of the Revised Statutes of 1911 is a part of the Act of 1895, being a portion of Article 4218j of the Revised Statutes of 1895. This portion of the article reads as follows:

"Any owner of land heretofore purchased, and which land has been or may be forfeited for nonpayment of interest, shall have ninety days prior right after this chapter goes into effect, or after the land is again placed upon the market, to purchase said land without the condition of settlement and occupancy, in case it has been occupied for three consecutive years as required by law; but if not, then he shall reside thereon until the occupancy under the first and last purchase shall together amount to said term of three years; provided, that when any forfeiture has been made the Commissioner of the General Land Office shall add to the appraised value of such land the amount of interest due thereon at the time of forfeiture, which shall be paid in cash with the first payment of one-fortieth of the appraised value of the land when purchased under the preference right to purchase given herein."

It is to be observed that the article refers to land "heretofore purchased" which, of course, means land purchased prior to the enactment

of the school land law of 1895. The article gives the prior right of ninety days to the owner of land which has been or *may be forfeited* for nonpayment of interest, and by its terms appears to have a prospective operation and to include any land purchased prior to 1895 and forfeited at any time for nonpayment of interest. It appears, therefore, that if this article of the statutes has not been repealed that the owner of the land described in your letter at the time of its forfeiture has a prior right of ninety days after the land was placed on the market; that is, after February 22nd in which to purchase the land by filing proper application therefor accompanied by the appraised value of the land and the amount of interest due thereon at the time of forfeiture.

We have made a careful examination of the various school land laws subsequent to the law of 1895, and we do not find that the article of the statute above referred to has been, at any time, expressly repealed. The different school land laws are cumulative, one of the other, and the later laws do not repeal any part of the former laws, except in case of conflict or repugnancy. See

Gaddis vs. Terrell, 110 S. W., 429.

Estes vs. Terrell, 92 S. W., 407.

Clark vs. Terrell, 98 S. W., 642.

In the case of Mound Oil Company vs. Terrell, 92 S. W., 451, this section of the Act of 1895 is discussed by the Supreme Court, and is treated by the court as still in full force and effect after the enactment of the school land law of 1905. We have not found any provision in any of the school land laws, subsequent to the law of 1895, which is in conflict or which is repugnant to this section. The fact that it is brought into the Revised Statutes of 1911 also indicates that it is still in effect.

We, therefore, advise you that if the owner of the land referred to in your letter, within ninety days from February 22, 1913, files in your office a proper application to purchase the land, accompanied by cash payment of the appraised value of the land together with payment of the amount of interest due thereon at the time of forfeiture, you should cancel the outstanding award of February 24th and award the land to the owner at the time of forfeiture.

Very truly yours,

G. B. SMEDLEY,
Assistant Attorney General.

PUBLIC SCHOOL LANDS.

(Act of April 18, 1913, Chapter 160, Regular Session, Thirty-third Legislature.)

1. The sufficiency of the request for re-appraisal when the land at the time for forfeiture was owned by the wife and the request is made by the husband.

2. The time when the ninety days for the filing of the application to repurchase begins to run.

3. When a tract of public school land purchased by the wife was forfeited for non-payment of interest and her husband made the request in writing that the land be reappraised in order that he might repurchase it and the application to repurchase it was subsequently and in proper time filed by the wife and

in her name, both the request for reappraisal and the application were sufficient and the land should be awarded to the wife.

When the board of appraisers appraised a tract of land under the act of April 18, 1913, and notified the former owner of such appraisal but afterwards made a corrected appraisal and renotified the owner of such corrected appraisal, the ninety days given the former owner by the act within which to repurchase the land began to run at the date when he received the notice of the corrected appraisal.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, DECEMBER 20, 1913.

Hon. J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: In your letter of December 15th, you state that Mrs. Minnie Lee Camp, the wife of J. T. Camp, was the owner of a section of public school land which was forfeited for non-payment of interest in July of this year and that her husband, J. T. Camp, thereafter wrote a letter to you in which he stated that he desired to notify you that he wished to repurchase the land which had been forfeited. You state that the land was reappraised and that an application to repurchase it has been made and filed by Mrs. Minnie Lee Camp, her husband signing the obligation with her. You desire to know whether the request for reappraisal was properly made and whether the land can now be awarded to Mrs. Minnie Lee Camp.

The Act of April 18, 1913, in its first section provides that the owner of the land "at the date of forfeiture" shall have the right for a period of ninety days after notice of classification and appraisal in which to repurchase the land. Section 2 of the act provides that if the owner at the time of forfeiture desires to repurchase land which has so been forfeited he shall advise the Commissioner of the General Land Office of such desire, and that thereafter the Commissioner shall furnish to the board of appraisers a list of all of the lands so forfeited together with the names of the persons who have advised him of their desire to repurchase it.

Section 3 provides for the reappraisal of the land and the mailing of notice of reappraisal to the forfeiting owner, and further provides that if such forfeiting owner desires to repurchase the land at the appraised price he shall file his application therefor.

It is evident that the sole purpose of the provision of Section 2 to the effect that the owner shall advise the Commissioner of his desire to repurchase is that the land which he desires to repurchase may be appraised by the board to the end that he may repurchase it at the price fixed by the board.

In the absence of any other reason, we are of the opinion that the facts as stated by you are sufficient to show or at least to raise the presumption that when the husband notified the board of his desire to repurchase he was acting as the agent of the wife. Her subsequent application in pursuance of his request for reappraisal would certainly amount to a ratification of his act.

It is, however, well established that school land purchased either by the husband or the wife during marriage is community property whether

it is purchased in the name of the husband or in the name of the wife.

The case of *Brown vs. Robison*, 131 S. W., 401, holds that when a husband has purchased a complement of school land the wife may not thereafter purchase other school land.

In the case of *Leaverton vs. Robison*, 120 S. W., 169, 102 Texas, 516, school land was purchased in the name of the husband who died and his surviving wife thereafter died. The court held that the surviving wife was a "purchaser" of the land which had been purchased in the name of her husband and that her heirs would have a year after her death within which to pay the interest on the land.

Under Article 42181, Revised Statutes of 1895, it is provided that "If any purchaser shall die his heirs or legal representatives shall have one year in which to make payment after the first day of November next after such death." In the opinion we find the following:

"Mrs. Leaverton was the wife of Henry C. Leaverton at the time he made the purchase of the school land in suit. That contract was a community obligation by which she acquired a one-half interest in the land. Her right was derived directly through the contract of purchase and was secured to her by the law the same as the right of the husband, except in matters of control, etc. Her name was not used in the contract, but that was not necessary to make her a party to it. She was therefore within the meaning of the law a 'purchaser' under that contract."

In the case of *Willingham vs. Floyd*, 73 S. W., 331, the court held that a wife could assist her husband in making settlement on school land purchased in his name on condition of settlement and that her acts with reference to the land should be considered on the question of settlement by the husband. The two opinions of the Court of Civil Appeals for the Second District of Texas in the case of *Erickson vs. McWhorter*, 132 S. W., 847, 143 S. W., 245, hold in effect that the jury was entitled to consider the fact that the wife resided upon school land purchased in the name of the husband in a case in which the issue was whether or not the husband had resided upon the land as required by law, and in which the evidence clearly showed that the husband had not resided or attempted to reside upon the land.

These cases clearly indicate that J. T. Camp had a community interest in the land which had been purchased by his wife and if he was a "purchaser" as held in the case of *Leaverton vs. Robison*, he certainly was a "owner" within the terms of the Act of April 18, 1913.

We, therefore, advise you that the notice of the desire to repurchase was sufficient even though the notice was given by the husband when the land had been owned by the wife, and that when in pursuance of such notice the land was reappraised and the wife applied to repurchase it, the land should be awarded to the wife.

You further state in your letter that in some cases the board of appraisers appraised lands which had been forfeited, but thereafter reconsidered their appraisal and made corrected appraisements and that notices were sent to the prior owners both of the original appraisal and of the corrected appraisal. You desire to know whether the ninety days given a former owner by the statute within which to repurchase the land would begin to run at the time of the first notice or at the time of the second notice. The act does not seem to con-

template that the board of appraisers shall make appraisements and thereafter make corrected appraisements. It simply provides that the board shall ascertain the reasonable values of the land and appraise it accordingly and prepare and mail notices showing their appraisement. The act, however, does not fix any time within which the appraisement shall be made or within which the former owner shall be notified of the appraisement. This being true we take it that whenever the board has appraised a tract of land and thereafter discovers that the appraisement was not correct it would not only be justified but the proper performance of its duties would require (provided the former owner had not already filed his application to repurchase under the first appraisement) that a corrected appraisement be made according to the real reasonable value of the land. The effect of the making of this corrected appraisement on the part of the Board would be for it to rescind its former action in appraising the land and the situation would then be as if the former appraisement had never been made, and we think that this being the case the time allowed to the owner after the appraisement should begin to run after notice of the corrected appraisement.

We, therefore, advise you that the former owner would have ninety days after notice of the corrected appraisement within which to repurchase the land. In accordance with another opinion we have this day written you, this ninety days would begin to run at the time when the owner receives the notice of the corrected appraisement.

Yours truly,

G. B. SMEDLEY,
Assistant Attorney General.

PUBLIC LANDS—VALIDITY OF LEASES OF PUBLIC LANDS.

(Article 7, Section 4, of the Constitution of Texas; Articles 5408, 5453, and 5454, Revised Civil Statutes.)

When part of a section of school land, after the enactment of the school land law of 1907, was under an unexpired lease and the balance of said section could not be sold by reason of that fact and both parts of the section were in demand by a prospective purchaser, the action of the Commissioner in executing a second lease covering both parts of the sections prior to the expiration of the first lease was unauthorized and the second lease was void and should be cancelled and the land should be awarded to an applicant who filed a legal application to purchase the entire tract after the expiration of the first lease.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, OCTOBER 1, 1913.

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

DEAR SIR: This Department is in receipt of your letter submitting the following statement of facts and questions:

"Prior to the Act of 1907 requiring school land to be sold in whole tracts, the N. W. $\frac{1}{4}$ of a section in Jeff Davis county was awarded to an applicant and the sale has been kept in good standing. In 1903 the S. W. $\frac{1}{4}$ of this section was leased for a period of five years and the lessee paid the rental from year

to year as the same accrued. The E. $\frac{1}{2}$ was duly classified and appraised, but owing to the fact that the S. W. $\frac{1}{4}$ was under lease, it could not be sold, and was not leased until about two months prior to the expiration of the lease on the S. W. $\frac{1}{4}$, when, by oversight, the entire tract, the E. $\frac{1}{2}$ and the S. W. $\frac{1}{4}$, was leased.

"There is on file a legal application to purchase the entire tract. The applicant insists that the outstanding lease should be cancelled and the land awarded to him. Our enquiry is, should this be done or should the lease be permitted to stand and his application to purchase rejected. In this connection I will state that the S. W. $\frac{1}{4}$ was advertised in our printed list as coming on the market at a fixed date, which was the expiration of the lease and that the applicant in question had made inquiries about the land and expressed a desire to purchase the entire tract prior to the second lease. The second lessee is not the same person as the first lessee."

It appears from the foregoing statement of facts that the E. $\frac{1}{2}$ of the section above described could not be sold until the expiration of the lease, which covered the S. W. $\frac{1}{4}$, the only thing preventing the sale of the E. $\frac{1}{2}$ of the section being the fact that it was not a whole tract, and that under the law of 1907 school land could be sold only in whole tracts. It was decided in the case of Ford vs. Terrell, 101 Texas, 327, 107 S. W., 40, that, when a part of a section was under a valid and unexpired lease, the other part not being a whole tract, could not be sold after the passage of the School Land Law of 1907. In that case the court said:

"The fact that part of a section may be under lease and is thereby temporarily kept off of the market is not made to take it out of the rule. The entire section in such a case still belongs to the school fund, and can eventually be sold in its entirety."

It thus appears that, in accordance with this decision of our Supreme Court, the E. $\frac{1}{2}$ of the section was temporarily kept off the market by reason of its being not a whole tract, and that the S. W. $\frac{1}{4}$ of the section also was kept off the market by reason of the fact that it was under a valid and unexpired lease. It further appears from the statement of facts that the S. W. $\frac{1}{4}$ of the section was advertised by the Land Office as coming on the market at the time of the expiration of the lease, and that the entire unsold portion of the section, both the E. $\frac{1}{2}$ and the S. W. $\frac{1}{4}$, were in demand for sale both before and at the time of the expiration of the lease on the S. W. $\frac{1}{4}$ of the section. It appears that through oversight both the E. $\frac{1}{2}$ and the S. W. $\frac{1}{4}$ of the section were leased about two months prior to the expiration of the lease on the S. W. $\frac{1}{4}$.

We are of the opinion that this statement of facts brings the case within the rule of the case of Ketner vs. Rogan, 95 Texas, 559, 68 S. W., 774, and other later cases, the rule of said cases commonly being known as the "lap lease" doctrine. It appears that the case of Ketner vs. Rogan was decided with reference to the school land law of 1895 as amended in 1897, but that the decision of the court in that case was based largely upon Article 7 of Section 4 of the Constitution, which has been construed by our courts as a mandate requiring the sale of the public school lands and prohibiting either the Legislature or the Commissioner from withholding the school land for sale for any unreasonable period. See

Reed vs. Rogan, 94 Texas, 177, 59 S. W., 255.

Smisson vs. State, 71 Texas, 232.

In the case of Ketner vs. Rogan, the Commissioner of the General Land Office, before the expiration of a lease on school land, the said lease being in good standing, cancelled it and executed a new lease for ten years; the court held that this act was unauthorized and that the second lease was void and that at the expiration of the first lease the land was on the market for sale. The reason for the division was that by such action on the part of the Commissioner public school land could be kept off the market indefinitely in violation of the article of the Constitution referred to.

The later school land laws with reference to the leasing of the land even more clearly than the Act of 1895 prohibit the execution of a new lease prior to the expiration of the old lease and clearly prohibit the leasing of any land which is in demand for purchase. Section 5 of the School Land Law of 1901, which is Article 5453 of the Revised Civil Statutes, contains the following:

"And lands situated in the absolute lease district which may be leased shall not be sold during the term of the lease, except as provided herein. On the expiration of any lease in the absolute lease district the lands shall remain subject to sale for a period of sixty days, except where there are improvements on a section of the value of \$200 or more, and if it has been previously classified and valued by the Commissioner of the General Land Office, and notice given to the county clerk, it shall not be necessary to give the clerk any further notice in order to put the land on the market and subject to sale. During said period of sixty days the Commissioner of the General Land Office shall suspend action upon any application to lease said land, and shall award it upon any legal application to purchase made during said time."

It thus appears that under the School Land Law of 1901, with reference to leases, the Commissioner was not only prohibited from executing a new lease prior to the expiration of the old lease, but it was expressly provided that upon the expiration of the lease the land should remain subject to sale for a period of sixty days and should be on the market, if already classified and valued and if notice had already been sent to the clerk, without any further notice in order to put the land on the market.

Section 7 of the School Land Law of 1905, which is Article 5454 of the Revised Civil Statutes of 1911, contains the following:

"When a lease expires or is cancelled for any cause, the Commissioner shall not consider an application to lease the land prior to ninety days from such expiration or cancellation, and no lease on any land shall be made if it is in demand by purchasers. * * *"

Section 2 of the School Land Law of 1905, which is Article 5408 of the Revised Civil Statutes of 1911, provides in substance that where practical the Commissioner shall notify the county clerk ninety days before the expiration of a lease when lands under lease shall come on the market by reason of the expiration of the lease. This section clearly shows the purpose of the law that land under lease shall always come upon the market at the expiration of the lease even though the clerk, for some reason, may not have been notified ninety days before the expiration of the lease.

It is apparent that the action of the Commissioner in the case stated in your letter in executing a new lease two months prior to the expiration of the old lease and in leasing land which was not in demand by a purchaser was plainly in violation of the statutes above quoted and referred to and was in violation of Article 7, Section 4, of the Constitution, and that for these reasons and in view of the holding of the Supreme Court of Texas in the case of *Ketner vs. Rogan* and other cases following it, the lease was void and should be cancelled and the lands should be awarded to the applicant if the application was filed subsequent to the expiration of the first lease and otherwise complied with the law, and if the applicant was a qualified purchaser.

Very truly yours,

G. B. SMEDLEY,

Assistant Attorney General.

PUBLIC SCHOOL LANDS—TERMS AND CONDITIONS OF THE SALE OF
UNSURVEYED LANDS.

(Section 8 of the Act of April 15, 1905, and Sections 6a and 6b of the Act of May 16, 1907.)

Unsurveyed public school land in Calhoun county and in other counties not named in Section 6a of the act of 1907 since the enactment of the school land law of 1907 is subject to sale without condition of settlement and in unlimited quantities whether classified as agricultural or grazing land.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JULY 24, 1913.

Hon. J. T. Robison, Commissioner, General Land Office, Austin, Texas.

DEAR SIR: In your letter to this Department of July 21st, you state that in Calhoun county a body of land, formerly the bed of Green Lake, is now dry land and that this body of land contains more than one thousand acres and that application has been made, under Section 8 of the Acts of 1905, to purchase this land. We have also been informed that the land is subject to overflow and that it has been classified as such by the county surveyor of Calhoun county. You desire to know whether, if the land is classified as agricultural land, one person can purchase more than two sections, and you further desire to know whether, the land is subject of sale without condition of settlement or subject to sale on condition of settlement.

By Article 4218f of the Revised Civil Statutes of 1895, which article is a part of the Act of 1895 as amended in 1907, it is provided in substance that one may not purchase more than four sections of public school land and that the purchaser shall not include in his purchase more than two sections of agricultural land. By Section 3 of the Act of 1901 (Acts of 1901, page 294), the Commissioner of the General Land Office is prohibited from selling to one person or the same person more than four sections of land. The Act of 1905 makes no change in the number of sections that may be purchased by one person, except that Section 6 of said Act (Acts of 1905, page 165) provides that in certain

named counties one may purchase as many as eight sections. Section 8 of the Act of 1905 contains no specific limitation as to the number of sections that may be purchased by one person. Said section does, however, provide that the classification, price and terms of the sale of unsurveyed land under said section shall be the same as that for surveyed lands except as provided in said section.

In the case of *Houston vs. Koonce*, recently decided by the Supreme Court and reported in 156 S. W., 202, it is held that that part of the Act of 1901 which limits a purchaser to four sections was not repealed by the Act of 1905 and that the said limitation of four sections to one purchaser applies to the sale of unsurveyed lands under Section 8 of the Acts of 1905 for the reason that such unsurveyed land is subject to sale on the same terms and conditions as surveyed land. It is to be observed, however, that the application to purchase the land involved in that case was made prior to the time that the Act of May 6, 1907, took effect.

The Act of 1907, for the purpose of defining the terms and conditions of the sale of surveyed public school land divided the counties of the State into two classes. By Section 6a of the Act (Acts of 1907, p. 492) a number of counties of the State were named and it was provided that all surveyed land in said counties should be sold on condition of settlement. The terms and the conditions of the sale of surveyed school land in the other counties which includes those counties not named in Section 6a of the Act of 1907, was prescribed by Section 6b of the Act of 1907, and it was provided in said section that the surveyed land in such counties should be sold in whole tracts only "without condition of settlement or limit as to quantity either for cash with the right to patent at once, or for one-fortieth cash with five per cent interest on the deferred balance."

Calhoun county is not named in Section 6a of the Act and therefore falls within that class of counties referred to in Section 6b in which the surveyed land is to be sold without condition of settlement.

The Act of 1907 did not undertake to regulate the conditions and terms of the sale of unsurveyed public school land and did not repeal Section 8 of the Act of 1905, and the sale of unsurveyed public school land is therefore controlled by the terms of Section 8 of the Act of 1905. As has been before stated, this section provides that the price and terms of the sale of unsurveyed public school lands "shall be the same as that for surveyed lands." At the time of the enactment of the law of 1905, surveyed lands in all counties of the State were sold on condition of settlement with some exceptions, and the number of sections that could be purchased by any person was limited to four sections which could include but two sections of agricultural land. However, as above stated, surveyed school land in Calhoun county is now subject to sale without condition of settlement and in unlimited quantities. In our opinion, the words used in Section 8. "the price and the terms shall be the same as that for surveyed lands" were not intended to mean that the price and the terms of the sale of unsurveyed land should be the same as the price and the terms of surveyed lands at the time of the enactment of the Act of 1905, but these words were intended to mean that, except in case of certain named exceptions, the price and terms of

the sale of surveyed lands and unsurveyed lands should be the same, the primary purpose being, as far as possible, to make such prices and terms uniform. In our opinion, therefore, when the Legislature in 1907 changed the law so that surveyed public school land in many counties of the State could be sold without condition of settlement and in unlimited quantities the unsurveyed school lands in said counties became also subject to sale without condition of settlement and in unlimited quantities.

Under our view of the law, in order to answer your two questions, it is unnecessary to discuss within what class of lands designated in Section 8 of the Act of 1905 the land in question comes, that is, whether it is disclosed or undisclosed land or land subject to overflow, for, in any event, it is subject to sale in unlimited quantities and without condition of settlement by reason of the change brought about by the law of 1907. It is also to be observed that the land may be sold either for cash or for one-fortieth cash with five per cent interest on the deferred payments. It is true that Article 8 of the Acts of 1905 has specified certain terms and conditions relative to overflowed lands and lands not disclosed on the maps of the Land Office and lands in small tracts, and contains the following words: "All other unsurveyed vacant tracts disclosed by the official maps in use in the Land Office when an application for surveyed land is filed, shall be sold on condition of settlement and improvement as provided by law for the sale of surveyed lands." However, for the reasons above enumerated, we are of the opinion that the proper construction of this portion of the section is that such unsurveyed lands in the counties enumerated in Section 6a of the Act of 1907 shall be sold on condition of settlement as provided by such section but that such unsurveyed lands in the other counties in the State shall be sold without condition of settlement as provided by Section 6a of the Act of 1907. We, therefore, answer that, if this land is subject to sale at all, an applicant to purchase the land would not be limited either to two sections, if it is agricultural land, or to four sections, if it is grazing land, and that the land is subject to sale without condition of settlement.

As you have heretofore been advised, this Department is preparing to file suit against certain persons claiming this land adversely to the State, and, in our opinion, on account of the decision of the Supreme Court in the case of the State of Texas vs. The Dayton Lumber Company it would be best that no award be made of this land until after the land is recovered for the State.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

SCHOOL LANDS—FORFEITURE AND REPURCHASE—CONSTITUTIONALITY
OF PREFERENCE RIGHT OF REPURCHASE.

This law enacted and held constitutional. (Judkins vs. Robison, 160 S. W., 955.)

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 25, 1913.

Judge N. P. Ross, Austin, Texas.

DEAR SIR: We have examined at your request for our opinion as to its constitutionality House Bill No. .., entitled:

"An Act to provide that the owners of public free school lands, purchased from the State after January the 1st, 1907, and prior to January the 1st, 1913, on consideration of settlement and residence which land may hereinafter be forfeited for the nonpayment of interest, shall have the right to purchase the same after forfeiture and prescribing the terms and conditions of such purchase and the sale of such land as may not be reinstated or purchased and declaring an emergency."

The general purpose of the bill appears to be to allow purchasers of public school lands bought from the State after January 1, 1913, and hereafter forfeited for non-payment of interest, a prior right of thirty days after forfeiture and appraisement of the lands in which to repurchase them at the appraised prices, and requiring as a condition precedent to the repurchase the payment of one-tenth of the interest accrued and unpaid on the original purchase and the obligation secured by lien on the land to pay the balance of the accrued interest.

It is well settled that the Legislature may enact laws, the effect of which is to withdraw public school lands from sale to the general public for limited periods. See *Brown vs. Shiner*, 84 Texas, 509; *Smisson vs. State*, 71 Texas, 229. And it is equally well settled that the Legislature may grant preference rights of purchase. See *Glasgow vs. Terrell*, 102 S. W., 98. To quote from the last cited case:

"When and by whom the lands shall be sold, is a question of sound policy, and belongs to the political department. So that as we think the Legislature in giving preference rights to lessees and their assigns to purchase the lands held by them under lease has not transcended its power from the Constitution."

The granting in this bill, therefore, the preference right appears to be the proper exercise of legislative power. The serious question presented is whether the bill is unconstitutional as contrary to that part of Section 4, Article 7, of the Constitution, which provides as follows:

"And the Legislature shall not have the power to grant any relief to the purchasers thereof," referring to purchasers of public school lands.

The case of *Barker vs. Torrey*, 69 Texas, 7, construes this constitutional provision as prohibiting the enactment of any law, the effect of which would be to free the purchaser from any part of his legal obligation to pay the principal and interest which he has obligated himself to pay for the land. This construction has been followed by the later cases.

The School Land Law of 1895 contained a provision to the effect that any purchaser whose land was forfeited for non-payment of in-

terest could have his sale reinstated, on written request, by paying into the Treasury the full amount of interest due on such claim up to the date of reinstatement. (R. S., 1895, Article 4218f.) This was, in one sense, granting "relief" to the purchaser, but the statute was sustained by the Supreme Court, and the rule of the case of *Barker vs. Torrey* applied. See *Anderson vs. Neighbors*, 94 Texas, 236; *Mound Oil Company vs. Terrell*, 92 S. W., 451; *Lindsay vs. Terrell*, 101 S. W., 1073.

The School Land Law of 1895, in language similar to that used in this bill, also gave to the owners of land forfeited for non-payment of interest a prior right of ninety days in which to repurchase the land after it was placed on the market; providing, as does this bill, that on such repurchase the period of residence under the original purchase might be counted as a compliance, or a partial compliance, with the residence required under the purchase, and providing, as does this bill, for the payment by the purchaser of the interest accrued and unpaid under the former purchase (Article 4218j, R. S., 1895). This article was also held valid. See *Mound Oil Company vs. Terrell*, 92 S. W., 451; *Cobb vs. Webb et al.*, 64 S. W., 792.

Various validating acts, and acts granting extensions of time and other favors to purchasers of school lands, have been held constitutional, but the two articles of the School Land Law above referred to are more nearly similar to this bill than any other laws that have been enacted for the benefit of purchasers of such lands, and the authorities above cited holding said articles valid are, in our opinion, sufficient to sustain this bill.

The effect of the bill is not to impair the obligation of the purchaser, for the bill has no effect until the obligation has been destroyed by the forfeiture of the sale. Under this bill, the school fund is benefited rather than impaired when the purchaser exercises the prior right to repurchase, for it secures the purchaser's valid obligation to pay the interest accrued on the original purchase, as well as the first payment for the land, and the obligation for the payment of the balance under the repurchase.

If it appeared that the purpose and ordinary effect of the law to be enacted by this bill would be to allow forfeitures and then resales to the original purchaser at prices less than the original purchase price, the bill would doubtless be unconstitutional as allowing a purchaser to be relieved of a larger obligation by the assumption of a smaller. But it is not apparent that such is the purpose of the bill, or that such would be the effect of the law, for it can not be assumed that the Commissioner of the General Land Office, in appraising the land after forfeiture, would put a smaller price on it than the original purchase price. It must be assumed that the Commissioner would put a fair value on the land. As said in the case of *Barker vs. Torrey*: "The rule is that a law will not be declared unconstitutional unless it is clearly shown, and, in cases of doubt, it will be held valid. The opinion of the Legislature of its constitutional power is entitled to great weight."

Section 4 of the bill, which is the emergency clause, contains recitals which may indicate that the purpose of the bill is to allow purchasers to forfeit their lands and to repurchase them at a smaller price, and,

if the bill were enacted with this emergency clause, it might be held unconstitutional.

The bill, without the emergency clause as written, is, in our opinion, constitutional.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

PUBLIC SCHOOL LAND ACT OF APRIL 18, 1913.

When a former owner in an effort to avail himself of the preference right to repurchase given him by said act, in good faith files his affidavit and obligation to repurchase the land within the ninety days allowed by the law, but inadvertently fails to sign the obligation, he should be allowed to sign the obligation if he makes the request to do so within a reasonable time and before the land is placed on the market by the Commissioner under Section 4 of the act, and the land should be awarded to him if the application is otherwise regular.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, DECEMBER 29, 1913.

Hon. J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: In your letter of December 29th, you submit to us the following statement of facts and questions:

"Land that was appraised for W. J. Underwood in Andrews county had 90 days to run from about the 9th day of September. On November 14th Mr. Underwood filed in this office his application, together with the first payment and full charges. When we reached the application for action on the 13th of this month it was found he had failed to sign his obligation, though the obligation was otherwise completely and properly filled out. The question I wish to submit is whether or not Mr. Underwood should yet be allowed to sign his obligation and this Department should then accept the same. Of course, the failure to sign it was purely an oversight on his part, or the part of the notary instructing him."

It appears from your letter that the failure of the applicant to sign the obligation was purely an oversight and that he did everything else that the law required of him in the exercising of his preference right. Under these circumstances, he should not lose his right to repurchase unless the law very clearly so provides. Section 3 of the Act of April 18, 1913, provides that the applicant shall file his application for the land in the General Land Office within the ninety days, "together with one-fortieth of the appraised value and his obligation for the remaining portion of the purchase price bearing 3 per cent interest per annum." The strict letter of the law seems to require that the obligation shall accompany the application. This Department held, however, in an opinion to you of date December 20th that it was not absolutely necessary that the first payment; that is, the one-fortieth of the appraised value, should be in the Land Office on the very day that the application is filed. This opinion was based largely on the case of *Buckley vs. Terrell*, 109 S. W., 861, and the reason for the decision in

the Buckley case was that the land was not for sale on competitive bidding, and that no rights of third persons could intervene. The principle of the Buckley case applies to the question under consideration, for the land under the act is not for sale on competitive bidding until it is placed on the market by the Commissioner in accordance with Section 4 of the act, and no rights of third persons can intervene.

The case of Faucett vs. Sheppard, 75 S. W., 538, is very nearly in point. In that case the obligation was for an insufficient amount, but the Commissioner allowed the obligation to be amended after it was filed so as to show the correct amount. The contention was made that on account of the amendment of the obligation the sale was void, but the court held that the sale was not void, saying:

"It is sufficient that it was shown beyond dispute that the proper obligation was in fact filed with the application and accepted by the Commissioner before the award was made, there being no intervening right."

The case of Walker vs. Marchbanks, 74 S. W., 929, is another case in which it appears that the obligation was amended after it was filed, but the sale was, nevertheless, held to be valid.

In the case of Neating vs. Terrell, 75 S. W., 485, the affidavit, which was a part of the application, was defective, in that it showed settlement on a tract of land other than that on which the settlement was in fact made. The court held that the applicant should be permitted to correct his affidavit so as to describe the land correctly, since the rights of a third person had not intervened.

In view of these authorities, and since the failure of the applicant to sign the obligation appears to have been purely an oversight and since the rights of a third person have not and can not have intervened, we advise you that you should allow Mr. Underwood to sign his obligation, and that you should award him the land if his obligation is otherwise regular. There should be no unreasonable delay in the making of an amendment to an application or obligation of this character, and it certainly should not be made after the Commissioner had placed the land on the market under the terms of Section 4 of the act. The act contemplates that the applications filed under the act shall be acted upon within a reasonable short time, and that, if the former owner has not exercised his right to repurchase in the manner provided by the law, the Commissioner shall place the land upon the market, the intention of the law being that the land shall not remain off the market for any unreasonable time. If, therefore, there are errors in any of the applications or obligations filed in pursuance of the act, they should be corrected promptly.

Very truly yours,

G. B. SMEDLEY,
Assistant Attorney General.

PUBLIC LANDS—VALIDITY OF SURVEYS—EFFECT OF PATENTS.

A survey made by the surveyor of a land district other than that in which the land surveyed is situated is invalid and created no right in the land.

The patent issued on such invalid survey is not void and the land held under such patent is titled land not subject to location or sale. Only the State or some person claiming under a right existing prior to the issuance of the patent can attack the patent in such case.

The owner of land purchased from the State and patented under corrected field notes has no right to purchase as excess land included within original field notes, but not included in the corrected field notes and which has been patented.

Laws construed: Section 2, Art. 7, Constitution of 1876; Sec. 2, Art. 14, Constitution of 1876; Act of April 16, 1889; Act of February 3, 1883.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MAY 31, 1913.

Hon. J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: Your letter of March 8, 1913, with the accompanying maps and copies of field notes regarding certain lands in Wichita county, has not been answered sooner for the reason that the various parties interested in the land have requested to be heard in the matter, and have at various times asked that we delay our final opinion until they could present further arguments and authorities. In our investigation of the matter, we have had in addition to the valuable authorities cited in your letter very able briefs and argument furnished us by Mr. John W. Maddox, and Messrs. Gregory, Batts & Brooks of Austin, Mr. D. Edward Greer of Beaumont, and Messrs. Montgomery, Carrigan & Britain of Wichita Falls, all of which briefs and arguments, and the authorities cited, have been very carefully considered.

To state the facts in the matter as briefly as possible, it appears that Wichita county was placed in the Clay Land District by the Acts of the Legislature of May 31, 1873, April 29, 1874, and March 11, 1881. (See Gammel's Laws, Volume 7, page 602; Volume 8, page 163, and Volume 9, page 116.) Section 1, S. A. & M. V. R. R. Co. grantee, was surveyed on November 8, 1874, by the surveyor of *Jack* Land District under a certificate issued to said railway company, and at the same time it appears that the surveyor also surveyed Section No. 2 for the public school fund. Section No. 1 appears from notation on the field notes to have been patented February 26, 1886. Section 23, H. & G. N. Ry. Co. grantee, which lies immediately south of Section No. 1, was surveyed by the surveyor of the Clay, Wichita and Archer District on May 23, 1873. This survey has been patented and its validity and superiority over other surveys herein referred to is generally conceded and recognized.

On March 16, 1878, Section No. 10, G. C. & S. F. Ry. Co. grantee, was surveyed for the public school fund by the surveyor of the Clay Land District. As originally surveyed, the northern portion of this section conflicted with Section No. 1, and the southern portion conflicted with Section No. 23. On March 11, 1893, Section No. 10 was resurveyed to contain but 334 acres, and corrected out of conflict with Section No. 23, but remained wholly in conflict with Section No. 1. Section No. 10 has never been sold by the State.

On May 27, 1878, Sections Nos. 13 and 14 were surveyed by the county surveyor of the Clay Land District under a certificate issued to the B. S. & F. Ry Co. Section No. 13 was in conflict with a survey known as Donata Leona. Section No. 14 as originally surveyed was in conflict with Section No. 1 hereinbefore referred to, and with its companion Section No. 2 and with Section No. 10, H. T. & B. Ry. Co.

On February 20, 1885, Section No. 13 was corrected entirely out of its original location and was given but 67 acres, and was patented on such field notes. At the same time Section No. 14 was corrected out of conflict with Sections Nos. 1, 2 and 10 and given but 67 acres, under which corrected survey it was sold in 1889. On August 3, 1892, Section No. 14 was again resurveyed so as to include 355.56 acres, but these field notes were never approved by the General Land Office. A third resurvey of Section No. 14 was made October 9, 1911, by which it was corrected to include 90.4 acres, and on these field notes Section No. 14 was patented on October 19, 1911.

On March 21, 1890, Day Land & Cattle Company survey D-1998 was surveyed by the county surveyor of Wichita county, and was patented on January 22, 1891, according to said survey. This tract of land lies immediately north of Section No. 1, S. A. & M. G. R. R. Co., and conflicts with Section No. 14, B. S. & F., as originally surveyed, but does not conflict with said section as corrected and patented.

We are also advised that the unsold portions of Sections Nos. 10 and 14 have been filed on under the mineral statute.

On these facts you submit the following questions:

1. Is school Section No. 10 superior to either or all of its conflicting surveys?
2. Is school Section No. 14 superior to either or all of its conflicting surveys?
3. Can the purchaser of the 67-acre portion of No. 14, which was patented for 90.4 acres, now stretch his purchase out so as to cover all of No. 14, if it be superior to conflicting surveys, and lawfully obtain a patent to the whole of No. 14 by paying for it at the original price; i. e., claim a right to purchase it as an excess belonging to his purchase of a part of No. 14?
4. If Nos. 10 and 14 are superior, should your Department proceed to have the courts cancel the patents on the conflicting surveys before this Department offers Nos. 10 and 14 for sale?

From the information which we have, it appears that Section No. 23, H. & G. N. Ry. Co., is a valid survey, prior and superior to Section No. 10, G. C. & S. F. Ry. Co. the balance of Section 10 being its northern portion, is in conflict with Section No. 1, S. A. & M. G. R. R. Co., which was surveyed some three and one-half years prior to the surveys of Sections Nos. 10 and 14, but patented after Sections Nos. 10 and 14 were surveyed. Section No. 14, as originally surveyed, conflicts also with said Section No. 1, S. A. & M. G. R. R. Co., and with Section No. 2, S. A. & M. G. Ry. Co., and with Section No. 10, S. A. & B. Ry. Co. As we understand it, this Section No. 10 is a prior and superior survey to said Section No. 14. We further understand that Section No. 2, S. A. & M. G. R. R. Co., has been sold as public school

land, and that on this account the persons who have filed upon the unsold portions of Section No. 14 under the mineral statute have omitted from their applications the portion of Section No. 2, as well as the portion of Section No. 10, with which Section No. 14, as originally surveyed, conflicted.

Your first two questions are, therefore, resolved practically into one question; that is, whether Section No. 1, S. A. & M. G. R. R. Co., is superior to Sections Nos. 10 and 14?

So far as we are advised, the only ground upon which the validity of Section No. 1, and its superiority over Sections Nos. 10 and 14 are attacked, is that it was surveyed by the surveyor of the Jack Land District when Wichita county was a part of the Clay Land District.

Our courts appear to have held uniformly that a survey made by a surveyor of a district other than that in which the land is situated is invalid, and that no rights are acquired under such survey.

H. & T. C. Ry. Co. vs. De Berry, 78 S. W., 736.

Cox vs. H. & T. C. Ry. Co., 68 Texas, 226, 4 S. W., 485.

Olcutt vs. Smith, 70 S. W., 343.

Marsalis vs. Greagor, 21 S. W., 545.

Duren vs. H. & T. C. Ry. Co., 86 Texas, 287, 24 S. W., 258.

Since this is true, it appears that the land included in the survey of Section No. 1, said survey being invalid, was by the surveys of Sections Nos. 10 and 14 made in 1878 set apart and appropriated to the public school fund in accordance with Section 2, Article 7, of the Constitution of 1876, and the Act of February 3, 1883.

The suggestion is made that the survey of Section No. 1 was validated by Section 2 of the Act approved April 16, 1889, which, in substance, provides that all surveys theretofore made shall not be called into question on account of having been made outside the proper county or district, but that such surveys shall be as valid as if made by the surveyor of the proper district. This would be true were it not for the fact that, prior to the passage of said act, the land had been surveyed and set apart to the public school fund as aforesaid.

The further suggestion has been made, and it has been argued to us with such force that Section No. 1, S. A. & M. G. Ry. Co., was at the time of the location of the school certificates therein "equitably owned" within the meaning of Section 2, Article 14, of the Constitution, and was by the Constitution protected from location, and that the land could not, therefore, have been lawfully surveyed for the school fund in 1878. If, as the authorities indicate, the survey of Section No. 1 made in 1874 by the surveyor of Jack county was void and created no right whatever in the land, it is difficult to understand how land claimed by virtue of such void survey can be said to be "equitably owned," even though the owner of the certificate and the surveyor both acted in perfect good faith in making the survey. However, we do not deem it necessary to enter into a discussion of this question.

We will next consider what was the effect of the patent of Section No. 1 issued in 1886. This patent, we presume, was regular in form and issued by the proper officers. It is our opinion that, although the survey on which the patent was issued may have been void and although the land had been legally surveyed for the school fund, the

patent was, nevertheless, not *void*. It may be and doubtless is voidable at the instance of the State, but, in our opinion, no one can question the validity of this patent if regular on its face and issued by the proper officers, except the State or someone claiming under a right existing prior to the issuance of the patent.

See *Von Rosenberg vs. Cuellar*, 80 Texas, 249, 16 S. W., 58.

Greenwood vs. McLeary, 25 S. W., 708.

Burnett vs. Powell, 25 S. W., 1030.

Miller vs. Ward, 124 S. W., 340.

Bunnell vs. Sugg, 135 S. W., 701.

Winsor vs. O'Connor, 69 Texas, 571.

Horton vs. Halff, 147 S. W., 735.

The facts before us show that no one, except the State, has any right in or to the land included in the patent of Section No. 1, which existed prior to the issuance of the patent. This being true, in view of the above authorities, we are of the opinion that no one but the State is in a position to attack the patent. Moreover, under the above authorities, Section No. 1, after the issuance of the patent, was "titled land" within the meaning of Section 2, Article 14, of the Constitution, and was no longer subject to location or sale, and we are of the opinion that you can not offer these lands for sale, unless the patent to Section No. 1 is first canceled by suit at the instance of the State. See *Juencke vs. Terrell*, 82 S. W., 1025.

Assuming for the purpose that on account of the irregular survey of Section No. 1 the patent could be canceled by a suit of the State, and the land recovered for the school land, this Department has carefully considered the advisability of filing such suit. Viewing the facts we have before us;—the ownership of a certificate presumably in all things valid and issued for value or in exchange of valuable service, an application for survey made and a survey of vacant land made under the certificate of one section for the public school fund and one section for the owner of the certificate, the field notes of said surveys returned to the General Land Office and there filed and approved, the subsequent solemn issuance of the State's patent to the land in accordance with said survey and the subdivision, transfers for value and improvement of the land in good faith by various purchasers under the patent, the one vice being that the original survey was made by the surveyor of the Jack Land District, rather than by the surveyor of the Clay Land District. This vice is at most an irregularity on account of which neither the State nor the school fund has suffered loss. A patent executed and issued by the State is the most solemn act of the State respecting the lands within the bounds and an act of the State which should be respected by all citizens of the State, including the officials. The filing of suit and the cancellation of the patent to this section would doubtless result in a financial gain to the public school fund, but it would work an unjust hardship on many citizens of the State who have acted in perfect good faith respecting the lands, and, if the power exists to cancel this patent, the exercising of this power by the State through its officials would be, in our opinion, inequitable and unwarranted. It will not be the policy of this Department under this admin-

istration to file suits for the recovery of lands merely because the State has the *power* to recover them.

We desire that the foregoing statement as to the policy of this Department be not misunderstood. It has reference to cases of the character of the one before us. Whenever land has been acquired from the State through fraud or has been acquired, or is held in violation of the spirit or plain policy of our laws, we shall do all in our power to recover it for the State, and we are confident that in the performance of such purpose we shall have the hearty co-operation of your Department.

You further desire to know whether the purchaser of the 67-acre portion of Section No. 14, which was patented for 90.4 acres, can now claim a right to purchase all of said Section No. 14, as originally surveyed, as an excess belonging to his purchase. From what has been heretofore said, it is clear that such right does not exist as to that portion of the original survey of Section No. 14 which conflicts with Section No. 1, for, as has been shown, Section No. 1 was titled and patented land prior to the time Section No. 14, as corrected, was purchased from the State.

That portion of Section No. 14, as originally surveyed, which conflicts with Day Land & Cattle Co. survey D-1998, presents a somewhat different question, since when Section No. 14, as corrected, was purchased from the State the survey had not been made for the Day Land & Cattle Company, and the land subsequently surveyed for the Day Land & Cattle Company was included within the bounds of Section No. 14, as originally surveyed. On this account, and on account of the further fact that the corrected field notes of Section No. 14 of February 20, 1885, contain a call for the N. W. corner of S. A. & M. G. R. R. Co., survey No. 1, the purchaser of Section No. 14 under such field notes might have been able to maintain, before the issuance of the patent to the Day Land & Cattle Company survey, a right to purchase the lands included in said survey as excess to Section No. 4; but since the Day Land & Cattle Company survey has been patented by the State, and since the purchaser of Section No. 14 has accepted a patent to Section No. 14 under field notes which respect the Day Land & Cattle Company survey, we are of the opinion that if the owner of Section No. 14, as patented, ever had the right to purchase this land as excess, such right no longer exists.

See *Jones vs. Peddy*, 146 S. W., 663.

Willoughby vs. Long, 96 Texas, 146.

Gale vs. Wright, 140 S. W., 91, 143 S. W., 147.

What has heretofore been said as to the effect of the patent to Section No. 1, S. A. & M. G. R. R. Co., applies also to the patent to the Day Land & Cattle Company survey D-1998. We assume, in the absence of any evidence to the contrary, that the certificate under which this land was surveyed was valid; that the survey was regular, and that the patent was issued in proper form and by the proper officers. This being true, the land is not now subject to location or sale, and, in view of the foregoing facts, we are of the opinion, also, as to the Day Land & Cattle Company survey, that it would be inequitable for the State to seek to cancel the patent and to recover this land.

Respectfully yours,

G. B. SMEDLEY,
Assistant Attorney General.

PUBLIC SCHOOL LAND—IMPROVEMENTS—FORFEITURE.

1. The Commissioner of the General Land Office may forfeit a sale of public school land solely for the failure of the purchaser to improve the same as required by law.

2. Improvements erected on public school land by a lessee and afterwards acquired by an assignee of the lease who purchases the land under the preference right, may be counted by such purchaser as in compliance with the law requiring improvement.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 13, 1913.

Hon. J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: We have your communication of January 4th to this Department as follows:

"In 1906 one lessee owned an unexpired lease and gave it to another party by written transfer, reciting a \$10 consideration, but in fact it was a gift. The assignee designated certain tracts which he afterwards purchased by virtue of being such assignee of a lease, the purchase being as an actual settler. On one of these tracts purchased under that preference right was a tank that perhaps in its original construction cost, say, \$500, which was placed there by the original lessee, but there was nothing in the assignment of the lease said with reference to the tank, as to whether or not the ownership of it went with the lease. After the assignee of the lease purchased the land out of the lease, he placed probably \$50 or \$100 worth of improvements on the land before the expiration of the three years from the date of his purchase of the land from the State. Before the completion of the three years residence the original purchaser transferred to another, which last vendee was substituted on the records of the Land Office. Thereafter my predecessor cancelled the purchase and made the following endorsement on the files: 'Forfeited for failure to reside on the land as required by law and for collusion to purchase thereof. John J. Terrell, Com'r.' The person who owned the land at the time of that endorsement has since sold to another party.

"In this matter there is no question about the fact of residence on the land for three consecutive years by the first substitute purchaser and before the present claimant purchased the land. The present claimant has never been substituted on the records of the Land Office, he having purchased since the forfeiture and the completion of the three years residence. The present claimant insists that the Land Office has no authority to cancel land for failure to place \$300 worth of improvements on the land.

"To summarize: The land was purchased out of a lease under the Act of 1905 and resided upon for three consecutive years, but there was not \$300 worth of improvements placed on the land after the purchase.

"Query: Kindly advise this Department if in your opinion the Land Commissioner has the authority to cancel purchases for failure to place \$300 worth of improvements upon the land if purchased as related in this instance? If so, then another question:

"Would the improvements placed on the land by a lessee who sold his lease to another party who in turn purchased from the State, be counted as placed thereon by the owner during a term of three years residence?"

Your communication presents two questions: First. Is the Commissioner of the General Land Office authorized to cancel the sale of land sold on condition of settlement out of a lease under Section 5 of the Act of April 15, 1905, solely on the ground that the purchaser has failed to improve the land as required by law? The language of Section 5 of the Act of 1905 indicates that land sold under the provisions of said act are sold upon the terms and conditions of other

school lands. The opinion of the Court of Civil Appeals in the case of *Hanna vs. Atchison*, 141 S. W., 190, is to some extent in conflict with this construction, but that case is now pending in the Supreme Court, the reason assigned by the Supreme Court for granting the writ of error indicating that our construction is correct.

The only provisions in the School Land Laws requiring the erection of improvements to a specified amount and authorizing the Commissioner of the General Land Office to forfeit the sale for failure to erect the improvements are found in Section 3 of the Act approved April 19, 1901, and are as follows:

"Every purchaser shall be required within three years after his purchase to erect permanent and valuable improvements on the land purchased by him, which improvements shall be of the reasonable market value of \$300. If any purchaser shall fail to reside upon and improve in good faith the land purchased by him, as required by law, he shall forfeit said land and all payments made thereon to the State, to the same extent as for the non-payment of interest, and such land shall be again upon the market as if no such sale and forfeiture had occurred."

It is well established, however, that the School Land Laws of 1897, 1901, 1905 and 1907 are cumulative, and that the latter laws do not repeal any part of the former laws except in case of conflict or repugnancy. See *Gaddis vs. Terrell*, 110 S. W., 429; *Clark vs. Terrell*, 98 S. W., 624. There are no provisions either in the law of 1905 or in the law of 1907 repugnant to or in conflict with that part of the law of 1901 above quoted.

The language of the forfeiture clause in the Act of 1901, "If any purchaser shall fail to reside upon and improve in good faith the land purchased by him as required by law, etc.," is the basis for the contention that the Commissioner is not authorized to cancel the sale solely on a ground of failure to improve. This question has never been directly decided in this State, though Judge Brown in the case of *Slaughter vs. Terrell*, 100 Texas, 600, uses language which indicates that in his opinion the Commissioner has such authority. On the other hand, Judge Stephens, in the case of *Carter vs. Clifton*, 98 S. W., 209, referring to the Act of 1901, says: "The forfeiture clause relied on does not seem to contemplate that the lands should be forfeited for the failure alone to make improvements." This statement, however, was but the expression of an opinion, not necessary to the decision of the case.

In our opinion, the Legislature intended to provide specifically by said act for the cancellation of the sale by the Commissioner for failure to improve alone as well as for failure to reside, as if the provision had been written: "If any purchaser shall fail to reside upon in good faith the land purchased by him as required by law, he shall forfeit said land, etc. And if any purchaser shall fail to improve in good faith the land purchased by him as required by law, he shall forfeit said land, etc." Moreover, it could be as well contended that the Commissioner under the law is not authorized to forfeit the sale solely for the failure of the purchaser to reside upon his land, as that he is not authorized to cancel solely for the failure to improve, which would be an absurd construction of the law in view of former statutes and the general policy evidenced in all the school land laws.

The forfeiture clause contained in Article 4218 of Revised Statutes of 1895 reads as follows:

"If any purchaser shall fail to reside upon and improve in good faith the land purchased by him, he shall forfeit said land, etc."

It was held in the case of *McLendon vs. Bumpas*, 114 S. W., 462, that the failure of a purchaser of school lands under said law to make improvements to an extent beyond that incident to the required settlement and occupancy would be no ground for forfeiture of the sale, for the reason that nowhere was a purchaser required in addition to his occupancy to make improvements to a specified amount. However, in the law of 1901, the erection of improvements was required of the purchaser to the specified amount of \$300, and this requirement was immediately followed by the provision above referred to authorizing the forfeiture for failure to reside upon and improve in good faith, evidently showing the legislative intent that the specified improvements should be erected under penalty of forfeiture.

We, therefore, answer the first question in the affirmative.

The second question presented is: When a lessee of school land from the State placed improvements thereon of the value of \$500 and afterwards assigned his lessee to another, who as assignee of the lease purchased the leased land from the State under the law of 1905 and resided upon the land for three consecutive years from his purchase and failed to erect after his purchase improvements to the value of \$300, could the said improvements placed on the land by the lessee be counted as placed thereon by the owner during the term of three years' residence and constitute a compliance with the law requiring the erection of improvements?

- We assume from the statement in your communication that there was no reservation of improvements in the assignment of the lease, and that the assignee became the owner of the improvements and that the improvements remained upon the land until after the purchase of the land from the State and during the three years occupancy. A strict construction of the statute requiring improvements which reads: "Every purchaser shall be required within three years after his purchase to erect permanent and valuable improvements on the land purchased by him, etc.," would lead to the conclusion that the law requires the actual erection of the improvements *after* the purchase and before the expiration of the three years. However, forfeitures are not favored, and when the purchaser does what the law requires, and thereby manifests his purpose to obey the law, a forfeiture should not be sustained. (See *Salgado vs. Baldwin*, decided by the Supreme Court on December 23, 1912, and not yet reported.)

In our opinion the purchaser in the case referred to in your letter substantially complied with the law as to improvements. It appears very reasonable that the primary purpose of the Legislature in using the words "shall be required within three years after his purchase, etc.," was to fix a final limit within which the erection of the required improvements should be completed. The purpose of the requirement of improvements, which is to evidence the good faith of the occupancy, is as well or better attained by the erection of the improvements before

purchase and their maintenance during the three years occupancy than by their erection a short time before the expiration of the three years.

It is true the purchaser in the present instance did not, in person, erect the improvements on the land, but in the case of *Shelton vs. Willis*, 58 S. W., 176, the court in construing Article 4218, Revised Statutes, 1895, said: "It is not claimed in his behalf that he has placed on such section improvements of the necessary value but we do not wish to be understood as holding that he shall have in person so placed such improvements." It is enough that the improvements were owned by the purchaser of the land and remained on the land permanently, whether he acquired them by gift or purchase, or whether he in person erected them.

Again, Section 5 of the Act of 1901, contains the following provision: "On the expiration of his lease or its termination under the provisions of law or by a final judgment of any court of competent jurisdiction, the lessee shall have the right for a period of sixty days to remove any or all improvements he shall have placed upon the leased premises." Undoubtedly the assignee of the lease would have the same privilege. Had the purchaser in this instance followed this course, he would have been required after his purchase to replace the improvements which he had removed or to erect other improvements in their stead. The same result is obtained by allowing him, when he elects to leave his improvements on the land, to count them as a compliance with the law.

The second question is answered in the affirmative.

Since the purchaser substantially complied with the law as to improvements, and there is no question as to his residence, you are respectfully advised that the sale should be reinstated to the present claimant.

Yours very truly,
G. B. SMEDLEY,
Assistant Attorney General.

PUBLIC LANDS—RIGHTS OF OWNER TO REPURCHASE UNDER THE ACT OF

APRIL 18, 1913—LAW CONSTRUED—ACT OF APRIL 18, 1913.

Lands repurchased by a former owner under the preference right given by the act of April 18, 1913, must in settlement counties be within a radius of five miles.

An owner of public school land, who has allowed his land to be forfeited for nonpayment of interest and notifies the Commissioner of his desire to repurchase it under the act of April 18, 1913, no longer has a right to reinstate his former purchase. See this principle upheld in *Judkins vs. Robison*, 160 S. W., 955.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JUNE 17, 1913.

Hon. J. T. Robison, Commissioner General Land Office, Austin, Texas.

DEAR SIR: In your letter to this Department of June 17th you desire a construction of Senate bill No. 129 of the Thirty-third Legislature in the following particulars:

"First: If A, should in a four section county, own four sections which may be 20 miles apart, can he exercise his preference right to purchase all of those four tracts, assuming them to be all he owns.

"Second: If, after forfeiture, one should advise this Department they desire to repurchase the land as provided by the enclosed act and the board should increase the price of the land, or for any reason the owner should conclude to reinstate his forfeited purchase after giving notice to this office he desired to repurchase, can he then do so, or would this Department have to require him to repurchase at the price fixed by the board, whether higher or lower than the original sale price, and failing to do proceed to place the land on the market to the public."

In reply to your first question, Senate bill No. 129 appears on page 336 of the Acts of the Thirty-third Legislature. The purpose of this bill is to give to the owners of certain public school lands which are forfeited for non-payment of interest a preference right of ninety days to repurchase the land from the State after its reappraisal. Section 3 of the act prescribes the method, terms and conditions of the repurchase by the owner at the time of forfeiture. It must be borne in mind that the right given the owner is to *repurchase* the land from the State. By the forfeiture the original sale is entirely rescinded and the former owner merely given a preference right to purchase the land from the State. Section 3 of the act does not undertake to set out the entire method and procedure under which this right shall be exercised, nor does it specify in detail all the terms and conditions under which such purchase shall be made. For example, it gives neither the form of the application and affidavit nor the form of the obligation; it does not specify when the obligation for the balance of the purchase money shall be payable, etc. It contains the following clause: "All terms, conditions and penalties now provided for the sale of public free school lands shall apply, govern and control all sales made under this act, except as may be otherwise provided herein." One of the conditions on which public school land is sold, is that each additional survey applied for must be within five miles of the designated home tract (see R. S., 1911, Art. 5418), which is Section 6 of the School Land Law of 1905). This is a condition precedent to the sale of such additional surveys, for unless the additional survey is within five miles of the designated home tract, the Commissioner is not authorized to award the land. This limitation obviously applies only to land in settlement counties, as defined in Article 5419, Revised Statutes, 1911, since lands in non-settlement counties are now by virtue of Article 5422 of the Revised Statutes sold without limit as to quantity.

One apparent purpose of the requirement that additional lands shall be within the five-mile radius, is to encourage the acquisition of small compact ranches by home builders. Another purpose of the requirement is to confine the bounds of the residence of a settler within reasonable limits. Another purpose is to prevent the indiscriminate selection and purchase of the most desirable sections. These reasons apply with almost equal force to the imposition of such restriction upon the right to repurchase under the Act of 1913.

The case of Lufkin Land and Lumber Company vs. Terrell, 100 S. W., 134, is a case somewhat analogous to the one presented by your question. The Act of 1901 gave the purchaser of timber on public

school land a right to purchase the land on which the timber grew at any time within five years from the purchase of the timber, and the act provided that the owner of the timber should have the right to purchase the land "on the same terms and conditions as other lands of like classification are sold under the provisions of this chapter." The Supreme Court held that such land could be sold only to an actual settler for the reason that other lands of like classification could be sold only on condition of settlement.

In the recent case of *Houston vs. Koonce*, 156 S. W., 202, the Supreme Court held that a purchaser of unsurveyed lands under the Act of 1905 was restricted to four sections, for the reason that the law under which such purchase was authorized provided that the price and terms should be the same as that for surveyed lands.

In the case before us we have a provision that the terms and conditions now provided for the sale of public free school lands shall apply, govern and control all sales made under the preference right given the owner of the land, and it appears that one of the conditions now provided for the sale of public free school lands is that the additional surveys shall be within five miles of the home tract.

We are, therefore, of the opinion that within the language of Section 3 of the Act of 1913, the restriction that the additional surveys shall be within five miles of the home or base section, is one of the conditions now provided for the sale of public free school lands and that it should apply in all sales made under the Act of 1913 of lands in the settlement counties.

In reply to your second question, it appears that by Article 5423 of the Revised Statutes of 1911, which is a part of the School Land Law of 1895, any purchaser whose lands are forfeited to the State for non-payment of interest, may have his claim reinstated on written request by paying into the Treasury the full amount of the interest due on such claim up to the date of reinstatement, provided no rights of third persons may have intervened. The case presented by your question is one in which the purchaser whose land has been forfeited for non-payment of interest takes advantage of the Act of 1913 and notifies the Commissioner that he desires to repurchase his land under said act, and thereafter the board appraises the land, but the owner for some reason, for example, that the board increases the price of the land, concludes that he will not exercise his right to repurchase, but will make application to reinstate his sale under Article 5423. You desire to know whether under such circumstances such land owner would be entitled to reinstate his sale, no rights of third persons having intervened.

An examination of the entire Act of April 18, 1913, leads to the conclusion that it was the purpose of the Legislature to give the former owner the opportunity to repurchase the land, but that if he did not desire to avail himself of such opportunity, the Commissioner should place the land on the market and offer it for sale to any person who might desire to purchase it. We do not believe that it was the intention of the Legislature that the owner at the time of forfeiture should have both the right to repurchase and the right to reinstate. Giving both rights would allow the owner to trifle with the State and would give him an unfair advantage over other persons who might desire to

purchase the land. For instance, the owner could notify the Commissioner of his desire to repurchase the land and could thus compel its reappraisal for such purpose. After the reappraisal, if it were reappraised at a lower price than that at which it was formerly sold, he could exercise his right to repurchase; but if it were reappraised at a higher price, he could exercise his right to reinstate, as up to that time the right of a third person could not intervene, since the land would not be on the market. We believe that it was the intention of the Legislature that when the owner, under this law, allowed his land to forfeit and then notified the Commissioner of his desire to repurchase it, he should be held to have abandoned all claims and all rights which he may have had under or by virtue of the former purchase, except his preference right to repurchase the land.

We therefore advise you that in our opinion when an owner of public school land under the Act of 1913 allows his land to be forfeited for non-payment of interest and notifies the Commissioner of his desire to repurchase it under said act, he no longer has the right to reinstate under Article 5423.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

PUBLIC LANDS—EFFECT OF FAILURE OF OFFICER TO SIGN JURAT—
AMENDMENT OF JURAT.

When the officer before whom the affidavit is made which accompanies an application to purchase public school land fails to sign the jurat to the affidavit and the applicant in fact swore to the affidavit, the Commissioner of the General Land Office may on proper application allow the officer to correct the omission by signing his name to the jurat, if the application to correct the defect is made within a reasonable time. When this correction is made, the land may be awarded to the applicant, even though there was filed before the correction of the defect another application to purchase the land.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JUNE 4, 1913.

Hon. J. T. Robison, Commissioner General Land Office, Austin, Texas.

DEAR SIR: In your letter of May the 27th you state, in substance, that for a tract of land in Angelina county which came on the market on May 17th you received applications and opened them on May 19th, the preceding day being Sunday, and that one applicant offered \$4.11 per acre for the land and filed a proper application, accompanied by the required first payment, together with his obligation for the correct amount of the unpaid purchase money, but the notary public before whom he made the affidavit attached to the application, failed to sign the jurat. You advise that another applicant offered \$4.07 per acre for this land and that his application is regular in all respects. You further say that on the 26th of this month the first named applicant filed with you the certificate of the officer before whom his affidavit accompanying the application was made, in which certificate the officer stated that he in fact swore the applicant to the affidavit and failed to sign his name to the jurat.

You desire to know whether the land should be awarded to the applicant who offered \$4.11 per acre for the land or to the applicant who offered \$4.07.

Article 5422 of the Revised Statutes of 1911, which is Section 6a of the Act of 1907, contains the following:

"All applications for the purchase of land without settlement and either for cash or on deferred payment, shall be in writing and accompanied by the affidavit of the applicant that he desires the land for his own benefit and not for any other person or corporation."

Article 12 of Title 2 of the Revised Statutes of 1911 provides that all affidavits shall be in writing and signed by the party making the same. This title of the statute which relates to affidavits contains no specific requirement that the officer shall sign his name to the jurat, though it is provided in Article 13 that certain named officers are authorized to take such affidavits and give a certificate thereto. An affidavit is defined as follows:

"An affidavit is a declaration on oath reduced to writing and affirmed or sworn to by affiant before some person who has authority to administer oaths." (2 Cyc., 22.)

On page 26 of the 2nd Volume of Cyc., we find the following:

"It has been held in some cases that the jurat is essential to the validity of an affidavit, but the generally accepted doctrine seems to be that the jurat is not such a part of the affidavit proper that its omission will render the affidavit a nullity, but is only prima facie evidence that the statements therein were sworn to by affiant or certified, and it may be shown otherwise that the affidavit was in fact sworn to at the proper time and before the proper officer."

It appears that the School Land Law requires merely that the application be accompanied by an affidavit. It does not specifically require that the affidavit be certified to by the officer before whom it was made and that the officer signed his certificate. The certificate of the officer is not the affidavit, but is, as shown in the quotation above, only evidence that the statements in the affidavit were sworn to before the officer.

On page 30 of the 2nd Volume of Cyc. we find the following:

"In order for the jurat to serve as evidence of the fact that the affidavit was sworn to, it must be signed by the officer and without such signature, the affidavit is prima facie invalid; but where it is otherwise shown that affiant in fact swore to the affidavit, the failure of the officer to affix his signature will usually not be allowed to vitiate the proceedings thereon. When the objection is raised, the officer may be allowed to sign the jurat *nunc pro tunc*; and if he failed to appear voluntarily and attach his signature, he may be compelled to do so by rule of court."

On page 34 of the 2nd Volume of Cyc. is the following:

"Where an affidavit has been properly made and sworn to and is correct in every respect, except that a proper jurat is not annexed, such defect may usually be cured by amendment. Thus where the officer neglects to fix his signature to the jurat he may be allowed to sign the same *nunc pro tunc*."

The case of *Watson vs. White*, 64 S. W., 826, is more nearly in point than any other Texas case which we have been able to discover. In that case the opinion was rendered by Justice Stephens, who is famous

for his learning in the School Land Law. The officer in that case failed to affix his seal to the jurat on an application to purchase school land, and the seal was afterwards affixed to the application and subsequent to the filing of a second application. Justice Stephens said in respect to this defect:

"We are of the opinion that the failure of the officer to use his seal in certifying to the oath in the first instance, which was but a formal defect, was not fatal to the validity of the application. A substantial compliance with the law on the part of the applicant is all that the law requires."

In the case of Nesting vs. Terrell, 97 Texas, 18, 75 S. W., 485, the application contained an incorrect description of the land, and the Supreme Court held that this mistake could be corrected. In that case the correction was made before any other application was filed, but the court, in this connection, said:

"Whether a third party might acquire a superior right by applying to purchase before the correction is made is a question not in this case and is one we do not decide."

Our courts have frequently allowed affidavits to be amended, for example: In the case of Ryan vs. Goldfrank, 55 Texas, 356, the officer omitted the jurat from an affidavit in an attachment proceeding and the court held that the affidavit could be amended by the insertion of the jurat.

In the case of Arnold vs. Kreissler, 22 Texas, 580, an injunction was dissolved upon the sworn answer of the defendant, but the officer inadvertently omitted to attach his certificate of that fact. The plaintiff at the next term of court moved to set aside the order dissolving the injunction on account of the answers not being sworn to. The court held that the defendant was properly allowed to supply the certificate and that the motion to dissolve the injunction was properly overruled. In the case of May vs. Ferrill, 22 Texas, 340, the district clerk failed to attach his jurat to an affidavit for sequestration. On motion to quash the writ, the court permitted the clerk to supply the omission *nunc pro tunc*. (See the case of Strickland vs. Wofford, 156 S. W., 916, decided since this opinion was written.)

Bearing in mind the foregoing authorities, it appears that the applicant in this instance who bid \$4.11 substantially complied with the law, in that his application was accompanied by his affidavit signed by him, stating the proper facts, but that there was no sufficient evidence that the affidavit was sworn to before an officer authorized to administer oaths, on account of the fact that the officer failed to sign the jurat. It is our opinion that if the officer and the applicant make application to you within a reasonable time that the officer be allowed to amend the affidavit by signing his name to the jurat and accompany such application with satisfactory evidence that the applicant did in fact swear to the affidavit at the time it was made, that you should allow such amendment to be made, and after the amendment is made, that you should award the land to the applicant who offered \$4.11 per acre.

Very truly yours,

G. B. SMEDLEY,
Assistant Attorney General.

**OPINIONS RELATING TO IRRIGATION AND NAVIGABLE
WATERS AND THE LAWS GOVERNING THE SAME.**

IRRIGATION—UNDERFLOW—ARTESIAN WELLS.

(Chapter 171 of the Acts of the Regular Session of the Thirty-third Legislature.)

The word "overflow" as used in Sections 1, 3 and 49a of Chapter 171, Acts of the Regular Session of the Thirty-third Legislature, has a well known and technical meaning, and is confined to those underground streams of water which find their way through the sand and gravel constituting the beds of surface streams and which underground streams are dependent upon and form a part of the surface stream.

The water of an artesian well comes properly within the class of percolating water, and the source of supply of an artesian well is generally believed not to be a well-defined subterranean stream, but rather the water which percolates through an inclined stratum of porous rock.

The waters of artesian wells do not come within the waters described in Sections 1 to 3 of the Irrigation Act of the Thirty-third Legislature, and are not subject to appropriation, and the Board of Water Engineers should not require filings to be made under Sections 12 to 16 of said act when the water from artesian wells is being used or has been used for any of the purposes named in said act.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, DECEMBER 23, 1913.

Hon. W. T. Potter, Secretary of the Board of Water Engineers, Capitol.

DEAR SIR: In your recent letter you call the attention of this Department to the word "underflow" as used in Sections 1 and 3 of the Irrigation Act of the Thirty-third Legislature in connection with Sections 91 and 95 of said act, which latter sections relate to artesian wells, and you desire to know whether the Board of Water Engineers should require the filing of records of appropriation as required by Sections 12 to 14 of said act and the filing of applications for the appropriation of water under the terms of Sections 15 and 16 where the waters of artesian wells have been used or are in contemplation of use for any of the purposes named in the act.

Section 1 of the act is as follows:

"Certain Waters Declared State Property.—The unappropriated waters of the ordinary flow and underflow and tides of every flowing river or natural stream, of all lakes, bays or arms of the Gulf of Mexico, collections of still water, and of the storm, flood or rain waters of every river or natural stream, canyon, ravine, depression or watershed, within the State of Texas, the title to which has not already passed from the State, are hereby declared to be the property of the State, and the right to the use thereof may be acquired by appropriation in the manner and for the uses and purposes hereinafter provided."

By this section the waters in it described are declared to be and are set apart as the property of the State, the right to the use thereof being subject to appropriation in the manner and for the purposes described in the act. The purposes for which such waters may be diverted and used are named in Section 2, and are as follows:

"For the purpose of irrigation, mining, milling, manufacturing, the develop-

ment of power, the construction and operation of waterworks for cities and towns or for stock raising."

By Section 3 the purposes and the persons by whom the ordinary flow and underflow of the flowing water and tides of every natural river or stream, may be diverted and used, are particularly specified.

Sections 12 to 14 provide for the filing, both in the office of the county clerk and with the Board of Water Engineers of records of prior use and appropriation of water for any of the purposes named in the act, such record including description of any dam, reservoir or other work theretofore constructed, and a statement of the amount of water theretofore diverted, etc., the evident purpose of these two sections being to inform the Board of all rights of appropriation and use acquired before the passage of the act and to fix such rights of record.

Sections 15 and 16 relate to the method by which the unappropriated water of the State may be appropriated after the passage of the act.

Sections 91 to 95, inclusive, are the only portions of the act in which any reference to artesian wells is made. It is very clear that the purpose of these sections is only to prevent the waste of the water from artesian wells and to require a record of each well as it is bored. There is nothing in any one of these last named sections with reference to the appropriation of waters from artesian wells.

The language of the act as a whole when referring to the waters of streams seems to indicate that surface streams and not subterranean streams were uppermost in the minds of the Legislature at the time of its enactment. The act, however, by its terms is not expressly confined to surface streams, for it includes "every flowing river or natural stream," and this is broad enough to include underground rivers which have a defined course or channel.

Your letter seems to indicate that some question has arisen with the Board of Water Engineers as to whether the use of the word "underflow" in Section 1 indicates an intention that artesian wells are included within the first portion of the act and that the waters of artesian wells are thereby declared to be the property of the State and subject to appropriation. It is to be observed that the word "underflow" is used in Sections 1, 3, and 49a, in connection with the water of rivers and natural streams, and these sections as worded very clearly convey the idea that a river has or may have both a surface flow and an underflow.

The best definition of the word "underflow" is found in the case of Platt Valley Irrigation Company vs. Buckers Irrigation Company, 25 Colo., 77, 53 Pac., 334. It is as follows:

"Those acquainted with the arid region know that some of the most important and well-defined streams become almost, and sometimes entirely, dry during a portion of the year, and that there is at all times what is known as the 'underflow.' Kin. Irr., 44. This is the subterranean volume of water which slowly finds its way through the sand and gravel constituting the beds of the streams which traverse the country adjacent to the mountains of this section, and to which rights by appropriation may attach."

The case of Vineland Irrigation District vs. Azusa Irrigation Company, 126 Cal., 486, 46 L. R. A., 824, contains an excellent illustration of the underflow of a stream. The stream in question was the San

Gabriel river in California, and the following description of the river with its underflow is copied from the opinion:

"The space between these rocky walls is filled with a loose formation of sand, gravel, and boulders. This forms the bed of the stream. In the summer season the channel is changeable along and across this gravel bed, moving from one side of the canyon to the other. In places the waters of the stream divide, forming small islands. The gravelly bed of the stream is of varying depth, being shallow where the canyon narrows and deeper in its broader parts. The water from the surface flow of the stream saturates this gravelly bed at times and in places from canyon wall to canyon wall. This water saturating the gravelly bed is a part of the waters of the San Gabriel river flowing in its channel between its natural banks in contact with the surface flow, and forms the subsurface flow of the river. It is found by the court that this subsurface flow protects and supports, and is necessary for the protection and support of, the surface flow."

In the case of *Miller vs. Bay Cities Water Company*, 157 Cal., 256, 107 Pac., 115, 27 L. R. A., N. S., 772, the plaintiff was the owner of a tract of land near the Coyote river, but not situated on the river. Beneath the land of the plaintiff and under a stratum of clay was a stratum of gravel which was saturated with water percolating from the Coyote river, and which was, therefore, in the nature of an underground stream dependent upon and fed by the water from the surface of the stream. The court held that the owner of the land had a riparian right to the use of the water under his land with which another person could not interfere by so appropriating water from the surface stream of the river as materially to decrease the supply of water under the plaintiff's land. This case shows that the underflow of a river is not necessarily confined to the actual bed of the stream. It is enough that the subterranean water be in the nature of a stream and that it be dependent upon and fed by the water of the surface stream.

Kinney, in his work on irrigation and water rights, in Section 1161 and the following sections, treats at length of the underflow or surface streams. It is shown by a reading of this text that the underflow is a very important part of the stream; that oftentimes the surface stream is entirely dry, but flowing water may be found beneath the bed of the river in great volume. It is also shown that the proper conservation of the underflow of a stream is necessary for the protection of the surface flow for the reason that an extensive use or diversion of the water from the underflow will materially decrease the water in the surface stream.

Farnham in his text-book on water and water rights also treats of the underflow of rivers. In Section 672 we find the following:

"The water of every surface stream which flows over gravelly or sandy soil is supported by a saturated stream of earth, the water of which may find its way solely in the direction of the flow of the stream. This underflow is regarded as part of the stream itself, and the water from it is subject to appropriation."

It thus appears from the above authorities that the word "underflow" has a well known and technical meaning and that it is usually confined to those underground streams which are dependent upon and form a part of a surface stream. By the express terms of the act this underflow is subject to appropriation, and it is so held in the authorities above

cited. It is further held in said authorities and in many others, that riparian rights exist in this character of underground streams.

There are other subterranean streams which are classified by Kinney as "known independent subterranean water courses." In Section 1154 of Kinney on Irrigation and Water Rights, we find the following:

"A large portion of the Great Plains, and also the valleys of the mountainous regions of the West is underlaid by strata of *water-bearing sand and gravel* which are fed by the mountain drainage. These water-bearing strata are oftentimes of great thickness, and the water moving freely through them is practically inexhaustible; and if it can be brought to the surface it is sufficient to irrigate a large portion of the country overlying it."

And in Section 1155 the following:

"These subterranean water courses have all of the characteristics of surface water courses: that is to say, they have beds, banks forming a channel, and a current of water."

The same laws which relate to surface streams are applicable to these subterranean streams. The owner of the land where the doctrine of riparian rights is in force has the same riparian rights in the waters of such underground streams as he would have in the waters of a surface stream. The waters of such streams are subject to appropriation, as are the waters of surface streams. 40 Cyc., 627, 707, 704; Kinney on Irrigation and Water Rights, Sections 1157 to 1160; Hudson vs. Darley, 156 Cal., 617, 115 Pac., 748.

Before these rules can be applied, however, it must be established that the underground stream is in fact a stream or river and not merely water percolating through the soil and that it has a known and defined channel or course, and the burden is upon the person asserting the existence of such known and defined underground stream to prove it. See Kinney on Irrigation and Water Rights, Sections 1156, 1158, 1165. 40 Cyc., 628. See also a valuable note in 67 Amn. State Reps., 659, to the case of Wheelock vs. Jacobs, 70 Vt., 162, 43 L. R. A., 105. See also note in 19 L. R. A., 92, to the case of Southern Pacific Ry. Co. vs. Dufour, 95 Cal., 615, 30 Pac., 783. These two notes contain a full discussion of the different classes of underground waters and of the law with reference to them. Since these known and defined underground streams are "flowing rivers and natural streams" they come within the class of waters which are referred to in Section 1 of the act and which are declared by said section to be the property of the State. They are, therefore, under the control of the Board of Water Engineers and their waters are subject to the filing of records of appropriation as required by Sections 12 to 14 of the act, and subject to the filing of applications for their appropriation as provided by Sections 15 and 16 of the act.

At one time there was a theory that artesian waters flowed like rivers in subterranean channels or caverns, but this theory seems to have been abandoned. In a very carefully considered opinion in the case of Huber vs. Merkel, 117 Wis., 355, 94 N. W., 354, 62 L. R. A., 589, 98 A. S. R., 933, we find the following:

"It has long since become a matter of common scientific knowledge that the

ordinary artesian well derives its supply from a pervious stratum of rock imprisoned between two impervious strata of earth or rock, the water-bearing stratum being inclined and coming to the surface at some distant and higher point, called the 'intake,' where it receives the water, and that the water percolates with greater or less rapidity along and through the inclined stratum, obedient to the law of gravity, until it reaches some obstruction so as to be imprisoned, in which event, if the stratum be pierced, water will rise in a tube by hydrostatic pressure, due to the greater height of the intake. The idea that there are vast subterranean channels or caverns, in which artesian waters flow like a river, has been long since abandoned. These are matters of common scientific knowledge. 1 *Geology of Wisconsin* (Chamberlain), p. 689; U. S. Geological Survey, 1885, pp. 125-173; 6 *Iowa Geological Survey*, p. 127.)"

In the same opinion in discussing the wells which were involved in the case the court used the following language, which shows clearly the difference between the source of an artesian well and a subterranean river:

"That source is not a stream or river with defined channel, but an inclined stratum of porous rock which may be many miles in extent, saturated with water which percolates gradually from the intake along and through the stratum until stopped by the termination of the porous formation, where it forms an accumulation. In no proper sense can such water be called a stream with a defined 'channel.' The word 'defined' here means a contracted and bounded channel. Kinney on Irrigation, Sec. 48. It is not meant by this that there must be an open channel or fissure in the rock, through which water flows freely and rapidly, in order that there may be a defined subterranean stream (such channels are rare, if in fact they ever exist), but simply that the water, whether moving slowly or rapidly, and whether passing through sand or gravel or porous rock, must have the characteristics of a stream, in that it has a course and a channel with definite bounds. Such subterranean streams doubtless exist, especially in sandy regions, where surface streams at times disappear and pursue their courses underground for long distances, and finally return to the surface again; but the waters in question in the present case have none of these characteristics, and hence must be held to be strictly percolating waters."

Kinney's definition of artesian water is as follows:

"Artesian waters are, therefore, those waters which underlie the lower lands of a section of the country, having seeped there through porous strata from upper levels, and which are kept down within their natural basins by the impervious shale or other rock overlying the saturated porous strata, but which, if tapped from above, will rise above the depth at which it is struck, and oftentimes above the surface of the earth." (Kinney on Irrigation and Water Rights, Section 1167.)

By the following language in Kinney's work is shown the difference between artesian water and ordinary percolating water:

"The waters of artesian basins are easily distinguishable from the ordinary percolations from the fact that they are always found below the impervious strata and are under pressure, while the ordinary percolating waters lie above the impervious strata and are under no pressure." (Kinney on Irrigation and Water Rights, Section 1169.)

Without attempting to go into a discussion of the difference between the rights of the owner of the soil in artesian water and his rights in ordinary percolating water it is enough to say that in each instance the water belongs to the general class of percolating waters as distinguished

from subterranean known and defined rivers or streams and that the general rule is that the owner of the soil has the right to intercept and divert and use all percolating waters in or under his land provided he uses the same for some lawful and beneficial purpose incident to the ownership and enjoyment of his land, and this whether or not the effect of his use of the water is to diminish the water supply of other land owners near him. See *H. & T. C. Ry. Co. vs. East*, 98 Texas, 146, 81 S. W., 279, 66 L. R. A., 738, 107 A. S. R., 620; *Hecker vs. City of East Orange*, 77 N. J. L., 623, 74 Atl., 370, 134 A. S. R., 798; *Crescent Mining Company vs. Silver King Mining Company*, 17 Utah, 244, 54 Pac., 244, 70 A. S. R., 810; *Wheelock vs. Jacobs*, 70 Vt., 162, 43 L. R. A., 105, 67 A. S. R., 659; *Huber vs. Merkel*, 117 Wis., 355, 94 N. W., 354, 62 L. R. A., 589, 98 A. S. R., 933.

The case of *Huber vs. Merkel*, above cited, goes as far as to hold that the owner of the soil may use the percolating water under his land for any purpose whatever and that he may even waste it to such an extent that he destroys a well on his neighbor's land which is fed from the same source, on the theory that the water is a part of the land and that the owner of the land owns the water absolutely. Most of the cases above cited, however, do not go this far, but hold rather that the owner may use the water for any lawful or beneficial purpose, but that he may not waste it or may not sell it when such latter use would materially affect the water supply of his neighbor. This is a question, however, in which we are not now concerned, as it appears that it has to do with the relative rights of land owners and not with the rights of the State. In other words, percolating waters and artesian waters, which are one class of percolating waters, do not belong to the State nor to the general public, but they belong to the owners of the land under which the waters are found. No riparian rights exist in such waters and they are not subject to appropriation, at least until they are brought to the surface and made to form a stream or river. (See 40 Cyc., p. 626; *Kinney on Irrigation and Water Rights*, Secs. 1176, 1177, 1190.)

As has been shown above, Sections 91 to 95, inclusive, which are the only sections of the act which refer to artesian wells, appear to be intended solely to prevent waste of artesian water since it is to the public interest that the artesian waters be conserved. In the case of *Ex parte Elam*, 91 Pac., 811, the Court of Appeals of California had before it the question of the constitutionality of a statute of that State which made it a misdemeanor to waste the water of an artesian well. The contention was made that the act was unconstitutional as an attempt to deprive the owner of the land of his property without due process of law. This contention was made on the theory that the owner of the land absolutely owned all the percolating water under the land and could dispose of it as he saw fit. The court held that the statute was constitutional and that the owner of the land was not deprived of his property without due process of law. One reason assigned by the court for so holding was that the water in the ground, being of a fugitive nature, belongs until it is reduced to possession to that portion of the public who may own the surface of the soil in the artesian belt and that the water is subject to a reasonable use on the part of each of such

land owners and that each land owner should so use the water as not to injure his neighbor. This case shows that the artesian waters are not regarded in California as belonging to the State and are not subject to appropriation, but that they belong to those who may own land in the artesian belt.

We conclude that a careful examination of the act of our Legislature and of the authorities which we have cited above leads necessarily to the conclusion that the Legislature did not intend that Sections 12 to 14 and Sections 15 to 16 of the act should have any application to artesian wells, and we, therefore, advise you that in our opinion the Board of Water Engineers should not require filings to be made in conformity with said sections.

Yours truly,

G. B. SMEDLEY,
Assistant Attorney General.

IRRIGATION—NAVIGABLE WATERS OF THE UNITED STATES—RIPARIAN RIGHTS.

Statutes construed: Sections 9 and 10, Act of Congress of March 3, 1899 (United States Compiled Statutes, 1901, page 3340).

Sections 14, 15, 44, Chapter 171, Acts Thirty-third Legislature.

Whether a river in Texas is navigable water of the United States and, therefore, under the jurisdiction of Congress, is a question of fact.

An application made to the Board of Water Engineers of Texas for the appropriation of water from the Rio Grande river, or other navigable river, not wholly within the bounds of Texas, when the application involves the construction of a dam or other structure in the river or would amount to an obstruction of the navigable capacity of the river, should be rejected by the board unless satisfactory evidence is furnished the board that the application has obtained the consent of Congress to the erection of such structure or the appropriation of the water and that the plans have been approved by the Chief of Engineers and by the Secretary of War.

When the application is for the appropriation of water from a navigable stream wholly within the State, or for the construction of a structure in such stream, it is only necessary that the plans be first submitted to and approved by the Chief Engineers and the Secretary of War.

When one who has filed an affidavit for the appropriation of water under the Act of 1895 has lost the rights acquired under such application by reason of failure to begin the work of construction in the time provided by said act, he may, nevertheless, under the terms of Section 14 of the Act of 1913, file a certified copy of such affidavit with the Board of Water Engineers, as the filing of such certified copy neither fixes nor enlarges the rights acquired under the original application.

"Riparian rights" defined. A riparian owner in Texas may with certain limitations use the water for irrigation purposes when a sworn statement filed with the Board of Water Engineers amounts to an application to enlarge an irrigation plant, and to appropriate more water it should be treated as an application to appropriate water, and fees should be charged under the terms of Section 44 of the act.

An irrigation system constructed under the Federal Reclamation Act of June 17, 1902, should be treated by the board in the same manner as an irrigation system constructed under any other existing law.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, SEPTEMBER 25, 1913.

Hon. W. T. Potter, Secretary, Board of Water Engineers, Austin, Texas.

DEAR SIR: In response to your letter of September the 11th, we shall endeavor to answer, in the order propounded, your several questions.

Replying to your first question,—from what sources you can ascertain what streams are or have been declared navigable,—Article 5338 of the Revised Civil Statutes of Texas provides that “all streams so far as they retain an average width of thirty feet shall be considered navigable.” We presume, however, that in your question you refer to such streams as are classed as “navigable waters of the United States” and fall under the jurisdiction and control of the Congress of the United States as far as their navigation is concerned. The question, whether a stream is navigable in the Federal sense, is one of fact. The Supreme Court of the United States, in the case of *Daniel Ball* (10 Wall., 557) discussing the question whether the Grand River in Michigan was a navigable river of the United States and therefore within the Federal jurisdiction by virtue of the commerce clause of the Constitution, said:

“Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which commerce is conducted by water.

“If we apply this test to Grand river, the conclusion follows that it must be regarded as a navigable water of the United States. From the conceded facts in the case the stream is capable of bearing a steamer of one hundred and twenty-three tons burden, laden with merchandise and passengers, as far as Grand Rapids, a distance of forty miles from its mouth in Lake Michigan. And by its junction with the lake it forms a continued highway for commerce, both with other States and with foreign countries, and is thus brought under the direct control of Congress in the exercise of its commercial power.”

In the case of the *United States vs. Rio Grande Irrigation Company*, 174 U. S., 690, in discussing this same question with reference to the Rio Grande River within the bounds of New Mexico, the Supreme Court of the United States said:

“The mere fact that logs, poles and rafts are floated on a stream occasionally and in times of high water does not make it a navigable stream. It was said in the *Montello*, 20 Wall., 430, 439, ‘that those rivers must be regarded as public navigable rivers in law which are navigable rivers in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of travel on water.’ And again (p. 442): ‘It is not, however, as Chief Justice Shaw said, 21 Pickering, 344, ‘every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.’”

In this last cited case the court held that when the navigability or non-navigability of a river is a matter of common knowledge, the court will take judicial knowledge of the fact, and held that it would take judicial knowledge of the fact that the Rio Grande River was, generally speaking, a navigable river. The court found, however, from the evidence before it that the Rio Grande River was not a navigable river within the bounds of New Mexico. The opinion further shows that the Rio Grande River has been treated as navigable in the treaties between the United States and Mexico in so far as it forms the boundary line between the Republic of Mexico and the State of Texas.

It appears from the two cases above cited that a river is navigable within the meaning of the Acts of Congress when it forms in its ordinary condition by itself, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water; and, in order for such river to have the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture. It is not enough that it may be occasionally navigable. Moreover, it is not necessary that the river be in fact navigated. It is its capacity for use for navigation rather than its actual use which brings it in the class of navigable rivers. See *Loovy vs. United States*, 177 U. S., 621. It appears that under the foregoing definition a river may be navigable in the Federal sense even though it be entirely within the bounds of one State. However, as appears from the case of *the United States vs. the Montello* (11 Wall., 411) if a river is navigable only between different places within the State, it is not a navigable water of the United States. In this connection, we call your attention to the case of *Robert Parsons* (191 U. S., 17) which holds that the Erie Canal, while entirely within the bounds of the State of New York, is navigable water of the United States as being a highway for commerce between the States or between the States and foreign countries.

We have been unable to find any general statute of the United States treating any of the rivers of Texas as navigable waters of the United States. From time to time, appropriations have been made by Congress for the purpose of making certain rivers of the State, or certain portions of such rivers, navigable and where such rivers have, by means of such appropriations, been made navigable streams so far as to form highways of commerce between this State and other States or between this State and foreign countries, they have thereby become navigable waters of the United States and are, therefore, under the Federal jurisdiction. By the act of Congress of March 3, 1899 (United States Compiled Statutes of 1901, pp. 3540 and following; Federal Statutes Annotated, Vol. 6, p. 905 and following) and by the act of June 21, 1906 (United States Compiled Statutes, 1911 Supplement, p. 1558) the regulation and control of dams, bridges and other structures in, over or on navigable rivers of the United States are given to the Secretary of War and the Chief of Engineers. It may be that these officers have classified the rivers of Texas with reference to their navigability, and we suggest that you communicate with these officers and ascertain

whether such classification has been made. The question of the navigability of rivers, is as shown by the above authorities, one of fact, but we believe that you would be justified, in the absence of convincing evidence to the contrary, to accept the classification of the rivers of Texas, if any, made by such officers.

There are one or more rivers in Texas of which Congress has taken control for the purpose of making them navigable. Even though this work is yet in progress and the rivers are not yet navigable in fact, we are of the opinion that by reason of the action of Congress, these rivers should be regarded by the Board as navigable waters of the United States.

In your second question you state that the Rio Grande River has been treated by the Federal Government as a navigable river of the United States, and you desire to know what is the status of the Board of Water Engineers of this State, under the present law, relative to the work of irrigation proposed, if any, which will affect the waters of the Rio Grande River. By virtue of the treaties between the United States and Mexico, the center of the Rio Grande River is the boundary between the two republics. The center of the river is also the boundary between the State of Texas and the Republic of Mexico. By the treaty between the United States and Mexico of February 2, 1848, the two republics agreed that the navigation of the Rio Grande River "shall be free and common to the vessels and citizens of the countries and neither shall, without the consent of the other, construct any work that may impede or interrupt in whole or in part the exercise of this right, not even for the purpose of favoring new methods of navigation." It has also been shown in response to your first question that the Rio Grande River has been held by the Supreme Court of the United States to be a navigable river of the United States.

It is well established that the States have not surrendered to the United States the absolute dominion and sovereignty over navigable streams within their bounds and the land under such streams. These the States reserved subject only to the right of Congress to regulate and control foreign and interstate commerce and navigation on such streams. See

Poung vs. Turck, 95 U. S., 459.

Packer vs. Bird, 137 U. S., 661.

Cummings vs. Chicago, 188 U. S., 411.

The Supreme Court has also repeatedly held that in the absence of legislation by Congress a State has complete control over navigable waters within its bounds. See

Manigault vs. Springs, 199 U. S., 473.

Cummings vs. Chicago, *supra*.

In the case of Manigault vs. Springs, the court said:

"As an original proposition, we have repeatedly held that, in the absence of legislation by Congress, a State has power to improve its lands and promote the general health by authorizing a dam to be built across its interior streams, though they were previously navigable to the sea by vessels engaged in the coastwise trade. This was decided in *Wilson vs. Black Bird Creek Marsh Co.*, 2 Pet., 245, in a brief but cogent opinion by Mr. Chief Justice Marshall. An act of the State of Delaware gave the defendant the right to build a dam

across the Black Bird creek, the constitutionality of which act was attacked as an abridgment of the rights of those who had been accustomed to use it for the purposes of navigation. 'But this abridgment,' said the court (p. 251), 'unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance.' The act was sustained. See also *Pound vs. Turek*, 95 U. S., 459; *Gilman vs. Philadelphia*, 3 Wall., 713; *Huse vs. Glover*, 119 U. S., 543."

The Irrigation Act of the Thirty-third Legislature (Acts of 1913, p. 358) relates to lakes, rivers, etc., "within the State of Texas," and Section 15 refers to "unappropriated waters of the State." Since the bounds of the State extend to the center of the Rio Grande River, we take it that the water to the center of the Rio Grande River may be treated as water "within the State of Texas" and therefore coming under the Irrigation Act. It appears, therefore, that, in the absence of legislation by Congress, the State of Texas would have the power to grant to its citizens the right to build dams or other structures in the Rio Grande River, at least as far as to the center of said river, or the right to take water from the river, except where the exercising of such rights would be violative of the treaties between the United States and Mexico. It becomes then necessary to examine existing Federal legislation bearing upon the question under investigation.

Section 9 of the River and Harbor Act of 1899, is as follows:

"Sec. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway, over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War. Provided, that such structures may be built under the authority of the Legislature of a State across rivers and over waterways, the navigable portions of which lie wholly within the limits of a single State; provided, the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction commenced. And provided, further, that when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War it shall not be lawful to deviate from such plans either before or after completion of the structure, unless the modification of said plans have previously been submitted to and received the approval of the Chief of Engineers and by the Secretary of War." (United States Compiled Statutes of 1901, Vol. 3, p. 3540.)

It is to be observed that this section prohibits, until the consent of Congress is obtained, the construction of any bridge, dam or other structures over or in any navigable river of the United States, and also requires the approval of the plans by the Chief of Engineers and the Secretary of War. It is provided, however, that the consent of Congress is not necessary to the construction of structures built under the authority of the Legislature of a State across rivers or other waterways, the navigable portions of which lie wholly within the limits of a single State. In such case, however, the location and plans must be submitted to and approved by the Chief of Engineers and the Secretary of War before the construction is commenced.

"Sec. 10. That the creation of any obstruction not affirmatively authorized

by Congress, to the navigable capacity of any of the waters of the United States, is hereby prohibited. * * *"

Since these sections are portions of the same act they must be construed together and it is evident that the construction of a structure, belonging to a class enumerated in Section 9 of the act, across a river wholly within the bounds of a single State under legislative authority of the State and with the consent and approval of the Chief of Engineers and the Secretary of War, would not be the creation of an obstruction to the navigable capacity of the river, as prohibited by Section 10.

Later laws have modified some of the details of the River and Harbor Act of March 3, 1899, but its essential features appear to be unchanged. It thus appears that there is not an absence of legislation on this subject but that on the contrary, by the act of Congress, there is a positive prohibition against the erection of dams or other structures in or across navigable rivers and a positive prohibition against the creation of any obstruction not authorized by Congress to the navigable capacity of any of the waters of the United States.

These laws were enacted by Congress in pursuance of the authority delegated by the States to the Federal Government to control interstate and foreign commerce, and by the terms of Section 20, Article 6 of the Constitution of the United States:

○ "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

It is true that the Irrigation Act of the Thirty-third Legislature makes no reference to the authority of Congress over the navigable streams of the State. The act makes it the duty of the Board to issue permits "if the proposed appropriation contemplates the application of water to any of the uses and purposes provided for in this act and does not impair existing water rights, or riparian rights, and is not detrimental to the public welfare."

Justice Harlan, in his opinion in the case of *West Chicago Railroad vs. Chicago* (201 U. S., 506) lays great stress upon the importance of preserving the navigability of streams and refers to the right of the public in navigable streams as "the paramount right of navigation." Under the reasoning in this opinion any interference with "the paramount right of navigation" would be "detrimental to the public welfare." It may well be concluded, therefore, that when an application is presented to a Board of Water Engineers for the appropriation of water in the Rio Grande river or other navigable river, which application contemplates the erection of a dam or other structures in such river or any obstruction to the navigable capacity of the river, that the Board would be both justified and required, under the law, to refuse to issue the permit on the ground that the contemplated use of the water would be "detrimental to the public welfare." But, however, this may be, the issuance of a permit in such case would be in direct conflict with the statutes of Congress hereinbefore quoted. In the case of *Cummings vs.*

Chicago, 188 U. S., 410, the Supreme Court in speaking of the authority of a State to erect bridges over navigable streams said:

“When its power is exercised so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the State and that of the Federal government come in conflict, the latter must control, and the former must yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it as the supreme law of the land.”

We conclude, therefore, that since the treaties of the United States and the acts of Congress are the supreme law of the land, the Board of Water Engineers of Texas would be wholly without authority to issue a permit for the use of the water of any navigable stream of the State when the contemplated use would violate either the above quoted statutes of Congress or the treaties between the United States and Mexico.

It is to be observed that Section 9 of the Act of Congress of March 3, 1899, prohibits the construction of any dam, bridge or other structure over or in any navigable river, etc., of the United States until the consent of Congress to the building of such structure shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War, and that Section 10 of the act prohibits the creation of any obstruction, not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States. In accordance with the terms of said Section 9, we advise you that whenever an application is presented to the Board to appropriate water from any of the navigable streams of the State (that is, navigable in the Federal sense, as defined above in response to your first question) and such application involves or contemplates the construction in such river of any dam or any of the other structures referred to in Section 9 of the Act of March 3, 1899, the Board should reject such application and refuse to issue the permit unless satisfactory evidence is furnished to the Board that the consent of Congress to the building of such structure has been obtained and that the plans for the same have been submitted to and approved by the Chief of Engineers and by the Secretary of War. This advice applies to the Rio Grande River and all other navigable rivers in the United States within the State of Texas, except those rivers, the navigable portions of which lie wholly within the limits of the State.

In construing Section 10 of the said Act of Congress, we call your attention to the fact that said section does not prohibit only the obstruction to the navigation of any of the waters of the United States but that it prohibits any obstruction to the navigable capacity of such waters. The case of the United States vs. Rio Grande Irrigation Co., 174 U. S., 690, was a suit by the Federal Government to restrain the dam and irrigation company from constructing a dam across the Rio Grande River in the territory of New Mexico. As has been hereinbefore shown, it was held in said case that the Rio Grande River, within the limits of New Mexico, was not a navigable stream. The court held in that case, however, that if the construction of the dam and the re-

tention of the water thereby tended to destroy the navigable capacity of the river in that part of the river which was navigable, or if the appropriation of the water substantially interfered with the navigable capacity of the river, it came within the prohibition of a statute of similar wording to Section 10 of the Act of March 3, 1899. It appears from the opinion in said case that the question whether an appropriation of water interferes with the navigable capacity of a stream is always a question of fact.

We, therefore, advise you that whenever an application is made to the Board for the appropriation of water from the Rio Grande River, it will be the duty of the Board to reject the application and refuse to issue the permit when it appears that the contemplated appropriation of the water would obstruct the navigable capacity of the river, unless satisfactory evidence is furnished to the Board that the applicant has been authorized by Congress to create the obstruction. Whether the contemplated appropriation would be such obstruction to the navigable capacity of the river as is prohibited by Section 10 of the act of Congress is a question of fact to be determined by the Board.

We deem it unnecessary to discuss in detail the treaties between the United States and Mexico, for what has been said with reference to the acts of Congress applies as well to said treaties. In other words, whenever the appropriation of water contemplated by an application made to the Board is plainly in violation of the terms of the treaties between the United States and Mexico, it would be the duty of the Board to reject such application and to refuse the permit.

Your third question is practically the same as your second, except that it includes in addition to the Rio Grande River all navigable streams of the State whether constituting a part of the boundary line of the State or lying wholly within the bounds of the State. What has been said with reference to the Rio Grande River, in response to your second question, applies as well to all of the other navigable rivers of the State, with the exceptions hereinafter referred to. It has already been noted that by the terms of Section 9 of the act of Congress of March 3, 1899, it is not necessary for one who desires to erect a dam or other structure in or across a river, the navigable portions of which lie wholly within the limits of the State, to secure the consent of Congress before building such structure. It is only necessary that the location and plans for such structure be first submitted to and approved by the Chief of Engineers and to the Secretary of War. So, also, we take it that one may create an obstruction to the navigable capacity of a river wholly within the limits of a State without first obtaining the consent of Congress. It is necessary, however, that before such obstruction to the navigable capacity of such river be created, the location and plans for the same be submitted to the Chief of Engineers and to the Secretary of War. We, therefore, advise you that when an application is made to the Board for the appropriation of the water of a navigable river of the United States wholly within the bounds of the State of Texas and such appropriation contemplates or involves the erection in said river of any dam or other structure, as defined by said Article 9, that the application should be rejected and the permit refused unless satisfactory evidence is sub-

mitted to the Board that the location and plans therefor have been submitted to and approved by the Chief of Engineers and the Secretary of War. We further advise you that whenever application is made to the Board for the appropriation of water from any navigable river of the United States wholly within the bounds of the State of Texas, and such appropriation in the opinion of the Board would constitute the creation of an obstruction to the navigable capacity of the river, that the application should be rejected and the permit refused unless satisfactory evidence is presented to the Board that the location and plans therefor have been submitted to and approved by the Chief of Engineers and by the Secretary of War. In this connection, we advise you that, in our opinion, under the decision of the Supreme Court in the case of *United States vs. Rio Grande, etc., Company, supra*, the mere taking of water from a navigable river of the United States to such an extent as substantially to interfere with the navigable capacity of the river would amount to the creation of an obstruction to its navigable capacity within the meaning of Section 10 of the act of March 3, 1899.

In your fourth question, you state that A files in conformity with the provisions of the Irrigation Laws of 1895, but does not actually perform any work in pursuance of such filing except engineering prior to the date of submitting to the Board of Water Engineers the certified copy of such filing in conformity with Section 14, Chapter 171, General Laws of the Thirty-third Legislature. You desire to know whether the Board shall admit such certified copy to its files according to said Section 14, or whether A should be required to file an application in conformity with Section 15 of the act of the Thirty-third Legislature.

It is evident that the purpose of Sections 12 to 14 of the act of the Thirty-third Legislature is, that any person who has, by compliance with the law of 1895, made a valid appropriation of water may file with the Board of Water Engineers a certified copy of his affidavit through which the appropriation was made to the end that the Board of Water Engineers may have a record of his appropriation under the Act of 1895 and may recognize his rights under said appropriation in issuing permits for the appropriation of water from the same source. It appears to be the further purpose of said sections, as is evidenced by the latter portion of Section 14, to allow any person who has, before the first day of January, 1913, actually taken or diverted any water for the uses named in said act to fix his right to take and divert such water to the same amount by filing his affidavit as required by said sections, and this even though he may not have made a valid appropriation of the water under the Act of 1895.

It is to be observed that Article 3122 of the Revised Statutes of 1895, which is a portion of the Irrigation Law of 1895, expressly provides that any person who undertakes to appropriate water, under said act, must within ninety days begin actual construction of the proposed ditch, canal, etc., and must prosecute the work thereon diligently and continuously to completion. The inference from said article is that the failure actually to begin the work of construction in said time and to prosecute the work diligently and continuously to completion will work a forfeiture of whatever rights may have been acquired by the filing of the

sworn statement. Your letter does not show whether the ninety days, referred to in said Article 3122, expired prior to the time the certified copy of the sworn statement was filed with the Board of Water Engineers. As so far as the facts which you have given us indicate, it appears very likely that the applicant referred to lost his right to the water by his failure to begin the work of construction within ninety days and to prosecute it as required by Article 3133, and, in our opinion, if the applicant desires to use the water, he should make application for its appropriation under Section 15 of the act of the Thirty-third Legislature. The language of Section 14, however, in our opinion, authorizes the certified copy of the affidavit referred to to be filed with the Board of Water Engineers whether the rights which may have been acquired under the original application have been lost or not. The section reads as follows:

“Every person, association of persons, corporation, or irrigation district, who shall have heretofore filed for record, or shall hereafter, in compliance with the provisions of Section 12, file for record the sworn statement in writing, as set out therein, shall, within one year after this act shall take effect, file in the office of the board a certified copy of such sworn statement and a true copy of the map as described in Section 12. * * *”

This section clearly authorizes the filing of the sworn statement for the purpose of a record of the Board, and it neither fixes nor enlarges any rights which the person filing the same may have. This being true, we advise you that the Board should admit such certified copy to its files. If, however, the Board finds the person filing the sworn statement has lost whatever rights he may have acquired under the act of 1895 by reason of his failure to begin the construction and to prosecute the same, as provided in said act, the Board would be justified in refusing to recognize the existence of any rights to the water under such attempted appropriation.

In your fifth question you request of this Department a definite and comprehensive definition of the term “riparian rights.” Generally speaking, the term “riparian rights” refers to such rights to the use of the waters of a stream as are incident to the ownership of land bordering on the stream. The right of a riparian owner to take from the stream so much water as may be required for his natural wants or domestic purposes is generally recognized. The riparian owner, in the beneficial enjoyment of his riparian land, and in supplying his natural wants and domestic uses, may even take, if necessary, all of the water from the stream. This is the common law rule and is in full force in most of the States of the Union, except in so far as it is modified by statute. In Texas, as shown by the authorities hereinafter cited, a riparian proprietor may use the water of a stream to a reasonable extent for the purpose of irrigating his riparian land as well as to supply his natural wants and domestic uses. Before discussing this question, however, it may be well to refer to some of the limitations upon the right to use water on riparian lands.

The riparian owner may not divert water to non-riparian land, even though he use it for purely domestic purposes. See *Osborne vs. City of Norwalk*, 77 Conn., 663, 60 Atl., 545; *Weil's Water Rights in West-*

ern States, 3rd Edition, Sec. 308; *Watkins Land Co. vs. Clements*, 98 Texas, 578, 86 S. W., 733; *Matagorda Canal Co. vs. Markham Irr. Co.*, 154 S. W., 1176.

It is also to be observed that riparian rights arise out of the ownership of land through or by which a stream of water flows, and cannot extend beyond the original survey as granted by the government (*Watkins Land Company vs. Clements*, supra).

Another limitation is stated in the case of *Matagorda Canal Company vs. Markham Irrigation Company*, supra. It is as follows:

"All surveys of land which abut upon a running stream are riparian as to all that portion of the survey which lies within the watershed of the stream, and its surface drainage is into the stream."

It appears that in Texas riparian rights exist only in those lands which were acquired from the State prior to the enactment of the Irrigation Law of 1895. See *McGehee Irr. Ditch Co. vs. Hudson*, 85 Texas, 587, 22 S. W., 398; *Imperial Sugar Co. vs. Jayan*, 138 S. W., 575; *Watkins Land Co. vs. Clements*, 98 Texas, 578, 86 S. W., 733.

The reason for this apparently is, that by the Act of 1895 all the unappropriated waters of the streams in Texas (or, at least, within those portions of the State in which by reason of the insufficient rainfall, or the irregularity of the rainfall, irrigation is beneficial for agricultural purposes) were declared to be the property of the public. Section 97 of the Irrigation Act of the Thirty-third Legislature is apparently a legislative construction of the law to the effect that no riparian rights exist in the owner of any land the title to which has passed out of the State of Texas subsequent to the first day of July, 1895.

The law in this State as to the general rights of riparian owners is set out in the case of *Watkins Land Co. vs. Clements*, supra, from which case we quote the following:

"Subject to the right of natural use by other riparian proprietors, each riparian owner is entitled to use the water of a stream, which flows by or through his land, for the purposes of irrigation; provided such use is reasonable, considering all of the circumstances and conditions under which it is made; citing cases. In speaking of the right to irrigate, Mr. Gould says: 'According to the later decisions in both countries (England and America), this is not a natural want authorizing an exclusive or undue appropriation by one proprietor, but the use of the stream for this purpose must be reasonable, and must not materially affect the application of the water by other riparian proprietors. The extent of each proprietor's right to thus withdraw the water depends upon the circumstances of the case. The owner of a large tract of porous land abutting on one part of the stream could not lawfully irrigate such land continuously by canals and drains, and so cause a serious diminution of the quantity of the water, though there may be no other loss to the natural stream than that arising from the natural absorption or evaporation of the water employed for the purpose.' The cases which support the text are numerous, but we think it unnecessary to cite other than those already given above. Each riparian owner has equal rights in the stream of water which flows by him, and the use by each must be reasonable as regards the rights of others. It is true that oftentimes it will be found difficult to determine what is the reasonable use of water under existing conditions. However, the same difficulty is encountered by courts in the determination of questions of reasonable conduct on the part of individuals in every phase of life and in all classes of business, but that constitutes no reason for rejecting the rule which makes reasonable use the standard by which to determine conflicting claims. Courts

have ample authority to ascertain the relative rights of riparian owners and to regulate the manner of using the water; citing authorities."

In the opinion in the case of Matagorda Canal Company vs. Markham Irrigation Company, 154 S. W., 1176, which case cites with approval the case of Watkins Land Co. vs. Clements, supra, we find the following:

"The rights of the owners of such land to use of the water of the stream for irrigation purposes, as between an upper and lower owner, are equal, and in any controversy between such owners the use of the water for irrigation would be proportioned in accordance with the number of acres of riparian land owned by each of the parties."

In accordance with these decisions of our courts, it appears that, generally speaking, the term "riparian rights" means the rights of the owners of land abutting on a stream to take from the stream for natural and domestic uses all water necessary to the beneficial enjoyment of the land, and to take from the stream for the purpose of irrigation such water as is reasonably necessary for the beneficial enjoyment of the land, having due regard in using the water for irrigation purposes to the rights of other riparian owners, as more fully explained in the above quotation from the case of Watkins Land Company vs. Clements. These riparian rights are subject to the limitations hereinbefore discussed, and they are, of course, superior to any right of appropriation under the law of 1895, or any other subsequent law, and they cannot be impaired by the law of 1895, or by any other subsequent law.

In your sixth question you state that A files with the Board a certified copy of his filing with the county clerk, as provided in Sections 12 to 14 of the act of the Thirty-third Legislature, and that his sworn statement accompanying the certified copy shows that he proposes to enlarge or extend his plant. You desire to know whether he should be required to pay the maximum filing fees as provided in Section 44 of the said act.

As has been hereinbefore noted, the purpose of Sections 12 to 14 of the act is to furnish the Board with a record of appropriations made under the Act of 1895 in order that valid appropriations made under said act may be recognized by the Board, and it also appears that under said sections, in accordance with the latter portion of Section 14, a person, by complying with said sections, may obtain the right to continue to take and divert the volume of water which he has prior to the first day of January, 1913, actually taken and diverted for the uses and purposes named in said act. Said Sections 12 to 14 appear to have nothing to do with the extension or enlargement of any irrigation plant or with the appropriation of an additional amount of water to that which has already been appropriated or used.

If the sworn statement accompanying the certified copy from the clerk's office is so worded as to constitute an application to appropriate additional water, or if the proposed enlargement or extension of the plant necessarily or reasonably involves the appropriation of additional water, it should be treated as an application under Section 15, and filing fees should be charged accordingly.

Answering your seventh question, we advise you that any irrigation works in this State, constructed under the Federal Reclamation Act of

June 17, 1902, according to the plain wording of the Irrigation Act of the Thirty-third Legislature, Section 18, come within the jurisdiction of the Board of Water Engineers of the State of Texas and should be treated by the Board as other irrigation plants are treated which have been constructed under any other existing law, State or Federal.

Section 8 of said Federal Reclamation Act expressly provides that nothing in said act shall be construed as affecting or interfering with the laws of any State or Territory relating to the control, appropriation, use, or distribution, of water used in irrigation, and that nothing in said act shall, in any way, affect the right of any land owner, appropriator, or user, of water in, to, or from, any interstate stream or the waters thereof. It is plain that both the Federal act and the act of the Thirty-third Legislature of Texas contemplate that neither act shall interfere with the other, but that the provisions of both acts, where applicable, shall be complied with.

Very truly yours,

G. B. SMEDLEY,
Assistant Attorney General.

WATERS AND WATER COURSES.

"Source of water supply," as used in Chapter 171, Acts Regular Session, 1913 (Irrigation Law), comprehends the main stream and all its tributaries. Notice prescribed by Section 21 of said act should be given to all claimants or appropriators along the stream or its tributaries.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 18, 1914.

Hon. W. T. Potter, Secretary Board of Water Engineers, Capitol.

DEAR SIR: We have your letter of the 5th instant, in which you make inquiry as to the following:

"1. Is it necessary to give the notice prescribed by Section 21, Chapter 171, Acts Regular Session, 1913, to all users of water along the stream whose appropriations are recorded in the office of the Board of Water Engineers?"

"2. Does the term 'source of water supply,' as used in the act, comprehend the main stream and all of its tributaries?"

Keeping in mind the objects of the act and of Section 21, as well as the rights of the public and those who have appropriated water and thus secured rights, we think both these questions must be answered affirmatively.

The general purpose of the act is to "provide a *system* of laws relating to irrigation" *adequate* and appropriate to the subject. The whole act in its object looks forward to a complete articulated and symmetrized system of irrigation facilities and to the determination and fixing of individual and public rights in public waters. Since the product of every spring seeks to reach the sea either directly through the channel of a river or through the intermediary of a tributary of a river, and since in this country, in the absence of tributaries, no considerable river would exist, and since conflicting uses of water might, and prob-

ably will, arise not only along each tributary but as between those along the main stream and those along the tributaries, it is manifest that no system of laws which dealt with each minor stream as a unit could be adequate for the accomplishment of the purposes comprehended within the legislative intent. As to rivers and streams, the "ordinary flow and underflow" is the thing dealt with; the waters of tributaries are proximately and inseparably connected with and related to the "ordinary flow" of the main stream; to say that whatever augments or retards the flow of the waters of the tributaries directly affects the flow of the main stream is manifest at a glance. The "ordinary flow" of the river is the collective "ordinary flows" of its tributaries as well as its own head-springs. The appropriator of water at any given point on either the main stream or on any tributary is interested in and affected by all other appropriations at all other points along the main stream or tributaries,—as will be made to appear more fully hereinafter,—and for this reason, and others, no one stream of a given watershed can adequately be dealt with as an independent unit; for the same reason Section 21 contemplates that each appropriator along the system of streams should be given the prescribed notice so that they may have their "day in court" to be heard.

That the taking of water out of the tributaries reduces the flow of the main stream is patent,—as stated above,—and because of it practically all of the States, where the law of appropriation is in force, it is recognized that the appropriation of the waters of the main stream for irrigation purposes is also an appropriation of the tributaries to the full extent of the original appropriation. That the original appropriator has such a right in the waters of the tributaries above him is held in the following cases:

Rait vs. Furrow, 74 Kansas, 101.

Stickler vs. Colorado Springs, 16 Colo., 61.

Priest vs. Union, etc., Co., 6 Cal., 170.

Malad, etc., Co. vs. Campbell, 2 Idaho, 278.

Bruening vs. Dorr, 35 L. R. A., 640.

Tonkin vs. Winzell, 27 Nev., 88.

Low vs. Rizer, 25 Ore., 551.

Salina, etc., Co. vs. Salina, etc., Co., 7 Utah, 456.

Verdugo Water Co. vs. Verdugo, 152 Cal., 655.

Beaverhead, etc., Co. vs. Dillon, etc., Co., 34 Mont., 135.

An appropriator of the waters of a stream has also an interest in the waters of the tributaries which flow into the stream below his point of diversion, in this: "Where there are appropriators prior to him below his point of diversion on the stream, and there are also appropriators subsequent to him of the waters of the tributaries, which naturally flow in the stream below his point of diversion and above those of his prior appropriators, and he is called upon to supply (or out of his appropriation to contribute to the supply) the water to which those below him are entitled,—in cases of this kind, he is entitled to the flow of the lower tributaries, as against his junior appropriators thereof, when it is necessary to protect the rights of the lower appropriators prior in time to him from the main stream." Water Supply and S. Co.

vs. Larimer and W. Res. Co., 25 Colo., 87, 53 Pac., 386; Platte Valley Irr. Co. vs. Buckers Irr. and Imp. Co., 53 Pac., 334.

Because of this interdependence of interests all the streams of water within a single watershed, under the doctrine of appropriation, are considered as a composite body and include not only the main water course, but also the branches and tributaries to the same.

Miller vs. Wheeler, 54 Wash., 429.

Strickler vs. Colorado Springs, 16 Colo., 61.

Kinney on Irrigation and Water Rights, Vol. I, p. 508, and cases cited in note 7, also p. 597; Vol. II, p. 649.

We hold, therefore, that the term "source of water supply," as used in this statute, comprehends the main stream and all its tributaries; and that because of their interest in the subject of each additional application for appropriation all the record prior appropriators along the stream and tributaries.

Yours truly,

LUTHER NICKELS,
Assistant Attorney General.

PUBLIC WATERS—NAVIGABLE SALTWATER BAYS.

CONTROL OF THE GAME, FISH AND OYSTER COMMISSIONER OVER THE SAME WHERE THE BED OF THE BAY IS PRIVATELY OWNED.

(Revised Statutes of 1911, Articles 3980, 3982, 3983, 4017; Penal Code of 1911, Articles 906 and 911.)

The waters of navigable rivers in the State and the waters of navigable bays in the State, even though the beds of such rivers or bays may be owned by an individual, are public waters of the State, and the public has the right to use such waters for purpose of navigation and fishing, and in so far as the use of such waters relates to the fish and oyster industry the Game, Fish and Oyster Commissioner has jurisdiction and control thereof.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MARCH 27, 1914.

Hon. W. G. Sterett, Game, Fish and Oyster Commissioner, Building.

DEAR SIR: In a recent letter you call the attention of this Department to Offett's Bayou, a body of salt water and an arm of Galveston Bay, and which bayou is navigable and within the ebb and flow of the tide from the high seas. You state that this bayou was included within the metes and bounds of a patent of the Republic and you state that certain persons are now claiming the bayou, or the land under the same, through such patent.

We find, upon an investigation, that on November 28, 1840, a tract of 18,215 acres of land on Galveston Island was patented by the Republic to Edward Ball and Levi Jones. This patent is apparently valid, and it was confirmed by the Legislature of the State in the year 1854 (see Gammel's Laws, p. 125). The Commissioner of the General Land Office has, since this matter was referred to us, made a personal investi-

gation of Offett's Bayou, and he advises us that Offett's Bayou is clearly included within the bounds of the patent above referred to. The validity of this grant is so far as it applies to Offett's Bayou was before the Court of Civil Appeals of the Fourth District, the contention being made that the grant was not effective as to this land for the reason that it was under the navigable waters of the State and, therefore, not subject to grant. See *Baylor vs. Tittlebach*, 49 S. W., 720. The court said, however:

"There is nothing in this connection, for it is well established that a State may grant to individuals or corporations the *soil* of public navigable waters."

It is to be observed that the Court of Civil Appeals treated this grant as a grant only of the soil under the water. The patent itself describes the property granted by it as *land*, and by its terms relinquishes to the patentees "all the right and title in and to *said land* heretofore held and possessed by the Government of said Republic." The Republic did not by the grant relinquish to the patentees the exclusive right to navigate the waters over the land, nor did it relinquish to the patentees the exclusive right to fish in the waters. Only the title to the soil passed by virtue of the patent. The granting of the title to the soil under navigable waters does not of itself pass the exclusive right to fish in the waters or the exclusive right to navigate them.

As said in the case of *Galveston vs. Menard*, 23 Texas, 349, 393, "this species of property being land covered by navigable water, embraces several rights that may be separated and enjoyed by different persons, and may become thereby partly private and partly public; as, the right to the soil, a right to fish in its waters, the right to navigate the waters covering it, etc."

The question which you ask this Department is, whether you, as Game, Fish and Oyster Commissioner, should take jurisdiction of Offett's Bayou as public water.

We advise you that, in the opinion of this Department, in so far as the use of the waters of Offett's Bayou relates to the fish and oyster industry you, as Game, Fish and Oyster Commissioner, have jurisdiction and control of the same.

The terms "public waters" and "navigable waters" are generally used synonymously, the reason apparently being that it is in navigable waters that the public has the common right of use for navigation, fishing and other lawful purposes. See

29 Cyc., 304, 330.

Lamphrey vs. State, 52 Mo., 181.

38 A. S. R., 38.

The use of such waters by the public for navigation, fishing, etc., may of course, be regulated by the State. By Article 3980 of the Revised Statutes (1911) "all the public rivers, bayous, lagoons, lakes, bays and inlets in this State and all that part of the Gulf of Mexico within the jurisdiction of this State, together with their beds and bottoms, and all of the products thereof, shall be, continue and remain the property of the State of Texas, except so far as their use shall be permitted by the laws of this State. So far as their use shall relate to the fish and

oyster industry, the State Game, Fish and Oyster Commissioner shall have jurisdiction and control thereof according to the authority vested in him by the fish and oyster laws of this State."

It appears, therefore, that by the statutes of this State, all the public rivers, lagoons, lakes, etc., of the State, the beds and the bottoms of the same and their products,—all are declared to be the property of the State and all of these, the rivers, lakes, etc., their beds and their products, are placed under the jurisdiction of the Game, Fish and Oyster Commissioner in so far as the use of the same relates to the fish and oyster industry. It is the public waters of the State, with their beds and products, which are placed under the control of the said Commissioner.

The Legislature did not undertake to provide that only those public waters of the State, the beds of which belong to the State, should be under the control of the Commissioner. A contrary intention is indicated by the language of various portions of the law relating to the fish and oyster industry. For example, Revised Statutes, Article 3983, levying a tax on persons taking fish from the waters of the State, uses the general terms "her waters" and "public waters."

Article 3984 requires the registration of fish boats by all persons using boats for fishing, etc., "*in the public waters of this State.*" Article 3986, with reference to the license of the captain of a fish boat, uses the same language, "waters of this State."

Article 4017 regulating the size of the meshes of seines refers to nets "used for taking fish in salt waters," showing an intention to regulate the size of the meshes of the nets used for taking fish from any salt water whatever, regardless of the ownership of the bed of the water.

Article 906 of the Penal Code (1911) makes it unlawful for any person to catch fish, etc., by seines within a certain distance of the limits of a city or town *in any of the bays or navigable waters of this State.* Article 911 of the Penal Code makes it unlawful, at certain times, to catch any fish by use of a seine "in the bays, tidal or coastal waters of this State."

These and other portions of the statutes show that all tidal and other navigable waters of the State come within the scope of the law regulating the fish and oyster industry, regardless of the ownership of the beds or bottoms of the waters. In other words, the legislation with reference to the fish and oyster industry treats the term "public waters" as including all tidal and other navigable waters of the State and shows an intention to place all such waters under the control of the Game, Fish and Oyster Commissioner as far as their use relates to the fish and oyster industry. A single exception is made by Article 3982, Revised Statutes, which provides, in substance, that whenever any creek, lagoon, lake or cove shall be included within the metes and bounds of any original grant, the lawful occupant of such grant has "the exclusive right to use such creek, lake, lagoon or cove for gathering, planting or sowing oysters within the metes and bounds of the official grant or patent of said land." This is the exception which proves the rule, for no exclusive right to fish in such waters is given by statute to such owner.

It is well settled by the authorities that the owner of the soil under navigable waters has not the exclusive right to fish in such waters. The

Court of Criminal Appeals of this State, in an opinion written by Judge Henderson (Gustafson vs. State, 48 S. W., 518), quoted with approval from a Connecticut case as follows:

"That the right to fish on the soil of another, when overflowed with the tide from the sea or arm of the sea, is a common right; and anyone may fish in the sea, of common right, though it flows on the soil of another."

In volume 19 of Cyc., on page 992, the rule is stated:

"By the common law all persons have a common and general right of fishing in the sea and in all other navigable or tidal waters; and no one can maintain an exclusive privilege to any part of such waters unless he has acquired it by grant or prescription, *notwithstanding the title to the bed of such stream is in the riparian owner.*"

Farnham, in Section 375 of his text-book on *Water and Water Rights*, quotes from Chief Justice Coke as follows:

"If I have land adjoining the sea so that the tide ebb and flow upon my land, while it flows everyone may fish in the sea which has flowed upon my land, for then it is parcel of the sea, and in that sea everyone may fish of common right."

Again, in the same book, we find the following:

"The right of fishing in the tide water belongs to the public, unless it was exclusively granted with the shore."

Without undertaking to cite the authorities, we will add here that it has always been the settled policy of the civil law, of Mexico and of Texas as a Republic and as a State to reserve from private ownership and for the use of the general public not only the navigable waters of the State but the beds and banks of such navigable waters to the end that the public generally may freely use and enjoy such waters for all lawful purposes. It can not be presumed, therefore, in the face of this policy that the mere grant of the land under the navigable waters of the Republic was intended also as a grant of the exclusive right to fish in such waters, or that by such grant it was intended that the common right of the public to use such waters for fishing should be in any way abridged.

In our opinion it is settled by the authorities above referred to that the owner of such land as that under Offett's Bayou has no exclusive right to fish in the waters of the bayou, but that the right to fish in such waters is still common to the public. The Legislature has seen fit to regulate such right and for this purpose has placed such waters under the jurisdiction and control of the Game, Fish and Oyster Commissioner.

Very truly yours,

G. B. SMEDLEY,
Assistant Attorney General.

EXCERPTS FROM OPINIONS CONSTRUING DRAINAGE LAW.

By B. F. Looney, Attorney General:

All moneys, bonds, etc., of a drainage district should be in the keeping of the county treasurer.

The responsibilities and duties of caring for the funds of such district is imposed upon the county treasurer as such and not as a district officer.

The county treasurer shall receive as compensation 1 per cent upon all money received and disbursed by him, belonging to said district, but his commission as county treasurer cannot in any event exceed the maximum fees prescribed by the statute. (*Opinion Book 27, page 88.*)

By B. F. Looney, Attorney General:

The commissioners court of the county is not authorized to pay out of county funds any of the expenses incident to the creation of a drainage district established under the provisions of Chapter 4, Title 47, R. S., 1911.

In the event the proposal for the creation of a drainage district and the issuance of bonds should carry at an election held for that purpose, the \$200 deposited by the signers of the petition with the clerk of the commissioners court, shall be returned to the parties depositing the same, and in such event all necessary and legal expenses created in the establishment of the drainage district shall be paid by the district; but should the election be against the proposition, then the clerk is authorized to pay out of the \$200 all vouchers issued by the county judge for all costs and expenses up to and including said election. (*Opinion Book 34, page 76.*)

OPINIONS WHICH HAVE TO DO WITH RAILROADS.

(See Also Anti-Pass Law.)

RAILROADS—SENATE RESOLUTION WITH REFERENCE TO EASTERN TEXAS RAILROAD COMPANY.

Right of the Legislature to relieve railway companies from forfeiture caused by failure to construct road as required by law; the penalty suffered by a railway company that fails to complete its road is the forfeiture of its right to construct the unfinished portion of the road.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, AUGUST 8, 1913.

Hon. Will H. Mayes, President of the Senate, Capitol.

DEAR SIR: At the regular session of the present Legislature the Senate adopted the following resolution:

"Whereas, Article 6633 of the Revised Civil Statutes of the State of Texas provides that if any railroad corporation organized under the laws of this State shall not, within two years after its articles of association filed and recorded as provided by law, begin the construction of its road, and construct, equip and put in good running order at least ten miles of its proposed road, and that if any such railroad corporation, after the first two years, shall fail to construct, equip and put in good running order at least twenty miles additional of its road each and every succeeding year until the entire completion of its line; and

"Whereas, The Eastern Texas Railroad Company was chartered in 1900 to build a railroad from Lufkin, in Angelina county, Texas, to Crockett, in Houston county, Texas, a distance of about forty-seven miles, and has built only thirty miles of railroad under the provisions of its charter, lacking only seventeen miles of completing its line of railroad as called for by its charter; and

"Whereas, At the Regular Session of the Thirty-second Legislature, a general relief act was passed by the Legislature, granting to certain class of railroads further time within which to complete their lines of railroad; however, especially excepting from the operations of said act all railroad companies having less than twenty miles to complete their line of railroad; and

"Whereas, Said Eastern Texas Railroad Company has failed and refused to complete its line of railroad as called for by its charter, in violation of the provisions of Article 6633 of the Revised Civil Statutes of the State of Texas: therefore, be it

"Resolved by the Senate, That the Attorney General, the Hon. B. F. Looney, be and he is hereby directed by the Senate to make an investigation into the affairs of said railroad, to ascertain if it has violated the provisions of said law, and, if so, to take such necessary legal steps to force said railroad to comply with its said charter and to build the remaining seventeen miles of railroad as called for by its said charter, and that he also investigate all other railroads and the question of compliance with their charter obligations to the State."

In compliance with the request of the Senate we endeavored to ascertain the condition of all railroads with reference to the question raised in regard to the Eastern Texas Railroad Company, and I find it a very difficult matter to investigate, without the expenditure of much time and the incurring of much expense.

It is believed, however, that this inquiry is rendered immaterial in view of the present status of the law controlling the subject.

Attention of the Senate is directed to Article 6633, Acts of 1911, referred to in the resolution, which, in so far as the present inquiry is concerned, is the same as Article 4558, Acts of 1895, and reads as follows:

"If any railroad corporation organized under this title shall not, within two years after its articles of association shall be filed and recorded as provided in this title, begin the construction of its road and construct, equip and put in good running order at least ten miles of its proposed road; and if any such railroad corporation, after the first two years, shall fail to construct, equip and put in good running order at least twenty additional miles of its road each and every succeeding year until the entire completion of its line, such corporation shall, in either of such cases, forfeit its corporate existence and its power shall cease as far as relates to that portion of said road then unfinished, and shall be incapable of resumption by any subsequent act of incorporation."

The above statute was in force at the date of the chartering of the Eastern Texas Railroad Company, which, as I understand, was chartered on November 8, 1900, to build from Lufkin to Crockett, a distance of 48 miles; that it began construction under this charter immediately, equipped and put in running order about 30½ miles of its road within two years from the date of filing its charter; that it has up to this time paid all taxes, made the reports required by law, and in other respects has complied with the law, and that its charter is not subject to be forfeited unless it has failed to comply with the provisions of Article 6633, Acts of 1911, and the several relief acts passed from time to time. The first relief act to which your attention is called was the Act of 1909, page 220, the portion of which applicable to this inquiry reads as follows:

"Any railroad company which since the 1st day of January, 1901, and during the first year of its incorporation, did construct and put in operation not less than 20 miles of railroad in this State, shall have two years from the date of this act takes effect, in which to comply, as to its main line or its branch or branches projected by such articles of incorporation or amendments, with the provisions of Article 4366, 4558 and 4559 of the Revised Civil Statutes of the State of Texas, and each such railway company which shall have forfeited its rights to construct or its corporate existence, as to any part of its said main line, or is about to do so, or any of its said branches, or any part thereof, shall have, and such corporate existence and right to construct same is hereby restored and preserved to it, and it shall enjoy all of its corporate franchises, property rights and powers held or acquired by it previous to any cause of forfeiture on account of such failure."

It will be seen from the above that the Eastern Texas Railroad Company, as well as all other railroads similarly situated, was given two years from May 8, 1909, within which to complete its road as chartered, regardless of whether the charter had theretofore been forfeited or not, as the act expressly restored charter powers.

The next relief act was the act of the Thirty-second Legislature, page 3, and reads as follows:

"Section 1. That the time in which any railway corporation chartered under the laws of the State of Texas since the first day of January, 1892, or the

charter of which has been amended since that date, is required to begin construction of its road, and construct, equip and put in good running order, as required in Article 4558 of the Revised Statutes of the State of Texas of 1895, and the same hereby is, as to any unfinished portion of such road, extended two years from the taking effect of this act; and any railway company having been chartered since January 1, 1892, or the charter to which has been amended since said date, which shall have forfeited its corporate existence or any of its rights and powers, or is about to do so, by reason of the failure to comply with said Article 4558, or any part of said article, shall have restored and preserved to it, its corporate existence, and it shall have and enjoy all of the corporate franchises, property rights and powers held or acquired by it previous to any cause or forfeiture as aforesaid; provided, that no railway company which shall be revived or the time extended by virtue of this act shall claim or exercise any right or franchise not allowed, granted or permitted to other railway corporations under the laws as now in force in this State."

"Sec. 2. (Extract from.) Provided that the provisions of this act shall not apply to any corporation which has less than twenty miles of railroad to build in order to complete its line of railroad, as contemplated by its original charter or any amendment thereto, or any terms thereof, which shall fail to construct and put in operation at least twenty miles of the line of railroad, as contemplated by its charter, or any amendment thereto, within twelve months from and after the passage of this act, or so much less mileage as may be necessary to complete and put in operation its line of road as called for by its charter, or any amendment thereto."

It will be seen that the relief here granted extended the time for complying with the charters for two years from May 8, 1911. Attention is here called to the provisions of Section 2 of the above act, which excludes from the benefits thereof railroads having less than twenty miles of road to complete. The Eastern Texas Railroad Company, having less than twenty miles to complete, of course did not receive the benefits of this relief act; and thus the matter stood until the relief act of the Thirty-third Legislature, adopted at the regular session, which reads as follows:

"Section 1. That the time in which any railway corporation chartered under the laws of the State of Texas since the first day of January, 1892, or the charter of which has been amended since that date, is required to begin the construction of its road, and construct, equip and put in good running order, as required in Article 4558 of the Revised Statutes of the State of Texas of 1895, and the same hereby is, as to any unfinished portion of such road, extended two years from the taking effect of this act; and any railway company having been chartered since January 1, 1892, or the charter to which has been amended since said date, which shall have forfeited its corporate existence or any of its rights and powers, or is about to do so, by reason of the failure to comply with said Article 4558, or any part of said article, shall have restored and preserved to it its corporate existence, and it shall have and enjoy all of the corporate franchises, property rights and powers held or acquired by it previous to any causes or forfeitures as aforesaid; provided, that no railway company which shall be revived or the time extended by virtue of this act, shall claim or exercise any franchise not allowed, granted or permitted to other railway corporations under the law now in force in this State."

This last act is couched in about the same language as all preceding acts of this nature and seems to have been intended to prevent the forfeiture of charters for the failure to construct roads as required by the law, and also to restore charters that had theretofore become forfeited by reason of such failure. The only punishment visited upon a railroad company for a failure to complete its line as required by the

statute was that it forfeited its corporate existence in so far as it relates to that portion of the road then unfinished and disabling said company from resuming by a subsequent act of corporation the right to construct the unfinished portion that should have been finished. We assume that under the provisions of the Constitution the Legislature was clearly in the exercise of its power and authority in passing the several relief statutes above quoted.

The Constitution, Article 1, Section 28, provides:

"No power of suspending laws in this State shall be exercised except by the Legislature."

Article 1, Section 17, provides:

"All privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof."

Assuming, therefore, that the Legislature had the power under the Constitution to suspend the operation of the statute with reference to the forfeiture of the charters in regard to the unfinished portions of railroads that had not constructed the mileage as provided by the statute, and assuming that it had the power and authority to restore forfeited charters, we are driven to the conclusion that at this time the Eastern Texas Railroad Company is in the exercise of its charter powers and is authorized under this charter to complete its road to Crockett as originally chartered. What is said here of the Eastern Texas Railroad Company may be said with reference to all railway companies of this State similarly situated. There exists no power, however, to compel a railway to complete its road. It simply suffers the penalty of forfeiting its right to construct the unfinished portion in the event of such failure.

Yours very truly,

B. F. LOONEY,
Attorney General.

SEPARATE COACH LAW—WHITE AND NEGRO CONVICTS.

No authority has the right to force a white man, even though a convict, to ride in a negro compartment on a railway train, or sit in a negro waiting room at depot.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, JANUARY 24, 1913.

Railroad Commission of Texas, Hon. Allison Mayfield, Chairman.

DEAR SIR: Your communication to this Department, under date January 23rd, with enclosed data, was duly received and has been considered by this Department. It appears that the gist of the complaint is that white prisoners, while chained together with negro prisoners, were carried by some railroad companies in the negro compartments of passenger trains and were placed together in the negro waiting rooms of the depots.

The duty imposed upon the railroad company to provide separate waiting rooms is stated in Art. 6693, R. S., 1911 to be:

"Said railroad companies shall keep and maintain separate apartments in such depot buildings for the use of white passengers and negro passengers."

And by Art. 6694:

"The power is conferred upon the Railroad Commission to require compliance therewith."

The duty to provide separate coaches or compartments for white and negro passengers is imposed upon the railway companies by Articles 6746, et seq., R. S., 1911. That is, the burden of this duty is to "provide separate coaches or compartments for the accommodation of white and negro passengers, which separate coaches or compartments shall be equal in all points of comfort and convenience."

It appears, therefore, that when a railroad company has provided separate waiting rooms in its depots and has provided separate coaches or compartments equal in all points of comfort for the accommodation of its white and negro passengers, its duty has been performed. In other words, the duty devolving upon a railroad as a company is to provide and maintain such accommodations.

The inference arises from your communication and the enclosed data that this duty has been performed in the instant case.

Article 6753 of the Revised Statutes of 1911, and Sec. 9 of Art. 1523 of the Penal Code lays upon the conductor the duty to refuse any passenger admittance to any coach or compartment in which they are not entitled to ride under the provisions of the articles of the Revised Statutes above cited, and the duty to remove from a coach or street car or interurban car any passenger not entitled to ride therein, and a conductor's refusal to perform this duty knowingly renders him guilty of a misdemeanor and punishable by fine in any sum not less than five dollars or more than twenty-five dollars. The railroad company having provided the separate compartments, the duty to see that a passenger rides in the compartment prepared for him by the railroad company is a personal and individual duty imposed upon the conductor and is not a duty imposed upon the company. This idea is strengthened by the fact that Sec. 5 of Art. 1523, which declares that any person who shall ride in a compartment to which he is not entitled admittance under the provisions of the Revised Statutes cited, is guilty of an offense and punishable by fine. In this case, of course, the passenger being a convict and being in the charge of a public officer, is denied his right to select the compartment in which he desires to ride.

It would appear, therefore, that the only offense committed in the premises is that committed by the conductor in charge of the train in failing and refusing to require the white convicts to ride in the compartment provided for white passengers and in permitting them to ride in the negro compartments, and this is an offense personal to the conductor.

As a matter of course, if the railroad company could be shown to have aided or abetted the effort to require the white convicts to ride in the negro compartment, another question would be presented.

The penitentiary authorities, or any other authority, would not have

the right to force a white man, even though a convict, to ride in a negro compartment. The fact of the deprivation of citizenship makes no difference, because the convict is a reasonable creature and being, and a person, notwithstanding supposed humiliation inflicted by stripes and chains. The question suggested by your correspondence, in the absence of a showing that the railway company connived at the offense, should be confided to the tender care of the grand jury of the county in which the offense was committed and to the watchful vigilance of the prosecuting officer.

Your file of correspondence relating to the matter is returned herewith.

Yours truly,
LUTHER NICKELS,
Assistant Attorney General.

DERAILING DEVICES.

(Chapter 158, Acts of the Regular Session, Thirty-third Legislature.)

Interurban railway companies and street railway companies must provide derailers on their repair tracks, under the terms of this act.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 14, 1914.

Hon. J. A. Starling, Commissioner of Labor, Capitol.

DEAR SIR: Under a recent date you submitted to this Department the question as to whether or not interurban railway companies and street railway companies are compelled to comply with the provisions of Chapter 158, Acts of the Regular Session of the Thirty-third Legislature, which provides, in part, as follows:

"It shall be unlawful for any person, firm or corporation or receiver operating any railroad, machine shop or other concern engaged in repairing or manufacturing cars within this State to use any tracks not equipped with derailing devices upon which to repair or manufacture cars. * * *"

Certain preliminary questions of construction arise over the meaning of certain terms used in the Act which we will dispose of before entering upon a discussion of the merits of the question.

One of these questions arises over the meaning of the term "other concern," and used in Section 1 of the Act. Does the statute mean that it is applicable only to such persons, firms or corporations as may be operating "any railroad," "any machine shop" or "any other concern" for the manufacture or repair of equipment, or is the statute intended to apply disjunctively to the following classes of persons, etc., to wit:

(1) Who operate "any railroad," and in doing so manufacture or repair the equipment.

(2) Who operate "any machine shop" for the manufacture and repair of cars.

(3) Who operate *any other concern* for the manufacture or repair of cars.

We are inclined to the latter construction. The word "concern," when used as a noun, imports animation rather than an inanimate object; "persons connected in business; a firm and its business; as, a banking concern" (Webster).

In cases of doubt as to the meaning of any word or phrase found in the body of an act, it is legitimate to refer to the caption for explanation.

McCall vs. City of Austin, 95 Texas, 575.

Otoe County vs. Baldwin, 111 U. S., 16.

Sutherland Statutory Constr., Sec. 210.

Reference being had to the caption of this act, we find it described as "An Act requiring railroads, machine shops and *other concerns*, manufacturing or repairing cars within this State, to provide all tracks upon which such cars are manufactured or repaired to be provided with derailing devices, etc." The caption clearly uses the three terms, "railroads," "machine shops," and "other concerns" disjunctively, and since the body of the act, when its terminology is taken according to the ordinary signification, is easily susceptible of a construction harmonious with the terms of the caption, we hold that the act applies to the following classes of persons, etc., engaged in the manufacture or repair of cars, to wit: "railroad companies," "machine shop companies or proprietors," and "other concerns."

Another preliminary question arises to the meaning of the term "cars," and as to this term we think the *ejusdem generis* rule applies in the construction thereof, and that it must be held to mean the various kinds of railroad or railway cars.

Bridge Company vs. Railway Co., 8 Atl., 233.

Ry. Co. vs. Freeman, 97 Texas, 395.

Since steam railroads, interurban railway companies and street railway companies are the only classes of persons, etc., of which we are to deal in answering your interrogatory, the sole question involved, therefore, reverts to this form: Are interurban and street railway companies engaged: (1) in "operating any railroad" or in connection with the operation of "any railroad," engaged in the manufacture or repair of railway or railroad cars within the meaning of the act? (2) Are they "other concerns" engaged in the manufacture or repair of railway cars?

ARE CORPORATIONS OF THESE CLASSES ENGAGED IN THE OPERATION OF RAILROADS?

The contention is advanced that the word "railroad," as used, refers to and signifies a steam railroad, and that, generally, whenever the word is used in a statute without further explanation it means steam railroad. In support of this proposition, the cases of Scott vs. F. & M. National Bank, 75 S. W., 16, and Riley vs. Galveston, 35 S. W., 826, and Railway Company vs. Groethe, 88 Texas, 262, are cited.

In the Groethe case, the Supreme Court, while declining to decide the question, expressed doubt that an act of the Legislature declaring who are and who are not fellow servants of "railway corporations" applied to street railway companies. The reason for this doubt is not stated by the court in that case.

In the Scott case the court decided that the prohibition of Section 5,

Article 10, of the Constitution, with reference to parallel or competing lines, does not apply to street railways. This decision was based, in part, at least, upon the fact that distinction is drawn between "Railroads Proper" and "Street Railways" by Section 7, Article 10, of the Constitution. The following expression is used by the court in that case:

"Ordinarily, when we speak of a *railroad*, we mean a railroad over which freight and passengers are transported from one town or city to another; when we speak of those roads on which passengers are transported over the streets of a town or city, we call them *street railways*."

In the Riley case it was held that the Fellow Servant Act does not apply to street railways, the court saying:

"* * * *any railway corporation*, in the first section of the act, should be restricted to the usual and popular import of that term, and that the act should be held not to embrace railways constructed and maintained upon streets and other highways in and contiguous to cities and towns for carrying persons."

The Fellow Servant Act construed in the foregoing cases was very broad in its language as to application to *railway companies*. Section 1 of that act provided:

"All persons engaged in the service of *any railway corporations* * * * who are entrusted by such corporation with the authority of superintendence, etc., * * * are vice-principals of such corporation, and are not fellow servants, etc."

Section 2 defines who are fellow servants and uses practically the same terminology. There is nothing in the act itself to suggest that the Legislature intended to except from its operation street railway companies. And yet the court, probably in view of the distinctive characteristics of a street railway, held that it was not such a railway company as was contemplated in that act. There are many authorities from the courts of other jurisdictions supporting this view, as well as many others opposing it. Among those supporting this view may be mentioned:

L., etc., Ry. Co., 2 Duv. (Ky.), 175.

Money Penny vs. Ry. Co., 4 Abb. Pr. N. S. (N. Y.), 357.

Funk vs. St. Paul, etc., Ry. Co., 61 Minn., 435.

Lincoln St. Ry. Co. vs. McClennan, 54 Neb., 672.

Vol. I, p. 13, Elliott on "Railroads."

St. Ry. Co. vs. I. C. C., 230 U. S., 324, and the many cases cited to this point on page 325.

Many cases to the opposite effect are cited on page 331 (230 U. S.). It cannot be said that in all instances the term *railroad* either includes, or excludes, the term *street railway* or *street railroad*. The context of the act, the reason for its enactment, the evil which it was designed to meet, and the remedy proposed, must always be looked to to determine whether or not the one term includes the other. We believe the weight of authority from other jurisdictions, as well as reason, would tend to show that *street railroads* should be regarded as *railroads* within the meaning of remedial legislation such as the Fellow Servant Act and the act here in question, and if we were without authorities from our own courts upon the proposition we would hold that the act under

consideration did apply to street railway companies, because they are operating "railroads." The Fellow Servant Act is strictly and highly remedial in its nature, and, as such, to be liberally construed; there is nothing in the act itself to indicate that it was not intended to apply to street railway companies, but, on the contrary, the terminology of the act, taken liberally, includes railroads of every species; and yet, according to our courts, it is not applicable to street railways.

The term "railroad," as used in the act here under consideration, is no broader than the Fellow Servant Act; and while the act is undoubtedly remedial in nature, it is also penal, and as such is to be more strictly construed than if it were remedial only; there is nothing more in the act to show that the term "railroad" was intended to include street railroads than there is in the Fellow Servant Act to show that it was intended to apply to street railway companies,—for these reasons we regard the cases cited above from our own courts as conclusive against the application of the act to street railway companies as "railroads," and, accordingly, if there were no broader terms used in the act we would hold it to be inapplicable to such companies.

Not so, however, as to interurban railway companies. The reasoning by which the courts have differentiated between *railroads* and *street railroads* does not warrant the drawing of a like distinction between *railroads* and *interurban railroads*, but, rather, argues the other way. In brief, it may be stated, the distinctions drawn between railroads and street railroads rest upon the fact that street railway companies usually have no need for the exercise of the power of eminent domain to secure rights-of-way because such roads are usually built upon streets and other public highways for the furtherance of the public purposes of such highways, and, of course, the street railway company does not own the right-of-way; the contrary is true of steam railroads. Street railway companies ordinarily carry only passengers, and that between points within the same town or city, while steam railroads always do, and are required by law to, carry both freight, express, baggage and passengers. These things, and not the differences in motive power, have usually been regarded as the distinctions in fact between the two classes of railroads upon which the distinction in law has been grounded. None of them exist as between a steam railroad and an interurban railroad. Both usually own their right-of-way, and secure them in the same way,—that is, by voluntary conveyance or by condemnation. Both extend between different cities or towns, and both always carry passengers, express and baggage. The steam railroad carries freight always; an interurban may do so under the laws of this State, and some of them actually do so. And while the motive power employed by each of them is different from that employed by the other, this is not a material distinction.

As said by the court, in *Malott vs. Collinsville, etc., Ry Co.*, 108 Fed., 318, "the fact that its (interurban) trains are operated by electricity instead of steam does not affect its place in the laws of the State (Illinois), as a railroad company. * * * Indeed these electrical roads, in the speed of their trains, in the distances traveled and in their capabilities for transportation, are well within the field of public utilities

hitherto occupied by the steam railroads alone. We can not conceive that these acts (eminent domain), so far, at least, as they are reasonably applicable, were not meant to cover every form of railroad that, in the march of events, answers the purposes of general transportation.

The business of steam railroads and interurbans is very similar, if not identical; their road beds are constructed along the same general plan; and what is more important in this connection, the equipment, the manufacture and repair of which is dealt with in this statute is similar in size and general character, so far, at least, as passenger, express and baggage equipment is concerned. No distinction between interurban and steam railroads is drawn in the Constitution. In fact they are treated together as *railroads*, for is not the road of an interurban constructed in this State a public highway; within the meaning of Section 2, Article 10? And is not the statute which permits the incorporation of interurban railway companies as well as the statutes which clothe them with the power of eminent domain referable for validity to Section 1, Article 10, which declares that "any railroad corporation or association, organized under the law for the purpose, shall have the right to construct and operate a railroad between any points within this State, etc.?"

The legislation of the State is unmistakably impressed with the idea that the Legislature regarded interurbans as *railroads* as witness the terms of Article 6741 (Revised Statutes of 1911), which speaks of an interurban as "any such railroad." There is, in fact, and can not be any contention that an interurban is not a railroad; the existent contention being that it is not such within the meaning of this act. The language of the act, taken literally, includes interurbans; we find no warrant for restricting the plain meaning of the language so far as to exclude interurbans. Such roads are within the spirit of the act; we think they are within the letter thereof under the authorities.

Reverting to the cases decided by our courts, in which it was held that the term "railroad" does not include a street railroad, it will be seen that the reasoning underlying these decisions does not exclude interurbans from the general classification of *railroads*, but would, rather, include them. For instance, in the Scott case it was said:

"Ordinarily, when we speak of a railroad, we mean a railroad over which freight and passengers are transported from one city or town to another."

As stated before, interurban railroads may lawfully, and do, transport both freight and passengers from one city or town to another.

In the Riley case it is said that the usual import of the term "railroad" does not embrace "railways constructed and maintained upon streets and other highways in and contiguous to cities and towns for carrying persons."

Interurban railroads, as a general proposition, are not constructed upon streets and other highways in and contiguous to cities and towns. Between the towns these railroads are constructed upon rights-of-way owned by the company in like manner as steam railroads are constructed.

Neither do we regard these Texas cases as conflicting with the general rule of construction announced by the Supreme Court of Pennsylvania

to the effect that "when the terms 'railway' or 'railroad' are used in a statute or constitutional provision, and the context is without indication that a particular kind of railroad is intended, the provision will be held applicable to every species of road embraced in the general sense of the word used." (Rafferty vs. Traction Company, 147 Pa. St., 589, and cases there cited; Philadelphia vs. Traction Co., 55 Atl., 762.)

In a very recent case, the Supreme Court of the United States, in drawing a distinction between a *street railroad* and a *railroad*, used this language:

"But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word 'railroad' will include street railroad. On the other hand, if the act was aimed at railroads proper, then street railroads are excluded from the provisions of the statute." (Omaha St. Ry. vs. Int. Com. Comm., 230 U. S., 335.)

As illustrative of the character of statutes using the term "railroad" which has been construed to include interurbans as well as steam railroads, we here take occasion to cite cases from other jurisdictions.

In McAdow vs. K. C. Ry. Co., 164 S. W., 192 (Missouri), it is held that an electric interurban is a railroad within the meaning of the Federal Employers Liability Act, which applies to "every common carrier by railroad, etc."

In Mallott vs. Collinsville, etc., Ry. Co., 108 Fed., 318, it is held that an electric interurban railway company may exercise the power of eminent domain under the statute of Illinois, which confers such power upon railroad companies.

A statute of Alabama provides that when the tracks of two railroads cross each other, the engineers and conductors must cause the trains of which they are in charge to come to a full stop within one hundred (100) feet of such crossing.

In Ry. Co. vs. Jacobs, 92 Ala., 199, this statute is held applicable to a company operating trains and cars by means of "dummy" engines from a point within a city to a point outside of the city, and in Montgomery, etc., Ry. Co. vs. Lewis, 148 Ala., 139, the other cases there cited, this statute was held applicable to street railways.

A tax statute of Pennsylvania provides that all real estate situated in the city and owned and possessed by any railroad company shall be subject to taxation for city purposes. In Railway Co. vs. Pittsburg, 104 Penn. St., 522, and cases there cited, it was held that the property of a "passenger railway" was subject to taxation under the statute. In Railroad Co. vs. Philadelphia, 89 Penn. St., 210, it is held that a "city passenger railway" is a railroad within the meaning of a statute of Pennsylvania, dealing with railroad mergers.

In Electric Co. vs. Lohe, 68 Ohio St., 101, so far as the rules of negligence are concerned and the degree of care required of it an interurban when operating its cars within a city, is a street railroad, and when operating them outside of the city, it owes the same duty as a steam railroad.

In Katzenberger vs. Lawo, 90 Tenn., 235, it is held that a "dummy"

line over which trains are drawn by a small engine for the transportation of passengers only, when operated within or without the limits of a municipality, is a railroad within the meaning of the statutes of Tennessee, prescribing certain precautions for the prevention of accidents on railroads.

In a case reported at page 442, 115 New York, it is held that a corporation for the transportation of freight and passengers by horses as a motive power over railroads in streets of cities might be formed under the general railroad act of New York.

A statute of Illinois provided that *railroad corporations* might enter into operative contracts and borrow money. In *Chicago vs. Evans*, 24 Ill., 52, it was held that a horse railway was such a railroad; the court saying: "They are in every sense of the term railroads."

In *Lieberman vs. Rapid Transit Ry. Co.*, 141 Ill., 140, it is held that an elevated railroad company may be chartered under a statute of Illinois providing for incorporation for the purpose of constructing and operating any railroad in the State

In *Clinton vs. Railroad Co.*, 37 Iowa, 61, it is held that a corporation operating a railroad between two cities by horse power is a railroad corporation within the meaning of a statute of Iowa providing that any railroad corporation heretofore organized, etc., should have the right to occupy streets and highways.

A statute of Massachusetts provided that any corporation created by authority of this State, except railroad and banking corporations might institute proceedings in insolvency. No horse railways existed at the time of the passage of the statute. Subsequently organized, they became *railroad companies* within the meaning of the statute. (*Bank vs. Railway Co.*, 13 Allen, 105.)

In *Savannah Ry. Co. vs. Williams*, 114 Ga., 416, it was held that the statute of Georgia, which made railroad companies liable to one servant for injuries inflicted by a fellow servant, was applicable to a street railway company.

A Connecticut statute provided that anyone who had furnished materials or rendered services to any railroads might acquire a lien thereon. The statute was held applicable to street railroads as well as those operated by steam power. *Egan vs. St. Ry. Co.*, 78 Conn., 291.

In *Bloxham vs. St. Ry. Co.*, 36 Fla., 519, it was held that a street railway company is a railroad within the meaning of a taxing statute of that State.

It has been held that a statute requiring all railway companies to fence their rights-of-way applies to interurban railway companies.

Hanna vs. St. Ry. Co., 81 Mo. App., 78.

Riggs vs. Francios, etc., Ry. Co., 96 S. W., 707.

Iola El. Co. vs. Jackson, 70 Kansas, 791.

For other illustrations, see

Chapter 44, Vol. 3, Elliott on *Railroads*.

Cedar Rapids, etc. Ry. Co. vs. Cummins, 125 Ia., 430.

We hold, therefore, that street railway companies are not operating "railroads" within the meaning of that term as it is used in this statute, and if the act is applicable to such companies at all it is so applicable

because of other *indicia* of legislative intent,—and this proposition will be dealt with hereinafter. We hold, however, that interurban railway companies are subject to the act because of the fact that they are operating “railroads.”

ARE THESE COMPANIES “OTHER CONCERNS” ENGAGED IN THE MANUFACTURE OR REPAIR OF RAILWAY CARS?

That the cars used by these companies are certain kinds of “railway cars,” we think there can be no dispute, under the trend of the case law of the country. As stated before, we think, also, that street railway companies fairly come within the spirit and letter of the act because they are operating railroads, and we would so hold, but for the decisions of our courts in the cases cited. And, as stated before, we think interurban railway companies do come within the scope of the act because they are engaged in operating “railroads” even in view of the same decisions. However, if we should be mistaken in both instances, there are other things in the act that remove it from the effect of these decisions and bring both of these classes of corporations within its purview irrespective of the use of the term “railroads.”

The Fellow Servant Act construed in the Riley case is expressly limited to employes of “railway corporations.” The present act goes further in this respect than did the Fellow Servant Act. This act is made applicable not alone to such corporations as may be operating “railroads” but as well to “other concerns” engaged in the manufacture or repair of railway cars. The use of positive terms in a legislative enactment should not, except in extreme cases, be ignored. The mere fact of their use indicates a positive idea in the legislative mind. The term “railroads” means one thing; “other concerns” means another or an additional thing. If the Legislature understood the term “railroad,” as contended, to mean steam railroad, and to exclude the idea of street railroad and interurban railroad, then, in that event, the most reasonable construction of the statutory effort would be that which would ascribe to the Legislature the intention to include, by the use of the term “other concern” something else than steam railroads. If it be said, as it may properly be said, that the Legislature, when it came to enact this statute, had in mind the definition of the term “railroad” given in the opinion of our courts, then the use of the other terms certainly evidence an intention to make the statute broad enough in its application to include others than steam railroads. The Legislature said the act is to apply to railroads; but it did not stop there; it said that it should apply also to “other concerns” engaged in the manufacture or repair of cars. If it be granted that street railway companies and interurban railway companies are not engaged in the operation of railroads, as that term is used, the fact remains, nevertheless, that they are “other concerns” engaged in the manufacture or repair of their cars. If they are not “railroads,” if they are not “other concerns,” then what are they? We think, and advise you, that these companies are subject to the provisions of the Act because of the fact that

they are "concerns" engaged in the manufacture or repair of cars, even if they are not included as corporations operating "railroads."

We deem it appropriate, in this connection, to call your attention to the fact that the statute in requiring "derailing devices" does not attempt to describe or specify what sort of devices are to be used except that such devices shall be provided with "private locks." We think a good deal of discretion is thus left to the companies as to what kind of devices they shall use. We think that any device, with a private lock, which is reasonably well calculated to prevent danger and injury to employes while at work upon or around cars being repaired, etc., will meet with the terms of the law.

Yours very truly,
LUTHER NICKELS,
Assistant Attorney General.

EXCLUSIVE CONTRACTS.

A contract between a railway company and a transfer company giving the transfer company exclusive right to stand its vehicles on depot grounds to solicit passengers is illegal.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JULY 1, 1913.

Hon. William D. Williams, Railroad Commissioner. Capitol.

DEAR SIR: We have your letter of recent date wherein you say:

"We are enclosing to you herewith copy of a communication addressed to the Commission by Mr. W. H. Sartain, of San Antonio, with reference to the right of the San Antonio & Aransas Pass Railway Company to grant to the Carter-Mulally Co. exclusive use of driveways in and around its station grounds.

"We would be glad to have you advise the Commission:

"1. As to the legality of the exclusive privileges such as is mentioned; and
"2. What control has the Railroad Commission, and what action may it take."

It may be stated as settled law that a railway company may make a regulation giving one individual or company the exclusive right to solicit on its trains, the transfer business of its passengers.

Lewis vs. Railway Company, 81 S. W., 111.

Railway Company vs. State, 87 S. W., 341.

Kates vs. Atlanta Baggage and Cab Co., 107 Ga., 631; 46 L. R. A., 431.

Express cases, 117 U. S., 26.

Railway Company vs. Car Company, 39 U. S., 79.

Fluker vs. Railway Company, 81 Ga., 461, 2 L. R. A., 843

Barney vs. Steamboat Company, 67 N. Y., 301, 23 Am. Rep., 115.

Jencks vs. Coleman, 2 Sumn., 221.

Barnay vs. The D. R. Martin, 11 Blatchf., 234.

Godbout vs. St. Paul Union Depot Co., 47 L. R. A., 536.

Lucas vs. Herbert, 37 L. R. A., 376.

Railway Company vs. Scovill, 42 L. R. A., 157.

It may be said also that the weight of authority is in favor of the proposition, that a railway company may grant special and exclusive privileges to particular transfer companies or persons with reference to the solicitation, etc., of transfer business *within* its depot buildings.

Godbout vs. Union Depot Co., 47 L. R. A., 532.

Old Colony R. R. Co. vs. Tripp, 147 Mass., 35.

Brown vs. Railroad Company, 75 Hun., 355.

Griswold vs. Webb, 16 R. I., 649; 7 L. R. A., 302.

Railway Company vs. Flynn, 74 Hun., 124.

Beadell vs. Eastern Counties Railroad Co., 2 C. B., N. S., 509. (An English case.)

Barker vs. Midland Railroad Co., 18 C. B., 46.

Hole vs. Digby, 27 Weekly Reports, 884.

Summit vs. State, 8 Lea, 413.

But the right of a railroad company to maintain a rule or regulation such as is described above ends at the point its passengers leave the company's charge and at the point where the railway company's right to maintain the rule or regulation ends, the common right of transfer companies and others begins.

Lewis vs. Railway Co., 81 S. W., 114.

In Godbout vs. St. Paul Union Depot Company, 47 L. R. A., 537, it is held:

"That all carriers, private and public, have a common right without discrimination to solicit patronage at such points as may be properly designated beyond the depot."

In Railroad Company vs. Langlois, 9 Mont., 419; 8 L. R. A., 765, it is held that:

"A railroad company could not grant to one person the exclusive right to use a portion of its depot platform to deliver and receive passengers and to solicit patronage: such grant being against public policy, etc., * * * all passengers in common are entitled to equal opportunities and convenience of place to approach and depart from trains; that the contract of carriage between the carrier and his passenger commences or terminates at the station, and passengers must have the right of competition among hackmen, and freedom of choice in selecting their method of transfer beyond the station."

In Kalamazoo Hack and Bus Company vs. Scotsma, 84 Mich., 194, 10 L. R. A., 819, the opinion is expressed that exclusive contracts as to depot approaches tend to establish monopolies not granted by the charter of the carrier.

Cravens vs. Rogers, 101 Mo., 247, 14 S. W., 106.

In this case it is held that a railroad company can not give one transfer company the exclusive right to use a certain approach to a depot platform, such approach being built on the right-of-way, so as to exclude other transfer companies from the use of such approach and so as to confine the teams of other transfer companies to other parts of the platform at which the chance of getting passengers is not so good as it is at the approach.

Says the court:

"If better facilities are afforded to one carrier (transfer company) than to

another * * * competition is discouraged, a monopoly created and the traveling public are apt to receive a slow, uncomfortable, slovenly, negligent and expensive service. Monopolies are obnoxious to the spirit of our laws, and ought to be discouraged. This is the spirit of our constitutional provision which prohibits discrimination in charges or facility in transportation * * * between transportation companies and individuals, or in favor of either; Article 12, Section 23, and in this case we do not think the railroad company could give the plaintiffs the exclusive privilege of approach to nearly one-half of its platform, and that the most desirable and advantageous half for securing passengers, and thereby deny it to the defendants, both being there for the same purpose and in the same business of furthering the railroad's passengers to their places of destination from the point where the railroad company landed them."

In *McConnell vs. Pedigo*, 92 Ky., 465; 18 S. W., 15, although no statute was in effect, the court held upon grounds of public policy that an exclusive contract with one hackman for platform privileges was in contravention of the rights and privileges of passengers. In the *Indianapolis Union R. R. Co. vs. Dohn*, 153 Ind., 10; 45 L. R. A., 427, is to the same effect. See also *Lindsey vs. Anniston* (Ala.), 27 L. R. A., 436, and *Lyon vs. McDonald*, 78 Texas, 71.

"Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." Section 26, Bill of Rights. Such is the spirit of our laws and reason applies this spirit to the business and property of a railway company perhaps more than its application is made to any other occupation or property for the reason that a railroad and its grounds constitute a public highway and a railway company, by virtue of its incorporation as such is a common carrier. Section 2, Article 10, Constitution. If the real property of a railway company is a public highway, it seems clear that every citizen has a right to go upon such property or to use it upon equal terms, and if a railway company is a common carrier, it seems equally clear that whatever it does it must do as a common carrier, and as a necessary corollary it must do business with every citizen who applies, upon the same terms that it does business with any other citizen.

Again, the right to authorize and regulate freights, tolls, wharfage or fares, levied and collected for the use of railways, landings, wharves, etc., devoted to public use has never been and shall never be relinquished or abandoned by the State, but shall always be under legislative control. Section 3, Article 12, of the Constitution, and all laws granting the right to demand and collect freights, fares, tolls or wharfage shall, at all times, be subject to amendment, modification or repeal by the Legislature. Section 5, Article 12, Constitution. In pursuance of this grant of authority to the Legislature, what is now Article 6670 and 6671, R. S., 1911, was enacted into law. Among other things, Article 6670, provides that it shall be unjust discrimination for any railroad to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality. This language, it seems to us, would condemn the character of contract or arrangement described in Mr. Sartain's letter, and upon principle and upon authority, as we believe, the contract, if it has the effect described, would be illegal.

In reply to your second question, we are compelled to say that we

doubt the power of the Commission to relieve the situation or to regulate the matter involved. It would seem that a suit for penalties or to restrain the performance of the contract, by the State, is perhaps the only remedy. In view of this conclusion, we desire to request that you secure from the railroad company a copy of the contract and furnish it to us at your earliest convenience.

Yours truly,
LUTHER NICKELS,
Assistant Attorney General.

RAILROADS--TRACKAGE RIGHTS--WATER CLOSETS--CONSTRUCTION OF LAWS.

Where one railway company owns a line of railroad and another railway company by contract has acquired trackage rights over the road, and receives and discharges passengers at stations on the road, each of the companies must comply with the provisions of Chapter 96, Acts of 1909, with reference to the erection and maintenance of water closets.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, AUGUST 20, 1913.

Hon. Earle B. Mayfield, Railroad Commissioner, Capitol.

DEAR SIR: Your communication to this Department of date, August 18th, presents the following statement of facts:

The line of railway extending from Whitesboro, Texas, to Ft. Worth, Texas, by way of Denton, is owned by the T. & P. Railway Company, and upon this line said company has established various stations at which it receives and delivers passengers.

By contract between the T. & P. Railway Company and the M. K. & T. Ry. Co. of Texas, the latter company has acquired the right to use said line of railroad, stations, etc., for the passage of its trains and for the receipt and discharge of passengers at the stations on the same, and the latter company operates its passenger trains over this line, and receives and discharges passengers at the various stations.

Thereupon, you propound the interrogatory as to whether or not each of these companies must comply with the provisions of Chapter 96 of the Acts of the Thirty-first Legislature with reference to the erection and maintenance of water closets at each passenger station on said line of railway.

Section 1 of said act provides that "each railroad and *railway corporation* operating a line of railway in the State of Texas for the transportation of passengers thereon" shall be required to construct and maintain in a reasonably clean and sanitary condition, suitable and separate water closets for male and female persons "at each passenger station on its line of railway." It will be noted that by the very terms of the act its operation is not confined to the company actually and absolutely owning the line of railway, but the requirement is that each *railroad* shall construct and maintain such water closets, and each *railway corporation operating a line of railway* is also required to build

and maintain water closets. There can, of course, be no question but that the T. & P. Railway Company, under the facts stated, is required to comply with this article of the statute. This would be true even if it had transferred all of its rights of operation to the M. K. & T. Ry. Co. of Texas, because it is well established that a railroad company can not transfer or lease the right to operate its road so as to absolve itself from its duties to the public without legislative authority, nor will a lease duly authorized by law release the company from a failure to discharge its charter obligations, etc., unless the law giving the power, contains a provision to that effect.

Railway Company vs. Morse and Crawford, 68 Texas, 59, and cases there cited.

Railway Company vs. Dunham, 68 Texas, 234.

A railway company which has trackage rights by reason of contract over a line belonging to another company for the carrying on of its business, such line of railroad, as to the public and third persons, is its own property.

Iron Works vs. Hurlburt, 15 N. Y., 34.

Elkins vs. Railroad Company, 23 N. H., 275.

Beale & Whyman Railroad Rate Regulation, Secs. 71 and 93.

In other words, it is operating the line of railroad. It follows therefore, that the M. K. & T. Ry. Co. of Texas must comply with this statute because of its operation of the road. (Railway Company vs. Dunham.)

The case of the State vs. Southern Kansas Railway Company of Texas, 99 S. W., 167, involved a suit against the Southern Kansas Railway Company of Texas for failure to comply with the water closet statute of 1905, the same being Chapter 133, Acts of 1905. The facts in that case disclosed that the Ft. Worth & Denver City Railway Company owned a passenger station in the town of Washburn in Armstrong county, Texas, and used said station for receipt and discharge of its passengers. By a contract between the Ft. Worth & Denver City Railway Company and the Southern Kansas Railway Company of Texas, the last named company was given the right to use said passenger station for the same purposes with reference to its own passengers. Neither company maintained water closets as required by the Act of 1905, and a suit was instituted against each of them by reason of such failure. In the suit against the Ft. Worth & Denver City Railway Company the State recovered judgment, and this judgment was plead in bar in the suit against the Southern Kansas Railway Company of Texas, the proposition being that by reason of the fact that the Ft. Worth & Denver City Railway Company owned the passenger station, the Southern Kansas Railway Company of Texas was not required to build or maintain water closets thereat, and upon this point the Court of Civil Appeals for the Second District said:

"It seems clear to us that the act under consideration required appellee (the Southern Kansas Railway Company of Texas), as well as the Fort Worth & Denver City Railway Company, to construct and maintain the facilities therein specified. Its language is: 'That each railroad and railway corporation operating a line of railway in the State of Texas for the transportation of passengers shall hereafter be required. * * *' No distinction is made

between an owner and a lessee of a line of railway. To both alike the law applies, and it seems too plain to require citation of authority that appellee cannot evade a duty required by law, upon the ground that by the terms of its agreement with the Fort Worth & Denver City Railway Company, the latter company was alone bound to perform such duty. The suit and judgment against the Fort Worth & Denver City Railway Company, therefore, does not constitute a bar to this suit."

The judgment of the Court of Civil Appeals in this case was reversed by the Supreme Court, 100 Texas, 437, but this reversal was based alone upon the fact that the Supreme Court had previously held the statute of 1905 to be unconstitutional upon the ground that it did not specify the time within which the railway companies might comply with the statute, nor did it give them a reasonable time to do so; the reversal of this judgment of the Court of Civil Appeals, therefore, in no way militates against the logic or authority of the judgment with reference to the point involved in the present matter. We believe the decision of the Court of Civil Appeals upon this point is sound, and that the same is conclusive of the question here involved; that is, that it is the duty of the M. K. & T. Ry. Co. of Texas to comply with the terms of the Act of 1909.

We do not wish to be understood, however, as saying that Texas & Pacific Ry. Co., and the M. K. & T. Ry. Co. of Texas must each construct and maintain suitable water closets at each of the stations on the joint tract. The point is that there must be erected and maintained at each of such stations water closets suitable and sanitary, and available for the use of the passengers of each of such companies. We believe that the law can be complied with by the erection and maintenance by each of these companies of separate closets, or by the joint erection and maintenance of the same in suitable capacity and condition; or that one of the companies may erect and maintain the closets and this will be a compliance with the law, if under some arrangement between the two companies the passengers of the other company have access to the closets, and the closets are large enough and in proper condition for the use of all the passengers of both companies.

Per your request, we are returning herewithin the letter enclosed in your communication to us.

Yours truly,

LUTHER NICKELS,
Assistant Attorney General.

RAILROADS—TAXATION BY CITIES.

Sidetracks are included in a rendition of certain number of miles of roadbed and appurtenances thereto. Switch engines are a part of rolling stock and not taxable by cities.

Statutes construed: Articles 7524 and 7525, Revised Statutes.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MAY 29, 1913.

Mr. J. A. McSpadden, City Assessor and Collector, Greenville, Texas.

DEAR SIR: This Department is in receipt of your communication reading as follows:

"The railroads have rendered and they call for so many miles roadbed and appurtenances thereto, which includes 'depot and depot grounds.'

"For instance, the M., K. & T. renders six miles at \$180,000, and in fact they have six miles main line and 10.587 sidings, making a total of 16.815 miles in the corporation, which has been measured by our city engineer and sworn to, and I contend they should be taxed but not for as much as the main line per mile. They do not give in their switch engines and nothing of that sort.

"Please give us your opinion in reference to taxing sidings and engines that stay here all the time, together with their depot and depot grounds."

Replying thereto, we beg to say that the manner of the rendition of railroad property is set out in Article 7524 and 7525, R. S., 1911, and with reference to the rendition of the roadbed the requirements thereof are set out in Section 2 of Article 7524. Section 2 reads as follows:

"The whole length of the railroad and the value thereof per mile, which values shall include right of way, roadbed, superstructure, depots and grounds upon which said depots are situated, and all shops and fixtures of every kind used in operating the said road."

Under this subdivision it is the duty of the railroad company to render a sworn statement of the whole length of the railroad and the value thereof per mile, which valuation shall cover right-of-way, roadbed, superstructure, depots and grounds and shops and fixtures used in operating said road, and we take it from your letter that the railroad company is correct in its rendition of six miles of main line, which together with the appurtenances thereto include depot and depot grounds, the road has rendered at a valuation of \$180,000. You state that in addition to the main line one of your roads has 10.587 miles of siding, making a total of 16.815 miles in the corporate limits, and you wish to know if in addition to the six miles of main line, you would be authorized to tax the siding.

It will be noted that the requirement of Section 2 of Article 7524 above cited, requires a statement "of the whole length of the railroad and the value thereof per mile, which valuation among other things shall include the valuation of the superstructure" and shall also include the roadbed. It has been held that the word "roadbed," when used in reference to railways has a well understood meaning. It is the bed or foundation on which the superstructure of the railway rests, and the superstructure is sleepers or ties, rails or fasteners. This of course,

includes the sidetracks which form a part of the railway. 7 Words and Phrases, page 7256 and the cases there cited.

We are therefore of the opinion that the sidings or sidewalks of a railroad constitute and are a part of the railroad proper, and the length of the sidings should not be added to the length of the main line track within your corporate limits in order to arrive at the number of miles to be taxed. We do not mean to hold, however, that such sidings should not be taxed, but on the contrary they should be taken into consideration in arriving at the value per mile of the railroad, just as much so as should the depots and grounds and shops and fixtures of every kind used by the road. In other words a railroad is taxed in accordance with the number of miles of the main line track and the valuation placed upon the main line track per mile is arrived at by considering the value of the roadbed, the superstructure, meaning the track and sidetrack, the right-of-way, the depots and grounds and shops and fixtures of every kind used in connection with said road.

We are therefore of the opinion that you would not be authorized to tax the sidings of such roads separate and apart from the main line track, but that same should be taken into consideration in arriving at the valuation placed upon such property, and if the sum of \$180,000 is not a sufficient sum to cover the valuation of the entire property within your city limits, then your Board of Equalization should raise the valuation taking into consideration all of the property of the railroad, including switches, but not including the rolling stock that may be within your corporate limits, which will be hereinafter discussed.

With reference to the taxation of the switch engines, which you say remain in your city all the time, we beg to say that under the provisions of Article 7525, R. S., that all of the rolling stock of a railroad company is rendered by said company for taxation to the assessor of the county in which its principal office is situated, the company giving in such statement the number of miles of roadbed in each of the counties through which the road runs. This statement is passed upon by the Board of Equalization of that county and thereafter certified by said Board to the Comptroller, whose duty it shall be to apportion amount of such valuation among the counties in proportion to the distance such road shall run through such counties, and certify such apportionment to the assessors of such counties.

There is no provision in our law for any further subdivision of the assessment of the rolling stock to any subdivision of a county, such as precincts, school districts or cities and towns incorporated, and we are of the opinion, and so advise you, that the city would have no authority to tax the rolling stock of a railroad, and included in this would be the switch engines stationed in a city. While these switch engines are more or less permanently located within a town, yet they are nevertheless a portion of the rolling stock of the company, and are changed from time to time and from place to place on the line of the railway, and we think it would come clearly within the definition of rolling stock of the company and should be rendered by them along with all other rolling stock to the assessor of the county in which the home office of the road is located, and that they would not be subject to taxation in any city

in which they might happen to be located on the first day of January of any year. It is true that a switch engine might remain within a city for a number of years and indefinitely, yet at the same time, we do not think that fact would deprive it of its character as rolling stock within the meaning of the taxing statute, and we therefore advise you, that in our opinion, the city of Greenville would not have authority to tax switch engines located within its corporate limits.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OPINIONS ON VARIOUS SUBJECTS OF TAXATION.**OCCUPATION TAX—INTERSTATE COMMERCE—PEDDLING—SOLICITING ORDERS.**

1. The term "peddler" defined.
2. A license tax may be constitutionally imposed upon peddlers because they are not engaged in interstate commerce.
3. Section 39 of Article 7355, Revised Statutes, 1911, is invalid in so far as it attempts to impose an occupation tax upon the soliciting of orders for goods for future delivery where the execution of the contract of sale requires the transportation of the goods sold from one State into another, because such a tax is an imposition upon interstate commerce and prohibited by the Federal Constitution.
4. The fact that goods ordered are shipped in bulk to and delivered by the salesman of the respective purchasers is immaterial if the transaction has in other respects the character of interstate commerce.
5. However, if for any reason goods ordered are not delivered and are left on hand, a resale thereof would not be protected as interstate commerce, and such salesman would be amenable to the license tax laws of this State.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, FEBRUARY 24, 1914.

Hon. Robert J. Sullivan, County Attorney, Conroe, Texas.

DEAR SIR: Under date of the 17th inst. you make the following statement to this Department with reference to a certain business that is proposed to be conducted in this State:

"The Aluminum Utensil Company is a Pennsylvania corporation, having its manufacturing plant at New Kensington, Pa., at which latter point alone it manufactures cooking utensils, which it sells in various States of the Union, the business being conducted in the following manner: This company employs traveling salesmen who solicit orders in the different States, which are forwarded to the company at Pittsburgh (except that some orders are forwarded to East St. Louis, Ills., and Portland, Oregon, to be filled from a stock of goods kept at those points), the orders are filled and the goods shipped to the salesmen to be delivered to the respective purchasers. No goods are sent to the salesmen except to fill orders actually received, and the company carries no stock of goods in any States except Pennsylvania, Illinois and Oregon. The said Aluminum Cooking Utensil Company never sends any goods into Texas until they have been ordered by the customer."

The question you ask is whether or not the business to be pursued, as outlined by you, will be protected as interstate commerce, or would it be subject to a license tax either as peddling or otherwise.

The business you describe is not that of peddling. The courts of the country have uniformly held that a license tax may be constitutionally imposed upon peddlers because not engaged in interstate commerce.

Emert vs. State of Missouri, 156 U. S., 296.

Commonwealth vs. Harmel, 166 Pa. St., 89.

Commonwealth vs. Dunham, 191 Pa. St., 73.

Rash vs. Farley, 91 Ky., 344.
 State vs. Gauss, 85 Iowa, 21.
 State vs. Agee, 83 Ala., 110.
 Hall vs. State, 39 Fla., 637.
 State vs. Gorham, 115 N. C., 121.

The term "peddler" has many varieties of definitions, but the popular definition is:

"A small retail dealer who carries his merchandise with him, travels from house to house and from place to place, either on foot or horseback or in a vehicle drawn by one or more animals, exposing his goods for sale and selling them." *Randolph vs. Yellowstone Kit*, 84 Ala., 472.

Also see numerous authorities cited in *Words and Phrases*, Vol. 6, p. 5261.

This definition of a peddler has been applied in numerous cases, among others the following, which show clearly the nature of the employment that is called peddling:

"A peddler is a dealer or trader in small wares, who has no permanent place of business, but carries his wares with him from place to place or from house to house. He is one who buys to sell again, whose gains are the profits realized on small sales." 12 L. R. A., 624.

"A peddler is an itinerant who goes from place to place and from house to house carrying for sale and exposing to sale the goods, wares and merchandise he carries. He generally deals in small and cheap articles, such as he can conveniently carry in a cart or on his person." *Commonwealth vs. Farnum*, 114 Mass., 267.

"A peddler is one who sells anything having value, bought by him and sold from place to place in small quantities." *Roy vs. Schuff*, 51 La. Ann., 86.

"Or one who carries about with him the article of merchandise which he sells; that is to say, the identical merchandise he sells he has with him and delivers at the time of sale." 50 La. Ann., 574; 52 La. Ann., 694.

"The term 'peddler' includes anyone who goes from place to place to peddle or retail goods, wares or other things, without regard to the distance between the different places visited in so doing." *West vs. City*, 65 S. W., 120.

Rapalje defines a peddler to be:

"A person who carries goods from place to place for sale."

While Webster defines a peddler to be:

"A traveling trader; one who carries about small commodities upon his back, on a car or on a wagon and sells them."

"By peddling we understand to go around from house to house or from customer to customer and sell goods." *Du Boystown vs. Rochester*, 9 Pa. Co. Ct. R., 442.

It is useless to quote other definitions, as they are all to the same effect and mean substantially the same. It is therefore easy to determine that the business you describe is not that of peddling.

The only statute in this State levying a tax on the business of soliciting orders for sales such as you describe is Sec. 39 of Art. 7355, Acts of 1911, which reads as follows:

"From every person, firm or association of persons selling on commission, if in a city of more than ten thousand inhabitants, fifty dollars; if in a city or town of less than ten thousand inhabitants, twenty-five dollars. This article

is intended to cover every person, firm or association of persons selling on samples only, and who do not carry any stock of merchandise or anything else on hand; provided, that this tax shall not apply to commercial travelers or salesmen making sales or soliciting trade from merchants."

It seems that this occupation tax is levied on every person who sells on samples, to people other than merchants, as commercial travelers or salesmen soliciting trade from merchants are specially excepted.

The question is, as to the validity of this statute, in so far as it applies to traveling solicitors for sale of goods for future delivery where the execution of the contract of sale requires the transportation of the goods sold from one State into another.

In our opinion such a tax is an imposition upon interstate commerce and prohibited by the Federal Constitution in so far as it applies to the soliciting of orders for the sale of goods to be transported from one State into another.

Mr. Tiedman, in his work entitled "State and Federal Control of Persons and Property," Vol. 2, Sec. 218, among other things, states the rule of law governing this subject as follows:

"But, when the traveling salesman receives an order for goods, the executory contract of sale is made by him on the spot, to be performed, however, subsequently by the transportation of the goods to and their delivery at the place of sale, and if the principal and the goods are outside the State in which the sale was made the transaction is interstate commerce. The levy of a license tax upon such a transaction would necessarily be a tax upon interstate commerce, which is prohibited not only by the Interstate Commerce Clause of the United States Constitution, but also by Article 1, Section 10, of the same Constitution, which prohibits the imposition of a State tax upon imports and exports. * * * But the imposition of a license tax upon a traveling salesman who solicits and receives orders for goods for future delivery is void, because he is engaged in interstate commerce in every case in which the performance of the contract of sale involves the transportation of goods from one State to another or the transfer of title to goods which are located in some other State than that in which the sale was made."

In support of this doctrine the author has cited numerous authorities in Note 2, at page 1029.

There can scarcely be a doubt, in the light of these authorities, that the business you describe is interstate commerce, and that the same is exempt from the occupation tax imposed by the statutes of this State. The authorities cited by you in presenting your question fully sustain this proposition, and in order that the collection of authorities you have made may not be lost I will reproduce them in this connection, as they are pertinent to this inquiry.

"Interstate commerce consists of intercourse and traffic between citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities." *Barnhard Bros. vs. Morrison*, 87 S. W., 376.

"The sole power to prescribe rules by which interstate commerce shall be governed is vested in Congress alone." U. S. Constitution, Art. 1, Sec. 8.

"A foreign corporation which manufactures or deals in goods which are the subject of commerce may send its agents into another State to solicit orders for the sale of goods without being required to pay a license tax or to establish resident agencies or file certificates required by the laws of the domestic State."

Brennan vs. Titusville, 153 U. S., 289; Mitler vs. Goodman, 91 Texas, 41; Gale vs. Finkelstein, 21 T. C. A., 241; Commonwealth vs. Hogan (Ky.), 74 S. W., 737.

"A State can either directly nor indirectly place a burden by way of taxation upon interstate commerce." G., C. & S. F. Ry. vs. Dwyer, 75 Texas, 572.

"Under an Act of 1889, providing that every person peddling cooking stoves or ranges shall pay an occupation tax, a person acting as manufacturer's agent, taking orders for stoves to be shipped from the factory in another State in three separate parcels and to be delivered and set up by another employe of the manufacturer, is within the protection of the Interstate Commerce Clause of the Federal Constitution." Harkins vs. State, 75 S. W., 26. Also to the same effect see Ascher vs. Texas, 128 U. S., 129; Robins vs. The Shelby Taxing District, 120 U. S., 489; Hopkins vs. U. S., 171 U. S., 602; Cohns & Sons Mfg. Co. vs. Rosenbaum, 45 S. W., 333; Bateman vs. Western Milling Co., 1 T. C. A., 90; Starch Co. vs. Bateman (T. C. A.), 22 S. W., 771; Le Loup vs. Port of Mobile, 127 U. S., 640.

In your statement of facts it does not appear whether the goods are to be shipped direct to the purchaser or to the salesman to be delivered; neither does it appear whether the goods are to be shipped in separate packages according to each order or in quantities sufficient in amount to fill the orders to be by the salesman unpacked, assorted and delivered according to each order respectively.

We believe, however, that these considerations are immaterial and would not of themselves change the interstate character of the transaction if in other respects it belonged to that category. Mr. Cook, in his work on the commerce clause of the Federal Constitution (Sec. 75), in discussing this phase of the subject, states the law as follows:

"And commonly, though not necessarily, the restriction is in the form of a tax or fee upon such agent; that is to say, imposed upon him as a condition of entering into such a contract of sale, a tax upon the seller being justly regarded as in effect upon the article sold. As in the case of the restrictions just considered (a license tax), the imposition of such a restriction upon the contract of sale is clearly established to be invalid, and it is none the less invalid because of the property in such article not passing to the buyer until delivery to him; thus, upon payment of the price. Nor does it ordinarily make any difference that transportation is not directly from the seller to the buyer; thus it may be directly from the seller to his agent in the State, and thereafter from the agent to the buyer. Nor does it make any difference, as commonly happens, for convenience sake, the articles are transferred 'in bulk' to the agent, who thereafter 'breaks' the bulk and makes distribution of the articles therein contained to the respective buyers."

The Caldwell case, 187 U. S., 622, was where a Chicago Portrait Company, of Chicago, Ill., employed agents to sell pictures and picture frames in North Carolina; the portrait company shipped large packages of pictures and frames for which it received orders from its soliciting agent, the consignment being made to another agent of the company also of Greensboro, the shipment being addressed to the Chicago Portrait Company. The receiving agent broke the bulk, placed the pictures in their proper frames and delivered them to the respective purchasers. The agent thus delivering was arrested for failing to comply with an ordinance of the City of Greensboro, which imposed a license tax on the business of selling and delivering pictures, frames, etc. The Supreme Court held that this ordinance as applied to the facts of this case was

invalid in that it was an interference with interstate commerce, and among other things the court said:

"Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to State taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail and were received at the railroad station by an agent, who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate."

The case of *Dozier vs. Alabama* (1909), 218 U. S., 124, called in question a statute of Alabama that imposed a license tax for soliciting orders for the enlargement of photographs or for picture frames, on all persons not having a permanent place of business in the State. The Chicago Crayon Company, with its place of business in Chicago, solicited orders in Alabama without paying this tax. The orders were given for the portraits and included an option to purchase the frame in which the portrait should be placed. The portraits and frames were sent to the agents of the company in Alabama, and he made deliveries and collected for the same. The agent was tried and fined in the State court for violating this statute, and the Supreme Court of Alabama, while admitting that the dealings concerning the portraits were interstate commerce, sustained the conviction on the ground that the sale of the frame was wholly a local matter. The Supreme Court of the United States reversed the Alabama court on the ground that the attempt to apply the statute in question was in violation of the commerce clause of the Federal Constitution. While at the time the orders were given the purchaser did not contract to take the frames, but merely obtained an option to take them, and on this point the court says (pp. 127-8):

"No doubt it is true that the customer was not bound to take the frame unless he saw fit, and that the sale of it took place wholly within the State of Alabama, if a sale was made. But, as was held in *Rearick vs. Pennsylvania*, 203 U. S., 507-512, what is commerce among the States is a question depending upon broader consideration than the existence of a technically binding contract or the time and place where the title passes."

The case of *Rearick vs. Pennsylvania*, 203 U. S., 509-513, presented the following facts: An Ohio corporation employed an agent to solicit retail orders for the sale of groceries in the State of Pennsylvania. When the company had received a large number of orders it filled them at its business place in Columbus by putting up the objects of the several orders in distinct packages and forwarded them to the agent by rail addressed to him for A, B, C, etc., the respective persons giving the orders. The company kept the orders but kept no book accounts with the customers, looking only to their agent. This agent alone had authority to receive the goods from the railroad, and when received by

him he delivered them, as was his duty, to the customers and made collection and forwarded the same to his principal. The customer had the right to refuse the goods if not equal to the sample shown to him when he gave the order. In cases of non-delivery the defendant returned the goods to Columbus. No shipments were made to the defendant, except to fill such orders, and no deliveries were made by him except to the parties named on the packages. In the case of brooms they were tagged and marked like other articles according to the number ordered, but they were then tied together into bundles of about a dozen, wrapped up conveniently for shipment. The agent was prosecuted under a State law imposing a license tax, and his defense was that the State law was invalid in that it was an imposition upon interstate commerce prohibited by the Federal Constitution. In disposing of the case the court, among other things, said:

"It will be seen from the insertion of the statement concerning the brooms that a ground relied upon by the prosecution to avoid that conclusion was that the goods, or at least this part of them, were not in the original packages when delivered, and that therefore the case did not fall within decisions last cited."

Under the facts stated above the Supreme Court held that the law of Pennsylvania in question did not apply to these transactions, and that the same were protected as interstate commerce, and that the license tax in question was an interference therewith.

We therefore conclude that whether the goods are shipped to the purchasers direct or to the agent for distribution, or whether each order was bound into a bundle separately and tagged with the name of each purchaser or in some other way to disassociate it from others, or whether the quantity, representing the aggregate of orders, is sent to the salesman to be by him separated and the amount of each order assembled and delivered, become and are immaterial considerations, and that the absence or existence of either of these elements would not change the nature of the transaction, if it in other respects had the nature of interstate commerce.

Another material matter not mentioned by you in this: That is, in your statement nothing is said as to the method, if any, of disposing of goods that are not accepted by the purchaser, or where for any reason goods are left on hand undelivered.

If goods left on hand and not delivered are to be returned by the salesman or agent to the manufacturer, no difficulty is presented, but if the salesman or agent under such circumstances is authorized to sell such left-overs, he would clearly be amenable to the tax laws of this State, because under such circumstances the resale would not be, and could not receive protection as interstate commerce.

This proposition seems to follow as a necessary corollary from the general principles controlling this subject, but the following case seems to be directly in point. In the case of *State vs. Cohen*, 70 Pac., 600, 65 Kan., 849, the defendant, an employee of a wholesale liquor house located at St. Joseph, Mo., was engaged in soliciting orders for the sale of intoxicating liquors in the State of Kansas. When such orders were received they were forwarded to the house, and if approved the

liquors would be shipped to each person ordering respectively. In the course of the business so conducted often persons ordering would fail to pay and receive the goods, in which event they would remain stored at the depot until another order corresponding in amount and character to the goods shipped and left over was made, and thereupon it was sought to fill the latter order with these left-over goods. In disposing of this case the court said:

"Whatever may be the right of the defendant under the law as a traveling salesman engaged in soliciting orders for a house located in a foreign State, where such orders are received, accepted and filled in such State, and liquors ordered and delivered to a common carrier for transportation into and delivery to the purchaser in this State, the transaction here shown can not be justified in law. It constituted an unlawful sale and violation of the law."

If, therefore, in the process of conducting the business outlined in your letter any goods should be left over and not delivered to the person ordering the same and not returned to the company, but should be sold to other purchasers subsequently found, this would clearly not be interstate commerce, and the salesman or agent would be taxable and amenable to a criminal prosecution for failure to pay the tax and obtain the license.

It is the opinion of this Department, and you are so advised, that the pursuit of the business described in the first paragraph of your communication quoted herein is that of interstate commerce, and that those soliciting orders for sales under the circumstances, as mentioned, will be exempted from any occupation tax imposed by the statutes of this State, for the sufficient reason that the same is interstate commerce pure and simple as adjudicated over and over again in similar cases.

Yours very truly,

B. F. LOONEY,
Attorney General.

OCCUPATION TAX ON OIL WELLS.

(Article 7383, Revised Statutes, 1911.)

The tax provided for by Article 7383 of the Revised Civil Statutes is an occupation tax levied upon the occupation of owning, controlling or managing oil wells, and is not a tax on the products of oil wells.

A person who owns, controls or manages a producing oil well must pay the occupation tax on the total amount of the oil produced from the well, and if the well or the land on which the well is situated is leased by the person operating the well on a royalty basis, he paying for his lease a certain per cent of the total amount of the oil produced, the person managing or operating the well must report the total amount of the oil produced from the well and must pay tax on such total amount of the oil produced from the well without deducting from the amount reported or from the amount by which the tax is measured the percentage of the oil which is paid as royalty or for the lease.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 24, 1914.

Hon. E. B. House, State Revenue Agent, Austin, Texas.

DEAR SIR: In your letter of February 12th to this Department you call attention to Section 15, Chapter 18, of the Acts of the Called Session

of the Thirtieth Legislature, and you desire to know whether an oil producer leasing land on a royalty basis and paying for his lease one-fourth or one-eighth of the total amount of oil produced, should report the total amount of oil produced or three-fourths or seven-eighths, as the case may be, in his quarterly report.

That portion of the Act of the Thirtieth Legislature to which you refer is now Article 7383 of the Revised Civil Statutes. This article is a re-enactment of Section 13 of an act of the Twenty-ninth Legislature. (See General Laws of 1905, p. 367.) This section of the Act of 1905 is almost identical with Article 7383 as enacted in 1907. The Act of 1905 was construed in the case of Producers Oil Company vs. Stephens, 99 S. W., 158. In that case the contention was made that the tax levied by the law was a tax upon the products of an oil well, but the court held contrary to this contention and held the tax to be an occupation tax, saying: "In our opinion the tax is not upon the gross products of the oil wells but upon the occupation of owning, controlling or managing oil wells producing oil; and the amount of the tax is measured by a percentage of the market value of the gross products." This decision of the Court of Civil Appeals was expressly approved by the Supreme Court in the case of Texas Company vs. Stephens, 100 Texas, 628, 103 S. W., 481. Since, as above stated, the language of Article 7383 is practically the same as the language of the section of the Acts of 1905, construed in the case above cited, it follows that the tax levied by Section 7383 is an occupation tax on a person or corporation producing oil and is not a tax on the products of oil wells. In fact, Section 7383 on account of some changes in the language is more clearly an occupation tax than was the section of the Act of 1905 above referred to.

Article 7383 provides that every individual, corporation, etc., "which owns, controls, manages or leases any oil well within this State" shall make "a quarterly report showing the total amount of oil produced during the quarter next preceding and the average market value thereof during said quarter," and further provides that such individual, corporation, etc., shall pay to the State Treasurer an occupation tax "equal to one-half of 1 per cent of the total amount of oil produced at the average market value thereof as shown by said report." It clearly appears from the language used in this act that the tax is imposed upon the person or corporation which is engaged in producing the oil from the well whether the well and the land on which it is situated is owned by the person or corporation operating it or producing the oil or whether the well is on leased land. It is the occupation of producing oil that is intended to be taxed. The person who owns the land on which the well is situated and leases it to the producing person or company for a certain percentage of the oil produced, or for a royalty, is not engaged in the business of producing oil. The royalty is in effect merely rental for the use of the land. As said in the case of Raynolds vs. Hanna, 55 Fed., 783, "Royalty is the most appropriate word to apply to rental based on the quantity of coal or other mineral that is or may be taken from a mine."

We therefore advise you that an oil producer who leases land on a

royalty basis and who pays for his lease a percentage of the total amount of oil produced should report under the terms of the statute above referred to the total amount of the oil produced and should pay taxes measured according to the terms of the statute by the total amount of the oil produced.

Yours truly,

G. B. SMEDLEY,
Assistant Attorney General.

OCCUPATION TAXES—TAX ON OIL WELL COMPANIES.

Statutes construed: Article 7383, Revised Civil Statutes, and Chapter 173 of the General Laws of the Thirty-third Legislature, Regular Session.

The occupation tax provided for by Article 7383, Revised Statutes, on all persons owning, controlling or leasing oil wells applies to persons who lease land from the State under Chapter 173 of the General Laws of the Regular Session of the Thirty-third Legislature for the development of oil.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MAY 9, 1914.

Hon. J. T. Robison, Commissioner of General Land Office, Austin, Texas.

DEAR SIR: In your letter of May 5th you desire to know whether a person operating and developing oil on land owned by the State under a lease from the State for that purpose is liable to pay the tax of one-half of 1 per cent of the total amount of oil produced.

Replying thereto we beg to advise you that in the opinion of this Department such person is subject to the tax.

Article 7383, Revised Statutes, provides in substance that every individual, company or corporation which owns, controls, manages or leases any oil well within this State shall pay an occupation tax equal to one-half of 1 per cent of the total amount of the oil produced. The language of this statute is sufficiently broad to include a person or corporation which owns or operates an oil well on land leased from the State for the purpose of developing oil. It is well settled that the tax imposed by this article is an occupation tax measured by the amount of oil produced and is neither a tax on the oil nor a tax on the land. See *Producers Oil Co. vs. Stephens*, 99 S. W., 157; *Texas Co. vs. Stephens*, 100 Texas, 628, 103 S. W., 481.

The person who leases land from the State under the Act of the Thirty-third Legislature for the purpose of producing oil is engaged in the occupation of producing oil, as is any person who leases land from an individual.

Under the act of the Thirty-third Legislature a lessee pays to the State \$2.00 per acre as rental, and in addition thereto he pays a royalty of one-eighth of the value of the gross production of oil. This is very similar to the arrangement usually made when a person leases land from an individual for the purpose of producing oil. In addition to this there is nothing in the act of the Thirty-third Legislature showing

any intention on the part of the Legislature to exempt from taxation persons operating oil wells on land leased from the State.

Very truly yours,

G. B. SMEDLEY,
Assistant Attorney General.

TAXATION—OCCUPATION TAX—LOANING MONEY—CORPORATIONS.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 1, 1913.

Hon. John A. Bitter, San Antonio, Texas.

DEAR SIR: We have examined the article to which we presume you refer, that is, Section 28 of Article 7355 of the Revised Statutes of 1911, which provides for the collection of an occupation tax in the following language:

"From every person, firm, or association of persons loaning money as agent or agents for any corporation, firm or associations of persons, either in this State or out of it, an annual occupation tax, etc."

It appears from the wording of this article that in order to subject the concern to an occupation tax it must either be a corporation, firm or association and the tax would not be levied upon an agent who made loans for an individual. However, it would be the duty of the tax collector to ascertain the exact facts in each case, that is, to find out from the examination of the instrument of record or from any other source of information available whether or not the money loaned was actually money belonging to some individual or belonging to a firm or association of persons or a corporation.

We think you could easily ascertain this fact as there are not many people in this State possessing individually a very large sum of money which they are hiring agents to loan for them, and it might be that certain agents are seeking to evade the operation of the law by claiming to loan for individuals, when, in fact, they are loaning for some firm, corporation, or association of persons, and, as stated above, it devolves upon the tax collector to ascertain the facts, and if the loan is really made for some firm, corporation or association of persons, they should be required to pay the tax.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

TAXATION—CLUBS—OCCUPATION TAX.

Clubs operating pool and billiard tables in their club rooms are liable for the occupation tax levied by Article 7355 (Revised Statutes) and Section 8 thereof.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, SEPTEMBER 17, 1913.

Hon. John F. Shelton, County Attorney, Austin, Texas.

DEAR SIR: In your communication of September the 10th, you

state that the Elks, Eagles, Austin Club, and other social clubs of Austin, Texas, each operate in connection with its club pool and billiard tables for the exclusive use of its members, and for which no fee is charged, and that each of these clubs sells whisky, beer, cigars and cigarettes to its members which are paid by such members ordering the same. You desire to know if the pool and billiard tables run and operated in said clubs are liable to the occupation tax levied by Article 7355, Revised Statutes of 1911 and Article 7355, Section 8. We assume that each of the above named clubs is operating under the laws of this State as corporations, which presents the question if the corporations are liable to the same burdens that are placed upon persons, firms, companies, or association of persons, pursuing the occupation named in Section 8.

We call your attention to Article 7355 of the Revised Statutes of 1911:

"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":

And Article 7355, Section 8, reads as follows:

"From every billiard or pool table, or anything of the kind used for profit, twenty dollars; and any such table used in connection with any drinking saloon or other place of business where intoxicating liquors, cigars or other things of value are sold or given away, shall be regarded as used for profit."

We believe, and so advise you, that every corporation, in the contemplation of this statute, levying an occupation tax as such firm, company or association of persons would make them liable for pursuing the occupation designated in Article 7355. We believe that every club which undertakes to operate a billiard or pool table is liable for the occupation tax upon such pool and billiard table where same is operated in any drinking saloon or other place of business where intoxicating liquors, cigars, or other things are sold or given away which, in the terms of the statute, compels them to be regarded as used for profit.

As we understand the law, its effect is to authorize corporations to operate under certain provisions of the statute with certain granted powers. We are of the opinion that there is no provision of law which would authorize a concern to be incorporated for the purpose of maintaining pool and billiard tables, or which would give a corporation the authority to maintain pool and billiard tables. However, if we are mistaken in this, we are sure that there is no provision of law which would exempt pool and billiard tables from all the burdens of taxation placed upon them when they are operated by a corporation.

The government has laid a burden upon pool and billiard tables, and it does not occur to us that it should be so construed that a less burden should be placed upon the corporation which operates the pool and billiard tables than is placed upon the individuals who operate them. In our opinion it is just as obligatory for the corporation to pay the occu-

pation tax as it is for them to pay an ad valorem tax on pool and billiard tables.

We have not been able to find any expression of a court upon this direct question, but we are of the opinion that it was the intention of the lawmakers to place the occupation tax burden upon corporations as well as upon individuals, and we advise you that each of the clubs mentioned by you would be liable for an occupation tax levied upon billiard and pool tables under the provisions of the articles above cited.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

TAX ASSESSOR—POLL TAXES.

Tax assessor is allowed compensation of five cents for poll taxes actually assessed by him in person.

He is not allowed five cents for poll taxes brought forward on the unrendered rolls.

Construing Articles 7503-4-5-9-46-49-50-51 and 83.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, NOVEMBER 7, 1913.

Hon. W. P. Lane, Comptroller of Public Accounts, Building.

MY DEAR SIR: We have the following inquiry from you:

"In the assessment of the taxes for the county of Bexar, in the year 1912, the tax assessor of said county reported to this Department that he had assessed 7267 polls; these polls having been rendered by the taxpayers themselves. On his unrendered rolls he assesses as unknown 18,372 polls. We have examined the statutes and are unable to find where the assessor is authorized to assess a poll himself, and reported the same as unrendered. The effect of this character of unknown renditions can be seen in the collector's report, wherein he returns 13,341 of this unrendered list of poll taxpayers as delinquent, and the collector assesses and collects 4835 polls. Thus you can see that the State has paid out five cents each for the assessment of these 13,341 poll taxpayers, and has also paid the collector for assessing 4835 polls. In other words, the State paid for the assessment of 30,474 poll taxpayers in Bexar county, while the actual collections, according to the sworn report filed in the Department by the tax collector, was 17,378.

"For the year 1913 the same assessor has reported 8296 polls rendered by the individual poll taxpayers, and 12,032 rendered by the tax assessor on his unrendered roll. The question which I would like for you to advise me is as to whether or not I, as Comptroller, would be justified in paying to the assessor of Bexar county a commission on this unrendered roll of taxpayers assessed in the manner in which the assessor himself personally explained to you today. My information is that the assessor's deputies in this county call at the several residences in said county and ascertain from the best information available the names of all parties who reside at said residences between the ages of twenty-one and sixty, who are subject to a poll tax. This information is carried back to the assessor himself, who afterwards enters the name upon an unrendered poll tax roll and reports the same into this Department."

In answer thereto, we beg to advise you that under the subject of taxation, Article 7503, designates property that is subject to taxation.

and Article 7504 defines what real property includes, and 7505 defines what is meant by personal property. Without copying these several articles, we would call your attention to the fact that under this chapter, for the convenience of the tax assessor, the property is divided into real and personal property. Article 7509 describes how real property should be rendered; Article 7546 requires all taxpayers to make oaths to renditions; Article 7549 describes a condition when the taxpayer is absent; 7550 when he refuses to list his property; 7551 proclaims the duty of the tax assessor in both cases in the following language:

"In all cases of failure to obtain a statement of real and personal property from any cause, it shall be the duty of the assessor of taxes to ascertain the amount and value of such property and assess the same as he believes to be the true and full value thereof: and such assessment shall be as valid and binding as if such property had been rendered by the proper owner thereof."

Article 7583 provides, among other things, for pay for assessing poll taxes in the following language:

"* * * and for assessing the poll tax five cents for each poll, which shall be paid by the State."

Outside of the mention of the compensation to be paid the tax assessor for assessing a poll tax there is nothing in the statute which contemplates that it would be his duty to make an assessment of the poll tax. However, we will assume that by reason of the fact the Legislature provided a compensation for assessing a poll tax, it meant to authorize the assessment of such poll tax. But we find no provision of the statute which would authorize the assessment of a poll tax in any other manner except in person. The provision of the statute authorizing the assessment of personal property in the absence or refusal of the party to render same by its language does not apply to poll taxes, and the fact that there could be no reason for the assessment of a poll tax, other than the mere convenience of having same rendered with other property so that in the payment of the tax it would be convenient to pay all taxes together.

The only authority for assessing personal property or real estate, in the absence of the owner, is derived from the statute, and, there being no statute which would authorize the assessment of the poll tax in the absence of the person liable to pay same, we conclude that in order to entitle the tax assessor to compensation for assessing the poll tax it must be done in person, and that he would have no authority in law to make a rendition of the poll tax as he does in case of failure or refusal to render property taxes.

We, therefore, advise you that where the assessor brings up a list of poll taxes on the unrendered roll that you would not be authorized to pay him the five (5) cents provided for as compensation. He is only entitled to compensation for the poll taxes actually assessed in person.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

COUNTIES—TAX ASSESSOR—COMMISSIONS.

The tax assessor of Nueces county is entitled to assess the taxes of Kleberg county, but his commissions should be figured on the combined assessment of the two counties.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, DECEMBER 23, 1913.

Hon. W. P. Lane, Comptroller of Public Accounts, Capitol.

DEAR SIR: We have the following inquiry from you:

"The act of the Thirty-third Legislature creating Kleberg county out of Nueces county makes no reference to the assessor's commission. General compensation for the assessor is covered by Article 7583, which is calculated upon a graduating basis, the assessor receiving 5 cents on each \$100 of property assessed for the first two million dollars or less, 2½ cents on all sums over two million dollars and less than five million, and 1 7-10 cents on all sums over five million dollars. Consequently, you can readily see the difference in the assessor's commission when calculated separately upon the assessed valuation of each county and when calculated collectively as if the total valuation was covered by one county."

It seems that from the above statement that your Department is in doubt as to whether or not it would be authorized to calculate the assessor's commission separately upon the assessed valuation of each county. In reply to your inquiry we advise you that Section 7 of the act creating the county of Kleberg provides that:

"The tax assessor and collector of the county of Nueces out of which the county of Kleberg is here created shall assess and collect the State and county and district taxes, if any there be, on all property subject to taxation in said Nueces county for the year 1913 and previous years *in the same manner as if no new county had been created by this act*, and said assessor and collector until said tax for the year 1913 and previous years are assessed and collected shall be governed by the laws of the State of Texas as to tax assessors and tax collectors generally for the assessment and collection of State and county taxes for said years. * * *"

An examination of this entire bill creating the county of Kleberg does not disclose the intent of the Legislature to allow an additional or extra compensation to the tax assessor of Nueces county, but on the contrary provision is made that he shall be governed by the laws of the State of Texas as to tax assessors and that he shall assess the taxes in the same manner as if no new county had been created. If it had been the intent of the Legislature to provide additional compensation to the tax assessor or to permit him to assess the taxes of the new county and compute his commissions thereon as if it were a new county, he would not then be assessing it as if no new county had been created, which was expressly provided for by Section 7 of the act. We note that it is suggested that on account of the Comptroller requesting the separate roll for Kleberg county that on this account the tax assessor of Nueces county would be entitled to assess the taxes of Kleberg county as if it were a new county and figure his commission thereon independently of the county of Nueces. We do not agree to this contention for the reason that it was clearly not within the power of the Legislature to make it possible for the Comptroller to impose a duty upon the tax assessor and

thereby carry with it a liability for compensation. When the tax assessor of Nueces county assesses the taxes of Kleberg county and computes his commission upon the combined assessments of the two counties, he will have performed the duty required of him by Section 7 of the act and will receive the compensation contemplated by the Legislature that he should receive.

Very truly yours,
W. A. KEELING,
Assistant Attorney General.

TAXATION—COMMON SCHOOL DISTRICT—RAILROAD.

For property of a railroad within a common school district that has not been assessed for previous years, it is the duty of the tax assessor under Article 7565, and in compliance with said article, to assess such property for back taxes. Intangible assets and rolling stock of railroads are not subject to local school district taxes.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 1, 1914.

Hon. O. H. Rodes, County Attorney, Emory, Texas.

DEAR SIR: We have your communication of recent date in which you say:

"There is a school district tax in common school district No. 13 of this county of 50 cents for 1913 and 20 cents for 1912. The Texas Short Line Railroad has 3 1-10 miles of their track in this district. Through an oversight and mistake of the tax assessor of this county he failed to assess this railroad for the district school tax for either year.

"I desire to know if the tax collector or assessor now has authority to assess these taxes against the railroad company for these years, and, if so, whose duty is it to make the assessment. Is the intangible assets of the railroad and the rolling stock subject to the district school tax?"

Replying to your first question, will say that under the provisions of Articles 7565 and 2836, R. S., 1911, under the facts stated by you, it would be the duty of the assessor of taxes for your county to list and assess the taxes for the years 1912-1913 against the property of the railroad within the school district mentioned in the manner provided by Article 7565; see, also, *State vs. St. Louis Southwestern Ry. Co.*, 96 S. W., 69.

Replying to your second question, I will say that the intangible assets and the rolling stock of a railroad company are not subject to the local school district taxes. They are liable for county taxes proper, but not for taxes levied by subdivisions of counties.

Yours truly,
LUTHER NICKELS,
Assistant Attorney General.

TAXATION—SCHOOLS—BUILDINGS.

All buildings and the lands upon which said buildings are located, used exclusively for school purposes, are exempt from taxation.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 4, 1914.

Hon. R. C. Johnson, County Attorney, Amarillo, Texas.

DEAR SIR: Under date of January 28, 1914, in a letter addressed to this Department you state that the Lowery-Phillips School is a corporation, incorporated under the laws of the State of Texas, the stock of which is almost entirely owned by Professors Lowery and Phillips; that this is a school for both sexes; with a military department for boys; that none of the boys nor anyone else take their meals in the main building, but a number of the boys room on the floor of the main school building, taking their meals nearby; that no family occupies any portion of the building, and that almost contiguous to the main school building is another small building used for the kindergarten purposes. You desire to know our opinion as to whether this school property would be subject to taxation under the Constitution and laws of our State.

Replying thereto, beg to advise you that Section 2 of Article 8 of the Constitution provides as follows:

"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."

Based upon this constitutional provision the Legislature of our State enacted a statute exempting from taxation public schoolhouses and houses used exclusively for public worship, the books and furniture therein and the grounds attached to such buildings necessary for the proper occupancy and enjoyment of the same and not leased or otherwise used with a view to profit; all public colleges, public academies, all buildings connected with the same, and all the lands immediately connected with public institutions of learning.

Our Supreme Court, in the case of *Cassianno vs. Ursaline Academy*, 64 Texas, 673, construing the above quoted statute, held that the word "building" must be construed to embrace the land used in connection with it. The court in that case further said:

"It has been the policy of the State to encourage educational enterprises by exempting them from the burdens of government, and there is nothing to warrant the inference that the framers of the Constitution in the use of the word 'building' intended to discriminate against private schools."

It is our opinion, therefore, based upon the Constitution and our statute enacted under said constitutional grant of authority, together with the construction placed upon this statute and the Constitution by our Supreme Court, that the Lowery-Phillips School property, as described in your letter, would not be subject to taxation.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

TAXATION—CONSTRUCTION OF LAWS.

The vote to authorize the issuance of bonds and the collection of taxes in an independent school district does not of itself constitute a levy of the taxes; the board of trustees must make a formal levy and enter its order of record in the minutes before the tax can be collected.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 14, 1914.

Hon. J. M. Andrews, Secretary Board of Trustees, Wharton, Texas.

DEAR SIR: From your letter of recent date it appears that an election was duly called and held in Wharton Independent School District to authorize the issuance of \$12,000 in twenty year 5% bonds for the support of, building, improving and equipping schoolhouses in said district and authorizing the levy, assessment and collection of a tax sufficient to pay interest on said bonds and to provide a sinking fund sufficient to pay the principal at maturity. The election resulted favorably to the bond issue, the return thereof being duly canvassed by the board, and return thereof duly made. These bonds were duly issued, approved by the Attorney General, registered and sold and are now outstanding. The election was held on the 8th day of May, 1909. Nothing appears in the minutes of the board of trustees with reference to a levy of this tax, except that on May 10, 1911, the minutes recite that "on motion it is hereby ordered that a tax of one-half of 1% * * * for the year 1911 is hereby levied for the purpose of maintaining the general fund of the schoolhouse bonds." Also on May 16, 1913, the following entry was made in the minutes of the board of trustees: "On this day, May 16, 1913, in regular session, it was ordered by the board that the secretary notify Gus Seydler, tax assessor, in writing, to levy and collect one-half of 1% tax on the property in the Wharton Independent School District for the support and maintenance of the school in said district for the ensuing year." Thereupon you propound the following interrogatories:

"1. Whether or not under this record one-half of 1 per cent on the \$100 valuation of taxable property within said district can be collected for the year 1912.

"2. Does the levy for 1913 authorize the board to collect the tax of one-half of 1 per cent upon the taxable property within said district for the year 1913 or for the ensuing year 1914?

"3. If these orders are defective, can the board at this date enter an order upon its minutes making the levy for 1912 and 1913, if necessary, and under such order and levy enforce the payment of taxes for said years from those persons who refuse to pay?"

In our opinion, each of these questions should be answered in the negative. The act of voting authority to levy a tax is not of itself a levy. Upon this point the Supreme Court of Nebraska, in the case of School District No. 6 vs. School District No. 9, 13 Nebraska, 173, says:

"The attorneys for the plaintiff very strenuously insist that the act of voting taxes by a school district is equivalent to a levy of the same, and that, therefore, the taxes were actually levied at the time of the division of the districts. That this proposition cannot be maintained will readily be seen. The

act of voting taxes by a school district is an important prerequisite to the right of levy, as no tax that requires the affirmative vote of the district to give it validity can be imposed without such action. But the act of voting taxes is not a levy. It is merely determining the amount that shall be levied."

All of our statutes conferring upon school districts or cities the power to levy taxes to pay the interest and to create a sinking fund for the retirement of bonds, contemplates, first, a vote by the qualified electors authorizing the levy and an actual levy by the governing board. With reference to common school districts, Article 2827, in part, provides:

"That the commissioners court of the county shall have the power to levy a special tax for the further maintenance of public free schools and the erection of schoolhouses, provided a majority of the qualified property taxpaying voters of the district shall vote such tax, etc."

With reference to cities and towns, that have assumed exclusive control of the schools within their limits, Articles 2875, 2876 and 2877 provide that a local maintenance tax *may be levied* after a two-thirds vote of the qualified voters of such city or town shall have authorized the same, and Article 2878 provides that after a favorable vote "it shall be the duty of the council or board of aldermen annually thereafter to levy * * * such additional tax, etc." With reference to other independent school districts, Article 2857, provides:

"That the trustees of a district * * * shall have the power to levy and collect an annual ad valorem tax not to exceed fifty cents on the one hundred dollars' valuation for the purchase of sites and purchasing, construction, repair or equipment of the public free school buildings within the limits of such incorporated districts."

It further provides "that no such tax *shall be levied* and no such bonds issued until after an election shall have been held wherein a majority of the taxpaying voters voted in favor of the *levying* of said tax, etc."

The language used in each of these statutes clearly contemplates that after the election has been held authorizing the governing board to levy the tax, this shall be followed by a formal act of the board making a specific levy annually, and as stated before, the vote authorizing the levy is not of itself a levy.

It is fundamental that every essential proceeding in the course of a levy of taxes must appear in some written and permanent form in the records of the bodies authorized to act upon them. Such a thing as a parole levy of taxes is not legally possible. (Moser vs. White, 29 Mich., 59.)

The formal levy of the tax and the written record thereof are jurisdictional facts, upon which the enforced collection of the tax must rest. (Allen vs. Armstrong, 16 Iowa, 508; McCready vs. Sexton, 29 Iowa, 356; 4 Amer. Reps., 214.)

All the authorities, with which we are familiar, hold that before the payment of a tax can be enforced, at least the following things must be made to appear: First, that the tax has been levied; second, that it has been assessed; and third, that the property upon which it is levied

and against which it has been assessed is subject to taxation. In *re* Douglass, 41 La. Ann., 765, 6 So., 675.

The only correct levy made by the board was that for the year 1911, under which the tax could be collected for that year. There appears to be no levy, or attempt at a levy, for the year 1912, and of course no tax can be enforced for that year.

There is a very serious question as to whether or not the order entered on May 16, 1913, can be construed to be a tax levy. It does not purport to be such; it simply instructs the secretary to notify the county tax assessor "to levy and collect" a tax. The tax assessor, of course, has no authority to levy or collect a tax of any sort; his function is to assess, and not to levy or collect. The power and duty to make the levy is vested in the board by the Legislature; it is familiar law that delegated power can not be further delegated by the delegate. The board can not delegate this power and duty to make the levy to any other person or body. However, since the board evidently thought it was making a levy, since the majority of the patrons of the school have probably paid the tax for the year 1913, and since if we should hold that this order was not a levy your board would have no remedy (while if we hold it is a levy the taxpayer has a remedy in the courts), we shall construe the order of May 16, 1913, as a levy for the year 1913. It can not be a levy for the year 1914 under any circumstances, and your board should make a formal levy for this year.

As to the order of May 16, 1913, further, the board now would not have authority to cure the defects, if any, in it. Neither would it have authority to make a levy for the year of 1912, because this is a duty that must be performed as you go along annually.

If the sinking fund for your bonds has in any way become depleted by reason of these things, you should in the future levy a tax, within the constitutional limits, high enough to pay current interest and current contributions to the sinking fund and also to make up for the depletion in the sinking fund. Mandamus would lie at the instance of the proper parties to compel this at the proper time.

Yours truly,

LUTHER NICKELS,
Assistant Attorney General.

COMMISSIONERS COURT—TAX COLLECTOR—STATE TAX MONEY.

The commissioners court has no power to compel the tax collector to pay over the State tax money to the county treasurer, but this must be paid into the State depository or to the State Treasurer under the provisions of Article 7618, Revised Statutes, and Article 109, Penal Code.

The statutes require the tax collector to make a monthly report and payment of both State and county tax money, and no authority is given to the commissioners court to require a daily settlement.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 7, 1914.

Hon. F. C. Weinert, Secretary of State, Capitol.

DEAR SIR: From data recently submitted to this Department by

you it appears that the commissioners court of your county has made an order requiring the tax collector of the county to turn over to the county treasurer immediately all money collected by him both for the benefit of the county and the State and ordering the tax collector not to deposit any of such money collected by him with any bank, and ordering the county treasurer immediately upon receipt by him of any such money to deposit the same with the county depository. Thereupon the following interrogatories arise:

1. Has the commissioners court the power to direct the disposition of State taxes collected and to direct that such tax money be turned over to the county treasurer?

2. Has the commissioners court the power to require the tax collector to make daily settlements?

Article 7618, R. S., 1911, provides as follows:

1. That the tax collector shall at the end of each month make an itemized report under oath to the Comptroller showing every item of taxes collected by him during said month and showing the disposition made of all State taxes collected.

2. The collector must present such report together with receipt stubs to the county clerk, who shall within two days compare the report with the stubs and certify to its correctness, if it be correct.

3. This certified report shall then be forwarded to the Comptroller, and immediately after the certification by the clerk the tax collector shall pay over to the *State Treasurer* all moneys collected by him for the *State* during said month, etc., and the State Treasurer shall thereupon pay such money into the treasury, giving the collector credit therefor.

4. The collector of taxes shall pay over to the *State Treasurer* all balances in his hands belonging to the State and make final settlement of his account with the Comptroller on or before the first day of May.

By Article 7619 a like duty as to payment of county taxes is laid upon the tax collector except that the county money is to be paid over to the county treasurer; that is to say, the report of collections is to be made monthly, and immediately upon the certification of said report the collector must pay over to the county treasurer all taxes collected for the county during that month.

By Article 109 of the Penal Code of 1911 it is provided that "the collector of taxes shall *at the close of each month* pay over to the *State Treasurer* all moneys collected by them during the month for the State, etc. It is further provided that a collector who fails to comply with the provisions of Article 109 shall be guilty of an offense and subject to a fine of not less than \$500 and not more than \$1000 in addition to incurring liability on the collector's bond.

What are now Articles 7618 and 7619 of the Revised Statutes were enacted by the Legislature in 1893 (see Acts of 1893, p. 90) and the provisions of Article 109 of the Penal Code were enacted by the Legislature in 1887 (see Acts of 1887, p. 67), and these provisions remained the law as to the duties of the tax collectors and as to the disposition of the tax funds up until the passage of what is known as the depository law in 1905 and 1907. The portions of the depository law affecting the

question here at issue are to be found in the present Articles 2428 and 2444, R. S. of 1911.

The only change in the duties of the tax collectors made by Article 2428 in so far as the State taxes are concerned, is that by said article the tax collector "shall, instead of remitting State funds to the State Treasurer, * * * cause the same to be remitted to, or deposited with, the nearest State depository and shall require of said depository a triplicate receipt therefor, one of which shall be reserved by the party so depositing said State funds and the other shall be forwarded direct to the Treasurer of the State of Texas and the Comptroller, respectively, whose duty it shall be also to keep with each State depository in Texas an accurate account, etc.

It appears to be clear, therefore, that under the present state of the law it is the duty of the tax collector monthly and immediately after his accounts have been certified as correct by the county clerk, to pay over to the State depository the amount of the State taxes collected by him during the preceding month, or if there be no State depository then he must remit directly to the State Treasurer as provided in Article 7618, R. S., and Article 109 of the Penal Code.

The duties of the tax collector as to county funds remain unaffected by the provisions of Article 2444, which provides for the deposit of county funds with the county depository where one has been selected and is qualified. This article simply requires of the county treasurer that he shall transfer to the depository all funds belonging to the county, when the depository is selected, and immediately upon receipt of any money thereafter to deposit the same with said depository to the credit of said county. So far as county tax money is concerned, this simply means that immediately after the tax collector has paid the county tax money to the county treasurer under the provisions of Article 7619, R. S., 1911, the treasurer (and not the collector) shall immediately deposit this money with the county depository.

Answering the interrogatories set forth specifically, we will say that under the present state of the law the commissioners court has no power to pay over the State tax money to the county treasurer, but this must be paid to the State depository or to the State Treasurer under the provisions of Article 7618, R. S., 1911, and Article 109 of the Penal Code. The statutes require the collector to make a monthly report and payment of both county and State tax money, and no authority is given the commissioners court to require a daily, or earlier than a monthly, settlement.

It is apparent that this state of the law works to deprive the county of the interest upon its tax money that would be paid by the depository for a maximum period of one month, and likewise deprives the State of like interest upon the State tax money, and that this, in view of the large amounts of taxes paid during the month, is a considerable loss both to the State and the county. But until the Legislature chooses to act in the premises and require a daily payment, no other branch of the government has authority to afford a remedy, if one be needed in any particular case. However, even with the law as it is, the people of any county have ample means of bringing a daily settlement about in this: There is nothing in the law to prevent or prohibit the tax

collector paying over to the county treasurer daily the amount of county taxes collected by him, and if this should be done, of course it would then be the duty of the treasurer to deposit the money immediately in the county depository and the county would thus secure the interest from the dates of deposit. The same thing is true as to the State tax money. And if the people desire such settlements to be made, their only remedy is to select at the ballot boxes men for these positions who will agree to do this and then to see to it that the promises are redeemed. This political remedy is the only means of removing conditions which, seemingly, brought about the order of the commissioners court submitted to us, and upon it the people must rely until the Legislature shall afford another.

Yours truly,

LUTHER NICKELS,
Assistant Attorney General.

TAXATION—UNRENDERED PROPERTY.

Tax assessor and collector may either assess unrendered personal property for more than two years back.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, AUGUST 29, 1913.

Hon. A. L. Love, Tax Commissioner, Capitol.

DEAR SIR: This Department is in receipt of your communication of August 28th in which you desire an opinion from us as to whether the county tax assessor or the county tax collector has authority to assess personal property that may come to his notice after it has been omitted from assessment and taxation. We desire to express our appreciation of the lengthy and full discussion of this matter contained in your letter and for the manner in which you have treated same, and the citation of the statutes and authorities therein contained.

In beginning we desire to say that this administration in this office has continuously held, and advised county attorneys that the assessor of taxes is not limited in assessing unrendered personal property to two years back, but that under the Constitution and statutes of this State, he may go back any number of years and assess personal property that has escaped taxation. Our former opinions, however, upon this subject have been given to county attorneys in a collateral and incidental way, the matter arising out of inquiries propounded by them touching their duties, and the direct question has not been passed upon, and a separate opinion written thereon by the Department. We will therefore take occasion to discuss this matter and give you our views upon it with such citations to the Constitution and statutes and the authorities to uphold the position we take.

We are aware of the fact that this contention is being continuously made throughout the State, and that in a ruling given out by a former administration of this Department, it was held that there is no authority

for the tax assessor to assess personal property for more than two years back where same has been unrendered. This contention has been made, and the opinion referred to above, was based on the provisions of Article 7566, Revised Statutes, 1911, which reads as follows:

"If the assessor of taxes shall discover in his county any property, or outside of his county but belonging to a resident of the county, and personal property which has not been assessed or rendered for taxation every year for two years past, he shall list and assess the same for each and every year thus omitted which it has belonging to said resident, in the manner prescribed for assessing other property; and such assessment shall be as valid and binding as though it had been rendered by the owner thereof."

No contention, so far as we know, has ever been made that the collector of taxes would not have authority to go back for any number of years and bring up on a supplemental roll, any personal property that may have escaped taxation. We think this authority is clearly given the collector in Article 7567, Revised Statutes, but the question has always arisen on the authority of the assessor to go back more than two years, which seems to be the limitation attempted to have been placed upon such act in Article 7566, above quoted.

In the first place, all property and persons in this State, except as is expressly exempted under our Constitution, shall bear their equal proportion of the burden of government. Section 1 of Article 8 of the Constitution provides that taxation shall be equal and uniform and that all property in this State shall be taxed in proportion to its value. If mere lapse of two years would exempt personal property from taxation, then such property would escape its just proportion of the burden of taxation, and so far as that property is concerned, taxation would be unequal and not uniform.

The doctrine is well established in this country that the State is not bound by statute of limitation unless expressly named therein.

Luder's Admr. vs. State, 152 S. W., 220.

Commonwealth vs. Baldwin, 26 Am. Dec., 33.

Kennedy vs. Townsley, 16 Ala., 239.

McKechan vs. Commonwealth, 3 Pa. St., 151.

The authorities on the above proposition are numerous and we only cite three on this proposition.

It seems to us that the only construction that could be placed upon Article 7566, Revised Statutes, is that it is one of limitation against the State on collection of taxes upon unrendered property in placing the period beyond which the State can not go, at two years.

If such is the purport of the statute just mentioned then we are firmly of the opinion that it would be violative of Section 55, Article 3 of the Constitution, reading as follows:

"The Legislature shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any incorporation or individual, to this State, or to any county or other municipal corporation therein."

All property is subject to tax and the liability to assessment, and consequently the taxes arising thereunder and any attempt to relinquish

the taxes due the State would be a release of the liability for all former years prior to the two years' period that the assessor is authorized to go back and assess property for. This theory is borne out in the case of *Lindsay vs. State*, 96 Texas, 586, from which we quote as follows:

"We must take and apply the plain language of the Constitution as we find it, and cannot add to it so as to restrict the powers of the Legislature further than such language restricts it in order to prevent fancied mischief. We are not to import difficulties into a Constitution by a consideration of extrinsic facts when none appear upon its face." *Cooley's Const. Lim.*, 78.

In other words, we must take the Constitution as we find it and as we read this section of the Constitution and understand it, it is a positive prohibition against the enactment of any legislation looking to the release or extinguishment or authorizing the release or extinguishment of any indebtedness, liability or obligation to the State. All taxes are a liability to the State, and when properly assessed by the assessor, become an obligation that the Legislature would be powerless to relieve against. We do not mean to hold that there exists a liability for taxes on personal property until the assessment is made, for under the holdings of the court of this State, the assessment upon personal property creates the liability.

Article 7661 referred to by you, makes it the duty of the district or county attorney of the respective counties of this State, upon the order of the commissioners court, to institute suit in the name of the State for the recovery of all money due the State and county as taxes due and unpaid on unrendered personal property. This statute does not create a liability for taxes, but merely gives an additional remedy for the collection of taxes. As above stated, the liability does not exist for taxes upon personal property until the same has been duly assessed. This question was before the court in the case of *Connell vs. State*, 55 S. W., 980. In that case the court said:

"This suit was evidently brought under Article 521a (7661, Statutes of 1911), which makes it the duty of the district or county attorney, by an order of the commissioners court, to institute suit in the name of the State to recover all money due the State and county as taxes on unrendered personal property. It is further provided in that article that all suits for the recovery of taxes due on personal property shall be brought against the person or persons who owned the property at the time the same should have been listed or assessed for taxation. Our construction of this article is not that it was intended to create any liability for taxes, but only to provide an additional method of collecting taxes from the persons already liable; that is to say, the taxes are not due from the persons sued within the meaning of this article until there has been a valid assessment against him, either as known or unknown owner."

In the above case, there was a failure on the part of the State to show an assessment of personal property in the name of *Connell*, and a demurrer was entered on that ground. The court said:

"This proposition, we think, must be sustained. It is laid down in the works on taxation that, in order to create a liability against the individual subject to taxation, the statute providing for an assessment for his share of the taxes must be complied with." *Cooley on Taxation*, pages 251-353. *Second Desty, Taxation*, page 642.

We are not dealing, however, in this instance with the question of unrendered property, but more particularly with the right of the assessor to make an assessment of unrendered property for prior years. After an assessment is made, then no question could arise but that under Art. 7661, R. S., 1911, the district or county attorney could enter suit and recover the taxes, provided always, that the suits were brought against the party against whom the assessment was made, he being the owner of the property at the time for which the taxes were assessed.

Again, with reference to the subject of limitation on taxes, we refer to the article cited by you, to wit: Article 7662, R. S., 1911, reading as follows:

"No delinquent taxpayer shall have the right to plead in any court or in any manner rely upon any statute of limitation by way of defense against the payment of any taxes due from him or her, either to the State, or any county, city or town."

We take it perhaps, that this statute has reference to the general statutes of limitation as set out in other articles of the Revised Statutes, but it is the clear expression of the legislative intent that no taxpayer should ever be allowed to impose the lapse of time as a defense for the payment of taxes, and is in consonance with Section 55 of Article 3 of the Constitution above quoted, wherein the Legislature is denied the power to release or extinguish any indebtedness due the State. The right to place limitation against taxes has been attempted to be conferred in various city charters granted by the Legislature, and it has been held that such attempted legislation is violative of the Constitution, and therefore void.

Oliver vs. Houston, 93 Texas, 206.

Houston vs. Stewart, 90 S. W., 49.

Link vs. Houston, 59 S. W., 566.

Link vs. Houston, 60 S. W., 664.

Greenlaw vs. Dallas, 75 S. W., 812.

Upon the reasoning above set out, and the authorities quoted, we are of the opinion, and so advise you, that Article 7566, R. S., 1911, would not warrant the assessor of taxes in failing to assess all personal property coming to his knowledge as being unrendered for more than two years back, but that on the other hand, it would be his duty to assess personal property for any number of years back if the same was unrendered and unassessed.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

TAXATION—EXEMPTIONS—PUBLIC LIBRARIES.

Property belonging to an endowment fund of a public library instituted and run under a bequest, open to all people free of charge, is exempt from taxation.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JUNE 14, 1913.

Mr. Fred C. Pabst, Chairman Finance Committee of Commissioners Court of Galveston County, Galveston, Texas.

DEAR SIR: Your communication reads as follows:

"The county commissioners court of Galveston county is now sitting as a board of equalization. The question has arisen as to the liability to taxation of certain real estate in this county owned by Rosenberg Library Association. In order that you may understand the character and purpose of this Association, I enclose a copy of its charter and by-laws. For a statement of those purposes, Section 4 of its charter copies in full the clause of the will of Henry Rosenberg, whereby provision was made for the establishment of the library.

"None of the trustees, directors or officers of the Association, except only the librarian, receives any salary or compensation of any kind. Every service of the institution is absolutely free to the public. No charge is made for the use of books or periodicals, and no admission fee is ever charged for any lecture.

"The real estate in question is a part of the endowment fund of the institution. All of it is unimproved except one lot, and none of it is leased or otherwise used with a view to profits, except that one lot upon which there is a building, which is used exclusively by the board of trustees of the Galveston public free schools as an annex to the Ball High School. The school trustees pay to the Library Association a small rental, which is appropriated solely to sustain the Rosenberg Library Association. None of the other property produces any revenue whatever.

"The claim is made that this property is exempt from taxation, on the ground that this is an institution of purely public charity (in support of which contention there have been cited to me several decisions of courts of other States), and on the further ground that all of the property of this institution is public property, used exclusively for public purposes. You will observe that Henry Rosenberg directs his executors to 'organize and endow a free public library for the use of the people of Galveston * * * trusting that it will aid in their intellectual and moral development, and be a source of pleasure and profit to them and their children, and their children's children, through many generations.'

"It is insisted that the use is essentially a public one, and that, although administered by a private corporation, the property is to all intents and purposes 'public property.'

"This institution differs from many public charities, in that neither the city government nor the county nor the inhabitants of the city or county are required to contribute to its maintenance; its endowment fund being adequate for that purpose. But to the extent that the unproductive property held in its endowment fund is taxed must its activities be impaired? It occurs to me that the case fairly comes within the spirit of our exemption laws.

"While the particular case is local, the principle which decides it is of general application, and, therefore, I take the liberty of asking your opinion whether this property is exempt from taxation.

"I shall be appreciative of an early reply so that the matter can properly be disposed of during the session of the board of equalization."

Replying thereto, we beg to say that all exemptions from taxation by the laws of this State are founded on that provision of the Constitution found in Section 2 of Article 8, which, after enumerating certain classes of property which the Legislature may by general laws exempt from

taxation, contains the following clause: "and institutions of purely public charity."

Acting upon this warrant of authority in the Constitution, the Legislature has exempted certain classes of property from taxation as will be found in Article 7507, Revised Statutes of 1911, and as applied to the particular class of property under consideration the provisions of sub-Section 6 control. From this sub-Section 6 we will quote as follows:

"All buildings belonging to institutions of purely public charity, together with the lands belonging to and occupied by such institutions not leased or otherwise used with a view to profits, unless such rents and profits and all moneys and credits are appropriated by such institutions solely to sustain such institutions. * * *"

Later in this sub-Section 6 the Legislature has attempted to define what is meant by an institution "of purely public charity" within the contemplation of such exempting statute, and this definition would seem to limit institutions of public charity which are exempt from taxation to that class of institutions having a membership, but looking back to the source of the authority of the Legislature to exempt property from taxation we find in the Constitution as above quoted that the Legislature shall have authority to exempt from taxation institutions "of purely public charity," and when the Legislature has by the first portion of sub-Section 6 exempted the buildings and lands belonging to an institution "of purely public charity" it has carried out the full intent and purpose of the framers of the Constitution in giving their warrant of authority for such action, and we are justified in looking to the Constitution for the intent and purpose of such law, rather than to the law itself. Nor do we think it was the purpose of the Legislature to limit the exemption from taxation to institutions "of purely public charity" to that class of institutions owned and controlled by organizations dispensing charity, either solely to their members or to their members and the general public, but we prefer to put a broader construction on this language and to hold that the object of the Legislature was to exempt from taxation, as it was authorized to do under the Constitution, all and every institution "of purely public charity" within the ordinary and usual acceptance of the meaning of that term. That is to say, that the Legislature intended to exempt from taxation all institutions dispensing charity to the general public without regard to what such charity might consist of.

There are various definitions of the phrase or term "purely public charity" to be found in the decisions of the courts of this country. Perhaps as clear and concise a definition of the term "purely public charity" as would be found, would be the following:

"A public charity is defined as whatever is done or given gratuitously in relief of the public burdens or for the advancement of public good. When the public is beneficiary the charity is public, and when no private or pecuniary return is reserved to the giver or any particular person, but all the benefits resulting from the gift or the act goes to the public it is a purely public charity." *Kentucky Female Orphan School vs. City of Louisville*, 36 S. W., 921; *Episcopal Academy vs. City of Philadelphia*, 25 Atl., 55.

We might quote various other definitions of "purely public charity," but we will content ourselves with citing the authorities defining the

term and upholding institutions as being "purely public charity," such citations being as follows:

Cleveland Library Assn. vs. Pelton, 36 Ohio State, 253.

Burd Orphan Asylum vs. School District of Upper Darby, 90 Pa., 21.

Commonwealth vs. Young Men's Christian Association, 76 S. W., 522.

Philadelphia Library Co. vs. Donohugh, 12 Phila., 284.

We are clearly of the opinion that under the clause of the will of the late Henry Rosenberg as set out in the charter and by-laws of the Rosenberg Library Association, which you enclosed, that such institution is one of purely public charity. It is created and established and maintained for the express purpose of according to all the people alike the benefit to be derived from a library and lectures upon practical literary and scientific subjects, and by the request aforesaid, all of the benefits shall be free of cost to the general public.

It will be noted that the language used in sub-Section 6 of Article 7507 is different from that used in sub-Section 1, which latter section applies to schools and churches, in this, that sub-Section 6 exempts from taxation lands belonging to public charities if the rents and profits derived from such lands are appropriated by such institutions solely to sustain such institutions, while sub-Section 1, with reference to schools and churches, contains no such provision, but by the express terms thereof eliminates all lands of such institution used with a view to profit. Under sub-Section 1 if a school or church should own lands not necessary for the proper occupancy, use and enjoyment of same, and should lease such other lands out for profit, the same would be subject to taxation no matter if the rents and profits derived therefrom were used for the exclusive benefit of such school or church. But under sub-Section 6 the rule is different, for by the express provision of the statute, where such other lands are used for profit, but the profit arising therefrom is used exclusively to sustain such institution, then such lands would be exempt from taxation.

We are of the opinion that it was the intent and purpose of the Legislature to exempt from taxation all institutions of purely public charity and all lands belonging thereto, whether producing a revenue or not, provided if producing a revenue, such revenue is used for the sole purpose of sustaining such institution, and that under the facts contained in your letter, and from the provisions of the will of the late Henry Rosenberg, the Rosenberg Library Association is an institution of that character, and we are of the opinion, and so advise you, that the lands in question used in the manner set out in your letter, come within the meaning of the statute and are exempt from taxation.

Trusting we have made ourselves clear in the above discussion, I am, with great respect,

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

TAXATION—DESTRUCTION OF PROPERTY BY FIRE—INSURANCE POLICY.

If a house and contents were destroyed by fire on December 15, 1912, the same was not in existence on January 1st, and, therefore, could not be taxable, but insurance policy being in force on that date was a valid claim and credit owned and held by the assured, and was taxable as such under the law.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 2, 1913.

Hon. W. P. Lane, Comptroller of Public Accounts, Capitol.

DEAR SIR: This Department is in receipt of your favor of the 31st, as follows:

"The following statement of facts has been given me for my opinion, and I refer them to you and ask that you give me your opinion on the same. I here quote them as given to me:

"On the 15th day of December, A. D. 1912, the house and contents of one of this county, was destroyed by fire, and on the 15th day of January, A. D. 1913, he received all of his insurance thereon—\$1500. Now the assessor of taxes desires him to pay taxes either on the house before it was destroyed by said fire, or on the amount of insurance recovered on the same, the same being the amount of \$1500, which he declined to do, saying that he will not pay taxes either on the house before it was destroyed or on the amount of money paid him on the 15th day of January, A. D. 1913."

"I would thank you to advise me whether he will have to pay any taxes on the house that was destroyed or on the money he recovered for the destruction of the same."

Replying thereto, beg to say that Article 7503 of the Revised Statutes of 1911 provides that all property, real, personal, or mixed, except such as may be hereinafter expressly exempted, is subject to taxation.

Article 7505 provides that personal property shall, for the purposes of taxation, be construed to include all goods, chattels and effects, and all moneys, credits, bonds and other evidences of debt owned by citizens of this State.

Article 7506, in defining the terms used in this title, defines "credits" as follows:

"The term 'credits,' wherever used in this title, shall be held to mean and include every claim and demand for money or other valuable thing. * * *"

By the provisions of Chapter 11 of Title 126, under which the above cited articles also appear, every person is required by law to list property and shall make and sign statement, verified by his oath, of all property, both real and personal, in his possession, and in enumerating properties thus required to be listed by an owner under subdivision 36, he would be required to list all credits. That policy of insurance above referred to is a valid and subsisting claim, held and owned by the assured against the insurance company. It is not necessary that debt claim or credit should be immediately payable in order for the same to be taxable, but in this case the claim would be payable upon the completion, within a certain stipulated time, after proofs of loss and the same constitutes and was a legal demand such as the law would recognize and enforce.

Under the provisions of Article 4874 of the Revised Statutes, 1911,

a policy of insurance becomes a liquidated demand in case of total loss by fire of the property insured for the full amount of such policy, but it is provided that the provisions of the article shall not apply to personal property, so that immediately upon the destruction of the property by fire so much of the policy as covered the house would become a liquidated demand.

While that portion of the policy covered the contents of the house, same being personal property, would not become a liquidated demand, yet at the same time it was a valid and legal claim in favor of the assured against the company, and this is borne out by the fact that on January the 15th the company paid to the assured the full amount of the policy.

In the case of *Cooper vs. Montgomery County Board of Review*, 64 L. R. A., 72, is held a policy of insurance issued by a fraternal benefit society is a credit subject to taxation after the death of the assured, although no proofs thereof have been made to the society. This case we deem a parallel case to the one in question.

Upon the first day of January the owner of the policy was in possession of valid claim or credit. It is immaterial, under the provisions of Article 7506, whether the same was due or to become due at such time as is stipulated in the policy, for under the definition of "credits," above quoted, every claim or demand for money due or to become due is taxable.

Of course, the house and contents in question, having been destroyed by fire on the 15th day of December, the same was not in existence on January the 1st, and, therefore, could not be taxable, but the policy of insurance being in force on that date was a valid claim and credit owned and held by the assured, and was taxable as such under the law.

You are, therefore, advised that in the opinion of this Department, the owner of the insurance policy on the first day of January, 1913, was liable for taxes thereon for the year 1913.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

TAXATION—RAILROADS—INTANGIBLE ASSETS AND ROLLING STOCK—
COUNTIES.

The tax on intangible assets and on rolling stocks of railway corporations can be collected by counties only. Such tax cannot be levied and collected by subdivision of counties.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 20, 1914.

Hon. A. L. Bevil, County Attorney, Kountze, Texas.

DEAR SIR: Under date of January 4, 1914, in a night letter addressed to this Department, you submit the following:

"Hardin county is divided into three road districts, and on each road district there is levied a tax of eighteen cents on the one hundred dollars' valua-

tion of property. A railroad company operating a line of railroad through this county, which said line of railroad is entirely in road district No. 3, has refused to pay the aforesaid road tax on their rolling stock and intangible assets, giving as their reason for refusing to do so that there cannot be legally levied and collected any special tax against rolling stock and intangible assets, such as special road and school tax. Please give this matter your careful attention and advise me at the earliest moment possible whether or not this tax is collectible. Further, would the tax collector be authorized to accept payment from said railroad of all of the taxes due the county except the tax mentioned above, leaving the legality of that tax to be determined by the courts?"

Replying thereto, we beg to advise you that in the opinion of this Department the tax on the intangible assets and the rolling stock of railway corporations does not run in favor of subdivisions of counties. The provisions of the law applying to intangible tax on railway corporations apply only to taxation on intangible assets and on the rolling stock for the benefit of counties. The intangible assets of railways are valued by the Board and are apportioned to the respective counties of the State through which the roads may run.

The statute makes it the duty of every railway corporation in this State to deliver a sworn statement on or before the 30th day of April of each year to the assessor of the county in which said railway's principal office is situated setting forth the true and full value of the rolling stock of said railway, together with the names of all the counties through which it runs and the number of miles of roadbed in each of said counties; and said statement shall be submitted to the Board of Equalization of the county in which its principal office is situated for review as is provided by Article 7564, R. S., 1911, and the other laws of this State in respect to boards of equalization on the first Monday in June of each year and as soon thereafter as practicable; and such Board shall certify such final valuation when made without delay to the Comptroller of Public Accounts, who shall proceed at once to apportion the amount of such valuation among the said counties in proportion to the distance such roads shall run through any such county, and shall certify such apportionment to the assessors of such counties, and the same shall constitute part of the tax assets of such counties; and the assessor of each of said counties shall list and enter the same upon the rolls for taxation as other personal property situated in said county.

It is thus seen that no provision whatever is made for the subdivisions of any county to tax railroad corporations on their rolling stocks. The tax on intangibles and the tax on the rolling stock of railroad corporations may be assessed and collected as provided by law in each county through which the railroad may run, but no authority under the law is given to the subdivisions of counties to assess or collect such taxes.

Yours truly,

C. A. SWEETON,
Assistant Attorney General.

TAXATION—CITY COUNCIL.

The city council of an incorporated city may fix a date upon which the municipal tax shall become due and delinquent, different from the date upon which the general taxes become due and delinquent.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 20, 1914.

Hon. W. J. Flesher, County Attorney, Canyon, Texas.

DEAR SIR: Under date of January 16, 1914, we have the following inquiry from you:

"Canyon City was incorporated under the general laws of the State of Texas in the year 1906. The city council by ordinance fixed August 31st as the time for all municipal taxes to become due, and have provided for a 10 per cent penalty on all taxes not paid by that time of each year.

"Question: Has the city the authority to add the 10 per cent penalty before January 31st of each year?"

Replying thereto, beg to say that Article 931, R. S., 1911, provides as follows:

"The city council shall have power to provide by ordinance for the assessing and collecting of the taxes aforesaid, and to determine when taxes shall be paid by corporations, and when by the individual corporators; provided, no tax shall be levied unless by consent of two-thirds of the aldermen elected."

Also Article 938, R. S., 1911, provides as follows:

"The city council may and shall have full power to provide, by ordinance, for the prompt collection of all taxes assessed, levied and imposed under this title, and due or becoming due to said city, and are hereby authorized and to that end may and shall have full power and authority to sell, or cause to be sold, real as well as personal property, and may and shall make all such rules and regulations, and ordain and pass all ordinances as they may deem necessary to the levying, laying, imposing, assessing and collecting of any of the taxes herein provided."

These articles have been construed by our appellate courts to give to incorporated towns and cities the power and authority to provide by ordinance that municipal taxes shall become due and delinquent at a different time from general taxes. For a full discussion of this question see *Eustis et al. vs. The City of Henrietta*, 37 S. W., 632.

We are, therefore, of the opinion that the city council of an incorporated city may fix a date upon which the municipal tax shall become due and delinquent, at a time different from the date upon which the general taxes shall become due and delinquent. This opinion, however, applies only to property taxes. We have heretofore held that the Constitution fixes the time within which a person may pay his poll tax, and that the time fixed by the Constitution with respect to the payment of poll taxes would govern, regardless of the ordinance of a city.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

TAXATION—POWER OF BOARD OF EQUALIZATION TO RAISE VALUATION
A SECOND TIME.

(Articles 7564-7580, Revised Statutes, 1911.)

The statutes contemplate but two sessions of a board of equalization, one to convene on the second Monday in May to receive assessments and to equalize taxes, and the other to convene on or before the first day of August to approve the rolls; and a second session for the purpose of equalizing taxes is unauthorized.

If a property owner has been cited to appear and show cause why the valuation of his property shall not be raised to a certain sum, and he fails to appear and the board of equalization raises the valuation of his property to said sum, the board is unauthorized to cite him to appear again at a second session of the board and show cause why the valuation shall not be raised a second time.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JULY 8, 1913.

Hon. Cade Bethea, County Attorney, Livingston, Texas.

DEAR SIR: In your letter of June the 24th, you state that your commissioners court, sitting as a board of equalization, decided that the valuation of certain property rendered for taxes should be raised, and gave notice to the owner to appear before the board at a certain time and show cause why the valuation should not be raised from \$2.00 to \$3.00 per acre. You further state that the valuation was raised by the board at said time to \$3.00 per acre, the owner not appearing but accepting the increase. You state that thereafter the board of equalization decided that the valuation of the land should be again raised to \$9.00, the board having theretofore adjourned as a regular board of equalization. You desire to know whether this matter can be reopened and the valuation raised for a second time at the session of the board to be held on the second Monday in July.

The statutes appear to contemplate but two sessions of the commissioners court sitting as a board of equalization,—the first session being provided for by Article 7564 which requires the commissioners court of the several counties of the State to convene and sit as boards of equalization on the second Monday in May of each year or as soon thereafter as practicable before the first day of June. It appears from this article of the statutes that the purpose of this meeting is to receive the assessment lists and to approve them and to equalize the valuations. The second session of the board of equalization is provided for by Article 7580, and it seems the sole purpose of this section is to examine and to approve the tax rolls.

In the case of *Clawson Lumber Company vs. Jones*, 49 S. W., 909, the court said:

“Only two sessions of the county commissioners as a board of equalization seem to be contemplated by the statutes, one convening on the second Monday in June (now May) or as soon thereafter as practicable; and the other to pass upon the tax rolls, which are required to be submitted by the assessors on or before the first day of August.”

In the case above cited it was held that after the approval of the assessment by the board of equalization and the approval of the rolls, the

action of the commissioners court in lowering the valuation was wholly unauthorized and of no effect. If the meeting of the commissioners court as a board of equalization adjourned to hold a second session the second Monday in July, this second session was entirely unauthorized, under the law, and their action in raising the valuation at such session would be of no effect. As above stated, the statutes contemplate but two sessions of the commissioners court sitting as a board of equalization, and at the first session only is it provided that the court shall equalize taxes. Of course, if the court did not really adjourn its first meeting and the July session is to be a continuation of the session begun in May, the session in July would be legal. In the case of *Graham vs. Lassater*, 26 S. W., 472, the court held that the statute which required that the board should meet on the second Monday in June did not mean that they should complete their labors before the first of July, and that if the session of the board, after the first of July, was but a continuation of the June meeting the acts of the board in July would not be void.

Your letter also presents the question whether the valuation of property for the purpose of taxation may be raised by the board of equalization a second time at its regular session for the equalization of taxes. It is true that Article 7570 of the Revised Statutes, 1911, provides that the action of the commissioners court, sitting as a board of equalization, in equalizing the value of property for taxation, shall be final. However, it is a general rule that any court has the power to set aside or to revise its judgments at any time before the adjournment of the term at which the judgment was rendered. In other words, the action of the court does not become final until the end of the term. We think this same rule applies to a commissioners court. If, therefore, a taxpayer is cited to appear at a date certain and show cause why the valuation of his property for taxation shall not be raised to a certain sum and he fails to appear at that date and the valuation is raised to said sum, the board of equalization may, if it finds that it has not raised the valuation of the property sufficiently, cite the property owner to appear a second time at the same term of court and show cause why the valuation shall not be raised a second time.

Answering your letter, therefore, we advise you that if the session of the board of equalization, to be held on the second Monday in July, is but a continuation of the regular session of the board of equalization, the taxpayer may be cited to appear a second time and show cause why the valuation of his property shall not be raised a second time; but on the contrary, if the board of equalization at its regular term adjourned after having raised the valuation of the property the first time, it can not cite the property owner to appear at a second session of the board of equalization and show cause why the valuation of the property shall not be raised a second time, for the reason that, as above pointed out, a second session of the board of equalization is unauthorized under the law.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

BOARD OF EQUALIZATION—COMMISSIONERS COURT.

Commissioners court of county without authority to alter a valuation fixed by it upon property, while sitting as a board of equalization, even though it might appear that such valuation at the time fixed by said court was excessive.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 29, 1913.

Hon. John Q. Adamson, Sherman, Texas.

DEAR SIR: Article 7570, R. S., 1911, provides that the commissioners court shall only once sit as a board of equalization. This old Article 5124 of the Acts of 1905 provided that in all matters submitted to them as a board of equalization, their action should be final, and not thereafter subject to revision by them or any other tribunal. The codifiers, for some reason, have seen fit to leave this last expression not subject to revision by them, or any other board. However, this does not, in our opinion, affect the article, for it provides that the action in such matters shall be final.

We are, therefore, of the opinion that this commissioners court of this county would be without authority to alter or change a valuation fixed upon property even though it might appear that such valuation, at the time it was so fixed by the court, was excessive.

When the court adjourned as a board of equalization it cannot convene again in such capacity for one year, and then it cannot take up the matters which it had before it at its last sitting. Of course, in many instances, we know this works a hardship. However, the law is plain on the subject and must be followed. This rule does not apply to property not rendered. See Article 7706, R. S., 1911.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

 COMMISSIONERS COURT—BOARD OF EQUALIZATION.

Time for convening of commissioners court as a board of equalization.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 30, 1913.

Hon. J. J. Mansfield, Columbus, Texas.

DEAR SIR: We have your favor of April the 25th, in which you say you are unable to harmonize the provisions of Articles 7564, 7575, and 7576 of the Revised Statutes of 1911 with reference to the date of the meeting of the board of equalization.

Article 7564 provides that the commissioners court shall meet as a board of equalization on the second Monday in May of each year, or as soon thereafter as practicable before the first day of June.

Article 7575 provides that the assessor shall furnish the board of equalization on the first Monday in June of each year, or as soon thereafter as practicable, a certified list, etc.

Article 7576 provides that the assessor shall submit all the lists of property rendered to him prior to the first Monday in June to the board of equalization of his county on the first Monday in June or as soon thereafter as practicable. It will thus be noted that Article 7564 provides that the commissioners court shall convene as a board of equalization on the second Monday in May and before the first day of June, while Article 7576 requires the tax assessor to submit his list on the first Monday in June, or as soon thereafter as is practicable, which is an apparent conflict in the law. This is explained, however, by reference to Article 7564 as it existed prior to the amendment of 1909. Prior to that time, the date set in that article for the convening of the board of equalization corresponded to the time set for the assessor to submit his list, but by the Act of 1909 the date of the convening of the commissioners court as a board of equalization was changed so that same shall thereafter meet on the second Monday in May, or as soon thereafter as practicable before the first day of June. This act did not amend Articles 7575 and 7576, but left them as they had theretofore existed. These latter two articles make no reference to the convening of the commissioners court as a board of equalization, but simply provide for the submission to the board of equalization of the tax list by the assessor and fix a time when such list must be submitted at a time then fixed by law for the convening of the board of equalization. So the real intent and purpose of those two articles was to compel the tax assessor to submit his list to the board of equalization, and not to fix a time when the board of equalization should meet. The time for the meeting of the board of equalization having been changed by law, the time at which such list must be submitted is therefore changed, and it is the duty of the assessor to submit his list to the board of equalization when convening under the law.

It is, therefore, the opinion of this Department, and you are so advised, that the commissioners court should convene and sit as a board of equalization on the second Monday in May of each year, or as soon thereafter as practicable, before the first day of June, that is now provided by Article 7564 of the Revised Statutes, 1911, and that the assessor should be governed accordingly in the submission of his list.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

TAXATION—BOARD OF EQUALIZATION—PROPERTY VALUATION.

Board of equalization should value property at its fair market value, and could not value certain buildings in a city according to the valuations of other buildings in the same block. Taxation shall be equal and uniform.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MAY 2, 1913.

Hon. R. E. Lee, Brownwood, Texas.

DEAR SIR: This Department is in receipt of your favor of April 30, in which you ask for construction of Article 948, Revised Statutes of

1911, with reference to the power of the board of equalization of your city. You state that in a certain block of buildings one building is rendered for \$10,000 and others from \$4000 to \$7000, and you wish to know if the board has the power only to raise other buildings in said block to \$10,000, or could the board raise all of said buildings in said block to, say, \$12,000.

Replying thereto we beg to say that under the Constitution and laws of this State the theory is that taxation shall be equal and uniform, and it is the duty of the board of equalization in its discretion to equalize as near as possible the valuations of property rendered for taxes. This does not mean that all property must be rendered at the same valuation, but it does mean that all property shall bear its proportion of the burden of taxation according to its value. It would be the duty of the board of equalization to place a valuation upon the property according to its fair market value, taking into consideration its location and surroundings, but it would not be their duty to take into consideration the rendition value placed upon other property, but it would be their duty to equalize the renditions as near as possible in accordance with the value of the property. The fact that one person renders his property for \$10,000 and another renders property of practically the same value at \$4000, creates a necessity for a board of equalization to arrive at the true value of the property. The board of equalization is not limited to placing values at the highest value placed upon any building in the block, but it is their duty to value all of the buildings in the block according to their true value, regardless of the rendition, and if they saw fit and it is just and equitable and the buildings were of a value sufficient to warrant it, they could raise the valuation of all buildings within the block even above the highest rendition. Beg to cite you to the following cases:

Norris vs. Waco, 57 Texas, 635.

M. K. & T. Ry. Co. vs. Shannon, 100 Texas, 379.

Galveston County vs. Galveston Gas Co., 72 Texas, 517.

Yours truly,

C. W. TAYLOR,
Assistant Attorney General.

TAXATION—ASSESSMENT—BOARD OF EQUALIZATION.

1. The commissioners court, sitting as a board of equalization, has the power to raise or lower the assessed valuations and to correct errors in assessments.

2. Said board has no authority to assess property, and no authority to add to the rolls property not previously assessed, or take from them property which they embrace.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 14, 1913.

Mr. Tom Perry, Sheriff and Tax Collector, Brackettville, Texas.

DEAR SIR: This Department is in receipt of your letter of January 10th, in which you state that a man on the nonresident roll, rendered

certain land and eleven hundred head of cattle for taxes, and the commissioners court, sitting as a board of equalization, raised his rendition over his protest to three thousand head of cattle; that the man now offers to pay the tax on his land and on the eleven hundred head of cattle, but will not pay on three thousand head of cattle, stating that he is willing to swear that he had only eleven hundred head of cattle in the county on January 1, 1912.

You ask whether you are authorized to accept the money on the land and the eleven hundred head of cattle, or whether you shall let all the taxes go delinquent.

The powers of the commissioners court sitting as a board of equalization are prescribed by Article 7564 of the Revised Statutes of 1911, and they consist of the power to raise or lower the assessed valuations and to correct errors in assessments. Said board has no authority to assess property and no authority to add to the rolls property not previously assessed or to take from them property which they embrace. With a few exceptions, only the assessor has the authority to assess taxes. (See *Sullivan vs. Bitter*, 113 S. W., 193, and cases cited.)

We, therefore, advise you that the commissioners court had no authority to raise the number of cattle rendered from eleven hundred to three thousand head, and that you are authorized to accept payment of the taxes on the land and the eleven hundred head of cattle, unless, in your opinion, the taxpayer had more than eleven hundred head of cattle in the county on January 1, 1912. By Article 7567, Revised Statutes of 1911, you as tax collector are given authority in such case to assess property not previously assessed, and you have authority to require the affidavit of the taxpayer as to whether or not he had such property at the proper time.

We are assuming in answering this question that the number of the cattle was actually changed on the list to 3000 head by some member of the board of equalization. If the assessor had changed the number of the cattle on the list, even though he did so at the direction of the board of equalization, and the rolls were afterwards properly approved by the board, the assessment would have been good, since it was made by the officer authorized by law to make assessments. (See *Ferris vs. Kimble*, 75 Texas, 476.)

You also ask the following question:

"Where a piece of town property was sold after January 1, 1912, and assessed to the original owner, who has gone and refuses to pay the tax on the property and such original owner was also assessed with a poll tax, can the present owner pay the tax on the property without paying the poll tax. and can he pay the poll tax without an order to pay it?"

Article 7630 of the Revised Statutes of 1911, provides that all real and personal property, held or owned by any person in this State, shall be liable for all State and county taxes due by the owner thereof, including taxes on real estate, personal property and poll tax.

Under this Article, the property to which you refer became charged with and liable for the poll tax assessed against the former owner. The present owner should be required to pay the poll tax, as well as the tax against said property, and there is no necessity for an order from the

former owner authorizing him to pay his poll tax. Article 2946 of the Revised Statutes of 1911, contains this provision:

“Provided, that any person who has bought the property of another, which property is legally bound for the payment of any poll tax, may pay the poll tax of such former owner.”

Yours very truly,
G. B. SMEDLEY,
Assistant Attorney General.

TAXATION—POLL TAX—PAYMENT AFTER JANUARY 31ST.

A poll tax may be paid by an agent after January 31st without the written authority.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, FEBRUARY 26, 1913.

Hon. A. G. Reid, County Judge, Tyler County, Woodville, Texas.

DEAR SIR: This Department is in receipt of your favor of the 19th inst., as follows:

“Now that the 31st day of January has past, can a man pay his son's insolvent poll tax without a written order from his said son? Please answer, and oblige.”

Section 2 of the Terrell election law provides that a person subject to pay a poll tax, in order to be qualified voter at an election must pay same prior to the first day of February next preceding such election and hold a receipt showing such payment. Section 16 of said law provides that if the voter does not reside within a city of ten thousand inhabitants or more the poll tax must be paid either by him in person or someone duly authorized by him in writing to pay the same.

It will be observed that the law above referred to does not place any time limit upon the requirement that such authority shall be in writing, and it would therefore appear that an agent could not at any time pay the poll tax of another without the written authority provided in the statute.

However, the statutes above referred to have but one object, to wit: the regulation of elections, and every clause relates in some manner to the mode and method of finally securing a fair and impartial election of our officers and the adoption or rejection of the proposition submitted to voters. *Watts vs. State*, 135 S. W., 585.

Section 2, Art. 6 of the Constitution, as amended in 1902, upon which the Terrell election law is based, and the laws passed thereunder have to do with and apply only to the question of qualification of electors and securing purity of ballot. *Watts vs. State*, 135 S. W., 585; *Solon vs. State*, 114 S. W., 350.

This section of the Constitution and the statutes referred to do not attempt to in any manner abridge or limit the time in which the revenue of the State may be collected or the manner of payment of same in that respect.

Under the law, of course, the person owing same could not exercise the right to vote on a tax receipt issued after January 31, and therefore after that date the matter of exercising the right to vote is not involved; the election law is eliminated; and the question resolves itself into simply the right of the State to collect a tax to which it is entitled. We find no provision of the law prohibiting the payment of a tax considered simply as a tax and not in connection with the right of suffrage by an agent without written authority, and it is the opinion of this office that a poll tax may be paid by an agent after the 31st day of January without the written authority.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

TAXATION—POLL TAX.

It is necessary for the person offering to vote to have paid his poll tax—State, county and city—prior to first day of February of the year in which he offers to vote.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, FEBRUARY 25, 1913.

Mr. W. C. Jackson, Fort Stockton, Texas.

DEAR SIR: You propound the following questions to this Department:

"1. Is it necessary, where a city has levied a poll tax, that a person should pay same in order to entitle him to a vote?

"2. Where a city levies a poll tax in August, 1912, would this be in time to force the collection of the tax in 1913?

"3. Where the city of Fort Stockton levied a poll tax in August, 1912, and such levy was written upon a sheet of paper, and afterwards pasted in the minute book of the city council, and was not signed by the mayor at the time, this being the accustomed manner of keeping the minutes of the council, would this be a sufficient levy?

"4. Where a person resided in the incorporation of Fort Stockton in 1912, would he owe the city of Fort Stockton a poll tax, which must be paid prior to February 1, 1913?"

Replying to your questions in order, we beg to advise you:

1. It is just as essential that the city poll tax be paid as the State and county poll. No person is a qualified voter who is subject to the payment of a poll tax who owes the poll tax. In other words, it is necessary for the person offering to vote to have paid his poll tax—State, county and city—prior to the first day of February of the year in which he offers to vote.

2. In answer to this question, you are advised that a poll tax levied in August, 1912, is levied within a proper time to require the payment of the poll tax for that year.

3. We are of the opinion and so advise you that the levy made in the manner designated by you and pasted in the minute book of the city, but unsigned by the mayor, would be a sufficient levy to enable the

forced collection of the poll taxes * * * in other words, a valid levy. The signing of the minutes of even a court is only in evidence that such proceedings were had. If the minutes were unsigned, nevertheless, the order making the levy was made, still the fact remains that the levy *was* made and is just as valid as if the mayor had signed same at the same time the levy was made.

4. You are advised that a person residing in Fort Stockton on January the 1st, 1912, would be liable to the payment of poll tax for the year 1912, which tax *must* be paid prior to the first day of February, 1913.

Yours very truly,
 W. A. KEELING,
 Assistant Attorney General.

POLL TAX—CITY AND COUNTY.

A city ordinance that requires one class of persons, viz.: those residing outside the city to pay the poll tax not later than January 31st, and another class, those residing within the city, to pay same tax not later than December 31st, or else be deprived of the right to vote, would be unconstitutional.

ATTORNEY GENERAL'S DEPARTMENT,
 AUSTIN, TEXAS, JANUARY 7, 1913.

Mr. W. E. Pope, City Attorney, Corpus Christi, Texas.

DEAR SIR: Your communication of January 4, 1913, makes a statement of the following facts:

"The Thirty-first Legislature passed a special charter for the city of Corpus Christi, and in the last paragraph of Section 1, of Article 111, authorized the assessment of a poll tax of \$1 for male citizens of the city of Corpus Christi, and in Section 5 of the same article provided that the city council should have full power by ordinance to provide for the prompt collection of all taxes levied, and to prescribe the time when the taxes should become due and payable. By appropriate ordinance the city of Corpus Christi requires all poll taxes to be paid between October 1st and December 31st of each year. The Constitution requires that all poll taxes must be paid on or before January 31st of each year in order to entitle the holder thereof to vote on same."

Thereupon you propound the following question:

"Would a poll tax payment made by a resident of said city after December 31st, and prior to January 31st, entitle the payor to vote in subsequent elections?"

Article 6, of the Constitution of the State of Texas, deals with the right of suffrage. Section 1 thereof declares what persons shall not be entitled to vote, as follows, to wit: Persons under twenty-one years of age; idiots and lunatics; all paupers supported by the county; all persons convicted of any felony, subject to such exemptions as the Legislature may make; all soldiers, marines and seamen employed in the service of the army or navy of the United States. Section 2 describes the qualifications of electors in the State, and in part declares that every

male person subject to none of the foregoing disqualifications, who shall have attained the age of twenty-one years, and who shall be a citizen of the United States, and who shall have resided in this State one year next preceding the election, and the last six months within the district or county in which he offers to vote, shall be deemed a qualified elector * * * provided further that any voter who is subject to pay a poll tax under the laws of the State of Texas, shall have paid said tax before he offers to vote at any election in this State, and hold a receipt showing his poll tax paid before the first day of February, next preceding such election, etc. This proviso of the section was embodied in an amendment adopted November 4, 1902. This amendment was self-enacting and required no enactment by the Legislature to put it in force. *Carter vs. State*, 45 Texas Crim. Rep., 431.

Section 3, Article 6, provides that 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.

Section 1, Article 8, of the Constitution, requires that "all taxation shall be equal and uniform. * * * The Legislature may impose a poll tax to this provision of the Constitution, and is referable the power of the Legislature to provide for the assessment and collection of poll taxes. When the attempt to levy and collect poll taxes is made it must be made in such a manner as to fall with equality and uniformity upon all persons in the class subject thereto. To require that one class of persons, towit: Those residing outside of the city of Corpus Christi must pay the poll tax not later than January 31st, and that those residing within said city must pay the same tax not later than December 31st, or else be deprived of the right of suffrage, would work an inequality in the burdens as well as the fruits of the tax, and would, therefore, be unenforceable.

It will be seen from the three sections cited in Article 6, that all electors, whether residing within or without the town or city, are classified under the same definition, and under those provisions it is clear that any elector has the right and privilege to refrain from paying the poll tax up until the 31st day of January, and still preserve the right of suffrage. It would be beyond the power of the Legislature itself to limit the exercise of the right of payment of poll tax, and the enjoyment of the results thereof, to an earlier date than that named in the Constitution, and it needs no argument or citation of authority to show that the Legislature could not delegate in a city charter a power which itself could not exercise. It has been held that the Legislature is even powerless to extend the date of the payment of the poll tax beyond the 31st day of January, and thus qualify as an elector who has paid his poll tax subsequent to that date. *Black vs. Poole*, 97 Texas, 337.

If it is beyond the power of the Legislature to enhance the privileges of the citizen beyond the strict letter of the Constitution in this respect, then certainly and for a much stronger reason it could not curtail the privileges and rights expressly granted therein, for amongst the high powers expressly exempted from the general power of government is a solemn declaration that no citizen of this State shall be deprived of

life, liberty, or property privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land. This provision of the Bill of Rights requires that every reasonable intendment of a statute, or subsequent constitutional provision, shall be construed liberally in favor of the citizen, and when this is done there can be no doubt that the right of the citizen in the city of Corpus Christi to vote at subsequent elections is secured to him, unimpaired by the fact that the city charter may require the payment of the poll tax not later than December 31st. See *Brown vs. City of Galveston*, 97 Texas, 10.

Yours very truly,

LUTHER NICKELS,
Assistant Attorney General.

POLL TAX—TAX COLLECTOR—ASSESSMENT OF POLL TAX—CONSTRUCTION OF LAWS.

1. The tax collector of any county is not authorized to issue a poll tax receipt to any person or his agent where such person has not been legally assessed and refuses to be assessed either in person or through his agent; that a valid assessment is a prerequisite to the collection of a poll tax and the issuance of the receipt therefor.

2. The tax collector is prohibited by law from delivering tax receipts to the agent of the taxpayer or to any other person to be held for the taxpayer, but requires him to immediately mail the tax receipt to the person who has paid the taxes through his agent.

3. The law prohibits the tax collector from issuing tax receipts to any person or for the benefit of any person after the 31st day of January of any year, even though the money for the payment of said tax was received by him prior to midnight of January 31st of any year. The law requires that the tax receipt shall issue when the money is paid. The issuance of the poll tax receipt is an essential part of the transaction.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, FEBRUARY 28, 1914.

Hon. E. L. Gammage, County Attorney, Rio Grande, Texas.

DEAR SIR: We have the following letter from you:

"I have been requested for an opinion on the following statement of facts by judge of Starr county, Hon. J. R. Monroe, and in turn respectfully ask your Department for a ruling on same.

"At the close of the day, midnight, of January 31, 1914, the tax collector of Starr county, Texas, had issued only 536 poll tax receipts, exemptions, and unders certificates.

"Since that date, on to wit, February 1, 1914, and for a number of days thereafter, he issued about 1000 poll tax receipts for the poll tax year of 1913, claiming that written authorizations had been filed with him as tax collector authorizing him to issue the same, and that the money for same had been paid and authorization filed prior to and on January 31, 1914.

"Query: Are the poll tax receipts issued by tax collectors valid if issued after midnight January 31, 1914, for the year 1913, under the above statement, and did he have authority to issue same after January 31st?"

Replying to your letter we beg to advise you that in an opinion recently rendered by our Mr. Sweeton of this Department, copy of which

we are enclosing to you, we have held that the law contemplates and requires an assessment of a poll tax before the tax collector would be authorized to receive payment of same, and where a person constitutes another his agent for the payment of his poll tax this agent must be authorized to render his poll tax, as well as his other property, if he has any, because the tax collector has a right to demand of the agent, and it is his duty to demand of the agent, an assessment of his principal's property as well as the assessment of his poll. The law does not authorize the tax collector, although he received orders prior to February 1, of any year, to issue tax receipts and deliver same either to the agent or the principal or mail same after the first of February of any year where he dates the tax receipt back into the time in which it could have properly issued. The law prohibits the tax collector under penalty from delivering to the agent of any person tax receipts, but requires him to mail such receipts to the person whose taxes have been paid. See Art. 2945, Revised Civil Statutes of this State. The law requires also that the citizen appear in person for the payment of the poll tax or that his agent appear in person. Sec. 20 of said act.

Article 2959 of the Revised Statutes provides that if the collector does not personally know one who applies to pay his poll tax or secure his certificate of exemption, as the case may be, as being a resident of the precinct, it shall be the duty of such collector to require proof, etc., all of which indicates that the tax collector must do something more than merely take the money and write the receipt. He must understand that he is qualifying some person to vote in an election and a very grave duty is imposed upon him by every term of the poll tax law to see that some person who is not a qualified voter does not receive a poll tax receipt. The law even tells him where he is in doubt not to issue the receipt. The law enjoins upon him the duty of refusing a receipt where he can ascertain that the person borrowed the money with which he is paying the poll tax. If the tax collector is satisfied by proper evidence that some other person is furnishing the money for the payment of the poll tax, he should not issue the receipt.

Article 238 of the Penal Code is as follows:

"Any tax collector who shall deliver a tax receipt or certificate of exemption to anyone except the one entitled thereto at the time when the tax is paid or the certificate of exemption applied for, except as specially permitted by this act, shall be punished by fine of not less than one hundred dollars nor more than one thousand dollars, and shall be removed from office."

Article 249, Penal Code, provides:

"Any collector of taxes who shall knowingly or wilfully issue and deliver a poll tax receipt, or certificate of exemption to a fictitious person, shall be punished by confinement in the State penitentiary not less than three nor more than five years."

You are therefore advised that the tax collector has no authority to issue a tax receipt after the first day of February of any year, even though the money was paid to him prior to that time and date the receipt back to a time in which the receipt could have been lawfully issued and that an assessment is a prerequisite to the issuance of a tax receipt

and that a tax collector who delivers a poll tax receipt after the first day of February is subject to removal from office as well as fine. There is no authority in law for the tax collector to issue a poll tax receipt to an agent of some person, which agent refuses assessment for his principal.

Yours very truly,
W. A. KEELING,
Assistant Attorney General.

POLL TAX—PERSONS NOT CITIZENS OF THE UNITED STATES MUST PAY,
IF THEY RESIDE IN TEXAS.

1. A poll tax is collectible against persons between the ages of 21 and 60 years, who are not citizens of the United States, but reside in Texas.
2. A person does not have to be a citizen of the United States to be liable for poll tax. It is sufficient that he has been in the State since January 1st, preceding levy, etc., since he enjoys the benefits and protections of our government by his own choice he must help to bear some of its burdens.
3. It is the duty of tax collector to collect from all such persons.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 16, 1913.

Hon. O. E. Irwin, Tax Collector, Floresville, Texas.

DEAR SIR: Your letter of January the 15th is as follows:

"I wish you would please advise me if where a person between the ages of 21 and 60 years that lives here, but is not a citizen of the United States, is due or can be made to pay a poll tax. There are several of such persons in this county that live here and own property here who refuse to pay poll tax. Please advise me on this at your earliest convenience."

We answer you that, in our opinion, a poll tax is collectible against the parties described above. Article 2942, R. S., 1911, prescribes who shall pay poll tax as follows:

"The poll tax required by the Constitution and laws in force shall be collected from every male person between the ages of 21 and 60 who resided in this State on the 1st day of January preceding its levy. Indians not taxed; persons insane, blind, deaf or dumb and those who have lost a hand or foot, or persons permanently disabled, excepted. * * *"

Article 2943 sets out the exceptions as follows:

"Every male person who is more than 60 years old or who is blind or deaf and dumb, or is permanently disabled, or has lost one hand or foot, shall be entitled to vote without being required to pay a poll tax, if he has obtained his certificate of exemption from the county collector when the same is required by the provisions of this title."

It follows, therefore, that a person does not have to be a citizen of the United States to be liable for poll tax. It is sufficient that he has been in the State since January 1st, preceding the levy, etc., since he enjoys the benefits and protections of our government by his own choice,

he must help to bear some of its burdens. It would be your duty to collect the tax from all such persons as you describe in your letter.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

INDEPENDENT SCHOOL DISTRICT—VOTER—TAX COLLECTOR.

1. Qualifications of voter in independent school district.
2. Where a county tax collector also collects for school district, it would be his duty to demand full payment of taxes—district, county and State.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, APRIL 24, 1913.

Mr. W. S. Barron, County Superintendent, Anderson, Texas.

DEAR SIR: You propound to this Department the following questions.

"1. How long does a voter have to reside in an independent school district before he is eligible to cast a vote in a maintenance tax election in said district?"

"2. Is a poll tax or exemption receipt necessary before a person can vote on maintenance tax in an independent school district?"

"3. Can a person not yet 21 years of age, but has an exemption receipt and property on which he pays taxes, vote?"

"4. Must a person's property be on the tax rolls of the county or independent district in which he resides before such person, with all other necessary qualifications, is eligible to vote in maintenance tax election in said district?"

"5. Can a man who has not paid his property tax in an independent district vote in a maintenance tax election?"

"6. Can a person who has paid his poll tax in some county, other than the county in which an independent district is located and in which district said person resides, cast a vote in a maintenance tax election in said district?"

"7. Where a county assessor and collector assesses and collects taxes for independent district, can a taxpayer pay his State and county tax without paying the independent district tax?"

Replying to them in their order, you are advised:

1. That it is necessary for a person to reside in an independent school district for six months before he is eligible to vote in a maintenance tax election in said district. Article 2860, together with Article 2939, Revised Civil Statutes of Texas, sets out the qualification of a voter in such election. We do not deem it necessary to copy this article here. See also case of *Clark vs. Willrich*, 146 S. W., 947.

2. It is necessary for a person offering to vote to exhibit his poll tax receipt or exemption certificate, as in other elections.

3. No person can vote in this State until he is 21 years old, and if he becomes 21 years old after the first day of January, it is necessary for him to obtain an exemption certificate prior to February 1, of the year in which he offers to vote, which he must exhibit when he offers to vote, but his privilege of voting does not begin until he is 21 years old.

4. It is not necessary that a person's property should be placed on the tax rolls in order to entitle him to a vote. Our courts have held that if he was an actual property owner, which property was subject to taxation on the first day of January of the year in which he offers to vote, he would be a property taxpayer in the contemplation of the law. *Clark vs. Willrich*, 146 S. W., 947.

5. It is not necessary that a person should have paid his property tax in order to entitle him to vote, while he must have paid his poll tax, it is sufficient that his property tax be charged against his property to entitle him to vote if he is otherwise qualified.

6. In order to qualify a person to vote it is necessary that he pay his poll tax in the county where same was properly due. In other words, if a person owed a poll tax in another county than the one in which he offers to vote he would not be a qualified voter by paying a poll tax in the county in which he offers to vote, because he would not owe a poll tax in that county, but would owe the poll tax in the county from which he came. When the poll tax which the voter properly owes under the laws of this State has been paid, his qualification so far as it is affected by the poll tax is made perfect and if he is otherwise qualified he should be permitted to vote.

7. A taxpayer would not have the privilege of severing his tax and paying a part and leaving a part delinquent. If the county tax collector also collects for the district, it would be his duty to demand full payment of taxes, both district, county and State.

Yours truly,

W. A. KEELING,
Assistant Attorney General.

SCHOOL DISTRICTS—TAX ELECTIONS.

Failure to post notices for full length of time required by law will not render election void unless it be shown that such failure affected the result of the election. Art. 2828, R. S., 1911.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MAY 27, 1913.

Hon. A. B. Wilson, County Attorney, San Saba, Texas.

DEAR SIR: This Department is in receipt of your favor reading as follows:

"At a special election held in Common School District No. 19, San Saba county, Texas, for the purpose of determining whether or not an additional special tax of thirty cents should be levied, thereby increasing the special tax to fifty cents. The notices of said election were posted 18 days instead of 21 days before the election, as the law requires.

"Now the question is, as the notices were posted only 18 days, *is the election valid*, and in case the election is invalid for said reason, can another election be ordered by the commissioners court and held at once, and not wait for one year? An early reply is requested, as the commissioners court are holding up the count until this matter can be settled."

Upon endeavoring to arrive at a correct solution of the question propounded by you in the above letter, we are confronted with a divergence of opinion between the Court of Criminal Appeals and the Courts of Civil Appeals in this State. The Courts of Civil Appeals hold in no uncertain terms that the failure to post notices of election for the required length of time does not of itself render the election void, while the Court of Criminal Appeals just as positively hold that a failure to post the notices, or any one of them, for the required length of time under the statute renders the election absolutely void and ineffectual for any purpose whatsoever. It therefore becomes necessary to consider the two lines of decisions rendered by our higher courts, and upon consideration of all of the decisions to arrive at a correct solution of the question you propound.

The holding of the Courts of Civil Appeals of this State is to the effect that unless the result of the election was affected by the failure to give the notice in the manner prescribed by law, the election will not be vitiated, but that if it be shown that by reason of the failure to give the notice as required by law enough of the electors were prevented from having knowledge of the election who would have voted contrary to those who voted at such election to have changed the result, that such election would be void. So it seems that each case of this character must stand upon its own basis and would resolve itself into a question of fact as to whether or not enough voters were deprived of the right to vote who would have voted contrary to the result of the election to have changed the result. *Norman vs. Thompson*, 72 S. W., 64; *Buchanan vs. Graham*, 81 S. W., 1237; *Wallace vs. Williams*, 110 S. W., 785; *McCormack vs. Jester*, 115 S. W., 285; *Deever vs. State*, 66 S. W., 256.

In the case of *Norman vs. Thompson*, supra, which was a contest of a local option election, the court, in holding the election valid, used the following language:

"The overwhelmingly weight of authority is unquestionably in favor of the contention of appellee that the failure to give the statutory notice of the election, if the voters had knowledge of and participated in the election, so that the result thereof was not affected by the failure to give notice in the manner prescribed by law, will not vitiate the election. We do not desire to be understood as disparaging the notice required by the statute. When such notice is not given the evidence offered to show actual notice will be closely scrutinized, and unless it is sufficient to show with reasonable certainty that no injury has resulted from the failure to give precise legal notice, the election will be declared void."

In the case of *Buchanan vs. Graham*, above referred to, the question was determined as to the legality of the election of school trustees. In this case the county judge for some reason failed to order an election, and no notice thereof was posted or given in any manner. In fact, the county judge caused it to be made known that there would be no election for school trustees. Upon the day set for such elections the voters gathered at the voting place, selected their officers of election and proceeded to the election of trustees. The court in upholding the validity of such election says:

"We have no difficulty in arriving at the conclusion that the election of appellee was not void. It is universally held, we believe, that the prime object

to be obtained in an election is to ascertain the expressed will of the electors participating in such election, and that where such election is fairly and honestly held, and the will of the electors is readily ascertained therefrom, mere irregularity will not render the election void. See *Deever vs. State*, 66 S. W., 256, and authorities there cited."

In the case of *Wallace vs. Williams*, above cited, which was an election to determine the location of the county seat, one phase of the issue being the posting of the notices for the time and in the manner required by law, the court held:

"The appellees were not required to show that notices of the election were posted for the time and in the manner required by law. The failure to post the notices did not render the county seat election void when all the evidence shows that the time and the places for holding the election was generally known throughout the county, and there is no evidence that any voter failed to participate in the election for want of notice of the time and places at which the election would be held, and nothing to create even a suspicion that the failure to post notices, if there was such failure, in any way affected the result of said election." *Buchanan vs. Graham*, 81 S. W., 1237.

In the case of *McCormack vs. Jester*, above cited, which was a contest of a local option election, the court uses this language:

"The notices were posted with the knowledge and consent of the clerk, and this was a substantial compliance with the statute. Again, it seems from the evidence the usual number of voters participated in the election, and no contention is made that any elector failed to vote for lack of notice." Citing authorities.

We will content ourselves with the above citations and quotations from the authorities upon the holding of the civil courts upon matters of this character. The strongest case we have been able to find upon the question rendered by the Court of Criminal Appeals, holding that the failure to post notices renders the election void, is the case of *Ex parte Conley*, reported in 75 S. W., 301, and it will be noted that the facts in this case arose out of the same local option election as that of the case of *Norman vs. Thompson*, cited by the Court of Civil Appeals above referred to. The case of *Ex parte Conley* is directly opposed to the holding in *Norman vs. Thompson* case, and the Court of Criminal Appeals holds that the decision in the *Norman* case is rendered ineffectual by the decision of the Supreme Court, holding that the question decided was not properly before the Court of Civil Appeals, and that the questions decided by the Court of Civil Appeals were not involved in the case. In this case four of the notices were posted for the required length of time, but the fifth was not. The fifth notice was posted for only nine days, while the four other notices were posted for the required number of days—twelve. The court said:

"The law requires five notices shall be posted as a prerequisite, and has not permitted or authorized any authority to discard or dispense with the whole or any one of the requisite five notices. This has been the universal holding in Texas, as we understand the authorities, from the inauguration of the local option law."

The court discusses the question at length, and after citing numerous authorities the Court of Criminal Appeals holds that by reason of the

failure to post one of the notices for the full twelve days the election was absolutely void. Concluding, the court says:

"We see no reason for overruling the long line of decisions in this State holding that the statute with reference to notice is mandatory. It has been the accepted doctrine, and in all the enactments and re-enactments of the local option law this doctrine has not sought to be changed by legislative action. Besides, this seems to be the rule in this State in regard to other elections where the question of local or special taxes has been involved. Without pursuing the question further, we are of the opinion that the election was void, and the relator is entitled to be discharged."

This decision was by a divided court, one of the judges holding that the election was not invalid, and adhering to the ruling of the court in the case of Norman vs. Thompson, above cited. So it will be seen that the difference of opinion between the two courts is positive and clear-cut, the civil courts holding that if the election was fairly held and the people had actual notice of the election, if no person was deprived of the right to vote, or at least a sufficient number were deprived of the right to vote, to have changed the result of the election, and that the will of the voters was arrived at, that the failure to post the notice as required by law would not render the election void; on the other hand, the Court of Criminal Appeals holds to the doctrine that the failure to comply with the provisions of the statute relating to the posting of notices for the length of time fixed by law would of itself render the election void, no matter if the election was fairly held, and regardless of the fact that the people may have all been advised of the holding of the election.

We do not at present conceive of any procedure whereby the election for the levy of a maintenance tax in a common school district could reach the Court of Criminal Appeals of this State, but that any contest of such election or any cause that might arise out of said election would be a civil action and would, therefore, reach the Courts of Civil Appeals for determination.

We are of the opinion, therefore, and so advise you, that in the case in question the election would be valid, and that the failure to post the notices for three weeks as required by Article 2828, R. S., would not invalidate the election, provided that the election was fairly held, that the people generally had knowledge of the fact that it was being held or would be held upon that date, and that not a sufficient number to have changed the result were deprived of the right to vote by reason of the failure to post such notices for the statutory period of time, and that the will of the voters was ascertained by virtue of the election, that such election would be valid. However, as above stated, each case of this character must stand or fall upon the questions of fact involved in that particular election. Of course, if the election should be held void it would not prohibit the holding of another election in the same year for the same purpose.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

ELECTIONS—PROPERTY TAX-PAYING VOTER.

Any person who owns an interest in any property, whether the title is in his name or whether same is rendered for taxes in his name; if he owns the interest in the property, he would be entitled to vote. It must not be a mere expectancy, but *must* be an interest.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 22, 1913.

Hon. Pink L. Parrish, County Judge, Crosbyton, Texas.

DEAR SIR: You ask us to define a "property taxpaying voter"; that is to say, that you have an election soon at which property taxpaying voters will be permitted to vote, and you desire to know who are property taxpaying voters.

We advise you that in our opinion any person who owns or renders for taxes any property of any kind and of any value would be entitled to vote, also any person who owns an interest in any property whether the title is in his name or whether same is rendered for taxes in his name or not, if he owns the interest in the property he would be entitled to vote. This, however, must be an *absolute* interest, it must not be a mere expectancy but *must* be an interest. For instance:

A husband and wife own a hundred acres of land which is community property; their son would have no interest in this property as long as the husband and wife lived, but when either dies, he then has an interest; that is, he inherits the interest of the deceased which would qualify him to vote in an election even though the property was not in his name, and also not rendered for taxation in his name.

While we have held that it mattered not how small an amount of property a person owns upon which he pays taxes, he would be entitled to vote. This subject to the qualifications that if it is a subterfuge or fraud, the mere owning a mere indeterminate interest in an infinitesimal small part of property would *not* qualify him as an elector; that is to say, we have held that where the election requirements were that the persons must be real estate owners, and in order to qualify a large number of statements, someone should deed to them, say a plot of ground ten feet square. We hold that such transactions are frauds, and that the holding of the property must be bona fide, a genuine good-faced proposition. The law and the courts do not encourage frauds. See 146 S. W., 947.

Yours very truly,
W. A. KEELING,
Assistant Attorney General.

TAXATION—TAXES—ROLLS—TAX ASSESSOR—TAX COLLECTOR—COMPTROLLER OF PUBLIC ACCOUNTS.

When tax rolls are approved by Comptroller of Public Accounts, and Comptroller gave tax assessor the statutory order on the tax collector in payment in full of the State's part of the assessor's compensation for such work, this amounted to an adjudication of the amount due the assessor by State for work done, etc.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 17, 1913.

Hon. R. W. Hunt, County Auditor, Hillsboro, Texas.

DEAR SIR: In your letter to this Department date of January 16, 1913, you make the following statement:

"The tax assessor having completed his rolls for the year, presented them to the Comptroller for approval; the Comptroller approved them and gave the assessor the statutory order on the tax collector in payment in full for the State's part of the assessor's compensation for such work—the completion of the rolls.

"The question is, was not that a settlement, and had not the assessor received his compensation in fact when he accepted the order on the collector as provided by law?

"Now he received this order about October 1st. The collector made collections of the funds during the months of October and November sufficient to take up the order on him in favor of the assessor. All the money was not actually paid to him, the assessor, prior to December the 1st, however, and the assessor reported the unpaid balance of his order among his delinquent fees. On December 8th he shows to have collected the balance of the order from the collector and on which he charged the county 10 per cent commissions for making the collection of said unpaid balance. The collector reports that he paid him out of the November collections.

"The question here is, if he was not already paid in the full sense and meaning of the law, would he be entitled to the full 10 per cent for collecting the balance, as he did? And, if he would be entitled to the 10 per cent under the circumstances above named, would it not be entirely reasonable for the assessor to hold all of the order until the first day of December of each year and then collect it and charge the county 10 per cent on all of it, and in which report he had included the whole amount as delinquent fees?

"If under any circumstances he is entitled to take out or charge 10 per cent for collecting the amount as delinquent fees, would he not be required under the statutes and decision of the court in the case of Ellis County vs. Thompson, as reported in 95 Texas, page 22 et seq., to list the said commissions as part of the fees of his office in making up his following annual report to determine the amount, if any, of the excess fees for that year?"

When the rolls were approved by the Comptroller, and the Comptroller gave the assessor the statutory order on the tax collector in payment in full of the State's part of the assessor's compensation for such work, this amounted to an adjudication of the amount due to the assessor by the State for the work done. This order gave the assessor the right to have it paid out of the first money collected for the year and this right he could have been enforced by appropriate proceedings in the event the tax collector should have failed or refused to honor the order promptly. It was the duty of the assessor to present this order promptly, and if it had been done so same would have been paid or payment could have been enforced.

The assessor would not be entitled to charge the county 10 per cent

commission or any commission for making collections of the unpaid part of said order. This is true for several reasons. One sufficient reason is that the order represented a debt due by the State and not by the county, and the county could not therefore be penalized for the non-payment of the order. Another reason is that the assessor, being clothed with certain power to enforce the payment of the order and it being its duty to do so, he could not allow the same to become delinquent, and through his own negligence or laches permit his own claim to enhance in value and to become increased by 10 per cent commission through delinquency. Still another reason is, that under the provisions of Article 3892, the 10 per cent commission on delinquent fees is to be taken out of such delinquent fees "as may be due the county"; this order was not due to the county but to the assessor personally, and upon its collection there would be no part of the same out of which the assessor could take the 10 per cent commission.

To the question contained in the last paragraph of your letter as quoted above, we make an affirmative reply.

Yours very truly,

LUTHER NICKELS,
Assistant Attorney General.

TAXATION—RESIDENCE—PERSONAL PROPERTY.

Property in notes is to be taxed at the place where the owner resides.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 24, 1913.

Hon. E. S. Briant, County Judge, Sonora, Texas.

DEAR SIR: Your communication to this Department of date January 22, 1913, requires an answer to the following interrogatory, to wit:

"Does a man who resides within the city of Sonora and within the limits of the Sonora Independent School District, who owns notes for money loaned outside the county and who has money on deposit in banks outside the county, have to pay the special district school tax?"

Personal property follows a person wherever he may go and is to be assessed for taxation at the place where the owner resides, unless otherwise provided by law, but taxation statutes generally provide also that personal property is to be taxed at the place where it is. (Coley on Taxation.)

Property in notes is to be taxed at the place where the owner resides and not at the place where the evidences of debt may be deposited. (Desty on Taxation.)

The Supreme Court of the State of Iowa decided in the case of Barber vs. Pharr, 54 Iowa, 58, that money and credits are taxable and assessable at the owner's place of residence and assessment at any other place is illegal and void. In the case of Smith vs. Betger the Supreme Court of the State of Indiana decided that all debts of every kind and

nature due to persons having a domicile in the State of Indiana are taxable against the creditor where the creditor has his domicile.

68 Indiana, 254.

City of Augusta vs. Dunbar, 60 Ga., 387.

Hunter vs. Board of Supervisors, 33 Iowa, 376.

People vs. Whartenby, 38 Cal., 466, 15 Wallace, 300.

It has been decided in Illinois and Nebraska that if the owner is absent, but the credits are in the hands of an agent for renewal or collection, with a view of reloading they have a situs there for the purpose of taxation.

Golddart vs. People, 106 Ill., 28.

———vs. York Co., 19 Neb., 50.

Our statute provides that all property, real and personal, except such as is required to be listed elsewhere, shall be listed and taxed in the county where it is situated. The statutory definition of personal property in this State is: all goods, chattels and effects, or moneys, credits, bonds and other evidences of debt owned by citizens of this State, whether same be in or out of the State. Property subject to taxation by towns and cities and by school districts as well is said to be all real and personal estate and property within the district, except such as is exempt from taxation by the Constitution and laws of the State.

It follows, therefore, that personal property, except when it is otherwise provided, is situated where its owner resides and is taxable there. Tangible personal property situated within any town or city of this State is subject to taxation at the place where it is situated, and intangible personal property, such as credits, is taxable only at the place of residence of the owner, without regard to where the evidences thereof are deposited, and without regard to how they were earned.

Money on deposit in a bank outside of your county would be a debt owing to the citizen of your city from the bank. The actual money in the hands of the bank would be reached for taxation by assessing the real value of the shares of stock of the bank against the individual owners thereof and would in this way be reached for taxation in the county where it actually is. A citizen of your town having this deposit with a foreign bank therefore owns only an intangible credit and the deposit with the bank, or the deposit slip, is simply evidence of that right or credit.

We hold, therefore, that both the notes and the deposits are taxable within your city and within said school district. *Paris vs. Kimble*, 75 Texas, 496.

Yours truly,

LUTHER NICKELS,
Assistant Attorney General.

TAXATION—ASSESSING TAXES—BANK STOCKS, ETC.—TAXATION OF
STOCK AND PROPERTY OF NATIONAL BANKS.

The president or some officer of a national bank is required to furnish to the tax assessor of the county in which bank is located a list of all shareholders of stock, and the number and amount of shares of each.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 7, 1913.

Hon. E. D. McMurtry, Tax Assessor, Briscoe County, Silverton, Texas.

DEAR SIR: In your communication of January 1st, addressed to this department, you state the following facts:

A, president of a national bank, is believed to be using private funds in connection with the bank. Notes evidencing these private loans, if any, are made payable to the bank and the same, together with collateral security therefor, are held in the name of the bank. These securities are deposited in A's private cases, separate and apart from the securities, from the funds of the bank, and are believed to be the private property of the president. You then ask if this property can be assessed or reached for taxation, if it is to be regarded, first, as the private property of the president, and, second, if it is to be regarded as the bank's property.

Article 7545, Revised Statutes, provides that any evasion by means of artifice, or temporary or fictitious sale, exchange or pretended transfer on any bank books, of gold and silver, coin, bank notes or other notes or bonds, subject to taxation under the laws of this State for United States non-taxable treasury notes or any notes or bonds not so subject to taxation, and any such pretended sale, exchange or transfer not made in good faith, and by actual exchange and delivery of the funds so sold, exchanged or transferred and made only by entry on bank books, or by any express or implied understanding not to immediately make a bona fide and permanent sale, shall be deemed prima facie to be a fraud upon the public revenue of this State.

Article 7546 requires all assessors of taxes in this State shall require all taxpayers when assessed by them to make oath as to any such sale, exchange or transfer made by them on the first day of January or within sixty days before said first day of January of any year for which any such assessment is made, as to the good faith and bona fide business transaction of any such sale, exchange or transfer, as above set forth, if any such should have been made by them; and, if it should be disclosed that any such pretended sale, exchange or transfer has been made for the purpose of evading taxation, then and in that event the assessor shall list and render against such person the coin, bank notes or other notes or bonds subject to taxation under the laws of this State; provided, that if any person shall make a false affidavit as to any of the foregoing facts he shall be deemed guilty of perjury and be punished as is now provided by law.

You will note in this connection that the language of the above article does not require this affidavit to be made on or before January 1st, but the same may be made when the assessment is made, and the date

specified in the article, to wit, January 1st, or sixty days immediately preceding, has reference to the date of such sale or exchange.

Article 7551 makes it the duty of the tax assessor, in case of failure to obtain a statement of real and personal property from any cause, to ascertain the amount and value of such property himself and assess the same as he believes to be the true and full value thereof, and such assessment when so made shall be valid and binding as if such property had been rendered by the owner thereof.

Under the facts stated, if the property is not in fact the individual property of the president, then the taking of this affidavit ought to disclose that fact, and enable you to assess the property for taxation.

If this affidavit, when taken, should disclose a bona fide sale or exchange to the bank, then in that event it would have to be reached directly as hereinafter indicated.

Section 1 of Article 7521 requires the president or some officer of a national bank to furnish to the tax assessor of the county in which such bank is located a list of the names of all the shareholders of the stock, together with the number and amount of shares of each stockholder. Section 2 of that article says that a national bank shall also "render" all other stocks and stocks of every kind except United States bonds, and all shares of capital stocks or joint stock or stocks of other companies or corporations held as an investment or in any way representing assets, *together with all other personal property belonging or pertaining to said bank*, except such personal property as is specially exempted from taxation by the laws of the United States.

In the event the shares of stock are not rendered as above stated, then the assessor shall list the same against the owner thereof as un-rendered property in the name of the owner as per the statement furnished for the president or the other officers of the bank. These articles do not mean that the shares of stock or the other property required to be "rendered" as above stated may be assessed for taxes against the bank itself. This cannot be done.

It is settled by the decisions of the Supreme Court of the United States, as well as by the courts of our own State, that it is not within the power of a State to subject the property of national banks to taxation without the consent of the Federal Congress. The only provision of the Federal statute which authorizes such taxation is Section 5219 of the Revised Statutes of the United States, and that permits such taxation as against such banks upon real estate only. It authorizes the taxation of the stock of such banks, as against the owners of such stock, that is, the stockholders individually, but not as against the bank.

Owensboro National Bank vs. Owensboro, 173 U. S., 664.

National Commercial Bank vs. Mobile, 62 Ala., 284.

National Bank vs. San Francisco, 129 Cal., 96.

Smith vs. National Bank, 17 Mich., 479.

First National Bank of Lampasas vs. City of Lampasas, 78 S. W., 42.

The effect of this statute is to exempt personal property belonging to national banks from direct assessment and taxation by the State; that is, the personal property of such banks cannot be directly assessed to them by the State for the purposes of taxation.

Rosenblat vs. Johnston, 104 U. S., 462.

People vs. Weaver, 100 U. S., 539.
 San Francisco vs. Bank, 92 Fed., 273.
 Bank vs. Covington, 21 Fed., 484.
 People vs. Bank, 123 Cal., 53.
 Bank vs. Young, 25 Ia., 311.
 Bank vs. Kreig, 21 Nevada, 404.

Shares of stock are personal property in the hand of the stockholder, and for the purposes of taxation personal property of every description shall be valued at its true and full value in money. This does not mean that stock must be assessed on the basis of its actual or real value. The State may value for taxation shares of stock in a national bank at their actual value provided thereby they are not taxed at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State.

Palmer vs. McMahon, 133 U. S., 660.
 People vs. Tax Commissioners, 94 U. S., 415.
 Hepburn vs. School Directors, 23 Wallace, 480.
 Bank vs. Kinsella, 201 Ill., 31.

It follows, therefore, that the object of the articles of the Texas statute above quoted requiring the listing of the shares of capital stock, together with other personal property, notes, etc., belonging to or pertaining to the bank, is to furnish the assessor and board of equalization data by which to arrive at a proper valuation of shares of stock. In arriving at the assessment or value it is proper for the tax assessor or board of equalization to consider all elements of property which tend to compose or add to the value of the share of stock in the hands of the individual stockholder, such elements to be the capital, surplus, undivided profits and all other personal and real property owned by the bank as a corporation, and the value of one share of stock in such corporation would be the result obtained by dividing the total amount of such elements by the total number of shares, and in this way a proper and legitimate valuation of the share for taxation purposes would be reached, and the notes and securities mentioned in your statement of facts, if regarded as the property of the bank, would be assessed for taxation in this way. *City of Marshall vs. State Bank*, 127 S. W., 1086.

Yours truly,

LUTHER NICKELS,
 Assistant Attorney General.

TAX LEVY—INDEPENDENT SCHOOL DISTRICTS.

The proceeds of a tax levy, where levied for a particular purpose, is a special fund, and must be applied to that particular purpose, and none other.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 14, 1913.

Hon. R. J. McMurray, County Judge, Chambers County, Anahuac, Texas.

DEAR SIR: In your communication to this Department of date January the 6th, you say:

"There is an independent school district in this county which has voted bonds for school purposes, and also a tax of 25 cents to maintain the school. The commissioners court at the August term last levied a tax of 25 cents to provide a sinking fund and pay interest on said bonds.

"It only takes about 12 cents to provide the sinking fund and pay interest on the bonds, and I desire to know if the amount collected more than enough to take care of the bonds can be applied by the commissioners court to the local funds, or will the same have to be applied to the sinking fund? In other words, the citizens desire the tax of 50 cents but want 12 cents, which will take care of the bonds, to be applied to the sinking fund and interest and the 38 cents to be applied to the local fund for school purposes instead of the 25 cents voted.

"Can the commissioners court levy a tax of 25 cents to the bonds which will be sufficient and apply 13 cents to the local fund, or will the court have to levy the 12 cents for the bonds, and the citizens vote the additional 13 cents?"

The 25-cent tax already levied to take care of the interest on the bonds and to provide a sinking fund can be applied only for that purpose and can not be applied for maintenance purposes. The proceeds of a tax levy, where levied for a particular purpose, is a special fund and must be applied to that particular purpose and none other. *City of Sherman vs. Williams*, 84 Texas, 423; *Desty on Taxation*, Vol. 2, page 1060; *Morgan vs. Pueblo & A. V. R. Co.*, 6 Col., 478; *State vs. Marion County*, 21 Kansas, 419-437; *Union Pac. Ry. Co. vs. Dawson County*, 12 Nebr., 255.

If in the election held for the purpose of voting a tax for maintenance purpose the rate was specified to be 25 cents, then the commissioners court would be confined to this rate as a maximum until changed by a subsequent election.

Yours very truly,

LUTHER NICKELS,
Assistant Attorney General.

TAXATION—COUNTY FAIR GROUNDS AND BUILDINGS.

County fair grounds and buildings are subject to taxation.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 11, 1913.

Hon. R. W. Bell, County Judge, Gainesville, Texas.

DEAR SIR: Under date of January 8, 1913, you make the following request of this Department:

"Kindly advise me whether or not a county fair grounds and buildings are subject to taxation under the State laws, as I have been advised that a precedent has been established exempting such property."

You are advised that Section 1, Article 8 of the Constitution, as well as Article 7503. R. S., requires that:

"All property in this State, whether owned by natural persons or corporations other than municipal, shall be taxed in proportion to its value, etc."

Section 2 of Article 8 of the Constitution provides what property may be exempted from taxes by the Legislature, and Article 7505, R. S., describes what property has been exempted from taxation. The property described in your communication could not be exempted under the provisions of the Constitution cited nor has it been attended to and exempted under the article named. It is, therefore, subject to taxation as other property of like kind and character.

Yours very truly,

LUTHER NICKELS,
Assistant Attorney General.

TAXATION—INTERURBAN COMPANIES—CONSTRUCTION OF LAWS.

Interurban companies chartered under Subdivision 60, Article 1121, Acts 1911, are transportation companies, and required to pay an annual tax measured by their gross receipts, and are exempt from the franchise tax imposed by Chapter 3, Title 126, Article 7403, Acts 1911.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, SEPTEMBER 18, 1913.

Hon. F. C. Weinert, Secretary of State, Capitol.

DEAR SIR: Under date of the 18th you state:

"Corporations created under Subdivision 60 for the purpose of constructing, acquiring, maintaining and operating lines of electric, gas or gasoline, denatured alcohol, or naphtha motor railways, within and between any cities or towns in this State, for the transportation of freight or passengers, etc., are claiming exemption under Article 7403, Revised Statutes of 1911."

Upon this statement you ask:

"Will you kindly advise the Department if such exemptions as mentioned in Article 7403 extend to interurban railway corporations incorporated under Subdivision 60, to which reference is made above?"

Article 7403 reads:

"The franchise tax imposed by this chapter shall not apply to any insurance company, surety, guaranty or fidelity company or any transportation company, or any sleeping, palace car and dining car company, which now is required to pay an annual tax measured by their gross receipts, etc."

The question presented is, whether or not interurbans chartered under subdivision 60 of Article 1121, are transportation companies required to pay an annual tax measured by their gross receipts? If so, such companies are clearly exempt from the franchise tax imposed by Chapter 3, Title 126, referred to in Article 7403.

We think that interurban railways that transport passengers or passengers and freight between cities in this State are transportation companies. Webster defines the word "transport" to mean to carry or convey from one place to another; to remove from one place to another and throughout all the deviations of the word "transport" it means to remove. (90 Pa., 307.)

Transportation implies the taking up of persons or property at some point and putting them down at another. (Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196; 29 L. Ed., 158.)

Article 7378 of Chapter 2, Title 126, relating to taxes based upon gross receipts, in so far as is material to this inquiry, reads:

"Each and every individual, company, corporation or association, owning, operating or controlling any interurban, trolley, traction or electric street railway, in this State, and charging for transportation on said railway, shall make quarterly * * * a report to the Comptroller of Public Accounts * * * showing the amount of gross receipts from said charges for transportation on said railway paid to or uncollected by the said individuals, company, corporation, etc., for the quarter next preceding."

This gross receipts tax is graduated according to the number of inhabitants of towns and cities connected by it and the said tax is required to be paid to the Treasurer of the State under severe penalty for failure.

We are, therefore, of the opinion, and so advise you, that interurban railway corporations connecting towns and cities of this State incorporated under subdivision 60, carrying passengers or freight, or both, are required to pay the gross receipts tax imposed by the statute above mentioned, and being transportation companies, are expressly exempted from the payment of the franchise tax imposed by Chapter 3, Title 126, and referred to in Article 7403 mentioned in your communication.

Yours very truly,

B. F. LOONEY,
Attorney General.

TAXATION—HOMESTEAD—PERSONAL PROPERTY.

Where one party fails to pay taxes on homestead and personal property and becomes insolvent and sells his homestead to another party, the latter is liable for taxes due by first party on homestead but not for taxes on personal property of first party, and the latter can, therefore, pay taxes on his homestead.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, APRIL 25, 1913.

Hon. J. E. Bradley, County Attorney, Grosbeck, Texas.

DEAR SIR: You state that Henry Bevil owned two lots in Grosbeck upon which he built a home and in which he lived and used as a homestead; that in the year 1908 he rendered said homestead for taxes together with \$4500 personal property; that Bevil thereafter became insolvent, and all of his taxes for that year became delinquent, after which he sold the two lots to Dr. T. J. Holton who now uses said two lots as his homestead; Holton, you say, desires to pay the taxes on the two lots, but refuses to pay the taxes on Bevil's personal property; you state that the tax collector refuses to permit him to pay taxes on the lots unless he will pay Bevil's taxes on his personal property; and you desire to know if Holton would have the right to pay the taxes on the two lots and the right to refuse to pay Bevil's personal taxes.

We beg to advise you that in the opinion of this Department, Holton would have the right to pay the taxes due on the two lots and would have the right to refuse to pay Bevil's personal taxes for the year 1908.

Articles 7631 and 7528 of the Revised Statutes of Texas (1911) fixes a lien against all property for all taxes due on any, but Article 7637 (Revised Statutes) provides an exemption in the following language:

"No real estate set apart, used or designated as a homestead shall be sold for taxes other than the taxes due on such homestead."

It has been definitely held in this State that a homestead can not be sold to satisfy tax lien or other delinquents; it is only liable for the taxes assessed to it.

Wright vs. Straub, 64 Texas, 64.

Lufkin vs. Galveston, 58 Texas, 545.

Jourdan vs. Brenham, 57 Texas, 655.

The world was put on notice by the Constitution, Article 16, Section 50, and the Revised Statutes in the articles above cited that Bevil used and occupied this property as a homestead, and that such property was only liable for the taxes against it, and when Holton purchased same, *in law* he purchased it with the knowledge that it was only liable for the taxes assessed against it.

We, therefore, conclude, and give it as the opinion of this Department, that Holton would be authorized to refuse to pay Bevil's personal taxes, but that it would be his duty to pay all taxes assessed against this property which was used as a homestead by Bevil and afterwards used as a homestead by Holton.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

TAXATION—DELINQUENT TAXES.

Held: Andrews county entitled to any back taxes which its collector collects, even though said taxes were assessed prior to the organization of the county, etc.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 17, 1913.

Mr. A. L. Green, Stanton, Texas.

DEAR SIR: In reply to your letter of the 14th, in which you desire to know whether certain delinquent taxes should be paid to Andrews county or to Martin county, and whether in the event such taxes are paid to Andrews county the same should be turned over to Martin county by Andrews county, we refer you to Article 7722 and the following articles of the Revised Statutes of 1911, which articles provide that when any county is created, or when any unorganized county is organized a transcript shall be made of the assessor's roll of the county to which the unorganized county was attached showing the unpaid assessments, and that the collector of the newly organized county shall collect the taxes

shown by the said transcript of the rolls. This article was construed in the case of Hardeman County vs. Foard County, 47 S. W., 30, and 536. In that case it was held that the authority given by the act to the collector of the new county to collect the taxes implies that the new county is entitled to the taxes when collected.

It is our opinion that under the articles of the statutes above referred to, and under the above cited case, Andrews county is entitled to any back taxes which its collector collects, even though said taxes were assessed prior to the organization of the county, and that neither Martin county nor Midland county would have any claim against Andrews county for any of said back taxes.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

TAXATION—DELINQUENT TAXES.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, AUGUST 22, 1913.

Hon. W. P. Lane, Comptroller of Public Accounts, Capitol.

DEAR SIR: You propound to us an inquiry made to you by Mr. L. L. Shield of Santa Anna, Texas, and we answer the questions in their order, which we will thank you to forward to Mr. Shield:

1. You desire to know if the State can sell a piece of land delinquent and thereby annul a vendor's lien note. We advise you that when land becomes delinquent it can be sold without reference to the vendor's lien notes against it. The vendor's lien notes are simply an equity in the land and the land is subject to the taxes and can be sold for taxes without reference to the vendor's lien notes.

2. You state that the board of equalization has valued certain land at three times its real value. Can the board reconsider its valuation after the land has been sold? We advise you that Art. 7570, R. S., 1911, answers this question by providing that a board of equalization may meet once only and after its adjournment their action shall be final. Art. 7564 of the Revised Civil Statutes sets out the proceedings of the board of equalization. After the adjournment of the board of equalization their action is not subject to revision by them nor any other court.

3. You desire to know if all the lots and blocks and parcels of land located in the same town belonging to the same person should be sold collectively? Art. 7689 answers this question and allows any person interested in it to appear and have the property separated and only so much sold as is necessary to pay the taxes on the whole.

We believe this answers the questions in the order in which they have been propounded to us, and we will thank you to convey this letter to Mr. Shield.

Very sincerely yours,

W. A. KEELING,
Assistant Attorney General.

TAXATION—EFFECT OF VALIDATION OF LOCATION AND PATENT.

When a survey of public school land was invalid on account of not being made contiguous to its alternate sections, and the survey was afterwards validated by the Act of April 7, 1897, the land is subject to payment of all the taxes levied against it prior to the validation of the survey.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JUNE 27, 1913.

Hon. T. R. Boone, County Attorney, Wichita Falls, Texas.

DEAR SIR: In your letter of June the 26th, you state that in the year 1888, a tract of school land was patented to E. M. Powell; that this tract was alternate to the tract of land surveyed under the John Wheat Confederate Scrip, and that in 1910 the State brought suit against E. M. Powell to recover the school tract on the ground that it was not contiguous to the other tract surveyed under the certificate, and that the defense was successfully made by Powell, that his title was validated by the Act of April 7, 1897. It further appears from your letter that an agreed statement of facts was filed in the case in which, among other things, it was agreed that Powell had paid all taxes on the land sued for up to the year 1908. You state that the tax collector's books show that the taxes on this land were unpaid for the year 1887. You desire to know whether Mr. Powell is liable for the taxes for the year 1887.

By the Act of April 7, 1897, all locations and patents, defective because of the fact that the land was not surveyed in contiguous tracts, were validated. In the opinion in the case referred to in your letter, being *State vs. Powell*, 134 S. W., 746, the court says:

"Appellee contends that the act in question rendered his location and patent valid *ab initio*, notwithstanding the intervening judgment in favor of the State. We think this view correct."

It thus appears that in the opinion of the court Mr. Powell's title was validated from its very beginning. If, therefore, the school section was purchased by him or his assignor from the State prior to January 1, 1887, the land would be subject to the tax lien for the year 1887. The suit by the State against Mr. Powell was not a suit for the collection of taxes, and it does not appear that the issue as to payment or non-payment of all taxes was a material issue in the case, and, if the taxes for the year 1887 are, in fact, unpaid, they may, in our opinion, still be collected notwithstanding the agreed statement of facts in the case that all the taxes had been paid.

Interest on these taxes could be collected but not the 10 per cent penalty, for, as we understand it, the 10 per cent penalty could not be collected on taxes that accrued prior to the year 1897.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

COMMON SCHOOL DISTRICT—SPECIAL MAINTENANCE TAX—INDEPENDENT SCHOOL DISTRICT, ETC.

Inasmuch as territory to be included in the independent school district is exactly the same as that included in common school district, the effect of the incorporation of such territory as an independent school district will be merely to change the form of government of the territory for school purposes.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 12, 1913.

Judge Richard Critz, Georgetown, Texas.

DEAR SIR: In your letter of April 8th you state that a common school district of your county, which includes the village of Round Rock, voted a special maintenance tax at an election, which we presume was held according to law prior to January 1, 1913, and that said tax has been levied for the year 1913. You further state that it is now the desire of the inhabitants of said common school district to create an independent school district which will cover exactly the same territory as that now included in the said common school district. You desire to know whether the said tax which has been levied for the year 1913 can be collected after the creation of such independent school district.

It is the opinion of this Department that said tax can be collected and that the creation of the independent school district would not have the effect of abrogating the tax. The tax has been voted by the inhabitants of the district and has been levied by the commissioners court. After the first day of January, 1913, and after proper assessment the tax became a lien on all the taxable property within the bounds of the common school district, and after such lien has been fixed and after the tax has been levied by the proper authority, we know of no law which would authorize the tax assessor to omit such tax from his rolls, or which would excuse the tax collector from collecting the tax. An independent school district can levy and collect this same maintenance tax and after the incorporation of such district as an independent school district the maintenance tax would properly be applied to the same use to which it would be applied by the common school district. In other words, inasmuch as the territory to be included in the independent school district is exactly the same as that which is now included in the common school district, the effect of the incorporation of such territory as an independent school district will be merely to change the form of government of the territory for school purposes. All the school property in the common district would pass to the independent school district, to be used by the independent school district for the same purposes for which it was used by the common school district, and though the money collected under the tax levied by the common school district would be handled by a new set of officers, it would, nevertheless, be applied to the very purpose for which it was voted and levied.

We trust that this opinion satisfactorily answers the questions contained in your letter.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

TAXATION—SCHOOL LANDS.

Taxes should be collected for period intervening between cancellation of purchase of school lands and the reinstatement thereof, because the reinstatement dates back to time of cancellation.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, APRIL 28, 1913.

Mr. M. B. Chastain, Sheriff, Marfa, Texas.

DEAR SIR: In your letter of April the 20th, you state that certain tracts of public school land in your county were sold by the State on condition of settlement, and that thereafter the Commissioner of the General Land Office cancelled the sales for the failure of the purchasers to reside upon the land and to improve it according to law and for collusion, and that at or about the time the sales were cancelled, suit was brought by the State against the purchasers for the recovery of the land, but that the suit was afterwards dismissed by the State and that the sales of the land were, after some two or three years from the date of the cancellation by the Commissioner, reinstated by the Commissioner of the General Land Office. You further state that the owners of the land contended that they had complied with the law, and that the Commissioner of the General Land Office was in error in cancelling the sales, and that during the period between the cancellation and the reinstatement of the sales, the purchasers continued to use the land and each year tendered to the Commissioner the annual interest due on the purchase money of the lands. You desire to know whether taxes can be collected on the lands for the period subsequent to the cancellation of the sales and prior to their reinstatement.

You are advised that in the opinion of this Department the lands were subject to taxation during the period named and that you should proceed to collect the taxes due for said period in the manner prescribed by law. When the sales were reinstated by the Commissioner, their reinstatement dated back to the time of their cancellation. In other words, the act of the Commissioner in reinstating the sales was nothing more than rescinding his former action in cancelling them and the effect was the same as if the cancellation had never been made. If this were not true, the purchasers would not now be entitled to the land, unless they should repurchase it from the State.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

TAXATION—PROPERTY SUBJECT TO, ETC.

Notes owned and held by party living within the incorporated limits of a town or city are subject to taxation in such town or city, even though they may be a lien against real estate without the incorporate limits of said city.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 11, 1913.

Mr. H. A. Lambeth, City Tax Assessor and Collector, Cooper, Texas.

DEAR SIR: In your letter of January 8, 1913, addressed to this Department, you propound the following question:

"You will please advise me in regard to a tax proposition, viz.: Are notes that are against land outside of city limits and owned by party living in said city subject to city tax?"

Under the law personal property includes all goods, chattels and effects and all moneys, credits, bonds and other evidences of debt owned by citizens of the State whether the same be in or out of the State.

Property subject to taxation by an incorporated city or town is defined in the statute to be all real and personal estate and property *in the city* not exempt from taxation by the Constitution and laws of the State.

In the case of *Ferris vs. Kimball et al.*, 12 S. W. R., page 689, in an opinion rendered by our Supreme Court, the question which you propound was definitely and clearly settled. The following rules were laid down in that case with reference to taxing personal property.

1. Personal property, except where it is otherwise provided, is situated where its owner resides and is taxable only there.
2. Tangible personal property situated in any town or city in this State is subject to taxation at the place where it is situated.
3. Intangible personal property, such as credits, are taxable only at the place of residence of the owner without regard to where they are kept or deposited, and equally without regard to how they were earned or to the place of residence of the debtor.

We think it clear, therefore, that notes owned and held by a party living within the corporate limits of a town or city are subject to taxation in such town or city, even though they may be a lien against real estate without the incorporate limits of said city. The residence of the owner fixes for taxing purposes, the situs of such property.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

TAXATION—COTTON.

1. Cotton held by producers is not subject to taxation.
2. Cotton held by buyers on the platform in the county on January 1st is subject to taxation.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 8, 1913.

Mr. R. S. Wiley, Tax Assessor, Milam County, Cameron, Texas.

DEAR SIR: In your communication to this Department, of date January 1st, you ask the following questions:

1. Whether or not cotton held by producers is subject to taxation?
2. Whether or not cotton held by buyers on the platform in the county on the first day of January is subject to taxation?

Replying to the first interrogatory, it is sufficient to say that Section 19 of Article 8 of the Constitution, provides that "farm products in the hands of the purchasers * * * are exempt from taxation until otherwise directed by a two-thirds vote of all the members elect of both houses of the Legislature."

These products have not as yet been expressly subjected to taxation in the manner required in this provision of the Constitution. It is true that Article 7503 of the Revised Statutes, 1911, declares that "all property, real, personal or mixed, except such as may be hereinafter expressly exempted, is subject to taxation, etc.," and that these products are not found amongst the exemptions contained in Article 7507. Nevertheless, they are still exempt for two reasons, to wit: The Revised Statutes of 1911 were not adopted by a two-thirds vote of all the members-elect of both houses of the Legislature. Besides, the general statement of the statutes referred to would not satisfy the constitutional provision, which declares products to be exempt "until otherwise directed by two-thirds vote, etc." To direct a taxation of the products would require special legislation adopted by two-thirds vote of all the members-elect of both houses of the Legislature. (*Cattle Co. vs. Faught*, 69 Texas, 404.)

The language of the Constitution and statutory provisions quoted above constitutes a complete answer to the second interrogatory, because it is perfectly clear that cotton held by buyers would not fall within the exemption of the Constitution and would therefore be subject to the articles of the statute quoted. The cotton would be subject to taxation.

Yours very truly,
LUTHER NICKELS,
Assistant Attorney General.

GROSS RECEIPTS TAX—PISTOLS—LEASES—WHOLESALE AND RETAIL DEALERS.

Contracts for lease of pistols are only for the purpose of evading the provisions of the gross receipts tax law. They are merely subterfuges, and their only purpose is to provide immunity to those dealers against the payment of the fifty per cent gross receipts tax.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, FEBRUARY 28, 1913.

Hon. W. P. Lane, Comptroller of Public Accounts, Capitol.

MY DEAR SIR: This Department is in receipt of your favor of the 26th inst., in which you set out at length Article 7380, Revised Statutes of 1911, requiring every individual, company, corporation or association created by the laws of this State, or any other State, who shall engage in its own name or in the name of others, or in the name of its representatives or agents, in this State in the business of wholesale or retail dealers in pistols, to make a report to the Comptroller showing the gross amount collected and uncollected from sales in this State of pistols during the quarter next preceding, and shall pay to the State Treasurer of the State of Texas occupation tax of 50 per cent on gross receipts from such sale.

You state that under the provisions of the above law there have been only two wholesale or retail dealers of pistols who have made reports to your Department and paid into the Treasury the gross receipts tax imposed. You further state that there appears to be no effort whatever to conceal the fact that pistols are being disposed of in large numbers throughout the State on what is termed a lease contract; and then ask for an opinion from this Department as to whether or not this agreement adopted by wholesale and retail dealers is an evasion of the law. You submit with your request three forms of what purports to be lease contracts under which pistols are alleged to be leased by dealers to other parties, said forms being as follows:

STATE OF TEXAS,
County of.....

This is to certify that I have this day rented from....., ofcounty, Texas, one..... I agree to pay said..... for the rental of same the sum of.....per day for each and every day after this date that I retain said....., and until the return of same to said.....

I further agree to return said.....to said.....at their place of business in....., Texas, in as good condition as when I received it, ordinary wear and tear excepted.

I hereby deposit with said....., as a guaranty for the safe return of said....., the sum of....., and I agree that should I fail to return said.....in the condition in which I receive the same, ordinary wear and tear alone excepted, or fail to pay the rent hereinbefore specified, said.....may retain the amount hereby deposited, or so much thereof as shall be necessary to cover the value of said....., or the damages that have been done the same, or the amount of accrued rental upon same.

Witness my hand, this.....day of....., 191....

Witnesses:

.....
.....

STATE OF TEXAS,
County of Tarrant.

Know all Men By These Presents: That I have this day rented from of Fort Worth, Texas, one pistol No....., for a term of.....from this date, shotgun, agreeing to pay said..... for the use of same as rental thereof for said period of time the sum of \$..... And I further agree at the expiration of said time to return said pistol to said.....at Fort Worth, Texas, shotgun, in as good condition as when I received it, ordinary wear and tear excepted.

It is, however, understood that in the event I return said pistol, shotgun, in good condition at any time within.....months hereafter, the sum of \$.....is to be refunded to me by the said.....

Witness my hand, this.....day of....., 191....

Attest:

STATE OF TEXAS,
County of.....

This contract made and entered into, this the.....day of....., A. D. 191...., between, of, county, Texas, of the first part, and....., of..... county, Texas, of the second part.

Witnesseth: That in consideration of the covenants herein contained on the part of the party of the second part, the party of the first part doth hereby grant, demise and lease unto the party of the second part the following described property, to wit.....

To have and to hold the above described property hereby leased unto the said.....and his representatives from the.....day of, A. D. 19..... Yielding and paying the sum of \$..... per annum from date hereof during the term of the lease, said amount being due and payable in advance for each current year, with the privilege reserved to the party of the second part to pay as many current years of the lease price and rental of the same in advance as the party of the second part may choose; that all money unpaid on the lease value of this contract shall draw interest at the rate of 10 per cent per annum from date until paid. And the party of the second part does hereby contract that he will peaceably deliver the property herein described to the party of the first part upon his default in any payment, or at the expiration of the lease period in good order, ordinary wear excepted, and his failure to do so, on demand, will subject any and all property of the party of the second part to execution, at the suit of the party of the first part, all exceptions being waived; and the party of the second part contracts and agrees to use the said property with care and prudence, and that he will not underlet or lease same to anyone else.

Witness our hands at....., Texas, this the.....day of..... A. D. 191....

Looking at these contracts as they appear on their face, and applying the rules of construction thereto to determine their legal significance, it readily appears that the true legal designation thereof must be either a contract of purchase and sale, or else that the same are in the nature of bailments.

Sale is variously defined, and we quote here some of the legal definitions:

"A sale in its broadest sense may be defined as a transfer of the property in a thing for a price in money." Houston Ry. Co. vs. Keller. 90 Texas, 214: Krnavek vs. State, 38 Texas Crim., 44.

"In a restrained sense a sale may be defined as an agreement whereby one party, called the seller, transfers to the other party, called the buyer, the property in goods for a money consideration, called the price, which the buyer pays or agrees to pay." 35 Cyc., 27; Benjamin on Sales, Secs. 1, 3; Tiedman on Sales, Sec. 1.

"Bargain and sale is defined to be the transfer and delivery of personal or real property or chose in action by one person to another in consideration of a price agreed upon between them as the value of the property sold." 5 Cyc., 616; Freeman vs. Horton, 17 N. J. L., 191.

"Sale has also been defined as a transmutation of property from one person to another for a price." Howell vs. State, 52 S. E., 649.

"Further defined as an agreement, a meeting of the minds of two or more persons, founded upon a money consideration, by which the absolute or general property in the subject of the sale is transferred from the seller to the buyer." White vs. Treat, 100 Fed., 290.

"An agreement by which one of two contracting parties gives a thing and passes title to it in exchange for certain price in money." Barry vs. Mutual R. Co., 119 S. W., 1020.

"A contract between parties to pass rights of property for money which the buyer pays or promises to pay to the seller for the thing bought and sold." Homan vs. State, 51 S. W., 237.

A bailment is defined to be a delivery of goods on condition expressed or implied that they shall be restored by the bailee to the bailor, or, according to his direction, as soon as the purpose for which they are bailed shall be answered. Bailments are of different kinds and involve different rights and liabilities upon the parties. One of the classifications is that of hiring, and this class is also subdivided in still other classes, one of which is bailment for the benefit of both parties.

"If the hirer, instead of delivering back the same, pays its full value to the owner on account of injury sustained by his own negligence, he becomes thenceforth the proprietor of the thing, and the bailor has no longer any title to it." Story on Bailments, 375.

"In the nature of bailment, it is essential that the specific thing be returned." 5 Cyc., 169.

"Where there is no intention that the specific article should be returned or delivered to another, the transaction becomes either a sale, mortgage, gift or an exchange." 5 Cyc., 169; Bretz vs. Brehe, 2 Am. St. Rep., 706; Collins' Appeal, 52 Am. Rep., 479; Austin vs. Seligman, 18 Fed., 519; Murch vs. Wright, 46 Ill., 487.

In the latter case the court says:

"But the rule is well settled that when, by the terms of the contract under which property is delivered by an owner to another party, the latter is under no obligation to return the specific property either in its identical form or in some other form in which its identity may be traced, but is authorized to substitute something else in its place, either money or some other equivalent, the transaction is not a bailment, but is a sale or exchange. Here the agreement was that Kempt & Co. should return the refined product of the sweepings or account for the value thereof, less the price of refining. They had an option which was inconsistent with the character of a bailment. (Citing cases.) The case is not one where they had possession of the plaintiff's property under an executory agreement to purchase, but one where the title passed on delivery, unless the delivery was a bailment. It was not a bailment if they had a right to return money in its place."

Applying the above principle to the three alleged leases as above set out solely and alone to the legal effect of such instruments as apparent

from the face thereof, and not looking to any ulterior motive or purpose of the contracting parties, it is the opinion of this office that the same constitute and are sales of the property therein designated. At first blush, it would seem from the reading of these contracts that they are bailments, but upon a close analysis of each of them it becomes perfectly apparent that under the definition of bailments for hire these contracts cannot be held in law to be bailments, but the true meaning thereof is a contract of purchase and sale. Applying the definition of bailment and the holding of the court thereon in the case of *Austin vs. Seligman*, above cited, to the first of the contracts set out herein, it will be noted that the contract comes within the holding of this case, wherein the contract sets out that the purported lessor may "retain the amount of money hereby deposited, or so much thereof as shall be necessary to cover the value of said pistol," thereby giving the option to the person to whom the pistol was delivered to either return the pistol or forfeit the amount deposited. It will be noted that there is a provision for a deposit as a guaranty for the safe return of said pistol. According to your advice in connection with your letter the deposits made for the alleged purpose of securing the return of the goods is always the selling price of the article, and the time expressed in the contract within which the same shall be returned is some long period of years, such as 50 or 99 years.

The second contract as above set out is subject to the same construction, and the rules laid down in the case above cited would apply to it with equal force, and it would in law amount to a sale.

The third contract above set out is one which differs in some material respects from the two just noticed. It provides for the lease of a pistol for a certain period of time for an agreed annual rental, said annual rental to be due and payable in advance for each current year, and it provides for the peaceable delivery of the property upon the default of payment or at the expiration of the lease or upon default in any payment; provides for suit for the recovery of the rent due with waiver of exemptions. This contract is ingeniously drawn and gives evidence of much labor and thought in its preparation; but a careful perusal of the same will disclose the vice therein and evince the real purpose of the same. One provision discloses the significance of the entire instrument, and that is this: After stipulating for an annual amount to be due and payable, it provides as follows:

"With the privilege reserved to the party of the second part to pay as many current years of the lease price and rental of the same in advance as the party of the second part may choose, and that all money unpaid on the lease value of this contract will draw interest at the rate of 10 per cent per annum from date until paid."

It would require no extraordinary effort of the imagination to conceive that the real purpose of this clause is to cover the fact that the full value of the pistol sold is paid in advance under this option to pay as many current years of the lease price as the purchaser may desire. It further throws out the inducement along this line by providing that the unpaid installments shall bear interest at the rate of 10 per cent per annum from date until paid. And these two clauses embody a

concession and a threat, of privileges granted to pay the entire value of the pistol, and if the entire value of the pistol is not paid at the time of the delivery then that portion of the unpaid value will bear interest at the rate of 10 per cent. There is also an unfortunate use of a word in this instrument in the granting clause thereof, wherein use is made of the word "grant." Under our law as applied to the sale of real estate the use of this word carries a conveyance of title and a warranty thereof.

It will thus be seen that each and all of the contracts above submitted provides for an option on the part of what they are pleased to term a lessee to return the pistol or pay the price thereof, which in each of these cases has already been done. The price has been paid. In fact, under the terms of the contract, that is the first step in the institution of the proceedings. The price is agreed upon and upon the agreement upon the price and the payment thereof, which in these contracts they are pleased to call a deposit, the pistol is delivered. The most striking portion of these contracts is the provision for the forfeiture of the deposit in event of a failure to return the pistol.

It matters not by what name a transaction may be called, it is the real intent and purpose of the parties that fixes the legal effect thereof, and it is the meeting of the minds of the contracting parties that determines the true status, and it is inconceivable from the reading of the above contracts that the real intent and purpose of the parties to these contracts is not that the title to the pistol shall pass and that effort shall ever be made for a recovery of the pistol, but it is apparent that the deposit made to secure its return shall be treated and held as the purchase price thereof. Otherwise it will be necessary to treat the deposit as a pledge, and the identical money placed upon deposit would have to be returned to the pledgor in event he should return the pistol.

It is the opinion of this Department that these contracts fall squarely within the rule laid down in *Austin vs. Seligman*, above cited, and are of that classification of bailments for hire which are construed by the courts to be sales.

The above is all directed to the legal effect of the contracts above set out and the transactions thereunder, but there is yet another, and in the opinion of this office a much more vital result sought to be effected by this character of instruments, and the real intention of the parties in entering into the same is not whether the contract may be called a lease or a bill of sale, but is an endeavor to evade the tax as set out in the provisions of the Gross Receipts Tax Law above referred to.

As suggested by you, and as a matter of fact, it is common knowledge throughout the State that some of the dealers in pistols who are operating under the lease contract system are charging full wholesale and retail prices for same, calling it deposits to insure the return of the pistol, and that the period of the alleged lease runs for a great number of years, such as 50 or 99 years. It is also a matter of common knowledge that the life of a pistol and the period of its usefulness cannot extend to a period of anything like that number of years. At the end of that length of time the pistol would either be worn and of no value or else, if it had been preserved, it would be out of date, anti-

quoted and a curio. Knowing this, the dealers have fixed the rental value at the full wholesale or retail price of the pistol in order that they should receive full value before parting with their goods.

Let us suppose for the moment that transactions under discussion are bona fide and that the contract of lease and return of the leased property is actually intended to be fulfilled, and that at the end of fifty or a hundred years the lessees, having grown old and feeble, or, if they should have passed beyond the allotted three score years and ten and have been gathered to their fathers, then their heirs, legal representatives or descendants, perhaps even into the fourth generation, would be found gathering into the office of the wholesale house or retail store of the lessor, his heirs or assigns, for the purpose of redelivering the rented pistol and of reclaiming that deposit made so long ago that the memory of man runneth not to the contrary. There must upon that occasion be a delving into shelves filled with the books and records of the dealer for those old volumes containing the transaction that happened so long ago, and we doubt that after the lapse of such time that the pistol or the transaction upon the books could be sufficiently identified so as to adjust the matter between the contending parties, and the litigation arising from such uncertainty would overcrowd the courts of the country, already, if conditions had not improved within a hundred years, crowded to suffocation, and perhaps the drama enacted upon that occasion would rival Joseph Jefferson in his unequalled production of Rip Van Winkle, and it might be that some old and decrepit citizen whose head was covered with the frosts of many winters would come tottering into the office of the dealer after a space of forty years and present to him what was left of once a double-action or an automatic revolver, the same being only a barrel covered with rust, and allege that the same was in that condition by the ordinary wear and tear of time.

When, after the expiration of all these lease contracts and all the pistols have been returned, there will be a collection of ancient arms of various forms and patterns, and the interior of one of these establishments will present a view of pistols of a varied make and design, there will be single-action, double-action, pump guns, automatic exterminators, single-barrel, double-barrel, side-ejectors, swing cylinders, and even old cap-and-ball, all of which will be in a more or less state of infirmity and decrepitude. These establishments will then reach the dignity of rivals of the Old Curiosity Shop and many a Little Nell will look in wonderment upon the varied array of curios there displayed.

This provision of the Gross Receipts Tax Law was before the Court of Civil Appeals in the case of Caswell & Smith vs. The State, 148 S. W. Rep., 1159. The court upheld the law as valid, and a writ of error was refused by the Supreme Court. In that case the court said:

"So that, if the pursuit of the business under consideration is entirely useful and harmless, one could not be so taxed as to destroy it, but, if it be admitted that the sale of pistols has a tendency to be hurtful to the welfare of society, then and in that event the lawmaking power, in their discretion, in our judgment, would have the right to not only levy an excessive tax, which would be prohibitory thereof, but could go further and absolutely prohibit anyone from engaging therein." Citing *Dabbs vs. State*, 39 Ark., 353.

The courts of this State, in construing and passing on the validity of laws enacted under the police power, have upheld what is known as the Cold Storage Tax, the C. O. D. shipment of intoxicating liquors tax act, levying an annual tax on solicitors taking orders in territory where local option has been adopted, and other legislation of like import has been sustained by the higher courts on the ground that same were the exercise of police power and not a tax, and the practice of matters regulated was harmful to society and detrimental to the public morals. Ex parte Flake, 149 S. W. Rep., 146; Edmondson vs. State, 142 S. W. Rep., 887.

It will thus be seen that the intent and purpose of the law above referred to, while carrying a revenue-producing idea, is the curtailing of the unrestrained sale of pistols, and is in reality a police regulation with that end in view.

This being the purpose of the law as defined by our higher courts in recent decisions, will that laudable purpose and construction placed thereon by the higher courts of our State be allowed to be subverted and held for naught by a system instituted as above, which in the opinion of this office is and can be only a palpable evasion of the law? If this subterfuge is upheld as valid, then the high aim of the law-makers and the construction placed upon such laws by our higher courts, having in view the protection of the lives of the citizens as well as the public morals, will be defeated.

It is the opinion of this office that the contracts as above set out, and those similar thereto, are only for the purpose of evading the provisions of the Gross Receipts Tax Law, that the same are merely subterfuges, and their only purpose is to provide immunity to those dealers against the payment of the 50 per cent gross receipts tax as provided in Article 7380 of the Revised Statutes of 1911, and that the same are illegal and invalid for that purpose, and that the parties operating thereunder are subject to the tax as provided in said Article 7380.

Respectfully,

C. W. TAYLOR,
Assistant Attorney General.

OPINIONS CONSTRUING LIQUOR LAWS.

SALOONS—NINE-THIRTY CLOSING LAW.

Construing the 9:30 Closing Law, both Civil and Criminal, holding that it would be unlawful for a saloon to open during prohibited hours for any purpose or for any length of time, defining what is meant by closed house or place of business.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, OCTOBER 22, 1913.

Hon. W. P. Lane, Comptroller of Public Accounts, Capitol.

DEAR SIR: You desire that this Department construe the act of the last Legislature known as the 9:30 Closing Act with reference to:—

1. Whether or not houses in which intoxicating liquors are sold would be required to close at 9:30 when in such houses there was also conducted a restaurant or news stand or bootblack stand or some other business, or would it be sufficient to draw a curtain around the bar and cease the sale of intoxicating liquors during the prohibited hours. In other words, when some other business is conducted in the house in which is situated a saloon or bar, is it necessary that such other business be also closed when the bar is closed?

2. Where a saloon or bar makes sales of intoxicating liquors prior to 9:30 and delivery is made thereafter in some restaurant would this constitute an opening of the house or place of business within the meaning of the 9:30 closing act?

3. Where a bar is situated in the same building with a restaurant and between the bar there is a door or opening through which during the week liquors are served to customers in the restaurant, would the restaurant so situated and used in connection with the bar during the week be required to close at 9:30 and remain closed on Sunday?

4. Where the bartender closes his door at 9:30, but remains in the saloon or place of business for the purpose of counting his cash or posting his books or cleaning up his saloon, would this constitute an opening within the meaning of the law?

5. Where the bartender closes his house or place of business at 9:30, but permits one or more of his customers to remain in the house with him while they engage in social conversation, would this be a violation of the law?

In order to give a fair and proper construction of the law requiring saloons to be closed during certain prohibited hours, it will be necessary for us to notice two laws in this connection. The first was passed and approved March 31, 1913, and is known as the "Criminal 9:30 Closing Act." This law requires under a criminal penalty, that "every person or firm having a license, who may be engaged in, or who may hereafter engage in, the sale of intoxicating liquors to be drunk on the premises in any locality of this State, other than where local option is in force, shall close and keep closed their *houses and places of business and transact no business therein or therefrom* after 9:30 o'clock p. m., until 6 o'clock a. m. of each week day, and shall close and keep closed their houses and places of business and transact no business therein or therefrom after 9:30 o'clock p. m. on Saturday and until 6 o'clock a. m. of the following Monday of each week," etc., and then follows: "or who shall sell or barter any intoxicating liquors of any kind or who

shall transact or permit to be transacted therein or therefrom any such business" during prohibited hours shall be fined, etc. When two acts of the Legislature are passed touching the same subject they should be construed together so that one would be a complement of the other. The Called Session in August, 1913, passed what is commonly known as the "Civil 9:30 Closing Act," the object of the Legislature being, as expressed in the caption of said bill, to provide a civil statute as an aid and help to the criminal statute requiring saloons to be closed during certain prohibited hours. As expressed in the caption of the bill, it was the intent of the civil bill to aid and help the criminal bill and give an additional assurance that all places in this State where intoxicating liquors are dispensed or sold under license that such places of business would be required to be closed during certain designated periods. In the application for the permit to engage in the liquor business the applicant is required to say that he will not keep open *house or place where liquor shall be sold under such license or transact any business in such house or place of business* after 9:30 o'clock p. m., etc. If any person is granted a permit and a license to engage in the business of retail liquor dealer and the Comptroller shall find that at any time he opened or permitted his place of business to be opened or conducted therein or therefrom any business during prohibited hours, the Comptroller shall forfeit the license.

Article 7451 of the act requires that every licensee shall close and keep closed their *houses and places of business and transact no business therein or therefrom*, etc., during prohibited hours. Every licensee is required to give a bond conditioned that he will not keep open the house or place of business where liquor shall be sold under such license for the sale thereof or transact such business in such house or place of business during prohibited hours.

We think from reading the two acts of the Legislature together that there is no doubt whatever that the clear and expressed intent of the Legislature was to require (1) that during prohibited hours the liquor dealer should cease selling intoxicating liquors under penalty; (2) that he should close and keep closed during such hours his house or place of business; (3) that he should transact no business therein or therefrom during the prohibited hours.

If a liquor dealer should open his place of business where he sold liquor in such place of business he would be guilty of violating the provision of the law requiring him to keep his place of business closed. It is not necessary to constitute this offense that the liquor dealer sell or open his place of business for the purpose of sale, but it is sufficient if he open his place of business during prohibited hours. The Legislature meant much more than merely he should cease selling on Sunday as is evidenced by the fact that a punishment is assessed against him for sale, and also for opening his place of business. It is intended by the act that the place of business should be absolutely closed for all purposes and that no business be transacted therein or therefrom during prohibited hours. It follows from this that it would be a violation of the law for a bartender or liquor dealer to remain in his house or place of business after 9:30 to count his cash or sweep his floors or dust his counters, or polish his mirrors or do anything else connected with his business, for

he would be transacting in such house or place of business "business" within the meaning of this statute. If the liquor dealer should remain in his house or place of business after 9:30 and permit one or more customers to remain with him even though he sold them no liquor, but merely engaged in social conversation, he would be guilty of keeping open house within the meaning of this law. If a liquor dealer should sell liquor before 9:30 o'clock to be delivered at a restaurant after 9:30 o'clock, even though the liquor was bought and paid for before 9:30, he would be guilty of keeping an open house.

If a restaurant is run in the same building with a liquor saloon or if it is separated from the saloon by a partition in which is a door or archway and during the week the customers of the restaurant are supplied with liquor from the saloon, the saloon would be guilty of keeping open house if this restaurant was opened and the customers of the restaurant had ingress and egress into the saloon or part of the house in which was situated the bar, even though the bar should be closed and no person permitted to obtain any drinks from the bar.

In other words, it is our construction of the 9:30 closing acts that the law requires each liquor dealer who sells intoxicating liquors in such place to select such place that he can close the house or place of business during prohibited hours, and it is not sufficient for the liquor dealer to simply say that he is in a house which has no doors or that he is so connected with a house in which is run a restaurant that he cannot close his house without at the same time closing the restaurant.

The construction that we here give the law is amply borne out by the great weight of authorities everywhere. Beginning with *Black on Intoxicating Liquors* we shall refer to a few of these authorities. Mr. Black says: "It will be observed that while the liquor laws commonly prohibit the sale of intoxicants (on prohibited days) the keeping open of a place for such sale on a prohibited day is an entirely distinct and severable offense. It cannot be said that one of these crimes is of higher grade than the other or that either merges into the other. On the contrary, if a liquor dealer keeps his shop open on Sunday and sells a glass of liquor, he is guilty under these statutes of two offenses and may be punished for both. Hence an actual sale of liquor is not necessary to complete the offense of keeping open and on an indictment for that offense it need not be alleged or proven that the defendants sold liquor or that the keeping open of his shop was a nuisance or hurtful to the neighborhood in respect to morals or otherwise. So a man may be convicted for keeping open a barroom in his restaurant after the lawful hours of selling, although he sold no liquor after the hour of closing and drew a curtain around the bar before that hour."

In *Bauldwin vs. City of Chicago*, 68 Ill., 418, the court holds where a restaurant is situated in a saloon or near a bar, that it will be necessary for both the bar and the restaurant to be closed during prohibited hours.

In construing what is termed an "open house" the courts have held that "although that part of the house where the bar is situated may not be opened to the public, yet every other room in the house connected with the barroom and habitually or occasionally used for drinking purposes are accessible to persons desiring liquor, such rooms are regarded

as a part of the saloon, and while they are opened, the saloon is not closed as the law requires."

People vs. Higgins, 56 Mich., 159, 22 N. W., 309.

People vs. Cox, 70 Mich., 247, 38 N. W., 235.

In the case of Hussy vs. State, 69 Georgia, 54, the court held a party guilty of keeping open a tippling house on Sunday where the proof showed that liquor was then retailed and drunk in his restaurant in the rear of his office and buyers entering by simply pushing open the street door of the office, notwithstanding the bar may be concealed from the view by a canvas bearing the sign, "bar closed."

This same doctrine is announced in the case of People vs. Whipple, 108 Mich., 587, 66 N. W., 490; Harris vs. People, First Colo. Appeals, 289; Lederer vs. The State, 11 Ohio Dec. (reprint), 31. It has also been held that where a restaurant and barroom are managed by the same person, there being a partition between them, and liquor sometimes furnished to the barroom to customers in the restaurant, the restaurant will be required to be closed during prohibited hours the same as a saloon.

Cooper vs. The State, 88 Georgia, 441, 14 S. E., 592.

Harmon vs. The State, 92 Georgia, 455, 17 S. E., 592.

But it has been held also that where an officer required the bartender to open his place of business to permit him to make a search of the premises that this did not constitute a violation of the closing statute.

Miller vs. The State, 56 Miss., 593, 9 Southern, 289.

The gist of all the decisions is clearly set out in the case of People vs. Beeler, 73 Mich., 640, 41 N. W., 827, in which the court said: "The object of the law requiring saloons to be closed when sales cannot lawfully be made is to remove the danger of the taking advantage of its being open to sell clandestinely what on other days is sold openly."

Woolen and Thornton in their work on the law of intoxicating liquors, in Section 665 in analyzing the provisions of the law prohibiting the sales by liquor dealers during prohibited hours and keeping the house or place of business open on such time declares that "such crimes are of equal turpitude and a prosecution and conviction for one cannot be plead in a defense in a prosecution for the other." In other words, a liquor dealer who admits a customer on his place of business during prohibited hours and sells intoxicating liquors to him may be prosecuted severally for both offenses, and if convicted be punished in each, or if acquitted in one he may be prosecuted and convicted in the other. It cannot be said that one of these crimes is of higher grade than the other or that either merges in the other. The following authorities bear out the construction that the statute requiring a saloon to be closed must be strictly observed and is not complied with by merely ceasing to sell, even though he conceals his bar and closes same to the public.

Morgenstein vs. Commonwealth, 94 Va., 787, 26 S. W., 402.

Hussy vs. The State, supra, 69 Ga., 54.

People vs. Hughes, 90 Mich., 365, 51 N. W., 518.

The courts have held also that it is keeping open within the meaning of the law where the barkeeper permits other persons to be present during the time of cleaning up and then taking a drink after the work is done.

People vs. James, 100 Mich., 522, 59 N. W., 236.

Or where even other persons are not permitted to be present.

People vs. Tolman, 148 Mich., 305, 111 N. W., 772.

People vs. Robey, 52 Mich., 577, 50 Am. Repts., 270, 18 N. W., 365.

People vs. Rinsted, 90 Mich., 371.

It has been held also that a billiard room with an opening to a bar-room though closed with buttoned curtains is a part of the saloon and if kept open at prohibited times is a violation of the statutes.

People vs. House, 97 Mich., 543, 56 N. W., 942.

In the case of Harris vs. The People, First Colo. Appeals, 209, 28 Pacific, 233, it was held that drawing liquor and delivering it in a saloon is keeping it open though the liquor was not there consumed, and the court likewise held that it was sufficient to sustain a conviction that the door of the house was open as well as the gate of the fence surrounding the house and the barkeeper and another person was in the saloon.

In the case of Club vs. The State, 77 Georgia, 734, the court said that a saloon keeper should see that no necessity existed for keeping his saloon open by carrying on any other business therein which would require the door to be open or for persons to enter therein. This was also borne out in the case of People vs. Minter, 59 Mich., 557, 26 N. W., 701. In the case of Harmon vs. The State, 92 Georgia, 455, the court held that where a liquor dealer sold liquor during hours in which he was permitted to sell the liquor, but that such liquor was thereafter served in a restaurant connected with the saloon by a door, it would constitute the liquor dealer guilty of keeping open house.

Keeping open a cigar stand in connection with a saloon is an offense though a high screen separate them at the prohibited times.

Lederer vs. The State, supra.

Any opening whereby patrons may enter is an opening within the prohibition of the statute, though no business be carried on therein.

State vs. Heibit, 54 Ohio State Reports, 321.

The Court of Criminal Appeals in this State, in the case of Smith vs. The State, 52 Texas Criminal Appeals, 357, 107 S. W., 353, held that it is not necessary to constitute the offense of keeping the saloon open to prove a sale, but this case was construing an old statute which read, that if any person shall keep open his place of business for sale or shall sell therein, etc. I mention this to call your attention to the fact that the statute we are now construing is worded differently from the one upon which the court in this case rendered the decision. The act we are construing absolutely requires that the house and place of business be closed.

The court in the case of Klurg vs. The State, supra, said: The law is "that these houses must be kept shut. To keep them open on the Lord's day is an offense, it matters not for what purpose. The open door is the crime. If you open the house to dry the room it is kept open. Such an excuse would always be made though people had ingress to drink and tittle and actual drinking must be proved to convict." Such is not the law says the court. Therefore a charge to the effect that keeping it open to dry fruit or other goods will not do, and if opened, the crime is complete no matter for what purpose it is kept open. It is in accordance with the law, citing Harvey vs. The State, 65 Georgia, 568. In the case of Monses vs. The State of Georgia, 78 S. R., the court used this language: "Under the statute if a tippling house must be closed

on the Sabbath day and if the owner kept it opened but for a moment, it is a violation of the statute and there is no purpose for which the courts authorized such a house to be opened."

In the case of *McNeal vs. The State*, 23 S. W., 52, the court held that where a person sold drugs and maintained in his drug store also a bar, that he could not keep his drug store open for the sale of drugs on Sunday because the law required him to keep his bar closed. He would therefore have to close both the drug store and the bar, the court saying in the opinion: "It is manifest that the Legislature intended to keep liquor houses closed on Sunday and did not intend that any person should have the privilege of keeping one open merely by taking out a druggist or other license."

In the case of *McKinney vs. The Mayor of Nashville*, 33 S. W., 724, the court held that where a pool room and dining room was connected by a door with the saloon and drinks sometimes served therein that the law would require that the pool room and restaurant be closed when the saloon was closed, the court saying: "It is shown to our satisfaction that the door between the pool room and dining apartment and the saloon was open. We are satisfied that other persons were in the dining room, if not the saloon, and this brings the case clearly within the ruling of the case of *McNeal vs. The State*, 92 Tenn., 720."

In the case of *Morgenstein vs. The Commonwealth*, supra, the court said: "The law means that during such time not only that there should be no sale of intoxicating liquors but that the place in which they were sold the rest of the week (whether this be restaurant or other room adjoining the saloon) should be closed to view and to all access except perhaps to the casual entrance of the owner or his employee for some innocent or necessary purpose so as to remove any temptation to buy or sell. Still the mere enclosure of the bar counter while free access is permitted to the room in which the liquors are dispensed is not a compliance either with the letter or the spirit of the statute. In a word, his barroom must be faithfully closed and all access to it cut off during the time the law declared that it should not be opened." "The question of intent is wholly immaterial," said the court in the case of *People vs. Waldvogel*, 13 N. W. R., 620. The Legislature, in order to guard against the danger of sales being made, has directed that the place where liquors are kept shall be closed so that no opportunity to violate by making sales shall be afforded. The person who engages in the business of carrying on a saloon must at his peril see that no necessity exists for keeping the same open by carrying on any other business therein which would require the doors to be opened or for persons to enter therein. The places named (referring to saloons) must be closed and cannot by the proprietor thereof be kept open for any business purpose of any kind" (citing *Kurtz vs. The People*, 33 Mich., 282). The remarks of the court above were directed to a statement of facts which involved the right of the barkeeper to open his own place of business for the purpose of cleaning up same.

On the question as to whether or not rooms connected with a saloon should be required to be closed, we think the correct rule is laid down in the case of *The People vs. John Hughes* (90 Mich., 370). The statement of facts in this case showed that a saloon keeper occupied two store build-

ings, in one of which was a bar and another room in which liquor was served when the bar was opened. The other building contained his office and a billiard room, and the buildings, as also the rooms in each, were connected by archways. On Sunday the bar was closed and separated from the other rooms by damask curtains and barricades, and no liquors were dispensed in the other rooms. The proprietor was a bachelor and spent his Sundays in the office and received his friends there, which was held by the court to be a violation of the Sunday closing law, the court saying: "The office and billiard room were both opened and both were contiguous to and used in connection with this bar, and must be deemed to be parts of the saloon." In another case against the same defendant which was decided by the Supreme Court a year later involving practically this same question and in which a diagram of the saloon and rooms connected therewith is shown, the court said: "The several rooms, which were a bar, a lunch room, a closet, billiard room and an office, the bar was connected alone with the lunch room by an opening; the lunch room was connected with the billiard room by an opening, and the billiard room was connected to the office by an opening and the closet was connected both to the billiard room and the lunch room by doors, but the bar had no direct connection to the office or the billiard room or the closet except through the lunch room." The court said: "The several rooms were all owned and managed by the defendant, though the lunch counter was rented to another and operated by him upon his own account. The room was, however, a part of the saloon. Between this and the billiard room was an open archway, several feet wide, without doors. This was provided by a canvas curtain which buttoned on the side and at the floor and which defendant claims was closed on the night in question. The closet in the rear was used from both rooms, defendant claiming it to have been locked on this occasion."

The only question in the case is whether the court erred in instructing the jury that the billiard room was a part of the saloon and found that it was necessary for it to be closed. We think that the court was right in so determining. The rooms were arranged for use together and for the accommodation of customers, were fitted with appliances for games, as well as for food and liquor, and it was necessary under the law that all be closed to the public during unseasonable hours.

In the case of *Warwick vs. The State*, 48 Ark. Rep., 27, the court held that if the saloon was opened for any purpose during hours in which it was required by law to be closed that it would have violated the law, holding that the intent is presumed from keeping the house open. (Citing the case of *Selig vs. The State*, 43 Ark., 96; *Marre vs. The State*, 36 Ark., 322.) For further authority on this point see the case of *Lucas vs. The State*, 92 Ga., 454. *The People vs. Bodkus*, 109 Mich., 360. The court sustained the following as a proper charge to the jury: "If a saloon is kept open on one of the forbidden days for any purpose or for any business for any length of time, no matter how short, it will be a violation of the statute," and further held that a saloon keeper who sells liquor on Sunday in a room adjoining and connected with his room is guilty of a violation of the law against keeping saloons open on Sunday, even though he receive no pay for the liquor furnished.

In the case of *Richardson vs. The State*, 59 S. E. R., 916, the court sustained a conviction where the bartender returned to his saloon for the purpose of extinguishing his lights, the court holding that the fact that a saloon is kept open though but an instant on the Sabbath day, if unexplained, will authorize a jury to convict, and they will not err if they do convict. The court in this case, however, held that it was proper for the court to permit the liquor dealer to make this explanation of why he entered his saloon. See also *Kolman vs. The State*, 58 S. E. R., 1070.

In the case of *Lingelbach vs. Hobson*, 107 N. W., 168, the court held that where a saloon keeper, though locking his place of business at 10 o'clock (this being the hour he was required to close) remained with his bartender to take up the cash and compare it with the register, which kept them from fifteen to twenty minutes, and in passing out they unlocked and opened the door for that purpose only, constituted a violation of the law which declared that places for the sale of liquor shall not be opened or any sales be made earlier than 5 o'clock a. m., nor later than 10 o'clock p. m., on that day.

The authorities upon this question are numerous, and we have cited only a sufficient number to show the great trend and weight of authority, and from all of them and from a proper construction of our statute upon that subject, we arrive at the following conclusions:

1. That the law requires a liquor dealer to conduct his business in such a place that he can close same during prohibited hours, and it would not be sufficient justification for him to say that his bar was enclosed in another building and that he could not for this reason lock or close all of the doors of his place of business. He must so arrange his place of business that his entire place of business, that is, all of that part of the building which is used by him to accommodate his customers and for any purpose connected with his business, can be closed and all ingress and egress to and from such place of business shall be denied, and this rule shall apply to liquor dealers who also have grocery establishments or other business connected with the saloon such as restaurant, bootblack stand, newsstand, cigar stand, and in fact any character or kind of business which during lawful hours are used in connection with the saloon as an accommodation to the customers of the saloon. All of such businesses shall be required to be closed during prohibited hours.

2. All liquor dealers shall close their places of business promptly at 9:30 p. m. and shall transact no business of any character whatever in such place of business thereafter. The bartender and proprietor of the saloon shall be required to leave the saloon at this hour, closing the same for every purpose, and it would be unlawful for him to remain for the purpose of cleaning up his saloon or for the purpose of counting the cash or for the purpose of posting his books or for the purpose of spending a while socially with a friend. The courts have laid down strong rules requiring absolute good faith closing of the saloon and place of business.

3. It would be unlawful for a saloon to make a sale during hours in which sales are lawful and make a delivery thereafter. This would constitute an opening of the saloon under the decisions of the court.

Under this a bartender could not make a sale of liquor prior to 9:30 which would involve a delivery after 9:30.

4. Where the proprietor of the saloon is either proprietor or controls any other house or room connected with the saloon which house or room in its ordinary and proper use accommodates the customers of the saloon, as for instance, a restaurant or a pool room, both the saloon and such other place of business so connected would be required to be closed during prohibited hours.

5. It is not a closing of the saloon within the contemplation of the law for curtains to be wrapped around the bar, even though they are securely buttoned and fastened to the floor and no ingress nor egress be permitted to the bar. This in law is not a closing of the saloon and has been so held by the courts. The saloon proper must have a permanent closing, a substantial closing, such a closing as would prevent ingress or egress to and from the house in which is situated the bar. In other words, it is not sufficient even if the bar should be separated by curtains or other temporary partition from the rest of the house or room in which it is situated; the house or place of business must be substantially closed.

Yours truly,

W. A. KEELING,
Assistant Attorney General.

PROHIBITION—ANNEXATION OF DRY TERRITORY TO WET.

“* * * when the prohibitory law is put in force, it can not be repealed or displaced except by vote of the district which adopted it.”

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, FEBRUARY 28, 1913.

Mr. D. Barker, Houston, Texas.

DEAR SIR: You desire to know of this Department if Houston Heights, which is now an incorporated town under the laws of Texas, and which is also under the operation of the prohibition law, should be annexed to the city of Houston, would the prohibition law still prevail in the town of Houston Heights?

Replying to your inquiry we beg to advise you that in the opinion of this Department that Houston Heights having adopted the prohibition law remains under the operation of said law is obligated by a vote of the citizens of Houston Heights in a direct question submitted to them, that the fact that the territory which constitutes the city of Houston Heights remains dry territory, even though the corporation of such city is abolished.

One of the recent authorities upon this question is the case of Griffin vs. Tucker, 118 S. W., 635. This was a case where a commissioner's precinct embraced two justice precincts, one of which had already adopted local option. It was held in this case that should the entire precinct vote against local option, the justice precinct, which had already

adopted local option, remained dry territory. The court rendering the opinion used this language:

"It is true that, when the prohibitory law is put in force, it can not be repealed or displaced except by vote of the district which adopted it."

In *Ex parte Pollard*, 103 S. W., 878, the Court of Criminal Appeals held that where a justice precinct which had adopted local option and was afterwards changed, that is to say, the commissioners court thereafter changed the boundary of such precinct, the court held that that territory which was cut out of the precinct which had adopted local option, remained dry until the entire precinct after it was originally constituted should, by vote, repeal the law. The court in the decision used this language:

"The almost omnipotent power of the commissioners court to change the precinct lines of that territory and enlarge or diminish it can not effect the status of local option as it existed at the time of the change. While the commissioners court has the right to change the boundaries they have no right or authority to appeal or set aside or vacate, or vitiate a local election under the terms of Article 16, Section 20, and the manner of holding, etc., as provided by the Legislature."

This same doctrine is forcibly held by the Court of Criminal Appeals in the case of *Ex parte Elliott*, 72 S. W., 837. In this case local option was adopted in justice precinct No. 3, that about ten years thereafter prohibition was adopted in school district No. 54, which was partly in justice precinct No. 3 and partly in justice precinct No. 2, that within the limits of said school district No. 54 is the incorporated town of Bells; that the town of Bells is divided from east to west by the Texas & Pacific Railroad, that portion lying north of the road is justice precinct No. 2, south is justice precinct No. 3; the court used this language in its opinion:

"The fact that the Legislature may alter the provisions of the local option law can not affect territories in which the law is then in force. The law in force in the given territory will stand as its provisions were at the time it was voted into operation, despite subsequent amendments to the law by legislative enactment. The Legislature may amend the local option law; but this ends their power. It takes the vote of the people of a given territory to put it into operation, and it takes the vote of the same people to end its operation."

This same doctrine was announced in the case of *Woods vs. The State*, 75 S. W., 38. This was another case in which the boundaries of the district had been changed. The court said:

"There is no statute or constitutional power granted the commissioners court to abrogate any part of the local option law. When the local option law has been adopted in a political subdivision of a county, it continues in said territory until the qualified voters thereof shall, by an election held at the proper time and place, abrogate said law by their votes. The mere fact that the commissioners court cuts off a portion of a justice precinct and places it in another precinct has no effect upon the local option law in that territory."

We think, therefore, and so advise you, that your status as to local option will not be changed should you be annexed to the city of Houston

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

LIQUOR DEALER'S LICENSE—FORFEITURE—DUTY OF OFFICERS.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MARCH 22, 1913.

Hon. W. P. Lane, Comptroller of Public Accounts, Capitol.

DEAR SIR: You propound to our Department this inquiry: W. M. Robertson, who was a liquor dealer in Fort Worth, Texas, had his liquor license forfeited by the county judge, that a copy of the judgment was sent to you as is required by Article 7455 of the Revised Statutes of 1911, which judgment bore date of January 28, 1913; that thereafter on February 3, 1913, a motion was made in the county court of Tarrant county for a rehearing, which motion was overruled by the county judge, a copy of which order was certified to you by the county clerk of Tarrant county, that acting upon such notice from the county clerk you filed and recorded same in a book which you keep for that purpose; that thereafter the county judge of Tarrant county sustained a motion for rehearing and made an order reinstating the liquor license of the said W. M. Robertson. You desire to know whether or not you should take notice of this last proceeding, and if any duty is required of you in the premises.

We advise you that in our opinion you would not have authority to reinstate the liquor license after it had been forfeited in the statutory manner as the facts in the case indicate, and after all orders and entries have been made and completed by your Department.

Article 7455 of the Revised Statutes of 1911 provides for the forfeiture of the liquor dealer's license, which proceeding may be had before the county judge, and when such proceeding is had the act provides that the clerk of the court shall immediately certify such forfeiture under the seal of such court to the Comptroller of Public Accounts, who shall record same, forfeiting the liquor dealer's license.

The Supreme Court of this State has held in the De Silva case (145 S. W., 330) that the act of the county judge in forfeiting the liquor dealer's license was a ministerial act and from it no appeal would lie.

The article of the statute above referred to requires the clerk immediately upon the county judge making his order to certify same, contemplating in that act that the act of the county judge should be a ministerial act.

When the county judge and the Comptroller and the county clerk has performed each his duty, as is required by law, we think it clear that neither one would have a right to afterwards modify or change his orders. This proceeding is unlike a judicial proceeding in which the court has general authority over the motions, etc., until the close of the term. It will be noted that the law does not require the clerk at the close of the term to certify the forfeiture and the Comptroller to make such forfeitures, but requires each of those officers to act immediately.

You are therefore advised that you have performed your full duty under the law, and that you have no authority to take further action in the Robertson case.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

LIQUOR LICENSE—MORTGAGE—WHOLESALE AND RETAIL DEALERS.

When a wholesale dealer advances money to a person who desires to sell by retail and takes a mortgage on the license of such retail dealer, the wholesale dealer has a general interest in the business, in so far as the license upon which he holds a mortgage is concerned, but the statute requires that he must have a property interest or a pecuniary interest of the same character.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 14, 1913.

Hon. W. P. Lane, Comptroller of Public Accounts, Capitol.

DEAR SIR: You hand to this Department an application by G. H. Leudde, who asserts that he is agent of A. Busch & Co., for the return portion of a liquor dealer's license which had been foreclosed under a mortgage held by the said A. Busch & Co. for money advanced to enable such liquor dealer to embark in the sale of intoxicating liquors by retail.

You propound to this Department the question:

When a wholesale liquor dealer advances money to a person who desires to sell by retail and takes a mortgage on the license of such retail dealer, has the wholesale dealer an interest in such retail business as is contemplated in Article 7435, R. S., 1911, which contains this language: "that no other person or corporation is in any manner interested in or to be interested in the proposed business?"

We advise you that under such circumstances we do not believe that the wholesale dealer would have such an interest as is prohibited in the article above mentioned; that is to say, we do not believe that he has a legal interest in the business—an interest involving a property right. Of course he has a moral interest in the business; he has a general interest in the business, in so far as the license which is the thing upon which he holds the mortgage is concerned, but we think the article mentioned requires that he must have something more than this, that is, he must have a property interest, or a pecuniary interest of some character. If it could be shown that the person who obtained the license was required to purchase his supplies from the wholesaler, or if some other benefit should accrue to the wholesale dealer, this, in our opinion, would constitute him an interest in the business. Surely, we believe that if a business is established and it is stipulated and agreed or understood that the retail dealer should buy his supplies from the wholesaler and the wholesaler loaned the money and enabled him to embark in the business in order that he might derive this benefit or profit from the sale to the retail dealer, he would have such interest in the business as is contemplated in Article 7435.

The law seems to recognize that a mortgage can exist upon the business, provided it is a bona fide mortgage made in good faith with no private agreements or understandings as to the division of profits or to the establishment of any particular method of business which would profit or benefit the mortgagor, for Article 7433 contains the provision as follows:

"Provided further that the sale of such license, whether in the name of the original licensee or assignee, may be made under execution or mortgage."

We, therefore, advise you that unless the facts disclose some interest other than the mere filing of a mortgage, the mortgagor would not have such interest in the business as is prohibited in Article 7475:

We return herewith the application for return portion of the license.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

LOCAL OPTION—CITIES AND TOWNS—COMMON AND INDEPENDENT
SCHOOL DISTRICTS.

Where common school district votes out liquor, and afterwards the district is embraced within an independent school district, which is wet, prohibition is still in operation in the old common school district.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 2, 1913.

Mr. George F. Trasker, Travis, Texas.

DEAR SIR: You addressed to this Department the following communication:

"About 13 or 14 years ago an election was held in the common school district of Travis in Falls county, Texas, for the purpose of determining whether or not the sale of intoxicating liquors should be prohibited. The election resulted favorably to prohibition and was so declared, since which time there has been no effort to sell intoxicating liquors within this district. However, last year the boundaries of this common school district were changed by its incorporation within an independent school district, this independent school district being within the justice precinct of Rosebud, which justice precinct as a whole is wet territory. Parties now are preparing to open up a saloon in the town of Travis which is located within the original common school district in which local option was voted.

"Please advise us whether or not local option is still in effect in the territory of the original common school district and whether or not we can punish any one who would undertake to sell intoxicating liquors in that territory.

"The town of Travis, that is to say, the territory within one mile square which we call the town of Travis, has a population of about 350. If you answer that local option is not in effect in the common school district which I have described, then please advise us whether or not we can incorporate the town of Travis as a municipality and vote on the question of local option in that territory."

Answering your inquiry, we beg to advise you that in the opinion of this Department, assuming that prohibition was legally adopted, as you state, some thirteen or fourteen years ago in common school district in your county and has not been expressly repealed in such territory so adopting it, the prohibition law is in full force and effect just the same as when it was first adopted. The fact that new territory has been added to the common school district does not effect the prohibition law which was theretofore adopted in such district. When the people in any subdivision of a county adopt prohibition within the prescribed limits of such subdivision, the prohibition law can only be repealed by the people in this identical territory voting expressly upon this question, and the

commissioners court cannot repeal nor effect prohibition adopted in any territory by changing its boundary.

This Department has held that where prohibition was adopted by the city of Houston Heights, and thereafter if the corporation of such city should abolish its corporate existence, still, prohibition would be in full force and effect the same as when adopted, or if such city should annex itself to the city of Houston, still, this would not effect prohibition theretofore adopted in the corporate limits of Houston Heights.

In a recent case upon this question, *Griffin vs. Tucker*, 118 S. W., 635, a case where the commissioners precinct embraced two justice precincts, one of which had already adopted local option, it was held in this case that should the entire precinct vote against local option, the justice precinct which had already adopted local option remained dry territory. The court rendering the opinion used this language:

"It is true that, when the prohibitory law is put in force, it can not be repealed or displaced except by vote of the district which adopted it."

In *Ex parte Pollard*, 103 S. W., 878, the Court of Criminal Appeals held that where a justice precinct which had adopted local option and was afterwards changed, that is to say, the commissioners court thereafter changed the boundary of such precinct, the court held that the territory which was cut out of the precinct which had adopted local option remained dry territory until the entire precinct after it was originally constituted should, by vote, repeal the law.

The court, in the decision, used this language:

"The almost omnipotent power of the commissioners court to change the precinct lines of that of territory and enlarge or diminish it, can not effect the status of local option as it existed at the time of the change. While the commissioners court has the right to change the boundaries, they have no right or authority to appeal or set aside or vacate or vitiate a local option election under the terms of Article 16, Section 20, and the manner of holding, etc., as provided by the Constitution."

This same doctrine is forcibly held by the Court of Criminal Appeals in the case of *Ex parte Elliott*, 72 S. W., 837. In this case local option was adopted in justice precinct No. 3, and later prohibition was adopted in school district No. 54, which was partly in justice precinct No. 3 and partly in justice precinct No. 2, that within the limits of said school district No. 54 is the incorporated town of Bells, that the town of Bells is divided from east to west by the Texas & Pacific Railroad, that portion lying north of the road is justice precinct No. 2, south is justice precinct No. 3; the court used this language in its opinion:

"The fact that the Legislature may alter the provisions of the local option law can not affect territories in which the law is then in force. The law in force in the given territory will stand as its provisions were at the time it was voted into operation, despite subsequent amendments to the law by legislative enactment. The Legislature may amend the local option law; but this ends their power. It takes the vote of the people of a given territory to put it into operation, and it takes the vote of the same people to end its operation."

The same doctrine was announced in the case of *Woods vs. The State*, 75 S. W., 38. This was another case in which the boundaries of the district had been changed. The court says:

"There is no statute or constitutional power granted the commissioners court

to abrogate any part of the local option law. When the local option law has been adopted in a political subdivision of a county, it continues in said territory until the qualified voters thereof shall, by an election held at the proper time and place, abrogate said law by their votes. The mere fact that the commissioners court cuts off a portion of a justice precinct and places it in another precinct has no effect upon the local option law in that territory."

From the authorities thus quoted, this Department is clearly of the opinion that territory which had legally adopted local option continues dry territory until the voters in the same territory which adopted it votes to repeal such law, and you are, therefore, advised that your prohibition law is in full force and effect in the territory which originally composed your common school district, and it would be a violation of the local option law for any person to sell intoxicating liquors within such territory.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

CLUBS—INTOXICATING LIQUORS.

It is a violation of the law for clubs in local option territory to store intoxicating liquors for another without obtaining a license; it is a violation of the law for a steward of a club to solicit or take orders for its members; it is a violation of the law for the steward of the club to work on Sunday.

(Articles 150, 151, and 299 of the Penal Code.)

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JUNE 11, 1913.

Messrs. Rube S. Wells, County Judge, and Charles Roach, County Attorney, Paris, Texas.

GENTLEMEN: You submit to this Department the following inquiry:

"Lamar county is a local option county, and Paris is the county seat thereof; now the question I wish to propound to you is, whether the Eagles club of the city of Paris can legally store or keep on deposit intoxicating liquors belonging to the individual members of said club, and through its agent or steward keep such liquors cold and when called on by the respective owners of such liquors to serve or dispense them to such owners and permit the same to be then and there drunk on the premises, without violating any of the laws of the State of Texas."

This Department is clearly of the opinion that Article 150 of the Penal Code would prohibit a club through any of its agents or employees from soliciting or taking orders for intoxicating liquors in dry counties without first having obtained a State tax of \$4000, a county tax of \$2000, and a city tax of \$2000 if located in a city and if the tax is levied by the city and county. It is not necessary to complete this offense for a person to solicit an order, but the offense is complete if he takes the order. However, if the steward of a club is present in his regular and ordinary pursuits, discharging his duties to the club, his duties being to take orders for such members as desire intoxicating liquors, he would, without doubt, be soliciting orders, but, as stated

above, if he solicits or takes orders in dry territory he would violate the provisions of Article 150, unless he had paid the tax levied in this article.

Article 151 provides that in all justice precincts, etc., where the qualified voters have adopted prohibition * * * there is hereby levied upon all firms, persons, association of persons and corporations that pursue the business of keeping, maintaining or operating what is commonly known as a "cold storage," or any place by whatever name known, or whether named or not, where intoxicating or non-intoxicating liquors or beverages are kept on deposit for others, or where any such liquors are kept for others under any kind or character of bailment, an annual State tax of two thousand dollars, provided, that the county may levy one-half of this sum and the city one-half, or a total of four thousand dollars due the State and county and city, assuming, of course, that the county and city has levied the tax.

Under this article until the persons, association of persons, firm or corporation had obtained a license or had paid the tax required, if such persons, association of persons, firm or corporation should store intoxicating or non-intoxicating liquors for others such act would bring the offending party clearly within the provisions of Article 151. The history of this bill shows that it was the clear intention of the bill to cover just such acts as those designated by you. Section 5 of the Acts of the Thirty-first Legislature, page 54, provides that when any person or any member of a firm or any member of an association of persons or any officer or representative of a corporation who shall pursue or engage in or aid or assist in any manner in said business mentioned in Sections 1 and 2 of this act in said local option territory without there having been issued to said person or firm or association of persons or corporation license therefor as provided for in this act shall each be guilty of a misdemeanor and on conviction therefor shall be fined in any sum not less than the amount of the tax due and not more than double that sum and shall in addition be imprisoned in the county jail not less than ninety days nor more than six months. This section would make all of the officers of a corporation, agents and employees guilty if they should pursue this business without having first obtained the license.

In addition to the above penalty, Article 299 of the Penal Code makes it a criminal offense upon all the officers of the corporation if they compel, force or oblige their employees, workmen, etc., to labor on Sunday. It is true that in the case of *Benson vs. The State*, 47 Texas Cr. Rep., 609, the court held that the steward of a club in opening his place of business and selling two bottles of beer did not constitute him guilty. However, this has clearly been set aside in the case of *Ex parte Axson*, 141 S. W., 793, which holds that the steward of the club would be guilty if he worked on Sunday. Not only would the steward of the club be guilty, but so would all of the officers of the club be likewise guilty of violating Article 299.

In view of the court's holdings in the above cases and the plain provisions of the statutes, we are of the opinion that the Eagles Club, or any other club, or associations of persons or individuals, in this State without having paid the taxes levied in Articles 150 and 151 (Penal Code) would be in direct violation of law if they did the things de-

nounced in these two articles, and, in addition, clubs cannot open their places of business on Sunday, for the reason that the officers and agents of the club would be guilty of violating the Sunday law by compelling their employees to work on Sunday.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

(Since writing the above the Court of Criminal Appeals sustained the doctrine in case of *Ex parte Barnes*, not reported.)

NON-INTOXICATING MALT LIQUORS.

Non-intoxicating malt liquors include liquors manufactured by the use of recognized substitutes for malt and imitation malt liquors.

(Articles 157, 158, 159 and 160, Penal Code of 1911.)

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JULY 1, 1913.

Hon. W. P. Lane, Comptroller of Public Accounts, Capitol.

DEAR SIR: This Department is in receipt of your inquiry, seeking a construction of Articles 157, 158, 159 and 160 of the Penal Code, relating to the subject of an occupation tax upon the sale of non-intoxicating malt liquors, with especial reference to whether or not this entire act prohibits the sale of non-intoxicating liquor manufactured from known substitutes for malt. In other words, you desire to know if the several articles mentioned should be given such construction as would prohibit the sale without payment of a tax of only such liquors as actually contain malt.

In the case of *State vs. Gill*, 95 N. W., 449, which case also cites Webster's Dictionary, and also the case of *Adler vs. The State*, 55 Ala., 16, and in the *United States vs. Cohn*, 52 S. W., 38, the courts laid down the doctrine that the common and approved usage of the term "malt liquor" is an alcoholic liquor, as beer, ale or porter, prepared by fermenting an infusion of malt.

In the case of *Sampson vs. The State*, 107 Ala., 76, the court held that malt liquor is a broader term than lager beer and includes other beverages as ale and porter.

The court held, in the case of *Watson vs. The State*, 55 Ala., that malt liquors include lager beer, which is a malt liquor of the highest sort, and differs from the other beers, not so much in its ingredients as in its process of fermentation.

Dr. Albert E. Leach, in his work on "Food Inspection and Analysis," which is a recognized standard of authority upon this subject, describes on page 707 the process of the manufacture of malt liquors, including beer. He says:

"The chief object of malting is the production of diastase, which by its subsequent action on the starch converts it into the fermentable sugars maltose and dextrin. Malt contains much more diastase than is necessary to convert the

starch simply contained therein to maltose, and is capable of acting on the starch of a considerable quantity of raw grain, such as corn or rice, when mixed with it."

On page 710 we find this statement relating to malt and hop substances:

"By reason of the fluctuation in the market price of these two chief constituents of beer, it sometimes becomes a question of economy to employ cheaper substitutes wholly or in part for one or the other. There are two classes of malt substitutes, (1) those which, like corn, rice, and wheat are mixed directly with the malt before 'mashing,' and, like the malt, have to undergo a saccharous fermentation before being acted on by yeast, and (2) such substances as cane sugar, invert sugar, commercial glucose, and dextrin, which are added to the wort at a later stage in the brewing, just before the addition of the yeast, being in condition to be readily acted on by the latter.

"Glucose is by far the most common malt substitute, by reason of the fact that its sugars much resemble those of malt, and are in readily fermentable form. Diastase forms from the malt dextrin and maltose, while commercial glucose contains dextrin maltose and dextrose."

When the price of malt is abnormally high, the addition of glucose is decidedly economical, but when ordinary conditions prevail, the cost of the two, figured with reference to their yield in alcohol and extract, is about the same. Aside from the question of economy, however, there are advantages in the use of glucose, such as diminishing the nitrogenous content of the wort without lessening the alcohol or extract yielded.

It will be seen from the recognized authorities that the substitutes for malt are as well recognized in the manufacture of such liquors as is in the malt itself, which is a higher grade sugar than the substitutes. It will be seen also that there are many of these substitutes, and the authorities also agree that outside of a chemical analysis, and then only with much difficulty, can the difference between the malt itself and its recognized substitutes be distinguished, and it is evident that so far as the human taste is concerned, or so far as the look or appearance of the liquor goes, there is no way to distinguish the liquor manufactured from the malt sugar from its recognized substitutes, such as glucose, etc. These general statements have been made to aid us in giving to this act a proper construction.

In the case of *Ex parte Townsend*, 144 S. W., 628, and *Ex parte Edmundson*, 142 S. W., 887, the constitutionality of the entire act, levying an occupation tax upon non-intoxicating malt liquors, was fully sustained, and it will not be necessary, therefore, for us to go into a discussion of that question. In order to enable us to determine whether or not the tax is also levied upon liquors manufactured from the recognized substitutes for malt as well as malt liquors, we must construe the act in the light of the history of the conditions that brought about its enactment, as well as the general rules of construction as applied to such legislation.

The Thirtieth Legislature passed a law in obedience to a demand of the people who were annoyed in dry territory by the sale of "Uno," "Ino," "Tintop," "Frosty," "Teetotler," and other such liquors, the effect of which law was to levy an occupation tax upon the sale of such liquors in dry territory.

The court, in the case of *Ex parte Woods*, 108 S. W., 1172, declared this law unconstitutional upon the ground that the tax was not equal and uniform in that it applied only to dry territory, etc.

The Thirty-first Legislature, yielding likewise to a demand of the people for such legislation, passed another act, which is the present statute upon this subject, meeting the court's objection to the former act, and levies an occupation tax of \$2000 upon all persons, firms, association of persons and corporations selling non-intoxicating malt liquors.

This now brings us to the question, does malt liquors in this act include also liquors manufactured by recognized and known substitutes for malt? This statute partakes both of the nature of a penal statute and a tax statute, both of which, according to the general rule of construction, should be given a strict construction. However, the court, in giving to such statute a strict construction, will not give it such construction as will defeat the intention of the law-makers.

Sutherland on "Statutory Construction," 2nd Edition, Vol. 2, paragraph 528, speaking of penal statutes, says:

"Where the intent is plain, it will be carried into effect. It will not be evaded or defeated on the principle of strict construction. The principle will be adhered to that the case must be brought within the letter and spirit of the enactment, but the intent of a criminal statute may be ascertained from a consideration of all its provisions and the intent will be carried into effect. Such statutes will not be construed so strictly as to defeat the obvious intention and purpose of the Legislature."

In the case of *The State vs. Bishop*, 31 S. W., 9, the court uses this language:

"While all statutes pertaining to crimes and their punishments should be strictly construed, and nothing left to intendment, they should not be so construed as to thwart the evident will and intention of those who enacted them, when that intention is plainly and fairly deducible from the law itself."

Sutherland says, paragraph 528, Vol. 2:

"A penal statute should receive a reasonable and common sense construction, and its force should not be frittered away by niceties and refinements at war with the practical administration of justice. The principle of strict construction does not allow the court to make that an offense which is not such by legislative enactment; but this does not exclude the application of common sense to the terms made use of in an act in order to avoid an absurdity which the Legislature ought not to be presumed to have intended."

Sutherland, in the same volume above quoted, paragraph 543, lays down this rule:

"The penal provisions of a revenue law are to receive a reasonable construction in aid of the purposes of the act, rather than a strict and narrow one in the interest of those who violate or evade its provisions."

"Revenue laws," says Sutherland, in paragraph 535, "are not to be regarded as penal in the sense that requires them to be strictly construed in favor of the defendant, though they impose penalties and forfeitures. They have even been declared remedial in character, as

intended to prevent fraud, suppress public wrong and to promote the public good."

In the case of *Mills vs. Thurston*, 16 Wash., 380, the court says:

"While there is some conflict in the authorities as to whether revenue statutes should be given a liberal or strict construction, it seems to us that the better rule is that they should receive a fair construction to affect the end for which they were intended."

From the great weight of authority, both English and American, we conclude that a statute similar to the one enacted which is remedial in part and penal in part should be given a reasonable and common sense construction, carrying out, as far as possible, the intent of the law-makers. We, therefore, conclude in view of the fact that the history of this legislation shows clearly that it was the intent of the Legislature to prohibit not only all liquors manufactured from the use of malt but also all liquors manufactured from recognized substitutes for malt, which are themselves imitations of malt liquors, from being sold without first paying the tax levied in the act. We are clearly of the opinion that it was not the intention of the Legislature to require a person who sold a liquor in the manufacture of which was used malt sugar to pay an occupation tax of \$4000, and, at the same time, permit a known substitute for malt to be used in the manufacture of the liquor, which substitute liquor could not be detected from the genuine by its taste or appearance to be sold without the payment of the tax. To give the act such construction would not only destroy its effectiveness but would be to put a premium upon the introduction of cheaper and more dangerous liquors. Malt liquors, that is, liquors in which there is used genuine malt, are less injurious to the health than liquors manufactured from the use of substitutes, such as glucose, and, while it is not possible for a person to detect the difference either from the taste or appearance or effect upon the human system, still such liquors contain substances which are far more harmful to the health than liquors manufactured by the use of pure malt and hops, and, as stated above, we are not willing to give to the law a construction, the effect of which would be to bar the use of liquor in the manufacture of which is used the less harmful ingredients without the payment of a heavy tax, and, at the same time permit the liquor to be freely sold without any tax which contains the more harmful ingredients.

The phrase "malt liquor" should be given its ordinary and common sense meaning, which would, in the opinion of this Department, include all of the substances and imitations as well as the genuine malt liquors.

You are, therefore, advised that all persons, corporations, firms, or association of persons, engaged in selling non-intoxicating liquors, manufactured from the use of pure malt, or any other recognized substitutes of malt, would be liable to the tax levied in the act of the Thirty-first Legislature, cited above.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

SALOONS—NINE-THIRTY CLOSING LAW.

The 9:30 closing act, passed by the Thirty-third Legislature, means 9:30 Standard, or Western Union, Time.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JULY 17, 1913.

Hon. J. R. Murray, County Attorney, Eagle Pass, Texas.

DEAR SIR: Under date of July 1, 1913, we have the following question from you:

"In reference to the 9:30 closing act, please advise me if this is 9:30 Western Union or is it 9:30 sun time,—which would really place the closing about 10:6?"

The question you present is not without its difficulty. There has been quite a good deal of litigation in the various States involving this identical question, and the courts have not been uniform in their interpretation. Our courts began with a well considered case, *Ex parte John T. Parker*, reported in the 35th Texas Criminal Reports, page 12, and Judge Henderson, in rendering this opinion, said:

"True sun time is ascertained by the means of a dial; mean sun time is what is called 'standard time.' What is known as simple 'standard time'—'central time'—is merely the solar time of the ninetieth meridian west of Greenwich. The difference between standard time and sun time is exactly the same over each meridian. What is called central time is used and extends between the ninetieth meridian running west to the one hundred fifth. There is a difference of four minutes for each degree between true sun time and standard time or mean sun time."

In the case decided by Judge Henderson the court had adopted sun time, which, according to this opinion, was the proper and legal time in law.

In the case of *Henderson vs. Reynolds*, 84 Ga., 159, the court said:

"The only standard of time recognized by the courts is the meridian of the sun, and an arbitrary standard set up by persons in business will not be recognized."

In the case of *Texas Tram and Lumber Company vs. Hightower*, District Judge, 96 S W., 1071, Judge Gaines of the Supreme Court, considered well and discussed at some length this question. The court said:

"We see no reason to doubt that, when the Legislature prescribes the times at which the term of the court shall begin and shall end, the true time at the place of holding the court is meant; and we understand that the true time is to be determined by the instant at which the sun passes the meridian of the place for which it is to be calculated, and not by the time of its passage at some other place. That where at a particular place there are two measures of time, one the true time at that place and the other time at some other place, the true time at the place of holding a court must govern the hour of its opening."

Our courts seem to be uniform in their holding that where the Legislature fixes the time for holding courts and does not mention or desig-

nate what time is meant, they will be presumed to have meant sun time. In the case presented by you, however, we have a different proposition. The reason for passing the law in question and what was meant by the Legislature in passing this law will be the governing in determining our decision. This is one question where we can truly say that time "is the essence" of the whole proposition.

This statute is passed by the State in the proper exercise of its police powers, and is a remedial statute in the true sense of that word, yet it prescribes a penalty, and is, in that sense, penal. The two natures of the act in question bring into being a conflict in well known rules of construction. Remedial statutes should be liberally construed, while penal statutes should be strictly construed, and, when this occurs, according to Sutherland in his work on "Statutory Construction," the plain and common sense meaning of the statute, if it can be ascertained, should be given. Sutherland on "Statutory Construction," paragraph 390, lays down this rule:

"As a general rule the words of a statute are to be taken in their ordinary and popular sense, unless it plainly appears from the context, or otherwise, that they were used in a different sense. In the construction of statutes a word which has two significations should ordinarily receive that meaning which is generally given to it in the community."

This rule of construction laid down by Mr. Sutherland has been followed by the courts of Minnesota in the case of *The State vs. Johnson*, 77 N. W., 293. In this case the authorities passed, in 1878, an 11 o'clock closing of saloons, which act was passed prior to the adoption of standard time. In 1883 standard time, or time fixed by the railroads of the United States and Canada, was adopted, and consists of eastern, central, western, mountain and Pacific time. If applicable to an area covering approximately fifteen degrees of longitude in each case, the standard being actually sun time at the central degree of longitude of the region to which the particular standard was applicable. The State of Minnesota, which fell wholly within central time, which was, in fact, sun time at the nineteenth meridian of longitude, not by statute but by custom, adopted or observed standard time; thereafter the 11 o'clock closing act was readopted by the Legislature, and the court, in the case cited above, held that the time referred to, *and meant*, by this statute was standard or common time, the time actually and commonly observed by the people in the discharge of their ordinary affairs.

Where a statute is of doubtful construction, it is a well known canon of construction that departmental or legislative construction can be resorted to and is entitled to receive a high degree of credit in giving to the act the proper interpretation.

This Department is of the opinion, and we so advise you, that Western Union or standard time should govern in the time when saloons should open and close. We arrive at this conclusion because we believe that the Minnesota case above referred to announces the correct interpretation of the law, and we are aided in this by legislative and departmental construction; by legislative because the Legislature which adopted the law prescribing that saloons should close at 9:30 convened its session by standard time or Western Union time, proceeded and conducted

all of its deliberations upon standard or Western Union time, and adjourned its deliberations upon standard or Western Union time, and, doubtless, every member of the Legislature carried in his pocket a watch set to standard or Western Union time. When this bill was passed there can be no doubt that the Legislature had in mind that the hours mentioned in the bill meant standard or Western Union time. Departmental construction is to the effect that all departments dealing with this subject have uniformly given to similar acts this interpretation. The Comptroller's Department has always construed the time designated in acts regulating saloons as being standard or Western Union time. All courts and officers, so far as this Department is advised, have always construed the election law, which may fix a time for the opening and closing of elections, to mean standard or Western Union time.

We therefore conclude that the hours mentioned in the early closing law refer to standard or Western Union time.

See the case of *Salt Lake City vs. Robinson*, Lawyers' Reports Annotated, 35 New Edition, 1912, p. 110.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

LIQUOR DEALER—GAMES—FORFEITURE OF LICENSE—INTEREST IN
OTHER SALOONS.

To justify the revocation of a liquor dealer's license, there must be a violation of some condition of his permit or bond, and the Comptroller would not be authorized to issue commission and take steps for the forfeiture of the licenses of the several houses in which he was interested.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, FEBRUARY 14, 1913.

Hon. W. P. Lane, Comptroller of Public Accounts, Capitol.

DEAR SIR: Your communication to this Department is as follows:

"Some days ago a complaint was filed in the county court of Tarrant county, against one W. M. Robinson, a liquor dealer in Ft. Worth, charging that he had violated the Robinson-Fitzhugh liquor law by permitting games prohibited by the laws of this State, to be played, dealt or exhibited in or about his house or place of business.

"The case came on for trial in the county court of Tarrant county on January 28, 1913, and after hearing the evidence and argument of counsel, and being fully advised in the premises, the county judge of Tarrant county, made the following order:

"It is therefore ordered, adjudged and decreed by the court that the license of W. M. Robinson as a retail liquor dealer at 1401 Main street, in the City of Fort Worth, Texas, be in all things cancelled, revoked, forfeited, set aside and held for naught from this date, and the clerk of this court will notify the Comptroller of the State of Texas and the tax collector of Tarrant county, Texas, of this order of this court."

"It appears that on the date of the revocation of Robinson's license, he, the said licensee owned a partnership interest in three other saloons, to-wit: Robinson & Dyer; Robinson & Bennett; Robinson & Black.

"The certified copy of the proceedings in this case filed with me by the county clerk, discloses that the county judge issued his order, revoking the license of the saloon of which Robinson was the sole proprietor.

"The question now arises as to whether or not the Comptroller would be authorized under the law, to issue a commission in a proceedings to forfeit the license of Robinson & Dyer; Robinson & Bennett; and Robinson & Black, on the testimony of the witnesses in the alleged violation of the law, at the place where Robinson was sole owner and proprietor.

"If you advise that the law authorizes the Comptroller to issue a commission to forfeit the licenses in the saloons in which Robinson was a partner, and in case the preponderance of credible evidence returned, justified a revocation of these licenses, in that event, would Dyer, Bennett, and Black, partners with Robinson in the liquor business be prohibited from securing another license in their own name for a period of five years?"

And in reply we beg to advise you that it is the opinion of this Department that the Comptroller would not be authorized under the law to issue a commission in a proceedings to forfeit the license of Robinson & Dyer, Robinson & Bennett, and Robinson & Black on the testimony of the witnesses in the alleged violation of the law at the place where Robinson was the sole owner and proprietor.

Article 7442 of the Revised Statutes of 1911 contains a statement of the grounds upon which the Comptroller may forfeit license, and, among other things, stating that "if he shall determine from the preponderance of the credible evidence therein contained (referring to the depositions) that at any time after the issuance of said license, the house or place where the business of selling liquors under said licenses was conducted, was kept open and business conducted therein, etc.," following all of the grounds upon which the license may be revoked, and further stating "that games prohibited by laws of this State had been permitted to be played, dealt, or exhibited in or about such house or place of business, or that the person or persons holding such license had rented or let any part of said house or place of business, etc."

Then, again, Article 7436 of the Revised Statutes of 1911 provides that "if the Comptroller at any time be advised that any person or persons to whom a retail liquor dealer's license or a retail malt dealer's license has been issued, *has violated any of the conditions and provisions set out in the application to apply for such license*, it seems that 'it shall be the duty, etc.'"

Now it appears that it is the duty of the Comptroller to proceed to ascertain if any of the conditions as required in Article 7435 in the application for the license have been violated. Among the conditions are the following:

"That he will not sell in such house or place of business any intoxicating liquors after twelve o'clock midnight on Saturday and between that hour and five o'clock a. m. of the following Monday of any week, and that he will not permit any games prohibited by the laws of this State to be played, dealt, or exhibited in or about such house or place of business, etc."

By a careful reading of all of the conditions contained in the permit and a proper construction of them, it is apparent that the authority of the Comptroller is to investigate the conditions of the permit to do business and to see if any of them have been violated, and throughout

the entire act it seems that the intent of the law-makers in requiring that a separate license be issued for each business makes the business and its conduct dependent upon the license as well as the license upon the business and each business independent of the others. In other words, a violation in one place of business does not of itself constitute a violation in the other places of business, for in each permit the business is limited to the house or place in which it is conducted.

We are aware of the holdings of the Court of Criminal Appeals in the Hewgley case (155 S. W., 348) and agree with them that the rules might be different where the same person was sole proprietor of all the places of business and as such had general supervision of all of them. In this instance the law which would take from him his license would disqualify him automatically from further engaging in the business which, of itself, would be sufficient ground for the revocation of the license of all his places of business. We therefore believe that to justify the revocation of the license, there must be a violation of some condition of his permit or bond, and, as stated in the beginning paragraph, we believe that you would not be authorized to issue your commission and take steps for the forfeiture of the licenses of the several houses in which he was interested.

Respectfully submitted,

W. A. KEELING,
Assistant Attorney General.

(NOTE.—Since writing the above opinion Article 7435 was amended by Chapter 30, General Laws, Thirty-third Legislature, First Called Session.—W. P. DUMAS, Chief Clerk.)

INTOXICATING LIQUORS—NEWSPAPER ADVERTISEMENTS—ALLISON LAW.

Construing Section 6 of the Allison law holding that it is a violation of the law for persons, firms or corporations outside of the State to solicit orders for intoxicating liquors in the State; holding that this also applies to orders solicited by newspaper advertisements, since the newspaper would be aiding in the commission of an offense in this State. They would also be liable to prosecution.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, DECEMBER 6, 1913.

Hon. J. E. Bradley, County Attorney, Groesbeck, Texas.

DEAR SIR: We acknowledge receipt of your recent letter propounding the following question to this Department:

"Does Section 6 of Chapter 31 of the First Called Session of the Thirty-third Legislature prohibit persons, firms or corporations residing outside of the State from soliciting orders for intoxicating liquors in dry territory within this State?"

Section 6 of the act referred to is as follows:

"It shall be unlawful for any person, firm or corporation in person, by letter, circular or other printed or written matter, or in any other manner to solicit or take orders for any intoxicating liquors in any county, justice precinct, town, city or other subdivision of a county where the qualified voters thereof have

by a majority vote determined that the sale of intoxicating liquors shall be prohibited therein."

There appears to be no exception whatever to this provision of the act but it absolutely destroys one character of business in this State, and that is soliciting or taking orders for intoxicating liquors in dry territory even though a druggist under certain conditions stipulated in the act is authorized to order alcohol to be used in compounding drugs. Yet it is unquestionably a violation of the law to solicit his order for alcohol, and this Department has held that the circulation in dry territory of affidavits containing the requirements of the act to enable druggists to procure intoxicating liquors where same is distributed by liquor dealers or their agents, is soliciting orders within the contemplation of this act, for there could appear to be no other motive prompting a liquor house in furnishing these affidavits than to receive the order contemplated by their use.

Since the passage of the Wilson Act regulating the interstate commerce feature of intoxicating liquors, the courts have uniformly held that the State may forbid advertising in newspapers published without the State of intoxicating liquors intended to be shipped into the State, as well as those liquors which are within the State, and the courts have also held that it is within the power of any State to prohibit soliciting orders for intoxicating liquors in dry territory of such State. One of the leading cases on this subject is *The State vs. J. P. Bass Publishing Company*, 104 Me., 288, 71 Atlantic, 894.

A statute which makes it unlawful to solicit orders for sales of intoxicating liquors in any section of the State wherein it would be unlawful to grant a license for such sale, either by means of agents, circulars, posters or newspaper advertisements, is held to be a valid exercise of the police power of the State, and does not conflict with the power of Congress under the Federal Constitution to establish postoffices and postroads and to designate what shall be carried by and what excluded from the United States mail.

In the case of *Zinn vs. The State of Arkansas*, 114 S. W., 227, the court said:

"The statute does not relate to that subject at all. It simply prohibits the soliciting of orders for the sale of intoxicating liquors in territory where the sale of such liquors is prohibited. The gravamen of the offense is the soliciting of orders for the sale. It matters not how the circular for that purpose reached the prohibited territory and the statute does not undertake to designate or condemn the manner by which the circular may be carried into or excluded from the prohibited territory. It is the presence of the circular there for the unlawful purpose of soliciting that the statute denounces and not the methods by which they may be conveyed there or distributed."

In the case of *Rose vs. The State*, 62 S. W., 117, the court held the Georgia statute valid which prohibited soliciting orders in dry territory, and held that the statute was just as effective when aimed against out of the State concerns as when applied within its own borders. The facts in this particular case were that a liquor firm in Tennessee solicited orders by mail in Georgia. The court considered well the law and facts in this case and made an extensive review of the authorities relating to the subject, and concluded the opinion in this language:

"The real question in the cases turn on whether the soliciting of sales of liquors can be a crime. Is the solicitation a crime or legitimate commerce? If the State of Georgia has the power, as held by the Supreme Court of the United States to make the soliciting of orders for intoxicating liquors a crime as a measure of police regulation, then he who uses any agency to violate that law, may be guilty of that crime and his guilt or innocence is not effected by the fact that solicitation is by law; that such an one used the mail as his medium of communication and action—any more than if the case was one of sending a threatening letter, a challenge to fight a duel, a circular in regard to a lottery or soliciting campaign contributions, or asking a postmaster to sell stamps upon a credit, or then if the case were even of murder, where the package which caused death was conveyed by mail."

It follows, therefore, and we so give it as the opinion of this Department, that any person, firm or corporation in this State or out of it that solicits or takes orders for intoxicating liquors in person, by agent, letter, circular, or in any other manner, would be guilty of a felony under this law and this would also include soliciting orders by a newspaper advertisement, for certainly a person could solicit orders by newspaper advertisements, as well as in any other manner. Newspapers in this State which publish matter amounting to soliciting orders would also be guilty of acting together with the principal offender and could be prosecuted under this law.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

INTOXICATING LIQUORS—ALLISON LIQUOR LAW—NEWSPAPERS—ADVERTISEMENTS.

Advertisements of intoxicating liquors in newspapers which have a circulation in both dry and wet territory in which advertisement is made clear that no orders will be received from nor shipments made into any prohibition territory and where the concern so placing the advertisement does not in fact intend to make shipments into dry territory or to in any manner supply dry territory with the liquor it is advertising, would not constitute a violation of the law.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, APRIL 22, 1914.

Hon. C. H. Theobald, County Attorney, Galveston, Texas.

DEAR SIR: We beg to acknowledge receipt of a letter from you and two enclosures. Your letter is as follows:

"In view of your recent opinion on the subject of the liability of newspapers circulating in territory in which the sale of intoxicating liquors is prohibited, we wish to obtain your opinion upon the following points: 1. Will the carrying of advertisements in newspapers circulating in such territory, advertising Hostetter Bitters, Nar-Tar-No, and Ducro's Elixir, assuming that in fact they are intoxicating liquors without any indicating such fact in the body of the advertisement, constitute a violation of the law? 2. Will it be lawful for newspapers circulating in such territory to carry liquor advertisements which advertisements shall include a statement, 'No orders solicited in, or shipments made into dry territory,' or similar words, similar to and like the advertisement herewith enclosed?"

One of the enclosures above referred to consists of an advertisement

of Sunny Brook whisky, which advertisement has noted on the margin thereof, "No orders solicited in or shipments made into dry territory in Texas." This advertisement is said to have appeared in several of the daily papers of the State, which papers circulate in dry territory as well as wet territory.

Another enclosure consists of an advertisement of Southern Select beer, which advertisement is as follows:

"Your friends are very fond of Southern Select Bottled Beer, and if you will keep a case on hand for their delectation when they call they will become fonder of you. There is nothing so appropriate in the way of refreshments to serve to the average guest as a bottle of Southern Select—the most popular beer in Houston—the most perfectly brewed beer in the world—so keep a case on hand. It gives appetite, produces refreshing sleep and is a safeguard against mental fatigue. For best results a small bottle of this delightful beverage should be taken with each meal. Phone for a case for the home. Magnolia Brewery of the Houston Ice & Brewing Co., Houston, Texas.

"No orders solicited in or shipments made into dry territory."

From notation made in pencil on this enclosure it is said to have appeared in daily papers which circulate both in dry and in wet territory.

To answer your inquiry it will be necessary for us to construe Section 6 of Chapter 31 of the General Laws of the First Called Session of the Thirty-third Legislature, which section reads as follows:

"It shall be unlawful for any person, firm or corporation, in person, by letter, circular, or other printed or written matter, or in any other manner, to solicit or take orders for any intoxicating liquors in any county, justice precinct, town, city, or other subdivision of a county where the qualified voters thereof have by a majority vote determined that the sale of intoxicating liquors shall be prohibited by law."

In the first place, we desire to call attention to the fact that this section does not attempt to denounce newspaper advertising as such, but merely denounces such advertising when its effect is to solicit orders for intoxicating liquors in dry territory in this State. In order to constitute soliciting orders it would be necessary that there be some contemplation on the part of those soliciting that an order be actually received and filled in dry territory. In other words, it occurs to the mind of the writer that there must be an intention on the part of some one to receive an order for intoxicating liquors in dry territory, or else it could not be truthfully said that the matter complained of was in fact soliciting an order. The gist of this offense seems to be soliciting or taking *orders* for intoxicating liquors and does not prohibit advertisement of intoxicating liquors where it is plain from the advertisement that its sole object and purpose was to promote the sale of such intoxicating liquors in wet territory only in this State; but we are fully aware of the fact that words alone would not determine this fact. All of the facts and circumstances surrounding each transaction would be admissible for the purpose of determining whether or not such transaction was in effect soliciting *an order* for intoxicating liquors in dry territory. If a person, firm or corporation places in a paper an advertisement for the sole purpose of promoting the sale of intoxicating liquors in territory in which the sale is authorized and it was never the intention to receive any orders from or ship or in any manner deliver any orders to

dry territory, we do not believe the law would be violated. While, on the other hand, a person, firm or corporation might declare in the face of the advertisement that it would not receive or fill orders in dry territory; but if from all the facts and circumstances of the case it can be shown that they did intend to fill orders in dry territory, the law would be violated notwithstanding the fact, as stated above, he had declared against the very thing he in fact did, which was to solicit orders in dry territory. If it had been the intention of the Legislature to prohibit newspaper advertisements of intoxicating liquors, we think it would have expressly prohibited such advertisements; but in view of the fact that instead of prohibiting such advertisements of intoxicating liquors the Legislature only prohibited soliciting and taking orders in person, by letter, circular, etc., we think it only meant to deal with an *order* in its common and ordinary meaning, that is to say, a request for the shipment of intoxicating liquors.

The question at last resolves itself into a question of fact. If from all the facts and circumstances surrounding any transaction it shall be made to appear that its effect is to solicit orders in dry territory in this State, the law will be violated.

We note that you especially inquire about advertisements for Hostetter's Bitters, Nar-Tar-No and Ducro's Elixir. With the exception of Hostetter's Bitters we do not know what is claimed for the other two medicines, but it occurs to us that there is nothing that would take any of these out of the general rule. If, however, the object should be to promote the sale of these in dry territory as well as in wet territory, the advertisement might be construed to be a solicitation for orders for the medicines above named, in view of the fact that medicines are generally recommended and offered for sale to persons in need of them whether situated in dry territory or wet territory, and in this respect an advertisement of medicine might be an offer to fill orders in dry territory. In order to permit this character of advertisement it should be made plain from all the facts and circumstances that it was not intended to fill any orders for such intoxicating liquors in dry territory. It should be made plain that no shipment or delivery by any other means would be made to persons situated in dry territory.

As a part of the history of this legislation it will be recalled that immediately after the adoption of prohibition in any subdivision of the State dealers in intoxicating liquors outside of the prohibited district would immediately flood the district which had adopted prohibition with literature advertising brands of intoxicating liquor and proposing to ship into the prohibition territory upon the order of any person therein any quantity of intoxicating liquors desired. This character of advertising built up large mail order houses which flooded the prohibited district with intoxicating liquors shipped therein upon the order of persons in said district. It was to break up this practice and custom that prompted the Legislature to pass the act in question.

It is, therefore, the opinion of this Department that advertisements of intoxicating liquors in newspapers which have circulation in both dry and wet territory, and in which advertisements it is made clear by the insertion of such words as "No orders will be received from nor shipments made into any prohibition territory in this State," in a promi-

ment place in the advertisement, and provided further that the concern so placing the advertisement does not in fact intend to make any shipments into dry territory or in any manner supply dry territory with the liquor it is advertising, would not constitute a violation of Section 6 of the Allison Law above quoted.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

COMPTROLLER OF PUBLIC ACCOUNTS—LIQUOR DEALER.

The Comptroller has the right to decline to issue a permit to apply for a liquor dealer's license if he finds that the facts stated in any application therefor are not true.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JULY 1, 1913.

Hon. W. P. Lane, Comptroller of Public Accounts, Capitol:

DEAR SIR: Answering your inquiry of this date, we beg to say, under the provisions of Article 7435, R. S., any person or persons desiring to obtain a retail liquor dealer's license in this State shall, before filing his or their petition for such license with the county judge, as now provided by law, make application under oath to the Comptroller of the State for a permit to apply for a license to engage in such business, the general form and character of which permit you are entirely familiar with. However, for the purpose of illustrating and applying the principles of law upon which this opinion is based your attention is called to the fact that in this application for a permit by the dealer certain facts must be stated by him under oath. These facts substantially are:

- (1) That there is no statute or ordinance of the city in force prohibiting the retail sale of liquors at the place at which the applicant expects to engage in the business.
- (2) That the applicant has resided for the past two years in the county from which he makes the application.
- (3) He shall also state the business in which he has been engaged during the time of his residence in that county.
- (4) That the applicant is not disqualified under the laws of the State from engaging in the retail liquor business.
- (5) That no other person or corporation is in any manner interested or to be interested in the proposed business.
- (6) That the applicant has not since the first day of May, A. D. 1909, as owner or as the representative, agent or employee of any other person, kept open any saloon or place of business where spirituous, vinous or malt liquors or medicated liquors capable of producing intoxication were sold, or sold, aided or advised any other person in selling in or near any such house or place of business any such liquor after or between the hours prohibited by law as specified in the act.

There are various other facts required to be stated in the application, all shown in the article of the statute referred to, but we deem it unnecessary to quote the entire list, but have only quoted a sufficient num-

ber of the facts required to be stated to illustrate the principle of law involved.

Now, after this application has been duly executed by the applicant for a permit and has been filed with the Comptroller, the Comptroller's duties then begin. In the first place, it is his duty to receive the application; second, it is his duty to file the same; and, third, to keep it as a permanent record of his office; fourth, it is his duty to examine the application and act upon the same; and, fifth, if he is satisfied that such applicant is entitled to such permit, he shall, upon the payment of the necessary fees, etc., issue the permit. It is this last provision just referred to which we here will undertake to construe; that is to say, the provision which recites "and if he is satisfied that such applicant is entitled to such permit he shall, upon the payment of the fees, etc., issue the same."

The question is, what is meant by the word "satisfied" as used in this act?

In legal signification the word "satisfy" has been construed to mean, among other things, the following:

"To free the mind from doubt regarding such fact; to set it at rest. The word implies much more than a preponderance of the evidence."

"Satisfy" ordinarily signifies something more than a belief founded upon a preponderance of the evidence, and hence its use in an instruction, that the jury should be satisfied from all the facts and circumstances shown in evidence, is erroneous."

"To satisfy is to free from doubt, perplexity or suspense; to set the mind at rest: to convince."

"One of the synonyms is to convince the understanding. While one person will be satisfied of the truth of a matter upon a mere scintilla of evidence, another require that all doubt be removed before it is shown to be true to his satisfaction, it can not be said that one is satisfied, that his understanding is convinced of the truth of the matter in respect of which he entertains a reasonable doubt. *Tory vs. Burney*, 113 Ala., 496; *Kenyon vs. The City of Mondovi*, 73 N. W., 314; *Kelch vs. The State*, 45 N. E., 6; *Rosenbaum Bros. vs. Levitt*, 8 N. W., 393; *Edwards vs. Stewart*, 44 S. W., 326."

Webster's International Dictionary, page 1278.

The sum and substance of these various definitions of the word "satisfy" is that when the word is used in the sense of establishing any fact or facts in the mind of anyone whose province it is to pass upon the existence of a fact, means to free the mind of the person to whom the evidence is addressed from doubt concerning the existence of a fact or facts to be established; that is to say, to set the mind at rest concerning the fact. Used in this manner and in this way, it really means much more than a preponderance of the evidence. Therefore, as used in this statute, the word "satisfied" means that you must be convinced that each and all of the relevant facts required to be stated in the application for a permit are true. You are not required blindly to accept the statements in the application, for the law does not prohibit you from looking beyond the application for evidence as to the existence or non-existence of the facts required to be there stated; for otherwise the law would not have required you to be satisfied of the existence of these facts, which would have made it mandatory upon you to have issued the permit when the proper application is sworn to and filed. It is apparent, therefore,

from the language used, that it is the purpose and intention of the Legislature to confer upon you the right, power and authority to determine whether or not the facts stated in the application to be true are in fact true. Now, when you have exercised your judgment and discretion in this matter, uninfluenced by any improper or malicious motives and based upon some substantial and tangible fact or facts, then your conclusion cannot be questioned by the applicant in so far as your personal liability is concerned, even though the conclusions reached by you should be erroneous. *Sanders State Bank vs. Hawkins et al.*, 142 S. W., 84.

The general rule is that when the conduct of an officer is attacked as being in excess of the authority conferred by law, if there are any conditions under which he may exercise the powers assumed, it will be presumed in support of the validity and regularity of his acts that such conditions existed and formed the basis of his official conduct.

Sanders State Bank vs. Hawkins et al., 142 S. W., 88.

City of San Antonio vs. Berry, 92 Texas, 319.

Throop on Public Officers, Sec. 559.

It is, of course, a familiar rule to you that a public officer may be mandamusd and compelled to do that which in law he ought to have done. This rule applies to the Comptroller as well as to the heads of other departments of the State government, except the Governor, and it is unnecessary to cite authorities.

We therefore advise you that in the event you should find in the exercise of your sound judgment and discretion, and in having due regard for the rights of any citizen desiring to pursue a lawful occupation, you should find that the facts stated in any application were not true, then you have the right to decline to issue the permit to apply for a liquor dealer's license; but in this regard your judgment and action should be based upon carefully ascertained facts, because it will take a substantial degree of truth to overcome the probative effect of the affidavit in which form the application is made.

Respectfully submitted,

B. F. LOONEY,
Attorney General.

LOCAL OPTION—JUSTICE PRECINCTS.

Two or more justice precincts may be combined in one election.

(Constitution: Art. 16, Sec. 20. Revised Statutes: Art. 5715.)

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MAY 27, 1913.

Hon. C. H. Theobald, County Attorney, Galveston, Texas.

DEAR SIR: This Department is in receipt of your letter reading as follows:

"Four justice precincts in this county, No. 4, No. 5, No. 6 and No. 7, have petitioned the commissioners court for an order to hold a local option election, the intention being to combine the four precincts. These four precincts do not compose one entire commissioners precinct, and there has been no election

on the question held for a period of more than two years, in any of the four justices precincts named.

"The question I wish answered, if the four precincts may combine for the purpose of a local option election, and if so, does the statute mean that fifty qualified voters in each precinct must sign the petition, or will fifty or more from all the four precincts be sufficient. One of the precincts, at least, has not fifty qualified voters.

"The question is to come before the commissioners court on the 28th instant, and if convenient I will be obliged to have your views on the matter by that time."

You desire a reply by the 28th and as the time is so limited it will be impossible for us to enter into a lengthy discussion of the matter, but we will give you a brief of the cases on the subject and our opinion as to the meaning of the Constitution relating to the subject of local option.

The Court of Criminal Appeals, in a long line of cases, has held that two or more justice precincts cannot be combined for the purpose of a local option election and that the act of the Legislature (R. S., 5715) authorizing such is in violation of the Constitution and to that extent void.

Ex parte Heyman, 45 Cr. App., 532.

Ex parte Mill, 46 Cr. App., 224.

Anderson vs. State, 49 Cr. App., 195.

Ex parte Randall, 50 Cr. App., 520.

We are of the opinion, however, that the combination of the subdivisions of a county for local option purposes was the real aim of the amendment adopted in 1891 to Section 20 of article 16 of the Constitution. By this amendment the following words were added to the section:

"or such subdivision of a county as may be designated by the commissioners court of said county."

Prior to the adoption of the above amendment the Legislature was clearly limited by the Constitution of 1876 to the enactment of laws

"whereby the qualified voters of any county, justice precinct, town or city"

might determine by majority vote whether the sale of intoxicating liquors should be prohibited.

The holding of the Court of Criminal Appeals in above cases is to the effect that the word "such" used in the amendment refers to those subdivisions already enumerated, to wit: "justice precincts, city or town," and that the commissioners court is limited in its authority to order elections in political subdivisions of like nature as those theretofore designated, and had no authority to designate a subdivision combining two or more of the enumerated subdivisions, thereby applying the doctrine of *ejusdem generis*.

Our opinion is that the doctrine of *ejusdem generis* does not apply; but, on the other hand and to the contrary, the phrase inserted by the amendment looks to the future rather than to the past, and authorized the Legislature to pass laws granting the commissioners courts the power to order elections in such other subdivisions of the county as the Legislature may determine, and the Legislature acting within such authority

has by Article 5715 authorized commissioners courts to combine two or more justice precincts, etc., in one election, and we are of the opinion that such legislation is sanctioned by the Constitution for the reasons above stated.

Our holding in the above opinion is in accord with the decisions of the Supreme Court and Courts of Civil Appeals of this State, as appear in the case of Griffin vs. Tucker, reported in 102 Texas Reports, page 420, and the cases therein cited, and we prefer to follow the Supreme Court in a matter of this character so long as the Court of Criminal Appeals adheres to the holding in the Heyman case above cited.

As to the necessary number of signers to the petition we suggest, as the statutes do not designate the number necessary in such case, that the petition be signed by not less than two hundred, being four times the number required to a petition from one justice precinct, such number to be divided among the four precincts substantially in proportion to their voting strength.

Yours truly,

C. W. TAYLOR,
Assistant Attorney General.

LIQUORS—CIDER—LIABILITY OF PERSONS SELLING CIDER, ETC., CONTAINING A CERTAIN PER CENT OF ALCOHOL.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 21, 1913.

Hon. W. P. Lane, Comptroller of Public Accounts, Capitol.

DEAR SIR: This Department is in receipt of your communication of February 17th in which you enclose a communication to you from Hon. J. S. Abbott, Commissioner, Chemist and Bacteriologist. For the purpose of giving you the desired information, we set out both communications, as follows:

AUSTIN, TEXAS, FEBRUARY 17, 1913.

Hon. B. F. Looney, Attorney General, Capitol.

MY DEAR SIR: Some time ago I received information to the effect that certain wholesale houses, both in Texas and outside of Texas, are selling and shipping into prohibition territory what is known as "apple cider" and "apple base cider," and that these ciders contained a large per cent of alcohol—in fact, from two to four times greater than can be found in beer.

I sent out into the territory in which prohibition has been adopted and secured from local retail dealers, samples of this apple cider and apple base cider, which I have now in my possession.

I turned over these samples to the Food and Drug Department here in Austin, and I herewith submit the analysis which the Department rendered me for your inspection and information.

You will observe that the analysis rendered me on January 8, 1913, contains the following:

AUSTIN, TEXAS, JANUARY 8, 1913.

Hon. W. P. Lane, State Comptroller, Capitol.

DEAR SIR: At your request this Department has examined the contents of one sealed gallon glass container labeled "Blue Ribbon Brand Sweetened Apple Cider," bought of W. L. Harrison, Austin, Texas, O. L. Gregory Vinegar Com-

pany, distributors, North Texas warehouse, Paris, Texas, with the following results:

Specific gravity (15° C.)	1.033 per cent.
Alcohol by weight	4.88 per cent.
Alcohol by volume.....	6.09 per cent.

Yours respectfully,

E. H. GOLAZ,
Chemist.

AUSTIN, TEXAS, JANUARY 13, 1913.

Hon. W. P. Lane, Comptroller, Capitol.

DEAR SIR: This Department has examined, at your request, seven samples of cider, with the following results:

No. 1—"Apple Cider, Sweetened, Blue Ribbon Brand," bought of S. M. Rough-ton, Corsicana, Texas; O. L. Gregory, Paris, Texas:

Alcohol by weight	4.06 per cent
Alcohol by volume	5.11 per cent

No. 2—"Apple Cider, Sweetened, Blue Ribbon Brand," bought of Sol Gotteib, Corsicana, Texas; O. L. Gregory, Paris, Texas:

Alcohol by weight	4.00 per cent
Alcohol by volume.....	5.03 per cent

No. 3—Cider, sold by Charles Simons, Corsicana, Texas:

Alcohol by weight.....	7.00 per cent
Alcohol by volume.....	8.81 per cent

No. 4—Cider, sold by J. W. Wright, Corsicana, Texas; O. L. Gregory Vinegar Company, through the Central Texas Grocery Company:

Alcohol by weight	5.11 per cent
Alcohol by volume	6.43 per cent

No. 5—Apple base cider, sold by Ollie Robinson, Mexia, Texas, bought from Lemonella Manufacturing Company, Dallas; the National Fruit Product Com-pany, Memphis, Tenn.:

Alcohol by weight	3.71 per cent
Alcohol by volume	4.66 per cent

No. 6—Cider, sold by Frank Oatts (colored), Mexia, Texas; from Lemonella Company, Dallas, Texas:

Alcohol by weight	5.06 per cent
Alcohol by volume	6.36 per cent

No. 7—Cider, sold by E. Golden, Corsicana, Texas; from the Price & Lucas Company, Louisville, Ky.:

Alcohol by weight .. .	5.06 per cent.
Alcohol by volume	6.36 per cent

I return you, by porter, samples examined and take the liberty to call your attention to our fifth annual report, page 13, article on cider.

Respectfully yours,

E. H. GOLAZ,
Chemist.

AUSTIN, TEXAS, JANUARY 16, 1913.

Hon. W. P. Lane, Comptroller, Capitol.

DEAR SIR: The following samples have been further analyzed:

No. 8—"Pure Apple Cider, Nectar Brand," bought from R. H. Melear, Lufkin, Texas; Marshall Cider and Vinegar Company, Marshall, Texas, manufacturers:

Alcohol by weight.....	6.56 per cent
Alcohol by volume	8.25 per cent

No. 9—"Boston Apple Cider," bought from Lee Bell, Lufkin, Texas; Great Western Manufacturing Company, distributors, Texarkana, U. S. A.:

Alcohol by weight	4.88 per cent
Alcohol by volume	6.14 per cent

No. 10—"Boston Apple Cider," bought from Mr. Chastine, Pollock, Texas, Great Western Manufacturing Company, distributors, Texarkana, Texas:

Alcohol by weight 8.45 per cent
Alcohol by volume 10.60 per cent

No. 11—"Refined Apple Cider," bought from A. Melvin, Pollock, Texas; bottled by Twin City Product Company, Texarkana, Texas:

Alcohol by weight 9.22 per cent
Alcohol by volume 11.62 per cent

No. 12—"Imitation Grape Juice Flavor," bought from James Johnapelus, Corsicana Candy Kitchen, Corsicana, Texas; made by National Fruit Product Company, Memphis, Tenn.:

Alcohol by weight 6.39 per cent
Alcohol by volume 8.04 per cent

No. 13—Cider, bought from Evans Bros., Lufkin, Texas; manufactured by the Los Angeles Fruit Cider Co., St. Louis, Mo.:

Alcohol by weight 4.41 per cent
Alcohol by volume 5.55 per cent

No. 14—Cider, from N. W. Myers, Lufkin, Texas; manufactured by the National Fruit Product Company, Memphis, Tenn.; sold by R. B. Walthall, Garrison, Texas:

Alcohol by weight 5.78 per cent
Alcohol by volume 7.27 per cent

No. 15—Cider, from Louis Markus, Lufkin, Texas; manufactured by Hirsch Bros. Company, Louisville, Ky.:

Alcohol by weight 7.63 per cent
Alcohol by volume 9.62 per cent

No. 16—Cider, sold by James Johnapelus, Corsicana Candy Kitchen, Corsicana, Texas; shipped by Lemonella Company, Dallas, Texas:

Alcohol by weight 5.72 per cent
Alcohol by volume 7.20 per cent

Respectfully yours,

E. H. GOLAZ,
Chemist.

AUSTIN, TEXAS, FEBRUARY 11, 1913.

Hon. W. P. Lane, State Comptroller, Capitol.

DEAR SIR: An analysis made at your request of a sample of apple cider, marked No. 17, labeled "Pure Apple Cider," sold by R. M. Hughes & Co., San Antonio, Texas, to C. F. Williams, Comanche, Texas; bought by W. L. Mays, shows:

Alcohol by weight 5.21 per cent
Alcohol by volume 7.08 per cent

Respectfully yours,

E. H. GOLAZ,
Chemist.

You will please advise me as to whether or not these people who are selling these different brands of cider at wholesale, containing alcohol, are subject to pay the tax imposed upon wholesale dealers and distributors of intoxicating liquors, and as to whether or not there is any other provision of the law under which these people can be made to pay an occupation tax.

You will also advise me as to whether or not these retail dealers who are selling these apple ciders and apple base ciders are subject to prosecution for pursuing the occupation of a liquor dealer in territory in which the sale of intoxicating liquors are prohibited by law.

Thanking you in advance for prompt attention to this inquiry, I am,

Yours very truly,

W. P. LANE,
State Comptroller.

In answering the above inquiry, it will be necessary to quote some of the provisions of the statutes relating to the sale of intoxicating liquors, applicable to both dry and wet territory. By "dry" territory, of course, we mean territory in which the sale of intoxicating liquors have been prohibited, and by "wet" territory we mean territory in which the sale of intoxicating liquors has not been prohibited.

In wet territory, the law levies a license tax upon the sale of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, as is provided in Article 7427, Revised Statutes of 1911, which is as follows:

"There shall be collected from every person, firm or association of persons selling spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, in this State, not located in any county or subdivision of a county, justice precinct, city or town where local option is in force under the laws of Texas, an annual tax of three hundred and seventy-five dollars on each separate establishment, as follows: For selling such liquors or medicated bitters in quantities of one gallon or less than one gallon, three hundred and seventy-five dollars; for selling liquors or medicated bitters in quantities of one gallon or more than one gallon, three hundred and seventy-five dollars; provided, that in selling one gallon, the same may be made of different liquors in unbroken packages aggregating not less than one gallon; for selling malt liquors exclusively, sixty-two dollars and fifty cents; provided, further, that nothing in this article shall be so construed as to exempt druggists who sell spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, on the prescription of a physician or otherwise, from the payment of the tax herein imposed; provided, further, that this article shall not apply to the sale by druggists of tinctures and drug compounds, in the preparation of which such liquors or medicated bitters are used and sold on the prescription of a physician or otherwise, and which tinctures and compounds are not intoxicating beverages prepared in the evasion of the provisions of this chapter, nor the local option law. The commissioners courts of the several counties of this State shall have the power to levy and collect from every person or association of persons selling spirituous, vinous or malt liquors, or medicated bitters, a tax equal to one-half of the State tax herein levied; and where any such sale is made in any incorporated city or town, such city or town shall have the power to levy and collect a tax upon such sale equal to that levied by the commissioners court of the county in which such city or town is situated; provided, that where any special charter gives the right to any city to refuse a license for the sale of intoxicating liquors, no license issued on behalf of the State or county shall become operative therein until a license therefor has been issued by such city."

Article 7428 defines liquor dealers as follows:

"A retail liquor dealer is a person or firm permitted by law, being licensed under the provisions of this law, to sell spirituous, vinous and malt liquors, and medicated bitters capable of producing intoxication, in quantities of one gallon or less, which may be drunk on the premises. *Any person who sells intoxicating liquors in quantities less than one gallon shall be governed by the provisions of this law and be required to take out license hereunder.*"

Special attention should be directed to the last clause of this article, which provides that "*Any person who sells intoxicating liquors in quantities less than one gallon shall be governed by the provisions of this law and required to take out license hereunder.*"

Article 7465 defines intoxicating liquors as follows:

"The term 'intoxicating liquor,' as used in this law, shall be construed to

mean fermented, vinous or spirituous liquors, or any composition of which fermented, vinous or spirituous liquors is a part; and all of the provisions of this law shall be liberally construed as remedial in character."

From a careful reading of the entire act relating to the sale of intoxicating liquors in wet territory, we think there can be no doubt that *every person, firm or association of persons engaged in the sale of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, or who shall sell any intoxicating liquor composed in whole or in part of fermented, vinous or spirituous liquors, in quantities of one gallon or less, shall be regarded as retail liquor dealers, and shall be required to qualify as retail liquor dealers, and shall take out a license and file a bond as required by Article 7452.*"

Article 611, Penal Code, provides a penalty for failure to do this in the following language:

"No person shall, directly or indirectly, sell spirituous or vinous liquors, capable of producing intoxication, in quantities of one gallon or less without taking out a license as retail liquor dealer. Any person who shall violate the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars, and by imprisonment in the county jail for a term not to exceed six months."

We think, therefore, that there can be no doubt, and give it as the opinion of this Department, that if any person in this State shall, directly or indirectly, sell any intoxicating liquor in quantities of one gallon or less, whether such liquor was fermented, vinous or spirituous, or a composition of which fermented, vinous or spirituous liquors is a part in any other than prohibition territory, without a license therefor, he will be guilty of a misdemeanor, and upon conviction therefor, shall be punished by a fine of not less than five hundred dollars and not more than one thousand dollars, and by imprisonment in the county jail for a period not to exceed six months.

It follows, therefore, that retail dealers in apple ciders and apple base ciders in territory in which the sale of intoxicating liquors are not prohibited, where such liquors contained a sufficient percentage of alcohol to constitute intoxicating liquor as defined by Article 7465, supra, would be subject to prosecution where they sell same without first qualifying as retail liquor dealer under the laws of this State. The very heavy percentage of alcohol contained in the various samples which have been analyzed, as is shown in your letter, ranging from 4.66 to 11.62 per cent, leaves no doubt in our minds that all of the ciders mentioned are subject to the tax, and the retailers of it without license, subject to prosecution. We do not think it would be seriously contended that apple cider containing such per cent of alcohol is not intoxicating liquor. It will be observed also from the analysis made by the chemist that the same concern sells apple cider containing various percentages of alcohol, which would seem to suit the peculiar temperament of the people where same is sought to be sold. However, the question, whether or not this cider, or any other cider sold in the State, is intoxicating, is a question for the trial courts to determine, and not for this Department.

This brings us to your further question: "Are the wholesale dealers

and distributors of such ciders subject to the gross receipts tax levied upon wholesale liquor dealers?" Article 7379, providing for the gross receipts tax, is as follows:

"Each and every individual, company, corporation or association created by the laws of this State or any other State, who shall engage, in his own name, or in the name of others, or in the name of its representatives or agents in this State, in the business of a wholesale dealer or wholesale distributor of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, shall make, quarterly, on the first days of January, April, July and October of each year, a report to the Comptroller of Public Accounts, under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the gross amount, collected and uncollected, from any and all sales made within this State of any of said articles during the quarter next preceding. Said individuals, companies, corporations and associations, at the time of making said report, shall pay to the treasurer of the State of Texas an occupation tax for the quarter beginning on said date, equal to one-half of one per cent of said gross receipts from said sales, as shown by said report. A wholesale dealer or distributor, within the meaning of this article, is any individual, company, association or corporation selling any of the articles hereinbefore mentioned, either in his own or in the name of others, or in the name of its agents or representatives, to retail dealers, or who deliver on consignment to their agents for retail."

It would appear, therefore, that the wholesale dealer or distributor of the ciders in question, or any other cider capable of producing intoxication, would be liable to the payment of the gross receipts tax, and upon a failure to pay same would be liable to the penalty provided in Article 7387, which is as follows:

"Any person, company or corporation or association, or any receiver or receivers, failing to pay any tax for thirty days from date when said tax is required by this chapter to be paid, shall forfeit and pay to the State of Texas a penalty of ten per cent upon the amount of such tax."

Article 7386 also provides a penalty for failing to make report as follows:

"Any person, company, corporation or association, or any receiver or receivers, failing to make report for thirty days from the date when said report is required by this chapter to be made, shall forfeit and pay to the State of Texas a penalty of not exceeding one thousand dollars."

All that we have said above relates to the sales and penalties in territory in which the sale of intoxicating liquors has not been prohibited. We will now discuss that branch of the subject which relates to the sale in prohibition territory.

Article 589, Penal Code, is as follows:

"If any person shall engage in or pursue the occupation or business of selling intoxicating liquors, except as permitted by law, in any county, justice precinct, city, town or subdivision of a county, in which sale of intoxicating liquor has been or shall hereafter be prohibited under the laws of this State, he or she shall be punished by confinement in the penitentiary not less than two nor more than five years."

It will be observed that in prohibition territory the sole question is whether the article sold is intoxicating when taken in such quantity as can practically be drunk. If the cider in question is capable of pro-

ducing intoxication, it undoubtedly subjects the seller to prosecution for a felony.

Article 606, Penal Code, requires that all packages containing intoxicating liquors shall be marked "intoxicating liquors" and provides a penalty of both fine and imprisonment for failure to so mark it.

Article 150, Penal Code, prescribes penalty for intoxicating liquors in prohibition territory by soliciting orders for same, and is as follows:

"In all counties, justice precincts, towns, cities or other subdivisions of a county where the qualified voters thereof have, by a majority vote, determined that the sale of intoxicating liquors shall be prohibited therein, there is hereby levied upon all firms, persons, associations of persons and corporations that pursue the business of selling or offering for sale any intoxicating liquors by soliciting or taking orders therefor, in any quantities whatsoever, in any such county, justice precinct, town, city or other subdivision of a county, an annual State tax of four thousand dollars; and each county, and also each incorporated city or town, may levy an annual tax not exceeding two thousand dollars in any such county or incorporated city or town where such business is pursued."

We therefore conclude that if the apple cider in question is intoxicating liquor as hereinbefore defined, and is sold by drummers or agents soliciting orders for same in prohibition territory, it would subject the person, firm, or association of persons so selling, by soliciting orders therefor, to a tax of four thousand dollars for the State, to which may be added two thousand dollars for county and two thousand dollars for city taxes.

Article 154, Penal Code, provides penalty for selling such intoxicating liquors without having paid the tax, as follows:

"Any person, or any member of a firm, or any member of an association of persons, or any officer or representative of a corporation, who shall pursue or engage in or aid or assist in any manner in said business, mentioned in Articles 150 and 151, in said local option territory, without there having been issued to said person or firm or association of persons or corporation, license therefor as provided for, shall each be guilty of a misdemeanor, and, on conviction therefor, shall be fined in any sum not less than the amount of tax due and not more than double that sum, and shall, in addition, be imprisoned in the county jail not less than ninety days nor more than six months."

We therefore conclude and advise you that if the cider in question is intoxicating liquor, which the analysis undoubtedly indicates, as is defined by the article quoted, it would be a violation of the law to sell same in wet territory without the seller first having qualified as a retail liquor dealer, or for the wholesale dealer, subjecting him to the payment of the gross receipts tax, and, if sold in prohibition territory, would be a violation of the various provisions of the prohibition law quoted above.

Respectfully submitted,

W. A. KEELING,
Assistant Attorney General.

OPINIONS CONSTRUING CONFEDERATE PENSION LAWS.

PENSIONS—PENSION LAW—DEFINING “INDIGENCY.”

Defining who are eligible for pensions under the act of the Thirty-third Legislature; the amount of property that may be owned by the applicant.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, AUGUST 25, 1913.

Hon. Geo. W. Kyser, Commissioner of Pensions, Capitol.

DEAR SIR: Under date of August 25 you write:

“Please give me your opinion as to the meaning of Section 3, Chapter 141 of the Acts of the Thirty-third Legislature concerning pensions. I understand that if the applicant owns a home of the value of more than \$1000 without reference to other property he would not be entitled to a pension; also if the other property of the applicant exceeds in value \$1000 without reference to the home property he could not draw a pension, and if applicant has an income of more than \$300 he would not be entitled to a pension. Can an applicant own a \$1000 home and also \$1000 of other property, also an income of \$300 and still be entitled to a pension?”

Section 3 of the statute above referred to by you reads as follows:

“To constitute indigency, within the meaning of this act, neither the applicant nor his wife, if the applicant be a married man, nor both together, nor the widow, if the applicant be a widow, shall own property, real or personal, exceeding in value one thousand dollars, exclusive of the homestead, and if its value be not in excess of one thousand dollars, and exclusive of household goods and wearing apparel; and such applicant shall not be in the enjoyment of an income, annuity, the emoluments of an office or wages for his or her services in excess of three hundred dollars per year, nor in receipt of aid or of a pension from any State of the United States, or from any other public source, nor an inmate of the Confederate Home or other public institution at the expense of the State. Persons who are not indigent under the foregoing definition shall not be entitled to a pension under this chapter.”

In reply to your inquiry, beg to state that if an applicant for a pension is in other respects eligible he may own, within the meaning of the statute above quoted, the following property and still be considered indigent, to wit:

1. Real or personal property, or both in the aggregate, that does not exceed \$1000 in value.
2. Also a homestead that does not exceed in value \$1000.
3. Household goods and wearing apparel without reference to value.
4. And such applicant may enjoy an income, annuity, the emoluments of an office or wages for personal services where the same do not exceed \$300 per annum.
5. If the applicant should own real or personal property, or both in the aggregate, exceeding \$1000 in value, exclusive of the homestead, he would not be entitled to a pension, and this without regard to any other consideration; if the applicant should have a homestead exceeding

in valuation \$1000, he would not be entitled to a pension, and this without regard to any other consideration; and if the applicant should be in the enjoyment of an income, annuity, the emoluments of an office or wages for personal services exceeding \$300 per annum, he would not be entitled to a pension, and this without regard to any other consideration.

6. If the applicant is receiving aid or a pension from any State of the United States or from any other public source or is an inmate of the Confederate Home or of any other institution maintained at public expense, he would not be eligible as an applicant, without reference to the question of indigency.

7. In determining the question of indigency within the meaning of Section 3 of the act in question, we are to look to the property that is owned by either the applicant or his wife or both together, if the applicant is a married man. In other words, if the applicant by himself, or if his wife in her own right, or if property owned by both together in the aggregate, exceeds the amount denominated in the statute, the applicant should be refused.

Yours very truly,

B. F. LOONEY,
Attorney General.

CONSTRUCTION OF STATUTES—CONFEDERATE PENSION LAW.

One must have actively served at least three months in the army or navy of the Confederacy before he would be entitled to a pension.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, SEPTEMBER 8, 1913.

Hon. Geo. W. Kyser, Commissioner of Pensions, Capitol.

DEAR SIR: We have your letter of the 4th instant, which reads as follows:

"A man volunteered in the Confederate service, and before he had served three months hired a substitute who served to the close of the war. Is this man entitled to a pension as to his service in the army; all other conditions being favorable?"

I respectfully direct attention to that portion of Section 2, Chapter 141, Regular Session Acts of Thirty-third Legislature, which provides:

"Out of the fund to be created under the provisions of Section 1 hereof, there shall be paid an annual pension * * * to every indigent and disabled Confederate soldier or sailor who served for a period of at least three months of active service in the armies or navies of the Confederate States, etc. * * *"

I am of the opinion, therefore, that the party you mention is not, under the law, entitled to receive a pension, because before he had served three months he hired a substitute, and because the law plainly provides that such soldier or sailor must serve "*at least three months,*" and that such service must be active service.

Respectfully,

B. F. LOONEY,
Attorney General.

CONFEDERATE PENSION LAW—CONSTRUCTION.

Widow of Confederate soldier who is drawing pension from Federal government not entitled to receive pension from the State.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, SEPTEMBER 16, 1913.

Hon. Geo. W. Kyser, Commissioner of Pensions, Capitol.

DEAR SIR: In your communication of the 15th instant, you submit the following:

"The widow of a Confederate soldier is now drawing a pension from the United States, as the widow of a Mexican war soldier; she is drawing \$12 per month. Is she entitled to a pension on the record of her deceased husband, as a Confederate soldier? Section 6, Chapter 141, Acts of Thirty-third Legislature, seems to repeal Article 6272, of the Revised Statutes of 1911, and creates a doubt, and I will thank you for a legal opinion as to what the law really is in the above case."

Replying, I respectfully direct your attention to that portion of Section 3, Chapter 141, Regular Session Acts Thirty-third Legislature, which declares:

"* * * and such applicant shall not be in the enjoyment of an income, annuity, the emoluments of an office or wages for his or her services in excess of three hundred dollars per year, nor in receipt of aid or of a pension from any *State of the United States*, or from any other public source. * * *"

And Article 6272, Revised Statutes, 1911, which was repealed by Chapter 141, Regular Session Acts Thirty-third Legislature, reads in part as follows:

"To constitute indigency * * * neither the applicant himself nor his wife nor both shall be owners of property, real or personal, in excess of the value of one thousand dollars * * * or who is in receipt of aid or of a pension from any State *or* the United States, or from any other source. * * *"

It will be observed on reading the two laws above quoted that, relative to applicants drawing pensions or aid from other sources, the language in Article 6272, R. S., 1911, which reads—"nor in receipt of aid or of a pension from any State, *or* the United States"—was changed by Section 3, Chapter 141, above quoted, to read—"nor in receipt of aid or of a pension from any State *of* the United States," by substituting the word *of* for the word *or*. However, Section 3 of the present law declares that such applicants shall, too, not be the recipients of aid or a pension from any "*other public source*." In my opinion, a pension coming from the Federal government comes direct from a *public source*, and I, therefore, respectfully advise you that the applicant you mention, being the recipient of a pension from the United States government as the widow of a Mexican War veteran, cannot, under the law, draw a pension from the State of Texas as the widow of a Confederate soldier.

Yours very truly,

B. F. LOONEY,
Attorney General.

CONFEDERATE VETERANS—MASONIC LODGE—CONSTRUCTION OF STATUTE.

Being an inmate of a private institution does not preclude an indigent Confederate soldier from being entitled to a pension.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, AUGUST 18, 1913.

Hon. Geo. W. Kyser, Commissioner of Pensions, Capitol.

DEAR SIR: In your communication of the 15th instant, you request to be advised whether a Confederate soldier, who is furnished a home, and is being cared for by the Masonic Grand Lodge of Texas, can draw a pension.

In reply thereto we respectfully direct your attention to that portion of Section 3, Chapter 141, Acts of the Thirty-third Legislature, which provides as follows:

"* * * and such applicant shall not be in the enjoyment of an income, annuity, the emoluments of an office or wages for his or her services in excess of three hundred dollars per year, nor in receipt of aid or of a pension from any State of the United States, or from any other *public* source, nor an inmate of the Confederate Home, or other *public* institution at the *expense of the State*. * * *"

In view of the fact that the funds for the payment of pensions to those who served in the army and navy of the Confederacy, and the widows of such soldiers and sailors are created by reason of taxation on all property within the State, in the enactment of the above quoted section it was therefore the intent of the Legislature, in excluding those Confederate soldiers, and widows of Confederate soldiers, who are inmates of the Confederate Home, or any other public institution, from being entitled to a pension, was for the reason that such institutions are supported and maintained solely by taxation. If an inmate of such public institution should be entitled to a pension, it would be an unjust discrimination and against public policy in that such indigent would be given protection and a home at the expense of the State, and at the same time, in addition thereto, permitted to enjoy the privilege of a pension at the expense of the State.

The Masonic Home is not a public institution. It is not supported by taxation on the property of the people of this State. We presume that those Confederate soldiers, who are inmates of the Masonic Home, are in indigent circumstances, and under the law would be entitled to a pension, provided they do not come within any of the exceptions of such law. Their being members of the Masonic Lodge is a distinction and a privilege which they enjoy, and it would not be legal for the State to discriminate against them and deny them pensions simply because they are fortunate enough to be cared for and protected by the great secret organization to which they belong.

You are, therefore, advised that in the opinion of this Department, being an inmate of a Masonic home, or any other private institution, does not preclude an indigent Confederate soldier from being entitled to a pension.

Yours truly,

B. F. LOONEY,
Attorney General.

CONFEDERATE PENSION LAW.

Unless widow of Confederate soldier had married such soldier prior to January 1, 1900, she would not be entitled to a pension.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, AUGUST 13, 1913.

Hon. Geo. W. Kyser, Commissioner of Pensions, Capitol.

DEAR SIR: In your communication of the 11th instant, you submit the following:

"Mrs. A., the widow of a Confederate soldier, marries a second husband, who is also a Confederate soldier. He too dies, and she is again a widow. Can she draw a pension on the war record of her second husband, everything else being favorable?"

Replying, beg to say:

If Mrs. A. was born prior to the year 1861, and if she married her first husband—a Confederate soldier—prior to January 1, 1900, as his widow, she would be entitled to a pension, provided she had not remarried. The same rule would apply if she married her second husband—also a Confederate soldier—prior to January 1, 1900. If, however, her second marriage occurred subsequent to the date provided by law, to wit: January 1, 1900, she would then not be entitled to a pension as the widow of her second husband. Nor would she be entitled to a pension as the widow of her first husband, for the law specifically declares "* * * who was married to such soldier or sailor prior to January 1, 1900, and who has never remarried."

You are, therefore, advised that unless Mrs. A. married her second husband prior to the first day of January, 1900, she would not be entitled to a pension.

Yours truly,

B. F. LOONEY,
Attorney General.

OPINIONS RELATIVE TO SAME PERSON HOLDING MORE THAN ONE OFFICE.**OFFICERS—MAYOR—CITY RECORDER—JUSTICE OF THE PEACE.**

1. A city operating under the general laws and not under special charter the mayor thereof shall be ex-officio recorder of the court unless the city council by ordinance authorize the election of a recorder.

2. The office of recorder of a corporation court would be held incompatible with that of justice of the peace.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 14, 1913.

Mr. A. C. Dunn, City Secretary, Rosebud, Texas.

DEAR SIR: This Department is in receipt of your favor of March 13, as follows:

"Our town is incorporated under the general incorporation law. Does our recorder have to be elected, or may he be appointed by the council? If he has to be elected, and it is too late to place a candidate's name on the ticket for the coming election, can the council appoint one to fill the office until the next general city election, or must a special election be ordered?"

"Is the justice of the peace of the precinct in which the town is situated eligible to election or appointment as recorder, also?"

Replying to your first question as to whether your recorder must be elected or appointed, we beg to say that this question would be determined by Article 905 of the Revised Statutes of 1911, which provides, in effect, that a city operating under the general laws and not under special charter, the mayor thereof shall be ex-officio recorder of the court unless the city council by ordinance authorize the election of a recorder. So your case will be governed by whether or not you have an ordinance providing for the election of a recorder. If you have no such ordinance your mayor acts as recorder.

Answering the second question, beg to say that the office of recorder of a corporation court would be held incompatible with that of justice of the peace, and that should a justice of the peace be appointed or elected to the office of city recorder he would vacate by his acceptance of such latter office the office of justice of the peace. *State vs. Brinkerhoff*, 66 Texas, 45. Also see other authorities cited in *Harris* on the Constitution, page 779.

Yours truly,

C. W. TAYLOR,
Assistant Attorney General.

OFFICERS—MAYOR—JUSTICE OF THE PEACE.

The same person can not at the same time hold the office of mayor of a town or city and the office of justice of the peace of a precinct embracing said town or city.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 22, 1913.

Mr. S. F. Cooper, Roanoke, Texas.

DEAR SIR: Replying to your inquiry of March 21, 1913, you are respectfully advised that this Department has recently given an opinion to the effect that a justice of the peace whose precinct embraces an incorporated town or city would not be eligible to hold the office of mayor of such incorporated town or city while holding the office of justice of the peace.

It is true the Constitution exempts a justice of the peace from its general provisions inhibiting the same person from holding more than one civil office of emolument at the same time, but the courts in construing this section of the Constitution hold that the same person may hold any of the positions falling within the exception, and at the same time any other civil office of emolument not incompatible therewith.

The duties of the office of mayor of an incorporated town or city are incompatible with the duties of the office of justice of the peace of a precinct which embraces said incorporated city or town, and for this reason we have held that the two positions cannot be held lawfully by the same person at the same time.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

 OFFICERS.

County attorney, justice of the peace and constable can not at the same time hold the office of city attorney, judge of the corporation court and marshal, respectively, of a city within the county.

(Sec. 40, Art. 16 of the Constitution of Texas and the Corporation Court Act.)

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, OCTOBER 3, 1913.

Hon. Philip P. Long, County Attorney, Carthage, Texas.

DEAR SIR: The Attorney General is in receipt of your communication of October 1, 1913, from which it appears that the city of Carthage has recently been incorporated and the city council desires to know whether or not the county attorney, justice of the peace and constable can be appointed city attorney, judge of the corporation court and marshal, respectively, for the city of Carthage. You state that the city council of the city of Carthage will not enact any criminal ordinances in conflict with or covering the same offenses prohibited by the State law.

In this connection we beg to call your attention to Section 40 of Article 16 of the Constitution, which reads as follows:

"No person shall hold or exercise, at the same time, more than one civil office of emolument, except that of justice of the peace, county commissioner, notary public, and postmaster, unless otherwise specially provided herein."

This section clearly prohibits any person holding or exercising, at the same time, more than one civil office of emolument, except those holding the offices therein designated.

It is the opinion of this Department that should any of the said officers named in your communication accept the appointment to the offices under the city government, as suggested by you, that such act on their part would operate *ipso facto* as a resignation of the county office held by them.

Kingsberry vs. Brinkerhoff, 17 S. W., 109.

Gaal vs. Townsend, 77 Texas, 464.

State vs. Degrees, 53 Texas, 387.

Figures vs. State, 99 S. W., 412.

It will be noted that the office of justice of the peace is one of the exceptions in Section 40, above quoted, which relieves this office from the rule that an incumbent thereof is inhibited from holding any other civil office of emolument, but there is a further limitation upon the holding of two offices although one or both of them may be named as excluded from the rule laid down in Section 40 and that is, that the duties of the two offices must not be incompatible or conflict one with the other.

Under the peculiar wording of the corporation court act, the corporation court has concurrent jurisdiction with the justice of the peace in all misdemeanors where the punishment therefor does not exceed a fine of \$200. (Article 904, Revised Statutes of 1911.) The fact that the city council will not pass penal ordinances covering the same offenses as are covered by the State law would not relieve the corporation court in the town of Carthage of the jurisdiction conferred upon it by Article 904, and while the justice of the peace would not have jurisdiction to try cases arising under ordinances passed by the city council covering offenses not covered by the State law, yet, to the extent of offenses arising under the State law, the justice of the peace and city recorder could take jurisdiction of the same offenses, and, consequently, you would have one man presiding over two courts of concurrent jurisdiction, and, therefore, the two offices would be incompatible to that extent.

We therefore beg to advise you that, in the opinion of this Department, should any of your county officials named in your letter accept the positions under the city government by such act they would vacate their county offices.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OFFICERS—HOLDING MORE THAN ONE OFFICE.

County attorney can hold office of notary public.

County attorney can not at the same time hold the office of county commissioner.

Sheriff can not at the same time hold the office of county commissioner.

Law construed: Section 40, Article 16 of the Constitution.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JUNE 7, 1913.

Hon. Vernon B. Goar, County Attorney, Johnson City, Texas.

DEAR SIR: We have your favor of June 3, reading as follows:

"Can a man be county attorney and notary public at the same time? If so, can he be county attorney, notary public and county commissioner at the same time? Could the sheriff of a county be a county commissioner at the same time?"

"Call vs. Townsen, 77 Texas, 464 and 99 S. W., 412, Figures vs. The State, seem to hold the above questions should be answered in the affirmative. Please advise me if the holdings of these cases is the law in Texas."

Replying thereto, we beg to say that Section 40 of Article 16 of the Constitution reads as follows:

"No person shall hold or exercise, at the same time, more than one civil office of emolument, except that of justice of the peace, county commissioner, notary public, and postmaster, unless otherwise specially provided herein."

It will be seen that the office of county commissioner is one of those offices excepted in the above provision of the Constitution, and that a person holding the office of county commissioner can thereunder hold any other office in the county as a general proposition. However, this rule is subject to the exception that no officer holding one of the excepted offices could, at the same time, hold any other civil office of emolument, the duties of which are incompatible with the duties of the former office. That a county attorney can also hold the office of notary public has been expressly decided in this State in the case of *Figures vs. The State*, cited by you, and this for the reason that the office of notary public is one of those enumerated by the Constitution, and the duties of the two offices are not conflicting.

This rule, however, does not apply when we come to consider the same person holding the office of county attorney and county commissioner. While the office of county commissioner is one of those expressly exempted in the Constitution, yet at the same time the county attorney could not act as county commissioner for the reason that the duties of the office would be incompatible, in that there would frequently arise, in the discharge of the two offices, conflicting authority attempted to be exercised by one and the same person holding two separate and distinct offices. The same rule would apply as to a sheriff holding the office of county commissioner at the same time he held the office of sheriff. The duties of the two offices are conflicting and incompatible. Should a county attorney or sheriff accept the office of county commissioner that act would *ipso facto* operate as a resig-

nation of the former office. *Kingsbury vs. Brinkerhoff*, 17 S. W., 109.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OFFICES—SAME PERSON CANNOT HOLD MORE THAN ONE, EXCEPT,
ETC.

The same person can not at the same time hold more than one civil office of emolument except the offices of justice of the peace, county commissioner, notary public and postmaster.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MAY 21, 1913.

Mr. A. N. Clayton, Harlingen, Texas.

DEAR SIR: In your letter of May 17 addressed to this Department you state that one man in your town is holding the offices of city marshal, city tax assessor, city tax collector, tax assessor of Harlingen Independent School District, tax collector of Harlingen Independent School District, and pound master of the city, and you desire to know if it is lawful for one person to fill at the same time all of said positions.

Replying thereto, we beg to advise you that our State Constitution forbids the holding of more than one civil office of emolument at the same time by the same person, except the offices of justice of the peace, county commissioner, notary public, and postmaster.

Our courts, in construing this section of the Constitution, announce the rule that the same person may hold either of the offices embraced within the exception and at the same time any other civil office of emolument not incompatible therewith.

Neither of the offices held by the person against whom you complain falls within the constitutional exception, and said offices are all civil offices of emolument. Therefore it would be unlawful for the same person to hold all of said offices at the same time.

If a person holds a civil office of emolument and is elected or appointed to another such office, upon his qualifying and being inducted into the latter office the former office is thereby vacated.

Yours truly,

C. A. SWEETON,
Assistant Attorney General.

OFFICERS—COUNTY COMMISSIONER AND JUSTICE OF PEACE.

The same person can not hold said offices at the same time.

The duties of the positions of county commissioner and justice of the peace are incompatible, and because of such fact, and because it would be against good public policy a county commissioner can not at the same time lawfully hold the position of justice of the peace.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 24, 1913.

Hon. A. B. Crane, County Attorney, Matador, Texas.

DEAR SIR: Under date of January 17, 1913, we have the following inquiry from you:

"Will you kindly tell me if it is lawful for a county commissioner to hold the office of justice of the peace? Our commissioners hold both offices, and we want to stop it if we can, that is, if it is not lawful?"

Section 40, Article 16 of the State Constitution, provides 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."

Under the exception in this section, a person may hold the office of county commissioner and at the same time another civil office of emolument. However, our courts, construing this section, hold that a person may hold either of the offices embraced within the exception, and, at the same time, another civil office of emolument not incompatible therewith.

In answering your question, therefore, we must determine whether the offices of county commissioner and justice of the peace are incompatible.

Under the law, a justice of the peace is charged with the duty of making a sworn report of all the moneys collected by him for the use of the county, to the commissioners court of the county, which report shall show the amount of moneys collected and the disposition made of same, and said report shall be carefully examined by the commissioners court, and if found correct, by order of the court, the clerk shall enter the same on the financial ledger of the county, and if found to be incorrect, the court shall summons said justice of the peace before them and have him correct the same. Now, if it is lawful and permissible for one man to hold both positions at the same time, every member of the court could hold both positions at the same time, and in such event we would have the entire commissioners court summoning themselves to appear before themselves to make the necessary corrections in their reports. If the justice of the peace should fail to correct the report, or if, upon examination, it should be ascertained that said justice of the peace was a defaulter, it would then become the duty of the commissioners court to pass an order directing that suit be brought against such officer and his official bondsmen. In such event, we would have this situation: The entire commissioners court sitting in judgment upon their own official work performed in a different official capacity. If they were inclined to be dishonest, or if they should conceive the idea of misappropriating

county funds while serving in the capacity of justice of the peace, if permitted at the same time to act in the capacity of county commissioner, and pass upon their own reports, who would detect the defalcation?

Again, the law requires the commissioners court to fill all vacancies in the office of justice of the peace. It might so happen that a vacancy might occur in the office of justice of the peace in the precinct of each county commissioner, and if permitted to hold both offices at the same time, the entire commissioners court might vote for themselves to fill such vacancies. If this should be done, they would pass upon and approve their own official bonds, because the law requires the commissioners court to approve the bond of a justice of the peace. They could, file and approve worthless bonds from which nothing could be recovered.

The law furthermore enjoins the duty upon the commissioners court to ascertain from the report of the justice of the peace whether all fines and judgments rendered by him have been collected, and if it appears that any such fines and judgments, imposed by such officer, have not been paid and satisfied then the commissioners court shall charge such unpaid fines and judgments against the justice of the peace, and he and his bondsmen would be liable therefor, unless he could show, to the satisfaction of the commissioners court, that he had used due diligence to collect same. Here again we would have a county commissioner sitting in judgment upon his official acts performed in another and different official capacity.

Again, the law makes it the duty of the commissioners court to require a new bond of the justice of the peace if, at any time, they should become satisfied that his bond, from any cause, was insufficient. And in such case we would have a county commissioner passing upon the sufficiency and solvency of his own bond as justice of the peace.

A number of other instances might be cited to show the incompatibility of the duties of these two positions, but we think the above are sufficient.

After careful consideration of this subject, we have come to the conclusion that the duties of these positions are incompatible; and because of this fact, and because it would be against good, sound public policy, in the opinion of this Department, a county commissioner can not, at the same time, lawfully hold the position of justice of the peace.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

DIGEST OF OPINIONS CONSTRUING THE MEDICAL PRACTICE ACT.

By B. F. Looney, Attorney General.

There is no provision of the Medical Practice Act that would prevent the Board of Medical Examiners from receiving applications from that class of physicians entitled to verification licenses and from hearing proof thereon and granting the same, even after the expiration of one year after the passage of the act; all such physicians, however, after the expiration of one year from the passage of the act, who continue to practice without such verification license, are subject to a criminal prosecution for practicing without license. (Opinion Book 28, page 293.)

By B. F. Looney, Attorney General.

Applicants for license before the Medical Board, who fail to pass on examination, are not permitted to take another examination until the expiration of a year. (Opinion Book 33, page 41.)

By B. F. Looney, Attorney General.

A person who practiced medicine in this State prior to 1885, but who never received a license from any previous Medical Board and who holds no diploma from any school and has not practiced medicine for twenty-five years, would have no standing before the present Medical Board and would not be entitled to verification license. In order to obtain a license he would have to comply with all requirements of the Act of 1907. (Opinion Book 33, page 163.)

By B. F. Looney, Attorney General.

Medical examiners for life insurance companies who are not engaged in the practice of medicine in this State, are not required, under the Medical Practice Act to be licensed practitioners. (Opinion Book 33, page 212.)

By B. F. Looney, Attorney General.

An optometrist who proposes to treat defective or diseased eyes by his method, or any other method, would be practicing medicine within the meaning of the Medical Practice Act. He would be permitted to sell eyeglasses like any merchant is permitted to sell his wares, but he could not prescribe certain glasses recommended by him to adjust or correct defects or to cure any diseased condition of the eye.

In order to be qualified to write a prescription for diseased or de-

fective eyes, a certain amount of scientific knowledge is essential. The eye is one of the most important parts of the human body and is deserving of the same protection, and its treatment deserves to be safeguarded, same as other organs of the body. The real function of the optometrist is that of the merchant selling his goods, and he should not be permitted to prescribe glasses for the treatment of the eye any more than he should be permitted to prescribe medicine generally for any diseased condition of the human body. (Opinion Book 28, page 163.)

OPINIONS CONSTRUING APPROPRIATION BILLS.

SCALP BOUNTY ACT.

The appropriation of \$100,000 by the Thirty-second Legislature to pay bounties upon wild animals killed, lapses August 31, 1913.
(Constitution, Art. 8, Sec. 6, Acts Thirty-second Legislature, Chap. 32.)

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JUNE 24, 1913.

Hon. B. L. Crouch, care of Maverick Hotel, San Antonio, Texas.

DEAR SIR: This Department has your favor of June 20, in which you ask if the State Comptroller would be authorized to issue warrants against any unexpended balance of the \$100,000 appropriated under the Acts of the Thirty-second Legislature providing for the destruction of wild animals after the 31st day of August, 1913, closing the fiscal year.

Replying thereto, we beg to say that Article 8, Section 6 of the Constitution of this State provides in part that no money shall be drawn from the treasury but in pursuance of specific appropriation made by law, nor "shall any appropriation of money be made for a longer term than two years. * * *"

The act of the Thirty-second Legislature, above referred to, carries an appropriation in Section 6 thereof of \$100,000 out of any money in the State Treasury not otherwise appropriated for the payment of bounties named in the bill. The bill, after enumerating certain species of wild animals and the amount of bounty paid therefor by the counties, provides that the commissioners court of the several counties making payments thereunder shall certify the amount so paid to the Comptroller, and upon the receipt of such certificate the Comptroller shall draw his warrant upon the State Treasurer for three-fourths of the aggregate amount paid out by the county, and in order that the Comptroller might be enabled to make such payment the appropriation herein above referred to of \$100,000 was made.

The above appropriation, as we view it, would fall squarely within the constitutional provision above quoted and would lapse at the expiration of the present fiscal year under the rule that no appropriation shall be made for a longer period than two years, and in order that the provision of the bill above referred to may be effective in all its parts, it would be incumbent upon the Legislature at each of its biennial sessions to make an appropriation to carry out the provision of the bill.

Trusting that I have made myself clear in this matter, I am,

Yours truly,

C. W. TAYLOR,
Assistant Attorney General.

SCALP BOUNTY ACT.

Second opinion to the effect that the appropriation of \$100,000 by the Thirty-second Legislature to pay bounties upon wild animals killed, lapses August 31, 1913.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JULY 30, 1913.

Hon. C. B. Hudspeth, Senate Chamber, Capitol.

DEAR SIR: Your communication of date, July 29, 1913, addressed to Mr. C. M. Cureton, first assistant in this Department, has reached the desk of the writer for answer.

You call attention to the former opinion rendered by this Department holding that the appropriation made in the scalp bounty law passed at the regular session of the Thirty-second Legislature would lapse on August 31, of this year and any unexpended balance thereof would not be available after that date.

You call our attention to the last section of the act and suggest that by reason of that section that you base a different conclusion upon this act than that placed thereon by the former opinion of this office. The last section of the act reads as follows:

"Section 7. And provided further, that the provisions of this act shall not become effective, and the appropriation herein made shall not become available, until the first day of September, 1912."

Upon the section just quoted you have reached the conclusion that the appropriation made in said act is for a period of two years beginning September 1, 1912, and ending August 31, 1914, and, therefore, that any unexpended balance in the treasury on September 1, 1913, would be available during the year beginning with that date. Since receipt of your letter we have carefully reconsidered our former opinion and have come to the conclusion, after a deliberate study of the Constitution and available decisions thereon, that our former opinion was correct, and we beg to adhere thereto.

In order that this opinion may be complete within itself, we beg to again quote a portion of Section 6 of Article 8 of the Constitution as follows:

"Nor shall any appropriation of money be made for a longer term than two years. * * *"

Section 6 of the act above referred to makes a clear appropriation of \$100,000 for the payment of the bounties named in the act but there is no limitation of time within which such appropriation may be expended. An indefinite appropriation of the public money must necessarily, if that construction is placed thereon, be void under that section of the Constitution above quoted and, in order that such appropriation shall be effective at all, the act must be construed so as to bring the appropriation within the meaning of that section of the Constitution above quoted and hold that the appropriation is limited to the period of two years from the date of its enactment. Otherwise the appropriation must be held as being in conflict with the Constitution.

There is no question but that the Legislature has the right to postpone the taking effect of a law enacted by it for the reason that there is nothing in the Constitution to prohibit same. But this rule does not obtain to the extent that the Legislature would have the right to postpone the taking effect of an act making an appropriation to such a date as would extend the expenditure of the funds thereunder for a period beyond two years from the passage of the act as is provided in that section of the Constitution above quoted. The clear intention of the framers of the Constitution in limiting the power of the Legislature to make appropriations for two years was that the affairs of State arising under the administration of each Legislature should terminate with such Legislature, and that one Legislature could not appropriate funds beyond its term and thereby deprive the ensuing Legislature from providing for the administration of the affairs of State. If the taking effect of the appropriation bill could be postponed for a year and the two years term of such appropriation begin to run a year from the enactment of the bill, then the taking effect of such bill would be deferred for any number of years which proposition no one would seriously contend for, and thus the wisdom of the framers of the Constitution, wherein they declare that no appropriation can be made for a greater term than two years, is made manifest.

The appropriation made by the act under discussion is an indefinite one. No period of time is fixed within which the same may be expended and no period of time is fixed for the operation of the act. The \$100,000 appropriated would be available for the purposes of the act until the same was expended without regard to the length of time consumed in its expenditure. It might have been expended in one year or if the demand thereon should be limited and of no consequence it would run for a number of years.

A similar question was involved in the case of *Pickle vs. Finley*, 91 Texas, 484, decided by the Supreme Court of Texas.

Speaking from Judge Gaines, plaintiff in the case was a stenographer for the Court of Civil Appeals for the Third Supreme Court. Defendant in the case was the Comptroller of the State. The Statutes, Article 1012, provided for a court stenographer who should receive a salary of \$1200 per annum. The appropriation bill passed by the Twenty-fifth Legislature appropriated only the sum of \$600 for the payment of such stenographer. The plaintiff contended that the act authorizing the appointment of a stenographer and fixing his salary at \$1200 per annum was the appropriation of such amount and he sought to compel the Comptroller by mandamus to issue the warrant for \$1200 for the year, this being (\$600) six hundred dollars in excess of the appropriation made by the Legislature. The court in discussing the question said:

"Section 6 of Article 3 of the Constitution (previously quoted) not only requires an appropriation before any money can be paid out of the Treasury, but also limits every appropriation to a term of two years. If Article 1012 of the Revised Statutes makes an appropriation for the payment of the salaries of stenographers of the courts of civil appeals it is an unlimited appropriation. There is not a word to indicate that it was the purpose to restrict its operation

to the term of two years. Therefore to presume that the Legislature intended by that provision not only to fix the salary of the office but also to make an appropriation for its payment is to presume that their purpose was to do that which the Constitution forbids. This can not be presumed, unless the language be so clear as to admit of no other construction. If they had made an appropriation in unmistakable terms which was to continue for all time, it might be held valid for two years, and inoperative thereafter. But this has not been done. Here we have to deal with a question of construction and since no appropriation is clearly and expressly made we must hold that none was intended."

The court held that, if the act authorizing the appointment of a stenographer and fixing his salary at \$1200 per annum could be held to be an appropriation, then that such appropriation was for an indefinite time which was inhibited by Section 6 of Article 8 of the Constitution but further held that it might be valid for two years and inoperative thereafter. This is the case with the act under consideration. This act does make a definite appropriation in unmistakable terms and by the terms of the act it would continue for all time or until exhausted, and the best that can be said of this act in the light of our Constitution is that the Legislature intended to make an appropriation of \$100,000 to be expended within two years after the passage of the act in accordance with the provisions of the Constitution and, having deferred the taking effect of the act and the availability of the appropriation until September, 1912, it must be held that the Legislature intended the \$100,000 appropriated to be for the year beginning on that date. Otherwise the appropriation would be for an indefinite time and void for the reasons above set out.

We, therefore, suggest that if the act is to be of effect in the future that from time to time the Legislature make appropriation sufficient to carry into effect the provisions of the act, bearing in mind at all times, that provision of the Constitution with reference to the limitation upon the time for which appropriations may be made.

With great respect, I am,

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

APPROPRIATIONS FOR EXPOSITIONS.

Under the provisions of the Constitution of Texas, the Legislature would have no authority to appropriate money for the erection of a building at the Panama-Pacific Exposition.

(Constitution, Art. 3, Sec. 48.)

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, AUGUST 6, 1913.

Hon. O. B. Colquitt, Governor, Capitol.

DEAR SIR: We have your favor of recent date in which you propound the following question:

"Is the Legislature authorized by the terms of our Constitution to appropriate money for the erection of buildings in other States and to gather together exhibits?"

You state that the particular question being the appropriation for a building and the gathering of exhibits for the Panama-Pacific Exposition to be held in San Francisco in 1915.

Replying thereto, we beg to call your Excellency's attention to the provision of Section 48 of Article 3 of the Constitution, which provides that:

"The Legislature shall not have the right to levy taxes or impose burdens upon the people except to raise revenue sufficient for the economical administration of the government, in which may be included the following purposes. * * *"

Then follows in such section an enumeration of various purposes which may be included, none of which could be construed to permit the expenditure of the funds of this State for the purposes named. Another provision of the Constitution of similar purport is Article 8, Section 3, reading as follows:

"Taxes shall be levied and collected by general laws and for public purposes only."

The latter quotation from our Constitution is contained in the Constitution of various States of the Union, and same has been before the courts for construction upon questions identical with the one you present, and same has been construed to permit of an appropriation for the erection of buildings and the maintenance of exhibits at various world's fairs or expositions, the courts holding that the exhibit of the resources of the State in calling the attention of the people of the world to the products of that State is the public purpose, in that it is for the general good of the people of the State, and for the public welfare of the commonwealth.

Daggett vs. Colgan, 14 L. R. A., 474.

Norman vs. Kentucky Board of Managers, 18 L. R. A., 556.

Minneapolis vs. Janney, 90 N. W., 312.

Shelby County vs. Tennessee Centennial Exposition Company, 36 S. W., 694.

State vs. Cornell, 39 L. R. A., 516.

House of Reform vs. Lexington, 65 S. W., 350.

Were this the only provision of our Constitution dealing with the subject, we would be constrained to hold that an appropriation for the purpose named would be permissible as being a public purpose, in that the entire State and all of the people would reap a benefit from a display of the resources and products of Texas, and that it would be for the common good and general public welfare of Texas to display to the people of the earth the resources and products of the State, but we are confronted with that other provision of the Constitution first above quoted, providing that the right to impose burdens upon the people and to levy taxes is limited to the raising of revenue sufficient for the economical administration of the government. All of the funds coming

into the treasury of the State are raised by taxation upon its people, and the burden thereby laid must only reach the extent of producing a revenue sufficient of running the affairs of the government, administered in an economical manner. We take this to mean that the only purpose for which taxation can be made is that of raising revenue sufficient to meet the expenses necessarily incurred in the operation of the usual and ordinary affairs of government. Of course, there are other provisions of the Constitution which permit the expenditure of public funds for the purposes that are not in a strict sense necessary in the operation of the government, but they do not cover an expenditure of the character under discussion. We refer here to appropriations for preserving and perpetuating memorials of the history of Texas, which could not be construed to be a governmental purpose, but expressly permitted by the Constitution.

There is yet another provision of our Constitution which might be well to call attention to here, to be found in Article 16, Section 56, which prohibits the appropriation of money for the purpose of bringing immigrants to this State. This section is often referred to as prohibiting the appropriation of funds for exhibits at expositions. While a display of the products of Texas at an exposition of the magnitude of the one under discussion, would doubtless bring numbers of immigrants to the State of Texas, yet we are of the opinion that such is not the primary purpose of such an exhibit, but we are constrained to believe that the chief gain to be made by such an exhibit would be to bring to the knowledge of people generally the character of the products of Texas, and thereby create a market for same, and we would not hold an appropriation for that purpose unconstitutional upon this section alone.

We base our opinion herein upon the provisions of the Constitution first above quoted, being Section 48 of Article 3, and advise you that under that section and article the Legislature would have no power to appropriate any part of the public funds of this State for the erection of a building, the gathering together of exhibits and maintaining same at the Panama-Pacific Exposition at San Francisco in 1915.

With respect, I am,

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

APPROPRIATIONS—CONTINGENT EXPENSES—SALARY OF PORTER.

Where no appropriation is made in the appropriation bill to pay the salary of a porter of one of the departments of the State government and a porter is necessary to such department, then a porter may be employed and his salary paid from the appropriation for contingent expenses.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, OCTOBER 8, 1913.

Mr. Ernest W. Winkler, State Librarian, Capitol.

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

"In the appropriations made by the Thirty-third Legislature to the Library and Historical Commission the designation 'porter' was changed to 'general assistant,' as the latter term more nearly described the duties of the person occupying that position. The Governor vetoed the item, presumably under the impression that it was a new place. The State library occupies a floor space equal to that of the largest department in the Capitol. The service of a cleaner or janitor is indispensable. As will be found by an examination of the appropriations made to the Library and Historical Commission, the only fund apparently available for the payment of a janitor is the 'contingent expense' fund. However, the Comptroller has questioned the correctness of this view. I have, therefore, to request your opinion upon the following question:

"Under the circumstances detailed above, can a janitor be paid out of the 'contingent expense' fund?"

We note that in the general appropriation bill of the Thirty-third Legislature there was incorporated an item in the appropriation made for the support of the Texas Library and Historical Commission for the salary of general assistant \$720 for each year. It appears that this item was vetoed by the Governor. You state in your communication that the position of general assistant as contained in the appropriation bill had formerly been denominated or designated "porter" but was changed in this bill to that of "general assistant," and when the item to pay a general assistant was vetoed by the Governor that deprived the library of a porter unless a porter could be employed and paid out of some other item of the appropriation; and you suggest, and we agree with you, that the only other item in the appropriation bill out of which a porter could be paid is that of contingent expenses. The question therefore presented by you is whether you could employ a porter and pay his salary out of the fund appropriated for contingent expenses.

The item in the appropriation for the support of your Commission relating to contingent expense reads as follows:

"Contingent expenses, including typewriter..... \$200.00 \$100.00"

That is to say, for the year beginning August 31, 1914, there is appropriated the sum of \$200 and for the year beginning August 31, 1915, there is appropriated \$100, and when we take into consideration that the standard price for a typewriter is \$100, it is very clear that the Legislature intended to appropriate for contingent expenses the sum of \$100 per year for your Commission.

The word "contingent" as used to qualify expenses in appropriation bills is synonymous with "incidental" or "miscellaneous," while at the same time it has a meaning distinct and separate from the two terms just mentioned, in that it depends upon the happening of some unknown event in the future and carries with it the idea of uncertainty.

"A contingency is a fortuitous event which comes without design, foresight or expectation. In law a contingent remainder is a remainder depending upon an uncertainty. And so contingent expense must be deemed to be an expense depending upon some future uncertain event."

People vs. Village of Yonkers, 39 Barb. (N. Y.), 266, Court of Claims Reports, page 269, the court, in discussing the item of contingent expense in the appropriation bill, said:

or miscellaneous purposes, for official or clerical compensation, and this is the only section relied on by defendants which seems to us to touch this case. The adjectives contingent, incidental, and miscellaneous, as used in appropriation bills to qualify the word expenses, have a technical and well-understood meaning; it is usual for Congress to name the principal classes of expenditure which they authorize, such as clerk hire, fuel, light, postage, telegrams, etc., and then to make a small appropriation for the minor and unimportant disbursements incidental for any great business, which can not well be foreseen and which it would be useless to specify more accurately. For such disbursements a round sum is appropriated under the head of 'contingent expenses,' or 'incidental expenses,' or 'miscellaneous expense.' Such appropriations the law says shall not be used for clerk hire."

It will be noted that the holding of the court in this case was based upon Sec. 3682 of the Federal Statute, which forbids the use of money appropriated for contingent, incidental or miscellaneous purposes for official or clerical compensation. This language above quoted is mere dictum, for the reason that the salary which had been paid to Dunwoody was not paid out of the contingent expense fund, but was paid out of a fund appropriated under a much broader term. But the inference is that the Court of Claims, had the exact question been before that court, and there had been no statute which expressly forbade the payment of the clerk's salary out of the contingent expense fund, then the court would have held that such payment was permissible.

Upon the reasoning deduced from the above case, we are of the opinion that if the facts make it absolutely necessary that in the efficient management and operation of your Department a porter be employed, and that his services are indispensable, then one could be employed and his salary paid out of the contingent expense fund.

Of course, we do not undertake to say, and do not wish to be understood as holding, that every expenditure that a head of a department might see fit to make could be taken care of out of a contingent expense appropriation, but our understanding of such an appropriation is that it is for the purpose of taking care of all those miscellaneous items of expense that are not expressly enumerated in the bill, and that such expenditures are for the best interest of the department and are absolutely necessary in the proper conduct of its affairs.

The fact that you have substantially only \$100 for each year in your contingent expense account makes it obvious that you could not pay a salary of a porter for the entire year from this account, and in order that the porter might be paid from this account it would be necessary for you to make application to the Governor for a deficiency, and if such should be allowed by him, then deficiency warrants could be issued, and in the event of appropriation by the Legislature the same could be paid. As the Governor vetoed an item which makes it necessary for your application for a deficiency in order to take care of the very item vetoed, then it might be that the Governor would be still of the same opinion that he was when the item was vetoed and that he would not allow such a deficiency and the result would be that if you had paid out your \$100 for porter salary and the Governor refused to allow a deficiency, then you would be wholly without a contingent expense fund for the remainder of the year. We, therefore, suggest that before you

adopt such course that you have a conference with the Governor and get his views upon the matter.

A deficiency warrant can not be paid by the Treasurer until an appropriation is made therefor, for the reason that Sec. 6 of Art. 8 of the Constitution provides that no money shall be drawn from the Treasury but in pursuance of a specific appropriation made by law. A deficiency warrant is not even a debt against the State, and there is no obligation whatsoever upon the Legislature to make an appropriation to pay deficiency warrants for in the first place there was no authority for the creation of a debt. Warrants issued in pursuance of an appropriation are not debts against the State although there may be no money in the Treasury at the time such warrants are drawn, but where the revenue is in process of collection such transactions are considered to be upon cash basis and the revenue to be collected during the current year is theoretically in the Treasury.

In re State Warrants, 55 Am. St. Rep., 852.

In re Appropriations, 13 Col., 313.

While Article 4342 of the Revised Statutes authorizes the issuance of deficiency warrants, yet at the same time a pursuance of such article does not create a debt against the State. A debt against the State, in the true significance of that term, can only be created under the provisions of Sec. 49 of Art. 3 of the Constitution, which reads as follows:

“No debt shall be created by or on behalf of the State, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war, or pay existing debt; and the debt created to supply deficiencies in the revenue shall never exceed, in the aggregate at any one time, two hundred thousand dollars.”

The only one of the heads set out in this section under which a deficiency could be deemed a debt of the State would be that exception allowed in said section “to supply casual deficiencies of revenue,” and it is sometimes thought that deficiency warrants issued under the provision of Article 4342 come within the meaning of casual deficiencies of revenue. But this is erroneous. Casual deficiencies in revenue arise when the revenues derived from taxation and other sources are insufficient during any one year to meet the appropriations made by the Legislature for the expense of the government during that year, and when such a contingency arises then the Legislature is authorized to borrow money and lend the credit of the State for the purpose of securing sufficient funds to meet the appropriations for that year.

In re Loan of School Fund, 18 Col., 195.

In re Contracting State Debt, 21 Col., 399.

State vs. McGraw, 12 Washington, 541.

In re Appropriations, 13 Col., 316.

In re Casual Deficiencies, 21 Col., 403.

In re Incurring of State Debt, 19 R. I., 610.

We have gone thus far in our discussion of this matter in order to clearly set forth our ideas upon the question submitted.

With respect, I am,

Very truly yours,

C. W. TAYLOR,
Assistant Attorney General.

APPROPRIATIONS—EMPLOYEES.

Where no appropriation is for an aggregate sum to pay the salaries of a fixed number of employees, without designating the sum each employee shall receive, then the head of the Department may contract with the employees to pay each such an amount as may be agreed upon so long as the aggregate does not exceed the aggregate amount of the appropriation, and the employees need not receive the same amount each.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, OCTOBER 7, 1913.

Hon. F. C. Weinert, Secretary of State, Capitol.

DEAR SIR: The Department is in receipt of your communication referring us to the appropriation made by the Thirty-third Legislature for the support of your Department for the two years beginning September 1, 1913, and particularly to that portion wherein the sum of \$3600 is appropriated for each year to pay the salaries of three stenographers, and you desire to know if you would be compelled under this appropriation to pay the three stenographers equal salaries, that is, \$1200 a year each, or would it be left to your discretion as to the amount to be paid to each, and you further desire to know if you could employ one stenographer and pay him an adequate salary to perform the further duties of cashier in your Department.

Replying thereto, we beg to say that the exact wording of the appropriation bill of the Thirty-third Legislature referred to is as follows:

"Salaries of three stenographers \$3600.00 \$3600.00"

There is no indication whatsoever in this bill of the amount that it was intended that each of the three stenographers should receive. Other instances in the appropriation bills enacted by that Legislature can be found where items in the bill provide for more than one employee and fixing the aggregate amount of such employees by stipulating the salary that each of the employees in such item are to receive. In this case, however, there is no reference made to the amount that each of the three stenographers are to receive.

Stenographers are merely employees of the State government and secure their position by contract made and entered into between them and the head of the Department whereby for a consideration mentioned they agree to give their services to the State. Such a consideration, of course, must be within the limit fixed by the appropriation act. A stenographer is in no sense an officer of the State government, but as said above he is an employee and holds his position by reason of a contract made with the head of the department which he serves. In entering into a contract with the stenographer for his services the head of the department is limited in the salary he agrees to pay by the terms of the appropriation bill, and where a bill appropriates a lump sum for a certain number of stenographers, as is done in this case, then the head of the department is limited in the payment to the number of stenographers provided for by the aggregate amount of the appropriation. The head of the department is under no obligation whatsoever to consume all of the appropriation made for any particular item. If

the work of his department is not sufficient to warrant the employment of three stenographers as provided for in this bill, then it is not incumbent upon him and in fact he would not be justified in employing three stenographers at any salary, nor is it incumbent upon the head of the department to exhaust the entire appropriation for stenographers in any manner, for if he could procure efficient stenographers at salaries that would not aggregate \$3600, then it would be his duty to do so.

The fact that \$3600 is appropriated annually for three stenographers, which would average \$1200 each, does not place any obligation whatsoever upon the head of the department to pay each of the three stenographers a salary of \$1200 per annum, but the \$3600 is a limitation upon the amount to be expended, and it is left entirely within the discretion of the head of the department to pay such stenographers such amounts as will aggregate not in excess of \$3600.

We think, however, that a proper construction of this item in the appropriation bill would be that you, as head of the department, would not have authority to pay one stenographer such an amount out of the \$3600 for each year that would reduce that sum to such an extent that you could not procure for the remainder two other stenographers, but that if you could contract with three stenographers at different rates per month, then that would be a matter within your discretion to pay each of the three such an amount as might be agreed upon, provided the aggregate did not exceed \$3600.

As to requiring one of your stenographers to act as cashier, the same rule as above laid down would apply in that instance, that is, that he would be simply an employee under the government and you could require of him such services in addition to that of stenographer as might be contracted for between you and the employee.

You are therefore advised that in the opinion of this Department it is within your discretion to contract with three stenographers at such a sum annually as will not aggregate in excess of \$3600, and that such stenographers need not be paid an equal amount. You are further advised that you may contract with one of your stenographers to perform other services in your Department such as that of cashier.

With respect, I am,

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OPINIONS RELATING TO SUNDAY LAW.

POOL ROOMS—SUNDAY LAW.

It would be a violation of the law for a pool room to be permitted to run on Sunday; also violation of law to permit persons to play with understanding that loser pays the fee.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 28, 1913.

Hon. R. E. Tompkins, County Attorney, Hempstead, Texas.

DEAR SIR: You ask this Department whether or not pool rooms are permitted to run on Sunday.

You are advised that it would be a violation of Article 303 of the Penal Code for any pool hall to be run on Sunday, and would be a violation of the law for them to permit persons to play for the fee; that is, for two persons to agree to play with the understanding between them that the loser should pay the fee. If the person running the pool hall was aware of this agreement, he would be guilty of running a gambling house, and would likewise be amenable to the felony statute; or if he permits any minors to come into his place of business without the written consent of the parent or guardian of such minor, he would be guilty of such offense.

You ask us to send you a copy of our former opinion on this case. This opinion was rendered in a social club case in which we held that it was a violation of the law for a social club, in which pool or billiards are played, to permit these games to be played on Sunday. We think you are eminently correct in your contentions that the pool hall must be closed on Sunday, and that no gaming shall be permitted, either directly or indirectly, and our courts have repeatedly held that *to play for the fees is gambling*.

We commend you in your siding against these violations of the law. When we can be of further service to you, we shall be glad to hear from you.

Yours very truly,
W. A. KEELING,
Assistant Attorney General.

SUNDAY LAW—MOVING PICTURE SHOWS.

It is unlawful to operate moving picture shows on Sunday either with or without charge. (Penal Code, 1911, Articles 302, 299.)

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MAY 23, 1913.

Hon. W. B. Anthony, Supt. of Police and Public Safety, Austin, Texas.

DEAR SIR: You request an official opinion from this Department as

to whether or not it is a violation of the State law for moving picture shows to run on Sunday, whether they charge admission or not.

In order to answer your inquiry, we will copy that part of the Criminal Statute relating to the subject, which is Article 302, Penal Code of 1911, and reads as follows:

"Any merchant, grocer or dealer in wares or merchandise, or trader in any business whatsoever, or the proprietor of any place of public amusement, or the agent or employe of any such person, who shall sell, barter, or permit his place of business or place of public amusement to be open for the purpose of traffic or public amusement on Sunday, shall be fined not less than twenty nor more than fifty dollars. The term, place of public amusement, shall be construed to mean circuses, theaters, variety theaters and such other amusements as are exhibited and for which an admission fee is charged; and shall also include dances at disorderly houses, low dives and places of like character, with or without fees for admission."

In construing this article it will be observed that it properly divides itself into two parts.

The first part pronounces the offense complete by providing that "any merchant, grocer, or dealer in wares and merchandise, or trader in any business whatsoever, or the proprietor of any place of public amusement, or the agent or employe of such person," and then follows the language "who shall sell, barter or permit his place of business to be open for the purpose of traffic on Sunday (which provision relates to merchants, grocers and dealers in wares or merchandise, or traders) or who shall "permit his place of business or place of public amusement for the purpose of traffic (relating to merchants, grocers, etc.), or public amusement (relating to place of public amusement) to be open on Sunday, shall be fined not less than twenty dollars nor more than fifty dollars." Thus the offense is made complete and the penalty therefor pronounced and if this article should stop here we do not think that any person could seriously contend that it would not be a violation of the law for any place of public amusement to be open on Sunday, whether fees are charged or not.

Then follows the second division of the article, which in the opinion of this Department, is intended to broaden the effect of the offense denounced above, rather than to limit its effect. "The term, place of public amusement, shall be construed to mean circuses, theaters, variety theaters and such other amusements as are exhibited and for which an admission fee is charged." This latter part of the article, as we have stated above, is to broaden the effectiveness of the article so that it apply as to "circuses, theaters, variety theaters and such other amusements as are exhibited and for which an admission fee is charged." Lest some misapprehension might arise as to whether or not shows which charge admission fees should be included in the general classification of places of public amusement, they were specially named as a class and declared to belong to the general class of places of public amusement, the effect of which is to simply state that all those things mentioned in that subdivision belong to the class of amusements which are prohibited on Sunday. To state it in another way, the article above referred to, absolutely prohibits any place of public amusement from

being open for the purpose of public amusement on Sunday. The class of public amusements to which this refers are such as "circuses, theaters, variety theaters and such other amusements as are exhibited and for which an admission fee is charged." All of these will be prohibited from operating on Sunday because they are in the class of amusements which the article prohibits from opening their place of business for traffic on Sunday. If the concern is a "circus, theater, variety theater and such other amusements as are exhibited and for which an admission fee is charged" it could not operate on Sunday, whether it charged an admission fee or not. The use of the expression "for which an admission fee is charged" is a designation of a particular class of amusements which are prohibited from running on Sunday. That is to say, all those shows which charge admission fees, as well as other places of public amusement, are prohibited from opening their places of business on Sunday.

In our opinion the use of the expression "for which an admission fee is charged" simply designates a class of shows which are prohibited from running on Sunday, just as if the Legislature had made some other designation, as for instance, we will suppose that some particular character of show should display a "red flag" at the entrance. Suppose these shows should be in every city in the State, and the Legislature should see fit by general statute to stop all places of public amusement on Sunday and should after the style of the article hereinbefore referred to, prohibit all places of public amusement to open their place of business on Sunday, and should use language similar to the language used in this article by saying "The term, place of public amusement, should be construed to mean theaters, circuses and all shows displaying red flags," could it be contended that the use of the words "red flags" would have any other meaning than to merely designate that the shows displaying these flags should not be permitted to open their place of business on Sunday? Certainly it could not be contended that the shows could display the red flag all the week and by taking it down on Sunday, permit their show to operate. The shows would belong to a class which had been designated and would therefore not be permitted to open their place of business on Sunday.

It therefore follows that a moving picture show which is accustomed to charge a fee for admission, belongs to the class of amusements which are prohibited from opening their place of business on Sunday, even though they make no charge for admission on Sunday they are a class of amusements which are absolutely prohibited from opening their place of business for public amusement on Sunday.

We are aware of the fact that the Court of Criminal Appeals of this State in the case of *Ex parte Jacobson*, 115 S. W., 1195, in passing upon the question as to whether or not a meeting of three or more persons with intent to aid each other by violence or any other manner would constitute an unlawful assembly, the court in construing Article 302, P. C., held that an admission fee was a necessary element of the offense of opening a place of public amusement on Sunday. This, however, was not necessary to the decision of this case for it was alleged in the complaint that the persons assembled "with the intent and purpose to aid

each other by selling tickets, etc.," and we are of the opinion that if this direct question had been in the case the court would have given a different construction for their attention would have been directed more particularly to the construction suggested above. The court in a later opinion in *Ex parte Lingenfelter*, 142 S. W., 555, holds that moving picture shows are within the full contemplation and meaning of Article 302, and that they are inhibited from opening their places of business for public amusement on Sunday. The court in this case in a long and well considered opinion leaves no room for doubt on the proposition that moving picture shows are such places of public amusement as are required to be closed on Sunday, even though no charge whatever should be made, or any fees received, directly or indirectly, for the performances given, would violate the law and be subject to prosecution. Article 299, P. C., provides that "Any person who shall hereafter labor or compel, force or oblige his employees, workmen or apprentices to labor on Sunday * * * shall be fined not less than ten nor more than fifty dollars."

Construing this article the Court of Criminal Appeals in the case of *Ex parte Axson*, 141 S. W., 793, holds that it is a violation of the above article for a person to open his pool hall, or for any of his employees to perform the various duties required of them in running the pool hall on Sunday. In other words, it is a violation of the law for any person to labor on Sunday and the courts hold that all parties interested in carrying on a business such as running a pool hall, are guilty of working on Sunday.

In the case of *Oliver vs. the State*, 144 S. W., 606, the court holds that where the ticket seller for a theater is prosecuted for working on Sunday, that the prosecution is proper, the intent of the law being to make it an offense for any agent or employee of the proprietor to do any act toward keeping the theater open and running on Sunday, whether he had control of it or could permit it to be opened or not, and also holds that every agent or employee, as well as all of the principals, are guilty of violating Article 299 by working on Sunday.

We, therefore, conclude, and give it as the opinion of this Department, that if moving picture shows should open their place of business for public amusement on Sunday, even though no admission should be charged, the persons so offending would be guilty of the criminal offense denounced in Article 302, that in addition to this offense, if they should open their place of business for public amusement on Sunday, the principals, every agent and employee, would be guilty of violating Article 299, P. C. In other words, to open a moving picture show on Sunday would, in the opinion of this Department constitute the offenders guilty of two offenses: the one denounced in Article 299, P. C., for working on Sunday, and the other denounced in Article 302, relating to opening places of public amusements on Sunday.

We are aware of the fact that in some instances moving picture shows have attempted to evade the effect of the law by making no charge for the performances on Sunday, but permitting any person who desired to contribute to them to do so. All schemes or devices of this character

are shameful evasions of the law and should not be countenanced by the officers charged with the enforcement of the law.

Our State law, as interpreted by the highest courts in this State unequivocally makes it a violation of the law for moving picture shows to be opened on Sunday, and every executive officer in this State is charged with the enforcement of this law, and if moving picture shows should attempt to violate the Sunday law as it is interpreted by our courts, it would be the duty of the sheriff, deputy sheriff, constables, deputy constables, marshals and policemen to procure evidence, and it would be the duty of the county attorney and city attorney to proceed with prosecutions to prevent such violations.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

CLUBS—ORANGE AMUSEMENT CLUB—OCCUPATION TAX—MINORS.

1. An amusement club which is chartered, but in reality is a pool hall, in which any one besides members can play pool or billiards by paying for cues as do members, it would be unlawful for such club to remain open on Sunday for purpose of doing business.

2. It would not have to pay an annual occupation tax.

3. It would be unlawful to permit minors to play billiards therein, or become members of such club.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 22, 1913.

Hon. Frank Hatton, County Attorney, Orange, Texas.

DEAR SIR: We have the following letter from you:

"Will you please give me a ruling on the following: There is an amusement club being run here under the name of the Orange Amusement Club. It is a chartered institution, I understand. In reality it is a pool hall, as anyone besides the members can play pool or billiards therein by paying the same for cues as do members. Will you please tell me (1) whether or not such a club will be allowed to remain open on Sunday and do business on that day the same as on others. (2.) Will the club have to pay an annual occupation tax to the county? (3.) Will minors be allowed to become members of the club? (4.) If minors can become members of the club, can the manager be prosecuted for allowing minors who are not members to loiter around there and playing therein?"

In answering same, we have carefully considered all opinions of our court rendered on this point and kindred questions which have arisen under the operation of social clubs. The case of the State of Texas vs. Duke, 137 S. W., 645, seems to be the leading case upon this subject, and was well considered by the court, and upon the authority and doctrine growing out of the various erroneous constructions of this case, has been the source of much mischief in our State. It will be noted that the question presented in that case involved different articles of the statute than those governing the solution of the questions you propound to us. In that case, the question before the court to be determined was

whether or not a social club, following the methods of business particular to such clubs, was, in the contemplation of the law, retailer of intoxicating liquors and therefore subject to a liquor dealer's license or tax. The courts held in that case that a bona fide club conducting its business as such was, in the meaning of this law, a place for retailing intoxicating liquors. Court phases of this question have been touched upon in various decisions of our Court of Civil Appeals, among which we note particularly, *Trezvant vs. the State*, 145 S. W., 1191; *Adams vs. the State*, 145 S. W., 941. These cases determine solely the question as to whether or not the owners, or proprietor, or manager of such club could be prosecuted in a criminal way for dispensing intoxicating liquors in such clubs to its members only without first having obtained a license therefor. The courts held in these cases and others that in the contemplation of the law, levying the tax upon retail liquor dealers, such law should not be made applicable to social clubs, that clubs do not, in that sense, have retail liquor dealers, but Justice Harper, in rendering the opinion in the case of *Adams vs. State*, 145 S. W., 944, used this very significant language:

"While the sales in this instance were made on Sunday, yet this prosecution is not based on Article 199 of the Statute (Penal Code, 1895) which prohibits sales on that day, but is prosecution for selling without first paying a tax and obtaining a license, and we pass on this question alone. A different question would be presented if appellant was prosecuted under the statute prohibiting sales on Sunday or other days in which sales are prohibited, but the question as to whether these clubs would be authorized to make sales of this character on Sunday, or election days, or other days, when our laws prohibit sales by all persons, is not before the court, and any expression on our part would be but obiter dicta, and the sole question presented in this case, and upon which we alone pass, is that bona fide clubs organized for legitimate purposes as in this one, who sell or dispense liquor to their members alone, as a mere incident to their organization, and not as a business for profit, are not permitted or required to take out a license to thus sell liquors, and, this being true, the proper construction of the statute does not prohibit them from selling to their members as they have heretofore done on days which the laws of this State permit sales to be made."

In other words the judgment is brought, if the agent of the club is prosecuted for violation of the Sunday law, he could not possibly be convicted. It appears to us that a proper construction of all the laws laid down in these cases, when made to apply to all the statute laws leaves no taxes, that in all those cases where it would be a criminal offense to do the act by an individual, it would likewise be criminal to do it under the guise of a club. The only apparent exception to this rule is where the club sells liquor without license, and this is only an apparent exception, for in this kind of case the court simply holds that the club under its method of doing business is not a retailer of intoxicating liquors in the sense of the law, levying tax upon such occupation.

Our answers to your several questions are as follows:

1. It would be unlawful for such club as you describe in your letter to remain open on Sunday for the purpose of doing business.
2. The club would not have to pay an annual occupation tax.
3. It would be unlawful to permit any minor to become a member of such club.

4. Minors would not be permitted to loiter around such club if pool or billiards are played therein, or if intoxicating liquors are dispensed therein.

If this Department can be of any further assistance to you in these matters, do not hesitate to command us, for we shall be ready and willing to render any assistance in our power to enforce laws that are applicable to the case you state to us.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

SUNDAY LAW—OPERA HOUSE—BASEBALL.

An opera house can not keep open on Sunday and use an automatic score board to show by diagram the playing of a baseball game where no other character of amusement is offered, and even though no admission fee should be charged, but merely a collection taken up.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, APRIL 10, 1914.

Hon. John E. Shelton, Austin, Texas.

DEAR SIR: You submit to this Department the following inquiry:

"Under the statute which authorizes the playing of baseball games on Sunday where admission fees are charged, I would like to ask if in your opinion it would be a violation of the law for an opera house to keep open on Sundays and use an automatic score board to show by diagram the playing of a baseball game where no other character of amusement was offered."

"Could said opera house charge an admission fee and if not, could a collection be taken up legally?"

We believe under the authority of the case of *Oliver vs. the State*, 144 S. W., 604, the above arrangement would constitute a violation of the Sunday law. The court in the *Oliver* case seems to have passed directly upon two propositions, first, the effect of which is to hold that the place, such as you describe, is a place of public amusement, and is such place as is described in Article 302 of the Penal Code, using the following language:

"The term 'place of public amusement' shall be construed to mean, circuses, theaters, variety theaters, and such other amusements as are exhibited and for which an admission fee is charged."

The court holds in the case cited above that moving picture shows are places of public amusement. Incidentally in this case the court holds that it would be a violation of Article 299, Penal Code, which provides that "any person who shall hereafter labor or compel, force, or oblige his employees, workmen, etc., to labor on Sunday shall be guilty, etc.," or for any person to work in any place of public amusement on Sunday or for the manager or owner of any place of public amusement to compel his employes to work on Sunday. We do not think the status of

the question is affected in any manner should any charge be made as admission fee, but instead thereof a collection taken up.

You are, therefore, respectfully advised that in the opinion of this Department it would be a violation of the law for an opera house to keep open on Sunday and use an automatic score board to show by diagram the playing of a baseball game where no other character of amusement was offered and even though no admission fee should be charged but merely a collection taken up.

For your information we call your attention to the cases of Adams vs. the State, 145 S. W., 940; Ex parte Axsom, 141 S. W., 793.

These cases are persuasive of the doctrine which was afterwards laid down by the court directly in the Oliver case cited above.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

OPINIONS RELATING TO COUNTY HOSPITAL ACT.**COUNTY HOSPITALS—COMMISSIONERS COURT.**

Law making it the duty of the commissioners court to establish county hospital is directory.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, SEPTEMBER 3, 1913.

Dr. Ralph Steiner, State Health Officer, Capitol.

DEAR SIR: Your inquiry is as follows:

"Under Section 15 of the County Hospital Bill, is it mandatory upon the commissioners court of counties having a city of ten thousand population and over to take steps to establish a county hospital on or before December the first? In the event of the commissioners court refusing to take an action in this matter, what steps may the State Board of Health or interested parties take to secure compliance with this law?"

Section 1 of the act above referred to states, in substance, that the commissioners court of any county *shall have power* to establish a county hospital. * * * At intervals of not less than twelve months, ten per cent of the qualified property taxpaying voters of a county *may* petition the commissioners court of such county to provide for the establishing or enlarging of a county hospital * * * and whenever any such proposition shall receive a majority of votes of the qualified property taxpayers voting at such election, said commissioners court shall establish and maintain such hospital, etc.

Section 14 of the act gives authority to the commissioners court in counties containing a city with population of less than ten thousand or not in excess of ten thousand the right to make contract with incorporated society or hospital or municipality within the county maintaining a hospital, or with any other adjacent county, for the care of the sick, etc.

Section 15, the section to which you direct our attention, provides:

"Where no provision is made as provided in Section 14, and no county hospital is now provided for the purpose aforesaid, or where such provision is inadequate, it shall be the duty of the commissioners court of each county which now has a city of more than 10,000 persons, on or before December 1, 1913, and of any county which may later have a city with a population of more than 10,000 persons, within six months from the time when such city shall have attained such population, such population is to be ascertained by such commissioners court in such manner as may be determined upon resolution thereof, to provide for the erection of such county hospital or hospitals, and to provide therein a room or rooms, or ward or wards, for the care of confinement cases, etc., * * * providing that the time may be extended by the State Board of Health for good cause shown. * * * Unless adequate funds for the building of said hospital can be derived from current funds of the county, available for such purpose, issuance from county warrants and script, it shall be the duty of the commissioners court to submit, either at a special election called for the purpose, or at a regular election, the proposition of the issuance of county bonds for the purpose of building such hospital."

It is the opinion of this Department that, in view of the fact that there is such a large amount of discretion still lodged with the commissioners court, until the proposition has been submitted, in accordance with this provision, to a vote of the qualified property taxpaying citizens or until, as is provided in the act, 10 per cent of such citizenship petitions the commissioners court for an election, according to the terms and provisions of the act, we are of the opinion that the instructions contained in this act to the commissioners court, wherein it says that it shall be the duty of the court to provide for the erection of such county hospital or hospitals as may be necessary for that purpose, and wherein it says that the commissioners court shall have power and wherein it says that the qualified voters may petition the commissioners court, is directory and points out in a definite way, but without penalty, the duties of the commissioners court.

In Section 15, it is noted that the commissioners court shall "provide for the erection of such county hospital or hospitals as may be necessary." The commissioners court is still left with the discretion to determine when the establishment of a hospital is necessary. The only instance in which it becomes mandatory upon the county commissioners to establish a hospital is when the commissioners court has, in conformity with the provisions of this act, ordered an election and established by vote a county hospital.

We, therefore, advise you that, while the State Board of Health is properly lodged with much authority in matters of this kind, there is no authority in law given to them whereby they can compel action of the commissioners court to the establishment of the county hospital until the qualified property taxpaying voters of the county have taken upon themselves this burden by first petitioning the commissioners court for an election, and by a majority vote declaring in favor of the establishment of a county hospital and providing funds for the establishment thereof

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

COUNTY HOSPITALS.

Construing the County Hospital Act, Chapter 39, holding that under the joint control both the city council and the commissioners court shall have the same board of managers.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, OCTOBER 4, 1913.

Dr. Ralph Steiner, State Health Officer, Capitol.

DEAR SIR: We have the following communication from you:

"In the event of a city and county establishing a joint hospital, as permitted under the last paragraph of Section 14 of the County Hospital Law, is the appointment of the board of managers subject to the provisions of Section 1 of the law, or may the city and county officials appoint more or less than five members of the board of managers and may they appoint said managers for a term of more or less than two years?"

"May the terms of office of said managers overlap instead of the term of each member expiring at the same time?"

Replying thereto, we beg to advise you that while the Legislature, in passing the County Hospital Act, was not explicit in paragraph 14 wherein it authorized a joint arrangement with the city authorities in the erection and management of hospitals, still, we are of the opinion, from reading the entire act, that the joint arrangement provided for and authorized in paragraph 14 could be brought about and accomplished by selecting five members of the board of managers, which is provided for in Section 2 of the act, by a joint action with the city council. In other words, any method the city council and commissioners should adopt for the appointment of the five members to constitute the board would be satisfactory and the commissioners court would then enter an order appointing and designating the five members; the managing board and city council would pass a like order appointing the same board as was designated in the commissioners court order. Every member of the board thus constituted should be satisfactory to the city council and, also, to the commissioners court.

When this board, so constituted, assumes control and charge of the hospital, they will manage it just as the boards manage hospitals wholly owned by the county.

You desire to know further, if the terms of office of such managers could be made to overlap, or if they could hold office for more than two years.

We advise you that, as provided in Section 2, the term of office of each member of said board shall be two years, and it would be unlawful for the members of the board to be appointed in any other manner than as the manner designated in Section 2 of the act. The board of managers thus constituted by the commissioners court and city council may at any time be removed by a joint order of the county commissioners court and the city council. When so removed, his successor would serve out his unexpired term of two years.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

COUNTY HOSPITALS.

Until a petition is presented to the commissioners court, etc., and an election is held and carried for a hospital, the provisions of Chapter 39, Acts of the Regular Session, 1913 are directory only; until such contingency, county may provide for care of its sick by making contract with established hospital therefor.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, FEBRUARY 19, 1914.

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

DEAR SIR: We have your letter of the 13th instant, in which you say that Webb county has a contract with the Mercy hospital of Laredo to take care of its indigent sick. Thereupon you ask whether or not this

provision for such sick meets the requirements of Chapter 39, Acts of the Regular Session of 1913.

We think the provisions of Section 1 of the act of the Legislature are directory only, until 10 per cent of the qualified taxpaying voters of the county shall petition the commissioners court to provide for the "establishing or enlarging" of a county hospital. When such a petition is filed with the court, the provisions of Section 1 at once become mandatory in so far as to make it the duty of the court to submit to the voters the proposition to issue bonds for this purpose. If the election should result unfavorably to the bond issue, the provisions of Section 1 again become, and remain, directory only; if the election should result favorably to the bond issue, then the provisions of Section 1 become and remain mandatory,—that is, the court can be compelled to "establish," etc., a county hospital.

It is nowhere made unlawful for the court to contract with a hospital for the care of its indigent sick. By Section 14 of the act, power is expressly given the courts in counties having no city of 10,000 inhabitants "to contract for a period not exceeding one year with any regularly incorporated society or hospital, or with any adjacent county, for the care of any or all of the sick, etc." And even where the county has established a hospital of its own, as provided in Sections 1 and 15, it may still, through the board of managers of its hospital, contract with another hospital, etc., for the care of *some* of its sick, etc. (Section 14.) Now, by Section 15, it is made the duty of a county having a city of 10,000 inhabitants,—“where no provision is made as provided by Section 14, and no county hospital is now provided for the purpose aforesaid, or where such provision is inadequate,”—to provide for the erection, etc., of a county hospital. If we are to give all the language used in Section 15, meaning, we must hold that counties having cities of 10,000 inhabitants have authority to contract for the care of its sick until the petition is filed and a favorable election is held, as provided by Section 1. If the county should not make provision by contract for the care of its indigent sick, then it would appear from Section 15 to be its duty, even without an election, to provide for the erection, etc., of a hospital of its own.

We hold, therefore, that: (1) In the absence of the petition and favorable election, as provided for in Section 1, the commissioners court must provide for the care of its indigent sick, but that it may do this either by erecting a hospital of its own or by contracting with another hospital for the care of the sick; (2) if the election, provided for in Section 1, is called and results favorably to the bond issue, the county may establish its own hospital; and, (3) until such an election is petitioned for and called and results are favorable to a bond issue in your county, a contract such as you describe, running from one year at a time, contemplating adequate accommodations for the indigent sick of the county, meets the requirements of the act.

Trusting that the above is the information you desire, and that it will be of service to you in the discharge of your official duties, we are,

Yours very truly,

LUTHER NICKELS,
Assistant Attorney General.

OPINIONS CONSTRUING PHARMACY LAW.

PHARMACISTS—PERSONS ENTITLED TO BE REGISTERED WITHOUT EXAMINATION.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 3, 1913.

Mrs. Zanie M. Hill, Lufkin, Texas.

DEAR MADAM: You are advised that under the provisions of Article 6294 of the Revised Statutes of 1911, the following persons are exempt from examinations as pharmacists and are entitled to be registered without examination, towit:

Proprietors, and employees of such proprietors, who were on the 19th day of July, 1907, actively engaged in the preparation of physician's prescriptions and compounding and vending medicines in towns of less than 1000 inhabitants in the State of Texas, and also proprietors, and employees of such proprietors, who may become so engaged in such towns during the five years next succeeding the date aforesaid, shall be exempt from examination; provided, he or she shall have registered as required by this chapter (that is, Chapter 1, Title 106, R. S., 1911) and upon paying said board of pharmacy \$1.00, shall receive a certificate of registration, which shall entitle such person to practice pharmacy in towns of one thousand inhabitants or under; and provided, further, that, if such persons should have failed to apply for registration within ninety days from and after the first meeting of said board after its creation, they shall be required to pay the same fees as for original registration.

Your letter does not disclose all the facts necessary for us to give you an absolute answer to your question, however, you can determine for yourself whether or not the facts exist which would bring you within the exemptions named above.

Yours very truly,

LUTHER NICKELS,
Assistant Attorney General.

DOCTOR—PHARMACIST—OPERATING DRUG STORE—CONSTRUCTION OF STATUTES.

Article 6293, R. S., 1911, and Article 771, et seq., Penal Code, would prohibit a physician from running a drug store without being a registered pharmacist or having a registered pharmacist employed therein to conduct same.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MARCH 17, 1913.

Hon. Merton L. Harris, County Attorney, Comanche, Texas.

DEAR SIR: This Department is in receipt of your favor of March the sixth, in which you say:

"Please inform me as to whether or not it is a violation of the Criminal Statutes for a doctor to run a drug store without being registered as a pharmacist or without having a registered pharmacist in the store."

Replying thereto, we beg to refer you to Article 6293, Revised Statutes of 1911, and particularly to Article 771, et. seq., Penal Code, which, in the opinion of this Department, would prohibit a physician from running a drug store without being a registered pharmacist, or having a registered pharmacist employed therein to conduct same as is further set out in the articles above referred to.

Article 293 of Civil Statutes and Article 771 of the Penal Code are the same and define who may conduct a drug store. It will be observed that this article makes special exceptions of the registered practitioner of medicine or dentistry in the compounding of his prescriptions and supplying his patients such medicine as he may deem proper, and if it had been the purpose of the law to permit a doctor or physician to run a drug store without being a registered pharmacist, this exception would not have been incorporated in this article.

It seems perfectly clear to us that it is not the intention of the law to permit a registered doctor or physician to engage in the sale of drugs, but that the occupations or callings are separate and distinct within the meaning of the law, and that the law has prescribed a procedure for each to comply with before the occupation, calling, or profession can be engaged in, and the bare fact that the exception above set out in the statute is included, it seems to us bears unmistakable evidence of the intention of the framers of this law that the two shall be separate and distinct, and that the requirements complied with under one head shall not permit the person so complying to engage in the practice of the other profession or calling. If the framers of this law had have so intended, it is our belief that, in addition to the exception above set out, they would also have incorporated an exception or proviso that the exception to the law should not apply to a registered physician.

It is, therefore, the opinion of this office that a registered physician can not conduct a drug store, and generally to compound, dispense or sell at retail, any medicine or poison, except as an aid to, or under the supervision of, a person licensed as a pharmacist, under this law, unless, he shall have complied with the laws above referred to.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

PHARMACY LAW—CONSTRUCTION.

Proprietor pharmacists and their employees who shall become so engaged in towns of 1000 or less within five years after passage of Pharmacy Act of 1907 may continue in business without examination during the five years and after.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, APRIL 25, 1913.

Mr. B. H. Walker, Secretary Board of Pharmacy, Gonzales, Texas.

DEAR SIR: This Department is in receipt of your communication enclosing your correspondence with Dr. Slator, and in which you ask a ruling from this Department upon the subject of issuing permits or certificates to practice pharmacy in towns of one thousand or less. You state that you issued permits to practice in such towns from July 12, 1907, to July 12, 1912, a period of five years, as provided in the act, but that since said date you have not issued permits, and that you have no authority to issue permits to anyone anywhere any longer, and that you further construe the law to be that no one is authorized to practice pharmacy anywhere in Texas, unless he be authorized to do so by having in his possession a permit or certificate issued by the State Board of Pharmacy, and you ask a ruling from this Department upon those matters.

The answer to your inquiries involves a construction of that portion of Section 2, of Chapter 186 of the acts of 1907, reading as follows:

"Proprietors and employees of such proprietors who are actively engaged in the preparation of physician's prescriptions, and compounding and vending of medicines in towns of less than one thousand inhabitants in the State of Texas, and also proprietors and employees of such proprietors who shall become so engaged in such towns during the next five years after the passage of this act, shall be exempt from examination, provided he or she will register as required in this act, and upon paying said Board of Pharmacy one dollar, shall receive a certificate of registration which shall entitle such person to practice pharmacy in towns of one thousand inhabitants or under. Provided, that should such person fail to apply for registration within ninety days, from and after the first meeting of said board, said party shall be required to pay the same fee as in original registration."

The above quoted portion of the act applies only to those proprietors and employees who were engaged in the practice of pharmacy in towns of one thousand inhabitants or less at the date of the passage of the act and to those who should become so engaged within such town during the next five years after the passage of the act. But in order to arrive at a correct construction, it is necessary that we consider the entire act and construe this provision in connection with the other provisions thereof.

It will be noted that the language of this provision, in speaking of the evidence of authority for engaging in the preparation of physicians' prescriptions and compounding and vending of medicines, is as follows: "Shall receive a certificate of registration," which shall entitle him to practice pharmacy, etc. Nowhere in the law, with two exceptions, which will be noted later, is the authority to proprietors and employees in towns of one thousand inhabitants or less denominated as a license. The first exception is found in Section 6 of the act and this provision only re-

quires the license to be conspicuously exposed in the pharmacy or drug store or place of business of the owner or employee. The other exception appears in Section 13 of the act, and is as follows: "For issuing license to any proprietor or employee to conduct a drug store in towns of not more than one thousand inhabitants, one dollar." The terms "pharmacist or assistant pharmacist" are applied in the act only to the following classes:

(1) Persons heretofore registered by district boards may be licensed without examination. (See Sec. 2 of the act.)

(2) Persons licensed as pharmacists or assistant pharmacists upon examination by the board of pharmacy. (See Sec. 2.)

(3) Persons legally registered or licensed in other States or foreign countries, upon complying with certain conditions, may be licensed without examination.

The law does not in any provision thereof speak of those engaged in the business in towns of one thousand inhabitants or less as pharmacists or assistant pharmacists, but speaks of them as proprietors and employes, and in the opinion of this Department the true construction of this law is, that it was the intention of the Legislature, in adopting this act, to make a distinction between those engaged in the practice in towns of one thousand or less and those in towns of above that population and that the distinction was that those in the larger towns should obtain license within the meaning of the act and that those in the smaller towns should merely obtain certificates of registration, which would authorize them to carry on their business.

Under the provision of Section 2 of the act which reads as follows: "and also proprietors and employees of such proprietors who shall become so engaged in such towns during the next five years after the passage of this act," you are advised that a proper construction thereof is, that those proprietors and employees who became engaged in such business in a town of 1000 or less within five years after the passage of the act, could register without examination, and continue after the five years, but that after the expiration of five years no person could become engaged in the business anywhere in this State without first obtaining a license in one of the modes set out in the law, as above quoted. The five years since the passage of the act now having elapsed, we are of the opinion you would have no authority to issue certificates to practice pharmacy to towns of one thousand or less, or anywhere in this State, but that those who, in towns of one thousand or less, complied with the law during the five years next after the passage of the law, can continue in the business under the terms of the law.

We return to you herewith correspondence between you and Dr. Slator.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

MISCELLANEOUS OPINIONS.

TEXAS FLAG—ADVERTISING—CONSTRUCTION OF STATUTES.

It is unlawful for the Texas flag, or any reproduction or imitation thereof, to be used for advertising purposes, and the insurance business is not excepted.

Act of Legislature prohibiting use of Texas flag for advertising includes all advertising, whether relating to goods, wares and merchandise, or insurance. The Texas flag defined; its origin traced; the courts may take judicial knowledge of its existence; and the constitutionality of the act discussed and sustained.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MAY 8, 1913.

Hon. Currie McCutcheon, County Attorney, Dallas, Texas.

DEAR SIR: In your favor addressed to this Department of the 2nd inst., you say:

"Judge Gray of the firm of Cockrell, Gray, Thomas & McBride, attorneys at law, has called upon me for an opinion as to whether it would be lawful or unlawful for the Southwestern Life Insurance Company to continue to use the flag of the State of Texas on their stationery as an emblem. * * * Judge Gray casually suggested that my department call upon you for this opinion. If you will give me an opinion in this I will appreciate it very much. * * *"

Attached to your letter is some correspondence, from which we gather the idea that the Southwestern Life Insurance Company has lithographed the flag of Texas on its policies and stationery, and we assume that the company has used and if permitted by law will continue to use this emblem in the manner mentioned as an advertisement.

The evident purpose of the Legislature in enacting this measure was to prevent the cheapening of the flag such as may result from using it for any character of advertising. We readily agree with Judge Gray that a commercial undertaking such as using the flag for the purpose of advertising goods, wares and merchandise does not include the business of insurance, but this in our opinion is not the real question involved. If the intent of the Legislature was to prevent the cheapening of this emblem of the State's sovereignty, certainly this purpose would be violated by its use for any character of advertisement, whether for strictly commercial purposes or for any other character of advertisement. We do not believe any distinction based on reason can be drawn between the use of this emblem to advertise the business of insurance from its being used for advertising goods, wares and merchandise. The question is, did the Legislature really intend to make any distinction? We think not.

It may be insisted, however, that this law is invalid for the reason that the flag of Texas, never having been adopted by any statute of the State, has not a sufficiently well defined status as to be made the basis

of a penal law, and on this point we submit for your consideration the following:

We will not attempt here to give a history of the evolution of the Texas flag, only to state that during the progress of the war for Texas independence many banners and many flags were used; each battlefield had its separate banner, and almost each separate company or battalion had its separate banner. Most of those, however, had emblazoned upon it the lone star, which of course stood for Texas independence and a separate national existence. It was not until the organization of the Republic that a flag was adopted by an act of the Congress. There were several acts of Congress on the subject, but the final act was passed December 10, 1836, adopting the national flag, and described it as follows:

"A blue perpendicular stripe of the width of one-third of the whole length of the flag and a white star of five points in the center thereof; and two horizontal stripes of equal length and breadth, the upper stripe of white, the lower red, of the length of two-thirds of the length of the whole flag."

From December 10, 1836, until Texas became a part of the Union this was the national flag of the Republic of Texas; it was hoisted over all the public buildings, the custom houses, the embassies, consulates, and was the flag that floated at the masthead of the merchantmen that carried the commerce.

After Texas was admitted into the Union the first Constitution adopted by the State perpetuated the existing laws of the Republic, and since that time there does not appear to have been any legislation whatever on the subject, but the flag of the Republic seems to have been by common consent adopted or considered as the emblem of this State.

In 1861, when the secession convention was in session at Austin, we find that on January 29, 1861, Mr. Rogers of Harris county offered the following resolution that was adopted:

"Resolved that a committee of five be appointed to receive from the ladies of Austin a flag to be tendered by them to this convention."

On January 31, Mr. Davison moved that some delegate be appointed to receive the flag to be presented to the convention by the ladies; that was carried, and the president appointed John A. Wharton to perform that duty.

Again, on February 1, a flag was presented to the convention by the ladies of Travis county, through Mr. George Flourney, delegate from Travis county, and it was received by Mr. John A. Wharton, of Brazoria county.

On February 2, among other proceedings, Mr. Terry of Tarrant county offered the following resolution, which was adopted:

"Resolved that Messrs. Flourney and Wharton be requested to furnish this convention with written copies of their respective remarks upon the presentation of the flags by a portion of the patriotic ladies of Travis county to this convention, and that said remarks when furnished shall be spread upon the journals of this convention in their appropriate places."

On March 25, Mr. Brown offered the following resolution, which was adopted:

"Resolved that a committee of three be appointed to present the lone star flag heretofore presented to this convention by a portion of the ladies of Travis county to the Governor of the State, with a request that it may be preserved in the Executive Department to be annually hoisted on the second day of March and other important anniversaries in the annals of this State."

On February 22, 1861, Col. John S. Ford, commanding the Rio Grande military district, made report of the capture of Brazos Santiago that had been under command of Lieutenant Thompson of the U. S. army, and as a part of his report he states that the Texas troops sailed from Galveston five hundred strong on February 19, arrived off the bar of Brazos Santiago on the 21st; that the Texas troops were landed in good order, and after a parley with Lieutenant Thompson he agreed to remove his command and to allow the Texas troops to take possession of the United States property on the island without resistance, and among other things the report uses this language:

"A salute of thirty-three guns was fired and the stars and stripes were lowered in respectful silence. The lone star flag was hoisted and cheered with enthusiasm and was saluted by twenty-two guns."

On February 20, Col. W. C. Dalrymple made demand on Captain S. D. Carpenter, U. S. army, for the surrender of Camp Cooper with its arms, munitions, equipments, etc., belonging to the U. S. government, and subdivision 3 of this demand for surrender reads as follows:

"The Texas flag shall be hoisted on the parade ground at Camp Cooper upon the evacuation of said post."

This demand for surrender was acceded to without resistance.

On March 20, 1861, Col. John S. Ford made a report to Hon. John C. Robertson, chairman of the committee public safety, and among other things appearing in a lengthy report he stated:

"Since writing the above the command arrived and the Texas troops are now in possession of Fort Brown. The lone star flag now floats from the staff from which the stars and stripes were lowered this morning. There is another corps of U. S. troops to arrive yet, and then no more will remain in my military district. Secession is now almost complete." (Journal Secession Convention.)

From the above we conclude, the flag that was presented to the convention was the lone star flag of Texas, the same that was adopted by the Congress of the Republic, and that it has been and is now by common consent considered and used in the current literature as the Texas emblem. (Comprehensive History of Texas, Vol. 1, pp. 692-693.) In the preliminary operations of war after secession this flag was the banner of the Texas troops and was hoisted wherever the stars and stripes were lowered.

On February 22, 1861, a controversy arose between a Mr. Caleb C. Forshey, superintendent of the Texas Military Institute of Fayette county, and Hon. H. K. Elgee of Louisiana, over the fact that the State of Louisiana had adopted as her flag a design very much similar to the Texas flag. Mr. Forshey was mildly protesting against this fact, and among other things stated:

"My object is to call your attention, however late, to the striking resemblance of the colors and designs you have adopted to the national flag of Texas, and to suggest whether this resemblance is not calculated to produce awkward and perhaps serious mistakes; and at the same time to claim for this State a priority in the adoption of her flag so great as to give her a prescriptive title on land and on sea."

Mr. Forshey then gave a short history of the evolution of the Texas flag, giving the date of its adoption, etc., and among other things he states:

"I need scarcely remind you how recent is the independent national history of Texas and how widely her flag became known during the Republic's existence, and how honorably it was sustained during her naval history."

Indulging the presumption that an executive officer should, as to the validity of acts of the Legislature, we believe in view of the history of this flag, that it has a sufficiently well established status in the public mind as that a court should take judicial knowledge of its existence and instruct the jury to that effect in any prosecution that may arise.

In regard to judicial notice, the rule is stated in Encyclopedia of Evidence, Vol. 7, page 916, as follows:

"Judicial knowledge of the facts of history is based upon the same general principles applied to the facts noticed because they are matters of general knowledge. It is consequently difficult to formulate general rules. The general public history of the State or country will be judicially noticed, as will the salient facts of the history of foreign countries. This rule has been applied to facts of geography, religion, political economics, matters relating to land surveys, titles and governmental, legislative or colonial grants, and to other matters as general history."

In *Swinnerton vs. Columbia Insurance Company*, 93 Am. Dec., 560, the court took judicial notice of the civil war and of the particular acts of the Confederate States leading up to it. Hunt, J., says:

"The rule I take to be is this: that matters of public history affecting the whole people are judicially taken notice of by the courts; that no evidence need be produced to establish them; that the court may in ascertaining them resort to such documents and reference as may be at hand as may be worthy of confidence. Knowledge of the main fact would necessarily carry with it knowledge of the particular acts of war which created that condition of things. I entertain no doubt that the historic facts necessary to the decision of the case are proper for the judicial consideration of the court without the production or offer of proof, and that its origin in Virginia was based upon the facts I have stated. This rule is limited to no particular lapse of time and no particular class of facts except that they shall be those of general history."

In the case of *Humphrey vs. Burnside*, 4 Bush (Ky.), 215, the court took judicial knowledge of the separation of the Methodist Episcopal church into two branches, one north and the other south of a common boundary line. This on the ground that it was a matter of history and public discussion, and from its notoriety as such the courts would take judicial notice of the same.

In *Porter vs. Flick*, 60 Neb., 773, it was held that:

"The political history of the State may be judicially noticed, and hence the court may know that the People's Independent Party from the date of its organization has been generally and popularly known as the Populist Party."

In *Lewis vs. Bruton*, 74 Ala., 317, it was held:

"The contested election between General J. Wheeler and Col. W. M. Lowe, as members of Congress from the Eighth District of Alabama at the general election held in November, 1880, is public official history, of which the court takes judicial notice."

Again, the rule is stated in *Encyclopedia of Evidence*, Vol. 7, page 919, as follows:

"Courts of the States and the United States take judicial notice of the Civil War, when it began and ended, the chief incidents leading up to it and occurring during its continuance and what States joined the Confederacy. Courts of a particular State take notice of whether it seceded, and if so when, and that the courts were closed during the period of military occupation. * * * The general political and economic conditions existing in a State during the continuance of the war are judicially noticed by the courts thereof. The political conditions existing immediately after the war during the period of reconstruction are judicially known."

Under the rules above announced, we are of the opinion that it would be the duty of the courts of this State, aside from the question as to whether the flag has a statutory definition or not, to take judicial knowledge of its existence and to charge the jury respecting the same accordingly.

It may be insisted that this law is arbitrary and unconstitutional for the reason that it is not a proper exercise of the police power, in that it has no relation to and does not promote the objects that are usually and ordinarily safeguarded under the exercise of the police power.

We submit that you may successfully answer such a contention if made. There are very few adjudicated cases involving legislation of this kind. In fact, we have been able to find only three. The statutes involved in these cases were where the use of the United States flag for advertising purposes was prohibited, but the reasoning upon which the decisions are based is applicable to a statute such as we have, in which the use of the State flag for advertising purposes is prohibited. The two earliest cases were decided against the validity of this class of legislation; one involving a statute of Illinois and another involving a statute of the State of New York. These cases are: *Ruhrstrat vs. People*, 185 Ill., 133; *People ex rel. McPike vs. Van de Carr*, 178 N. Y., 425.

In the Illinois case the statute was held unconstitutional because the court said it deprived a citizen of the United States of the right of exercising a privilege impliedly, if not expressly, granted by the Federal Constitution, and because it was discriminating and partial in its character and infringed the personal liberty guaranteed by the State and Federal Constitutions.

In the New York case the statute, in its application to articles manufactured and in existence when it went into operation, was held to be in violation of the Federal Constitution as depriving the owner of property without due process of law and as taking private property for public use without just compensation.

In a later case, the case of *Halter vs. Nebraska*, both of these contentions were overruled and the validity of the flag statute sustained. In the *Halter* case the conviction in the lower court was affirmed by the

Supreme Court of the State. (74 Nev., p. 757.) This case was carried on writ of error to the Supreme Court of the United States, and after fully considering the Illinois case and the New York case above mentioned, the judgment of the court of Nebraska was affirmed in an opinion rendered by Justice Harlan. (205 U. S., p. 37.) Disposing of the case, among other things, Justice Harlan said:

"In our consideration of the questions presented we must not overlook certain principles of constitutional construction long ago established and steadily adhered to, which preclude a judicial tribunal from holding a legislative enactment, federal or State, unconstitutional and void unless it be manifestly so. Another vital principle is that except as restrained by its own fundamental law or by the supreme law of the land, a State possesses all legislative power consistent with a republican form of government. Therefore each State, when not thus restrained and so far as this court is concerned, may by legislation provide not only for the health, morals and safety of its people, but for the common good as involved in the well-being, peace, happiness and prosperity of the people.

"Guided by these principles, it would seem difficult to hold that the statute of Nebraska in forbidding the use of the flag of the United States for purposes of mere advertisement infringes any right protected by the Constitution of the United States, or that it relates to a subject exclusively committed to the national government. From the earliest periods in the history of the human race banners, standards and ensigns have been adopted as symbols of the power and history of the peoples who bore them. It is not then remarkable that the American people, acting through the legislative branch of the government, early in their history prescribed a flag as symbolical of the existence and sovereignty of the nation. Indeed it would have been extraordinary if the government had started this country upon its marvelous career without giving it a flag to be recognized as the emblem of the American Republic. For that flag every true American has not simply an appreciation but a deep affection. No American, nor any foreign born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free government. Hence it has often occurred that insults to a flag have been the cause of war, and indignities put upon it in the presence of those who revere it have often been resented and sometimes punished on the spot. * * * When by its legislation the State encourages a feeling of patriotism towards the nation, it necessarily encourages a like feeling towards the State. One who loves the Union will love the State in which he resides, and love both of the common country and of the State will diminish in proportion as respect for the flag is weakened. Therefore, a State will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige and will be debased if any open disrespect is shown towards it. By the statute in question the State has in substance declared that no one subject to its jurisdiction shall use the flag for purposes of trade and traffic, a purpose wholly foreign to that for which it was provided by the nation. Such a use tends to degrade and cheapen the flag in the estimation of the people as well as to defeat the object of maintaining it as an emblem of national power and national honor. And we can not hold that any privilege of American citizenship or that any right or personal liberty is violated by a State enactment forbidding the flag to be used as an advertisement on a bottle of beer. It is familiar law that even the privilege of citizenship and the rights inhering in personal liberty are subject in their enjoyment to such reasonable restraints as may be required for the general good. Nor can we hold that anyone has a right of property which is violated by such an enactment as the one in question. If it be said that there is a right of property in the tangible thing upon which a representation of the flag has been placed, the answer is that such representation, which in itself can not belong as property to an individual, has been placed on such thing in violation of law and subject to the power of government to prohibit its use for purpose of advertisement. * * * As the statute in question evi-

dently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the State erred in duty or has infringed the constitutional right of anyone. On the contrary it may reasonably be assumed that a duty rests upon each State in every legal way to encourage its people to love the Union, with which the State is indissolubly connected."

If the purpose of legislation of this kind is to cultivate a feeling of patriotism among the people, of their State and nation, and to prevent the cheapening and degradation of the flag emblematical of the State or national sovereignty, then certainly there can be no distinction between an act which forbids the use of the national emblem, and a similar use made of the State emblem. Especially is this true of a State like Texas, that waged a successful war for independence, that maintained for over ten years a separate national existence, and that during the first operations of the war between the States used this flag as its banner and emblem of authority.

We, therefore, conclude that on this point the validity of this act should be sustained by the courts.

We, therefore, advise that until this act is nullified by the courts, and until it is given a different construction from the one indicated above, you will be well within your rights and authority to prosecute thereunder all persons using the flag for any character of advertising whatever.

It is to be regretted that this law finds so many of our citizens with more or less investments in advertising matter; in justice to those thus using the emblem, the operation of the law ought to have been postponed for a sufficient length of time as to cause as small a loss and as little inconvenience as possible.

Yours truly,

B. F. LOONEY,
Attorney General.

GOVERNOR—RANGERS—FUGITIVES FROM JUSTICE.

The Governor may commission members of the Ranger force to return fugitives from justice when requisition is made on the authorities of other States for their surrender.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, SEPTEMBER 10, 1913.

Hon. O. B. Colquitt, Governor, Capitol.

DEAR SIR: You verbally requested this Department for an opinion as to whether or not in making requisition on the authorities of other States for the surrender of fugitives from justice from this State, members of the State ranger force could be legally commissioned or designated by you to perform this service.

In reply to your inquiry I beg to say that after a review of the Federal and State laws on the subject we fail to find any provision of law either directly or by implication that forbids such an arrangement.

The authority of an executive of one State to demand of the execu-

tive authority of another State the surrender of fugitives from justice is based upon the following provision of the Federal Constitution:

Subdivision 2 of Section 2, Article 4, of the Federal Constitution reads:

"A person charged in any State with treason, felony or other crime who shall flee from justice and be found in another State shall on demand of the executive authority of the State from which he fled be delivered up to be removed to the State having jurisdiction of the crime."

By virtue of this provision of the Constitution, Congress enacted the following statutes:

Section 5278, under the head of "Extradition," reads as follows:

"Whenever the executive authority of any State or territory demands any person as a fugitive from justice of the executive authority of any State or territory to which such person has fled and produces a copy of an indictment found or an affidavit made before a magistrate of any State or territory charging the person demanded with having committed treason, felony or other crime certified as authentic by the Governor or chief magistrate of the State or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or territory to which such person has fled to cause him to be arrested and secured and to cause notice of the arrest to be given to the executive authority making such demand or to the agent of such authority appointed to receive the fugitive and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest the prisoner may be discharged. All costs or expenses incurred in apprehending, securing and transmitting such fugitive to the State or territory making such demand shall be paid by such State or territory."

Section 5279 reads:

"Any agent so appointed who receives the fugitive into his custody shall be empowered to transport him to the State or territory from which he has fled. And every person who by force sets at liberty or rescues the fugitive from such agent while so transporting him shall be fined not more than five hundred dollars or imprisoned not more than one year."

Congress, in the statutes above quoted, has not designated any particular instrumentality by which the fugitive is to be carried back to the State or territory from whence he fled, but leaves such State or territory to select its own agent to execute the requisition.

Our Supreme Court, in the case of *Hibler vs. State*, 9 Texas, 203, held that the above quoted provision of the Federal Constitution is in the nature of a treaty stipulation between the States of the Union, equally binding on each State and on its officers.

Referring to our own statutes on the subject, Article 1101 of the Code of Criminal Procedure reads as follows:

"Whenever the Governor of this State may think proper to demand a person who has committed an offense in this State and has fled to another State or territory, he may commission any suitable person to take such requisition; and the accused person, if brought back to the State, shall be delivered up to the sheriff of the county in which it is alleged he has committed the offense."

Under the above provision the Governor is authorized to commission any suitable person to execute the requisition, and this brings us to

consider whether or not a member of the Ranger force is within the meaning of this statute a suitable person.

The Ranger force, its duties and the purposes for which it was created and is maintained, are outlined in Title 116, Acts of 1911.

Article 6754 of this title reads:

"The Ranger force authorized to be organized by the Governor is for the purpose of protecting the frontier against marauding or thieving parties and for the suppression of lawlessness and crime throughout the State."

Article 6758 reads:

"This force shall always be under the command of the Governor, to be operated by his direction in such manner, in such detachments and in such localities as the Governor may direct."

It will thus be seen that the Ranger force is at all times under the command of the Governor, to be used and operated by his direction in such manner, in such detachments and in such localities as he may direct for the purpose of suppressing lawlessness and crime throughout the State.

The only purpose in arresting a fugitive from justice and in returning him to this State, is that he may be suitably punished for his crime in order, as our Penal Code declares, "to suppress crime and reform the offender." (Penal Code, Art. 2, Chapter 1.)

We find, therefore, that the use of members of the Ranger force as a means of returning fugitives from justice to this State for trial and punishment for crime is not only not prohibited by anything in the law, but is in perfect harmony and accord with and executes the legislative intent in creating and maintaining such official force.

Yours very truly,

B. F. LOONEY,
Attorney General.

MINISTERS OF THE GOSPEL—ROAD DUTY—EXEMPTION.

Ministers of the Gospel "in the active discharge of their ministerial duties" are exempt from road duty; it being a question of fact in each case whether or not the minister is thus engaged.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 7, 1914.

Hon. J. E. Carter, County Attorney, Weatherford, Texas.

DEAR SIR: In your communication of the 2nd instant, you submit the following question:

"Under Article 6919 of the Civil Statutes of 1911 as to whom are liable to road duty it says 'except ministers of the Gospel in the active discharge of their ministerial duties.' I would like to have your construction on this above quoted language as just how far it extends, or, rather how broad it is. For instance, do you think it would apply to a case where a minister has been ordained but only preaches once or perhaps twice a month?"

The question you propound turns on what is meant by the phrase "in the active discharge of their ministerial duties."

This term is not defined in the law and it is essentially a question of fact and each case would, of course, have to turn on its own peculiar facts. It is impossible in advance to lay down rules by which it can be inevitably determined whether a minister is or is not in the active discharge of his ministerial duties.

The statute in question in addition to exempting ministers of the Gospel in the active discharge of their ministerial duties, also exempts from road duty invalids, members of the Texas National Guard, members of volunteer fire companies in the active discharge of their duties, also all persons under the age of twenty-one years and those over the age of forty-five.

Article 5118, Revised Statutes, exempts the following from jury service:

Persons over sixty years of age; civil officers of the State or United States; road overseers; ministers of the Gospel engaged in the active discharge of their ministerial duties; physicians and attorneys engaged in actual practice; publishers of newspapers; schoolmasters; druggists; undertakers; telegraph operators; railroad station agents; ferrymen; millers; officers; conductors; engineers of railroad companies engaged in the regular and active discharge of their duties; members of the National Guard and persons who have prior thereto performed certain jury service within a certain specified period.

We see, therefore, that these exemptions are based upon age, want of physical ability, and in favor of those who in one way or another render a public or *quasi*-public service and in favor of those whose vocations are of such a nature, being a *quasi*-public function, that require constant attention.

The profession of the minister is of this *quasi*-public nature. The practical duties of a minister, among other things, require that he shall during stated periods deliver sermons to his congregation and this in turn requires hard study and close application for the preparation. He is also required to do social work among the members of his congregation and in the community where his charge or charges are located. If his charges are separated he must of necessity travel from place to place absenting himself from home and depriving his family of the comfort and benefit of his presence and also denying himself the pleasure of being at home with his own family. The work of a minister is not alluring in the sense that it is the pursuit of earthly glory, wealth or honor, but with the true minister it is a life of sacrifice and in a sense, of hardship. In his service to others he is a consolation when sorrow and affliction come; he visits the sick; buries the dead, and adds to the rejoicing at the marriage feast. There is a varied and far-reaching influence in the community, such that should be recognized in a way to mark the true minister a different order of men from others.

I do not think the question could turn on whether the minister preaches to one or more churches or preaches more than once or twice per month. Each case would have to stand upon its own facts and circumstances, and the jury or court trying out such an issue would have to believe not only that the minister was ordained or licensed to preach, but that he is engaged actively in the discharge of the duties of his

ministry. This would depend, of course, upon just how much of activity characterizes his conduct as a minister.

Yours very truly,

B. F. LOONEY,
Attorney General.

OFFICES—PRISON AUDITOR.

Articles of statute construed: Art. 6193, R. S., 1911.

Constitutional construction: Sec. 17, Art. 16, State Constitution.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, FEBRUARY 17, 1913.

Board of Prison Commissioners, Huntsville, Texas.

GENTLEMEN: Your communication of date February 14th raises the question as to whether or not the Commission is liable for the salary and expenses of the prison auditor since January 20, 1913,—it having appeared that the one-year term of the auditor's office should have expired that date, and that no successor to the auditor has been appointed.

Article 6193, R. S., provides for the appointment, etc., of an auditor, who shall hold his office for a term of one year, etc.

Section 17, Article 16, Constitution, provides that "All officers within this State shall continue to perform the duties of their office until their successors shall be duly qualified." This provision of the Constitution is mandatory. It does not mean that officers *may* perform the duties of their offices until their successors are qualified, but that they *shall* do it. Such is the contract between them and the State when they take the office, and there are many good reasons why the Constitution should be thus interpreted. Some of them are that the functions of government must not cease, and the public records of the office must be preserved and handed over to a successor. The public necessity for continuity of official tenure is not left to the caprice of the officeholder. The contract for public service imposes a mutual obligation on the official and the public which can not be arbitrarily dispensed with by either party. *Keen vs. Featherstone*, 29 T. C. A., 565; *McGhee vs. Dickey*, 4 T. C. A., 104.

Under the conditions stated in your letter, Mr. Barton would be compelled to perform the duties of auditor until his successor is appointed and qualified and the Commission on the other hand would be compelled to pay the salary and expenses as required by the statute cited.

Yours truly,

LUTHER NICKELS,
Assistant Attorney General.

BOARD OF PRISON COMMISSIONERS—INSANE PRISONERS—EXPENSES OF
ADJUDICATING INSANE CONVICTS—RELEASE OF INSANE
CONVICTS ON BAIL DISCUSSED.

1. The expenses of adjudicating insane convicts whose insanity develops after incarceration in the penitentiary, and the expenses of keeping them prior to their admission in the asylum for the insane, and of their transportation, should be paid by the State and not by the county in which the convict is kept by the State.

2. If a convict is adjudged insane, when restored he should be returned to the penitentiary and can not be released on bail as provided in Article 162, Acts 1911.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, DECEMBER 18, 1913.

Board of Prison Commissioners, Huntsville, Texas.

GENTLEMEN: Your auditor, Mr. Moore, called our attention to the fact that we had failed to answer your inquiry of June 21st, in regard to your responsibility for the expenses incident to the adjudication, maintenance and transportation of insane convicts, your letter being as follows:

"Referring to your letter of April the 29th with reference to question of whether or not the care of State convicts, who have been adjudged insane, is properly chargeable to the county so adjudging them, which opinion was rendered by you at the request of Mr. John M. Moore, auditor of the prison system, we beg to say that the county authorities are not disposed to pay these charges, as evidenced by the enclosed letter from Hon. W. A. Leigh, county judge. You will kindly note what Judge Leigh has to say, and advise us whether the view he takes is tenable and legal, and, after reconsidering the matter as he requests, please favor us with your opinion."

Mr. Moore furnished us a copy of your letter, from which we have quoted as above, the original of which if ever received by this Department has been misplaced, and this is our reason for failing to reply earlier.

I note Judge Leigh states that after receiving the opinion of this Department of April 29 he submitted the matter to the commissioners court of his county (Walker), and that the court referred the matter to him for attention, but was not disposed to pay the expense of adjudicating and maintaining convicts after being convicted of insanity and of transporting them to the asylum, feeling that such charges were unjust and that the county ought not to be liable therefor.

In view of your request and the very earnest and vigorous protest of Judge Leigh, we have given our former opinion and the subject a thorough reconsideration, with the result as stated below.

Those who become insane after the commission of crime are in the three groups, each having a separate procedure by which their insanity may be adjudicated. The first group mentioned are those provided for by the criminal statutes.

Article 39 of the Penal Code provides, among other things:

"No person who becomes insane after he committed an offense shall be tried for the same while in such condition. No person who becomes insane after he is found guilty shall be punished for the offense while in such condition."

The Code of Criminal Procedure, beginning at Article 1017 and ending at Article 1030, provides that if it shall be made known to the court at any time after conviction, or after the court has good reason to believe that a defendant is insane, a jury shall be impanelled to try the issue, and if upon the trial the defendant is found to be insane all further proceedings in the case against him shall be suspended until he becomes sane, and the court shall make an order entered upon the minutes committing the defendant to the custody of the sheriff to be kept subject to the further order of the county judge of the county. The defendant is then incarcerated in the asylum for treatment and for safe-keeping, and after regaining his sanity and the same is made known to the court in which the conviction was had, by the superintendent of the asylum, the case shall then be proceeded with from the point where it was interrupted by the insanity proceedings.

It is our opinion that these provisions of the criminal law are applicable only before the defendant is finally convicted and sent to the penitentiary. After the conviction is obtained and the defendant enters upon his service as a convict in the penitentiary and insanity then supervenes, he is to be tried under the procedure prescribed in the civil statutes. This point seems to have been adjudicated in the case of *Wilson vs. State*, 149 S. W., 118. Judge Prendergast, among other things in this case, used this language:

"It is only when a person is charged with crime and that charge is pending in the district court that the district court has any power or authority whatever to try one for insanity and have him so adjudged and restrained for treatment in the insane asylum."

This idea is further strengthened because of the absence of any provision in the law whatever authorizing a convict to be taken from the penitentiary and back to the trial court for adjudication as to the condition of his sanity; so this Department concludes that in no event can a convict confined in the penitentiary be tried as to his sanity in any forum except before the county judge of the county where he may be.

The second group which we will mention are those comprehended by Article 144 (Acts of 1911), which reads as follows:

"When a convict shall be discharged from one of the State penitentiaries, and is insane at the time of his discharge, and it shall be adjudged by a court of competent jurisdiction within thirty days after his discharge that said convict is insane and that he should be placed under restraint, he shall be delivered to the superintendent of the penitentiaries, or to one of the assistant superintendents of the penitentiary, to be conveyed to one of the lunatic asylums of this State by said superintendent, or under his direction; and the expenses incurred in said adjudication and in keeping and conveying such patient to the asylum, including such clothing as shall be necessary for his comfort, shall be paid by the State upon the certificate of the superintendent of the penitentiary."

Therefore, it is perfectly plain that where a convict is discharged from the penitentiary, and is insane at the time of his discharge, and shall be so adjudged by a court of competent jurisdiction, that is, the county court having general jurisdiction over this subject in the county where the convict may be, that when so convicted of insanity he shall

be delivered to the superintendent of the penitentiaries (in this case to the Commission) where he shall be placed under restraint to be conveyed to one of the asylums for the insane, and, of course, to be kept there until there is an opening in the asylum for the reception of the convict, all expenses incident to said adjudication and to the keeping and conveying of said patient to the asylum, including all clothing that shall be necessary for his comfort, shall be paid by the State.

The third group comprise all those who become insane after they reach the penitentiary and before their discharge, and who are adjudged insane while in this status in the penitentiary. The question arises as to the responsibility for the cost of adjudicating, keeping and transporting the insane patients belonging to this last group. In this connection, attention is called to the following articles of the statute:

Article 150, Acts of 1911, provides:

"If information in writing and under oath be given to any county judge that any person in his county is a lunatic, or non compos mentis, and that the welfare of himself or of others requires that he be placed under restraint, or that such lunatic is a convict confined in the State penitentiary, and such county judge shall believe such information to be true, he shall forthwith issue his warrant for the apprehension of such person. or, upon the filing of such complaint before any justice of the peace, said justice may issue the warrant for the apprehension of such person, or, upon the filing of such complaint before any justice of the peace, said justice may issue the warrant for the apprehension, returning said complaint and warrant to said county judge; and said county judge shall fix a day and place for the hearing and determining of the matter, which place shall be either in the court house of the county or at the residence of the person named, or at the State penitentiary, if he be a State convict, as the county judge may deem best for such person."

From the above statute it will be seen that it is the duty of the county judge wherever a convict confined in the penitentiary in his county becomes a lunatic to issue his warrant, to set a day for hearing at the penitentiary where the convict is confined, to summons and impanel a jury and to try the issues prescribed by Article 155 of the statute.

Article 145 provides:

"The expenses of conveying all public patients to the asylum shall be borne by the counties, respectively, from which they are sent; and said counties shall pay the same upon the sworn account of the officer or person performing such service, showing in detail the actual expenses incurred in the transportation."

Article 146 provides:

"In case any public patient is possessed of property sufficient for the purpose, or any person legally liable for his support is so possessed of property, the county paying the expenses of such transportation shall be entitled to reimbursement out of the estate of the lunatic or the property of the person legally liable for his support, which may be recovered by the county in an ordinary action in any court of competent jurisdiction."

From the provisions of the statute regulating the penitentiaries and regulating the asylums for the insane, it is perfectly plain that in creating penitentiaries it was never intended that the same should be used as a place to keep and treat the insane, and it is furthermore apparent

that whenever a convict becomes insane that he shall no longer be punished under the judgment convicting him of crime, but that he shall be carried to one of the asylums for the insane and there restrained and treated for his mental malady.

We can see no reason in principle why there should be any distinction between the two latter groups of insane. The statute recognizes the liability of the State to pay all expenses incident to the trial, keeping and transporting of convicts who are insane when discharged and whose insanity is ascertained within thirty days thereafter. Article 145 provides that where the counties have incurred any expense for adjudicating, keeping and transporting the insane, they shall be reimbursed from the estate of the patient, if he has an estate, and if not, shall be reimbursed by any person legally liable for his support.

The status of all convicts in the penitentiary is that during the period for which they are sentenced their time belongs absolutely to the State, and the State is correspondingly liable for their support.

The laws regulating our penitentiary system abundantly show that the Legislature has recognized not only that the State is legally liable for the support of the convict, but has made ample and detailed provision for his support and maintenance humanely, having due regard for his physical comforts as well as for his mental and moral culture.

We believe it is inequitable and unjust to quarter several thousand convicts, gathered up from different counties of the State, in one county and charge the entire expenses of adjudicating those who become insane, and keeping them after conviction and prior to being transported to the asylum and of transporting them to the asylum, against the county in which these convicts are assembled and kept by the State. We cannot believe that it was the intention of the Legislature to saddle this expense upon the people of the county where the penitentiary is located, but believe rather that it is an item of general expense to be paid by the State at large, and not to bear more heavily upon the citizens of one county than it does upon the citizens of another county, and thus believing we would not hold to the contrary unless compelled to do so by some mandatory provision of law.

It is therefore the opinion of this Department, and we so advise you, that the expenses of adjudicating insane convicts in the penitentiary and the keeping of them prior to the time that they may be admitted into the asylum and the expense of transporting them to the asylum, should be borne and paid by the penitentiary commission out of any funds at its disposal.

In so far as our conclusions arrived at as above stated conflict with the opinion of this Department issued on the 29th day of April, 1913, the former opinion is overruled or modified to that extent.

In order that there may be no misunderstanding as we have understood that convicts who have heretofore been adjudged insane have been liberated under the provisions of Article 162 (Acts of 1911). This article provides:

"No warrant to convey a lunatic to the asylum shall issue if some relative or friend of the lunatic will undertake, before the county judge, his care and restraint, and will execute a bond in the sum to be fixed by the county judge,

payable to the State, with two or more good and sufficient sureties to be approved by the county judge, conditioned that the party giving such bond will restrain and take proper care of the lunatic so long as his mental unsoundness continues or until he is delivered to the sheriff of the county or other person, to be proceeded with according to law; which bond shall be filed with, and constitute a part of, the record of the proceedings, and may be sued and recovered upon by any party injured in his own name."

It is the opinion of this Department that this statute has no application whatever to convicts serving terms in the penitentiary who may be convicted of insanity. This proposition seems to be clearly sustained by the Wilson case, above referred to, in which, among other things, Judge Prendergast said:

"We are further of the opinion that the object and intention of the law is, and that it was the intent of the Legislature, that where persons, after the commission of an offense and after they are properly charged therewith in a court of competent jurisdiction, become insane and are so properly adjudged before the trial, that they shall be restrained and treated in one of the insane asylums, and that they shall not be allowed bail and to be taken therefrom until time or such treatment shall render them sane; and that then they shall be returned by the authorities of the asylum to the court that has jurisdiction to be dealt with as the facts and law justify."

It occurs to us that where a party is charged with a felony, which is clearly bailable, and bail has even been granted and he is out on bail, if when the case is called for trial he sets up insanity to prevent a trial and is adjudged insane and thereby prevents a trial, he should then be committed for restraint and treatment to one of the insane asylums and kept there and not turned loose again on the bail he then had, but that pending this restraint and treatment bail should not be permitted by his parent or anyone else so as to take him from the insane asylum until by treatment or time he again becomes sane; then he should be returned to the custody of the court having jurisdiction for trial in accordance with law.

It is therefore the opinion of this Department that when a convict serving time in the penitentiary is adjudged insane, he should be restrained for treatment in the asylum, and should he become sane, he must under the provision of the law, be returned to the penitentiary where his punishment under the conviction for crime will be begun where it was broken off and will be finished in accordance with the judgment of conviction, and that he can not be permitted to go at large on bail given by any relative or friend under the provisions of Article 162, as this article has no application whatever to the insane who may be serving terms in the penitentiary.

Yours truly,

B. F. LOONEY,
Attorney General.

COUNTY HEALTH OFFICER—COMMISSIONERS COURT—CONTAGIOUS
DISEASE—QUARANTINE—EXPENSES.

1. When commissioners court appoints a county health officer such health officer when so appointed has only the authority to act under the direction of the commissioners court, and do those things that the court directs.

2. If a person is able to pay his doctor's bills, he is liable therefor just the same when he contracts a contagious disease as when he contracts a non-contagious disease. When the commissioners court sees fit for their protection to incur expenses it should always be done.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MARCH 22, 1913.

Hon. Robt. J. Sullivan, County Attorney, Conroe, Texas.

DEAR SIR: In your letter of March the 17th, you state that your county health officer was called in by the attending physician to see a patient who had meningitis. A flag was then put up and the members of the family were told not to leave the house, with the exception of one member who was permitted to go about and get provisions. The sick person was not a pauper, nor was he is a prisoner or in a detention camp. Upon being called in and it being determined that the patient had meningitis, the county health officer, together with the attending physician, administered the serum and the patient was thereafter treated by the two by administering the serum on three other occasions. You desire to know first, would the county be liable for the county health officer's first visit, and for the services of disinfecting the house after the patient died. Second, if you answer that the county would be liable for the first visit and for the services rendered in disinfecting the house, then would the county be liable to the health officer for attending the patient after his first visit, it being determined that the patient had meningitis at such first visit?

Answering your inquiries, we advise you that when the commissioners court appoints a county health officer such health officer when so appointed has only the authority to act under the direction of the commissioners court, and to do those things that the court directs. The court alone has the authority to establish and maintain quarantine, and to incur and pay indebtedness in establishing such quarantine, provided, of course, the county may direct the health officer to establish such quarantine and would be liable for the expenses incurred, provided, the health officer did not exceed the authority given him by the commissioners court. The services rendered by the county health officer, while acting as such and not in an individual capacity should be borne by the county; that is to say, that if the county health officer is in the discharge of some duty required of him by the commissioners court, the court would be liable for his pay while discharging such duty. If, however, he was in the discharge of his regular practice and while so engaged he should visit a patient, then, he would have to look to the patient for compensation.

The mere fact that a person contracts a contagious disease places no obligations upon the county to pay his doctor's bill, or any other expenses incurred during his sickness, except those expenses incurred by

the county in preventing the spread of the disease from this patient to other citizens of the county,—the object of the law being to pay more attention to the protection of the health of the well than to the care of the sick. The authority to establish and maintain quarantine is to protect and preserve the health of the people.

It follows, therefore, that if the health officer was in the discharge of his duty as health officer and not his private engagement as a practicing physician when he made his first call upon the patient, the county would be liable to pay him therefor. If the commissioners court should think it best for the preservation of the health of the people that the house should be disinfected, if a person had contracted a contagious disease therein, that court could order the county health officer to disinfect same, and would thereby become liable to him for compensation for such service. Of course, a little different phase of this question is presented where it should appear that the person who had the contagious disease was unable to secure medical attention, in other words, a pauper, then it occurs to us that the obligation of the county would be to take care of the sick as well as to preserve the health of the well. If, however, a person is able to pay his doctor's bills, he is liable therefor just the same when he contracts a contagious disease as when he contracts a non-contagious disease.

The question of contagion does not affect nor determine the matter of expenses connected with it, except so far as the general public is concerned. When the commissioners court sees fit for their protection to incur expenses it should always be done.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

QUARANTINE—CITY OR TOWN AND COUNTY.

The city is not liable for expenses incurred where quarantine was established by order of the commissioners court; nor is county liable for any part of expense of quarantine established by the city.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 9, 1913.

Hon. J. L. Lewis, County Judge, Hamilton, Texas.

DEAR SIR: We have your communication of December 18th, from which we take the following questions:

1. In case the county establishes a quarantine who is liable for the expense of same?
2. In case a city or town establishes a quarantine who is liable for cost of same?

Then, growing out of these two questions, we find it necessary to answer three other questions:

1. When should the county establish quarantine?
2. When should city or town establish same?

3. What is the effect of the rules of the sanitary code where they appear in conflict with Article 4568?

This Department, after due consideration, begs to answer your several questions as follows:

Article 4539, Revised Statutes, 1911, creates the office of county health officer, prescribing his duties and fixes his compensation, and likewise abolishes the office of county physician.

Article 4540 creates the office of city health officer, and prescribes his duties and qualifications, and Article 4551 provides for his compensation.

Article 4543 provides, among other duties, that the county health officer is empowered and authorized to establish, maintain and enforce quarantine within his county; also provides that he must operate under and be subject to the State Board of Health and the rules it may prescribe.

Article 4548 prescribe the duties of the city health officer, and among other things says that he "shall aid said State Board of Health at all times in the enforcement of proper rules, regulations and requirements in the enforcement of all sanitary laws, quarantine regulations and vital statistics collections, etc."

Article 4568 relates to the duties of the commissioners court of a county with reference to the establishment of quarantine, and provides:

"Whenever the commissioners court of any county has reason to believe that they are threatened at any point or place within or without the county limited with the introduction or dissemination of a dangerous contagious or infectious disease that can and shall be guarded against by quarantine, they may direct their county health officer to declare and maintain said quarantine; to provide hospitals, tents or pest houses for those sick of contagious and infectious disease; to furnish provisions, medicine and all other things absolutely essential for the comfort of the well and the convalescence of the sick. * * * Chartered cities and towns are embraced within the purview of this article, and the mere fact of incorporation does not exclude them from the protection against epidemic diseases given by the commissioners court to other parts of their respective counties. The medical officers of chartered cities and towns can perform the duties granted or commanded in their several charters, but must be amenable and obedient to the rules prescribed by the Texas State Board of Health. This article, however, must not be construed as prohibiting any incorporated town or city from declaring, maintaining and paying for local quarantine."

To aid in the enforcement of these various articles, the State Health Board, under the authority given it by law, has prescribed certain rules called the "Sanitary Code," Rule 31. of which Code contains this language:

"City health officers shall assume control and management of contagious diseases and exposures and practice quarantine, etc."

In order that we may correctly arrive at the full purport and meaning of all these articles, and thus give full force to the intent of the Legislature, it is our duty to construe all of them together, and if possible give to them such construction as will carry out the original intent of the Legislature.

We, therefore, arrive at the following conclusions, and give same to you as the opinion of this Department:

1. It was the evident intent of the Legislature to place within the discretion of the county commissioners court the establishment of quarantine where, in their judgment, it was deemed advisable. It was likewise the intent of the Legislature to give to incorporated cities and towns a concurrent jurisdiction, or rather similar powers, acting under their various charters, to establish and maintain quarantines, or, rather, to state it more accurately, they did not take from, nor attempt to do so, cities and towns their right to maintain such quarantine as they may deem proper for the protection of the health of their citizenship. From this we conclude that where a county, through its health officer, under the direction of the county commissioners court, establishes a quarantine anywhere in the county, whether within or without an incorporated city or town, the county would be liable for the whole expense incurred.

2. Where the commissioners, in the exercise of their proper discretion, do not see fit to establish a quarantine, but the city council or city health officer of an incorporated city or town, under the authority of its city charter, deems it expedient to establish a quarantine, and does so establish it, the city would then become liable for the total expense of establishing and maintaining such quarantine. This would not, however, prevent the city and county authorities from agreeing upon a proper division of the expense, but it is fully contemplated that they should do so and should work in harmony the one with the other. It follows, therefore, that the city is not liable for expenses incurred where the quarantine was established by order of the commissioners court; nor would the county be liable for any part of the expense of quarantine established by the city, acting by and through its proper officers.

Rule 31 of the Sanitary Code contains language which seems in conflict with the powers delegated to the commissioners court. Clearly this Code cannot repeal the original act, nor has the State Health Board authority to prescribe any rules that would vary or change the original intent of the Legislature as expressed in the various articles cited above. The law contemplates that the rules prescribed by the Health Board shall be in aid of and to help carry out the original intent of the Legislature. If, therefore, they should prescribe a rule in conflict with the general laws, it would simply be void, or so much of it as was in conflict.

We are aware that Article 4340 uses this language: "May direct their county physician to declare, maintain a quarantine, etc," when the commissioners court has reason to believe that they are threatened with the named diseases, notwithstanding the fact that this act, in Article 4339, uses the word "shall" and in this section the word "may." We are of the opinion that the Legislature intended to impose the absolute duty upon the county authorities to establish and maintain an effective quarantine. In other words, it was clearly mandatory. However, this would not destroy the discretion lodged in the county commissioners to establish and maintain quarantine when they deemed it necessary for the protection of the health of their citizenship, nor does it impair the discretion of the city council or city authorities to establish and maintain a quarantine when in their judgment the health of their citizenship demands it.

Trusting that this answers all of your questions, but holding ourselves in readiness to answer any further questions that will aid you in the proper enforcement of the law, we are,

Very sincerely yours,

W. A. KEELING,
Assistant Attorney General.

QUARANTINE—EXPENSES—CONSTRUCTION OF LAWS.

If a city should establish quarantine, city would be liable for actual expenses in maintaining same, but would not be liable for board or parties under quarantine. If parties under quarantine are indigent poor, obligation would rest upon authorities to take care of them.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 4, 1913.

Hon. Ed. I. Key, City Attorney, Denton, Texas.

DEAR SIR: In your favor of April 2d you propound to this Department the following interrogatories:

"1. Does the city have to take charge of smallpox and other such diseases within the limits of one city, or can the city refuse to take charge of said diseases, and refuse to quarantine, and the county be compelled to do so?"

"2. If it is necessary for the city to take charge of such diseases and quarantine, is the city legally liable for the expenses of the persons sick or the ones under quarantine, if the persons are financially able to pay the expense of the same, and are not placed in the city's pest house?"

"3. And if the city is liable for such expense, what expenses should be paid, for instance if students are boarding and attending a State school, and are placed under quarantine by the city health officer, will the city be liable for their board while they are under quarantine, if they should refuse to go to the detention camp?"

Replying to your first interrogatory, we beg to say that the matter of quarantine rests primarily with the commissioners court, and whenever the commissioners court deems it expedient to prevent the introduction or dissemination of contagious diseases, they may direct their county health officer to declare and maintain a quarantine. See Art. 4568, R. S., 1911. This right, however, is not exclusive in the commissioners court, for cities exercising the rights granted in their charters and under Health Rule 31, Acts of Thirty-second Legislature, 179, also have concurrent authority in the matter of establishing a quarantine.

Replying to your second question, we beg to say that in the event the city should establish quarantine it would only be liable for the actual expense of maintaining the same. It could not be held liable for any of the necessary expenses of sick persons, or persons who are under quarantine, if the parties are financially able to pay the same. There is no obligation whatever resting upon the city to bear the expenses of parties under quarantine any more than there would be if such parties were not under quarantine.

Replying to your third question, we beg to say that as above stated the city would only be liable for the actual expenses of maintaining the

quarantine, and would not be liable for the board of parties under quarantine. Of course, if parties under quarantine are indigent poor, the obligation would rest upon the authorities to take care of them, but they would be in no way liable for the necessary expenses of any person who is able to pay the same themselves.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

CONSTITUTIONAL CONSTRUCTION—AMENDMENT TO CONSTITUTION—
GOVERNOR—VETO.

An amendment, proposed to the Constitution of this State by the Senate and House of Representatives, does not have to be presented to the Governor for approval, and he cannot, therefore, exercise thereon the power of veto.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 3, 1913.

Hon. O. B. Colquitt, Governor, Capitol.

DEAR SIR: We quote from your communication of the 1st inst. to this Department the following:

"Section 1 of Article 17 of the Constitution provides that Constitutional amendments can be submitted at any biennial session by a vote of two-thirds of all the members elected to each House, to be entered by yeas and nays on the journals. Section 14 of Article 4 of the Constitution confers the power of veto upon the Governor. Section 15 of Article 5 of the Constitution reads as follows:

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

"Wherefore, it appears that a joint resolution proposing and submitting an amendment to the Constitution must be presented to the Governor for his approval, and if he does not approve it, the said resolution must take the course of a bill and be returned to the House from which it originated for further consideration as directed in the Constitution, and that in the event a joint resolution reaches the Governor's office less than ten days prior to its adjournment, Sundays excepted, the right of veto of such resolution by filing with the Secretary of State is given, just as in the case of a bill, and that by reason of the fact that such a resolution is thus vetoed it is negatived and of no force.

"Please advise me, in your opinion, whether my construction of the Constitution on this point is correct."

The question thus presented; that is, as to the right of the Governor to veto an amendment to the Constitution proposed by the House of Representatives and the Senate, has never arisen in this State so as to call for judicial construction.

In other States, however, and with reference to the Federal Constitution, having provisions similar and in fact almost identical with the provisions of the Constitution of this State brought under review, the right of the chief executive to veto such a measure is denied.

The manner and method of amending our Constitution is fully provided for in Article 17 as follows:

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

This article of the Constitution is separate and apart from any other article. It affords a complete procedure. It does not refer to nor is it dependent upon any other part of the Constitution. It does not deal with matters of general legislation, but is confined exclusively to the one subject of amending the Constitution. The case most nearly in point, denying the right of the Governor to veto a proposed amendment to the Constitution, is *Commonwealth ex rel. Elkin vs. Griest*, 196 Pa., 396, 50 L. R. A., 570. The Constitution of the State of Pennsylvania was divided into eighteen articles, as ours is divided into seventeen articles, the eighteenth being confined, as the seventeenth of our Constitution is confined, to the method and procedure of amendments, and while not in detail the same procedure as prescribed in Article 17 of our Constitution, yet in so far as material to the question under consideration it presents a parallel case and is directly in point. It reads as follows:

"Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives; and if the same shall be agreed to by a majority of the members elected to each House, such proposed amendment or amendments shall be entered on their journals with the yeas and nays taken thereon, and the Secretary of the commonwealth shall cause the same to be published three months before the next general election in at last two newspapers in every county in which such newspapers shall be published, and if in the General Assembly next afterwards chosen such proposed amendment or amendments shall be agreed to by a majority of the members elected to each House, the Secretary of the commonwealth shall cause the same again to be published in the manner aforesaid; and such proposed amendment or amendments shall be submitted to the qualified electors of the State in such manner and at such time at least three months after being so agreed to by the two Houses as the General Assembly shall prescribe; and if such amendment or amendments shall be approved by a majority of those voting thereon, such amendment or amendments shall become a part of the Constitution; but no amendment or amendments shall be submitted oftener than once in five years. When two or more amendments shall be submitted they shall be voted upon separately."

The question presented under the above provision of the Pennsylvania Constitution was as to whether a proposed amendment to the Constitution must be submitted to the Governor for his action thereon. Those

urging this view based their contention on another article of the Constitution, which reads as follows:

"Every order, resolution or vote to which the concurrence of both Houses may be necessary, except on the question of adjournment, shall be presented to the Governor, and before it shall take effect, be approved by him, or, being disapproved, shall be repassed by two-thirds of both Houses, according to the rules and limitations prescribed in case of a bill."

It will be observed that this provision of the Pennsylvania Constitution is couched in almost the identical verbiage as that employed in the similar provision of the Constitution of this State, the meaning being the same; the resemblance of the two provisions being so marked that we must believe that one was copied from the other, or that they both came from a common parent.

The Supreme Court of Pennsylvania, in disposing of the question thus presented, among other things, said:

"The question is, must a proposed amendment to the Constitution be submitted to the Governor and be subjected to the requirement of his approval? The first and most obvious answer to this question is that the article which provides for the adoption of an amendment is a complete system in itself, from which the submission to the Governor is carefully excluded, and therefore such submission is not only not required, but can not be permitted. It can only be done by reading into the 18th Article words which are not there and which are altogether inconsistent with and contrary to the words which are there. Under the article the amendment becomes a part of the Constitution without any action of the Governor. Under the opposing contention it can not become a part of the Constitution without the positive approval of the Governor, when no such approval is either expressed in or implied from the explicit words of the article. They can not be implied because there is no necessity for such implication, and without such necessity there can be no implication. This is a most familiar principle in the construction of mere ordinary statutes and also in the construction of written contracts. And more than this, if the proposed amendment is to be submitted for the approval of the Governor, it follows that if he disapproves it it may fail altogether and thus an element of defeat be introduced into the 18th Article, when that article manifestly does not permit the existence of such an element. The only authorities which have any right to assent to or to dissent to the adoption of the amendment are the two Houses of the General Assembly and the people. If these latter vote adversely it fails. If the two Houses do not agree it never has any existence even as a proposition. But nowhere in the article is any other assent or any other dissent permitted to affect the question of adoption, nor is there any place in the article into which the necessity or the propriety of any other assent or dissent can be imported by implication. Therefore it follows upon the most obvious and ordinary principles of statutory interpretation that there being no warrant for executive intervention contained in the 18th Article, it can not be placed there by any kind of implication from the 26th section of the third article (being the one last quoted). * * *"

Referring to the article of the Constitution last quoted, the court says:

"Nowhere in the article is there the slightest reference to or provision for the subject of amendments to the Constitution. It is not even alluded to in the remotest degree. On the contrary, the entire article is confined exclusively to the subject of legislation, that is, the actual exercise of the lawmaking power of the commonwealth in its usual and ordinary acceptation. It is too plain for argument that unless there was somewhere else in the Constitution a provision for creating amendments thereto, that that power could not be exercised under any provision of the third article. It follows that a direction to submit 'every order, resolution or vote' of the two Houses to the Governor for his ap-

preval does not carry with it any other matter than such as is authorized by the article. As constitutional amendments are not authorized by the third article (being the one last quoted), they can not be within the purview of these orders, resolutions or votes which must be submitted for the action of the Governor. But independently of this consideration, which seems conclusive, it is perfectly manifest that the orders, resolutions and votes which must be so submitted are and can only be such as relate to and are a part of the business of legislation as provided for and regulated by the terms of Article 3. These are the affairs that are the exclusive subjects of the article. They constitute the matters which are fully and carefully committed to that department of the government which is clothed with its whole legislative power. The things that are to be done by the two Houses are legislative only, and hence when orders, resolutions and votes are directed to be submitted to the Governor, it is orders, resolutions and votes referring to matters of legislation only that are to be so submitted. * * *

The court further in its opinion, in commenting upon the article with reference to the amendments to the Constitution and the article with reference to submitting every order, resolution or vote to the Governor the same as a bill, says:

“These two articles of the Constitution are not inconsistent with each other, and both may stand and be fully executed without any conflict. One relates to legislation only, and the other relates to the establishment of constitutional amendments. Each one contains all the essentials for its complete enforcement without impinging at all upon any other function of the other. And it follows further that because each of these articles is of equal dignity and obligatory force with the other, neither can be used to change, alter or overturn the other.”

The similarity in the constitutional provisions of the State of Pennsylvania, brought under review in the discussion by the Supreme Court of that State, above quoted, to the corresponding provisions of the Constitution of this State, renders this a parallel case to the one presented by Your Excellency's communication, and we believe is of controlling force.

However, the same question arose under similar provisions of the Federal Constitution in the case of *Hollingsworth vs. Virginia*, 3 Dall., 378, 1 L. Ed., 644, where it was held by the Supreme Court of the United States that amendments to the Federal Constitution, proposed by Congress, were not required to be presented to the President for his action thereon. In other words, that he did not possess the power to veto proposed amendments to the Federal constitution. In order that the pertinency of this decision may be appreciated, we here quote the provisions of Article 5 of the Federal Constitution under consideration:

“The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the Legislature of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress. * * **”

Subdivision 3, Section 7, of Article 1, of the Federal Constitution, is as follows:

“Every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjourn-

ment), shall be presented to the President of the United States; and before the same shall take effect shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives according to the rules and limitations prescribed in the case of a bill."

The language of the latter provision of the Federal Constitution is strikingly similar to the language employed in the corresponding provision of the Constitution of this State, quoted in Your Excellency's communication.

The question in the *Hollingsworth* case was, whether the Eleventh Amendment to the Constitution of the United States should have been presented to the President for his approval. It appeared upon inspection that the amendment was never submitted to the President. It was contended in the argument that the Constitution declares that every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States, and before the same shall take effect shall be approved by him, or, being disapproved by him, shall be passed by two-thirds of the Senate and House of Representatives. Replying to this, Mr. Justice Chase said:

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

We respectfully submit that in the absence of any conflicting authority the cases above cited and quoted from, in which the same question arose, one under a State and the other under the Federal Constitution, involving similar provisions of the respective Constitutions, are of controlling force, and compel this Department to disagree with Your Excellency's conclusion as indicated in your communication. While it is not necessary to bolster this conclusion with a citation of other authorities, yet the following cases fully sustain the conclusion at which we have arrived, to wit:

State ex rel. Morris vs. Mason, 43 La. Ann., 590, 25 Neb. 864, 41 N. W., 981.

Green vs. Weller, 32 Miss., 650.

Koehler vs. Hill, 60 Iowa, 543.

Answering your question, therefore, we advise that it is the opinion of this Department that an amendment, proposed to the Constitution of this State by the Senate and House of Representatives, does not have to be presented to the Governor for approval, and that he cannot exercise thereon the power of veto.

Yours truly,

B. F. LOONEY,
Attorney General.

CONSTITUTIONAL AMENDMENT.

Cities of more than five thousand inhabitants may adopt their own charters by vote of the people.

The amendment was at the general election, November 5, 1912, legally submitted to the electors of the State in compliance with the direction of the Legislature; and has been legally adopted and is a part of the State Constitution.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 3, 1913.

Hon. O. B. Colquitt, Governor, Capitol.

DEAR SIR: Your favor of the 2d instant, in regard to the status of the amendment to Section 5, Article 11, of the Constitution, voted upon at the recent general election, has received the careful consideration of this Department.

Your communication makes the following case: That is to say, the Thirty-second Legislature at its Regular Session proposed an amendment to Section 5, Article 11, of the Constitution, whereby cities of more than five thousand inhabitants might adopt their own charters by a vote of the people, and, in providing for the election, directed that "the Governor of this State is hereby directed to issue the necessary proclamation submitting this amendment to the qualified voters of Texas at the next general election held in this State, or, in case any previous election shall be held in this State for other purposes, then this proposed amendment shall be submitted to the qualified voters of the State at such election."

A special election (the election on the prohibition amendment, July 22, 1911) intervened between the adoption of the joint resolution in question, and the general election November 5, 1912, at which special election the amendment in question was not submitted, but the necessary publication thereof was made in all respects as required by the Constitution before the day of the general election and the same was then voted upon by the qualified electors of this State and was adopted by a majority, which result has been ascertained from returns regularly made to the Secretary of State. The proclamation of the Governor declaring the amendment a part of the Constitution has not as yet been made, being held up pending an inquiry into the legality of its adoption. It being claimed by some that because the special election (on the prohibition amendment) intervened that the submission of the amendment in question at the general election last November was unlawful.

Section 1, of Article 17, of the Constitution, providing how amendments to the Constitution may be adopted, among other things, directs that the Legislature proposing the amendment shall specify the time the election shall be held.

The Legislature complied with this provision of the Constitution by specifying that the election should be held "at the next general election," or, in case any previous election shall be held in this State for other purposes, then this proposed amendment shall be submitted to the qualified voters of the State at such election.

The question presented by your communication is whether it was

mandatory on the Governor to make proclamation and submit the amendment at the special (prohibition) election, or was this provision merely directory?

It is the opinion of this Department that the provision in question was directory; that the amendment has been duly and legally submitted to the electors of this State in compliance with the direction of the Legislature; that it has been legally adopted and is a part of the Constitution of this State, and should be proclaimed as such.

Whether this act of the Legislature is to be regarded as mandatory or directory is not to be determined exclusively by verbiage employed; that is to say, the use of mandatory language is often construed by the courts to be directory and vice versa. The subject is to be determined, not from the use of mere words, but from the context and the evident intent and purpose of the Legislature.

Where a provision such as the one in question contains mere matters of direction as to the mode of proceeding by a public officer, it is to be deemed directory, and a precise compliance is not essential to the validity of the proceedings, unless the statute contains negative language which implies positive prohibition against doing another thing. The Legislature nowhere directed in the resolution in question that if a special election should intervene and if this amendment was not submitted at the special election, that the Governor was prohibited from submitting it on the other date named; that is, at the general election. Reasoning upon it, there certainly can exist no substantial reason why the election might not as well have been held at the general election as at the preceding special election. The Legislature complied with the Constitution in that it specified these dates, either of which was in its judgment proper, and as no negative language was used prohibiting the submission of the question at the general election, in case there should be a failure to submit it at the preceding special election, we conclude that it was a matter left to the sound discretion of the Governor to submit this amendment to the electors of this State at a special election, if one intervened, and, if not, then it should be submitted at the general election, as was done. To illustrate, let us suppose that the Legislature had proposed a number of constitutional amendments to be voted upon in addition to the prohibition amendment that was voted upon on July 22, 1911. The Legislature had the power and might have submitted amendments to be voted upon on August 10, September 15, October 22, and so on. Now, if it had called such elections, either one of which would have been a "previous election" to the general election, which should the Governor have selected at which to submit the constitutional amendment in question? Either of these dates could have been selected with propriety, and this illustrates the proposition that the act directing the time for this election was directory, as to whether it should be submitted at the special or at the general election.

Those who raise a doubt as to the legality of the adoption of the amendment in question take the position that it was mandatory upon the Governor to submit the matter at the special election held in July, 1911, and further reason that, as it was not submitted at this time, its adoption was illegal.

We do not for a moment question the proposition that, in order for

a popular election to be legal, there must be a time fixed in advance for holding it, either by law or by an officer charged with the duty of so doing, and that the election must be held at the time thus fixed. Our position here does not run counter to this general rule. The election in question was held at a time contemplated by the resolution, and the Governor acted clearly within the discretion committed to him in not submitting it at the time the vote was taken on the prohibition amendment. Whether or not this question should be voted upon at the special election or at the general election, was certainly not of the essence of the thing to be done. The different dates mentioned for the election was with a view to the proper, orderly and prompt conduct of the public business, and the failure on the part of the Governor to submit the question on the first date did not end his duty, but failing so to do it became imperative upon him that the question should be submitted at the general election. The essential thing sought to be accomplished by the Legislature was that the qualified electors of this State should be accorded the privilege of voting on the proposed amendment to their organic law, and it was comparatively immaterial whether the election should take place on one or the other of the times mentioned by the Legislature.

Truchart vs. Addicks, 2 Texas, 217.

Murray vs. The State, 3 S. W., 105.

Cooley's Constitutional Limitations, 7 Ed., 113.

Words and Phrases, Vol. 3, pp. 2078-2079.

If, however, we should be in error, any citizen of this State who is a qualified voter, desiring it, may contest the validity of this election, as provided by an act of the Thirty-second Legislature, page 144. This act provides for a contest of an election upon any proposed amendment to the Constitution "within sixty days from the date of any such election. * * * and not thereafter." (Sec. 8.)*

The act further provides that "the result of said contest shall finally settle all questions relating to the validity of said election, and it shall not be permissible to again call the legality of said election in question in any other suit or proceeding, and, if no contest of said election is filed and prosecuted in the manner and within the time herein provided for, it shall be conclusively presumed that said election as held and the result thereof as declared are in all respects valid and binding upon all courts."

Thus it appears that the statute in question is comprehensive enough to include all questions that might be raised to the validity of the election at which a constitutional amendment is voted upon, and, therefore, any citizen of this State who is a qualified voter has the right in a judicial proceeding to call in question the validity of this amendment. We do not feel that there is sufficient doubt about the correctness of our position to hesitate a moment about advising that the necessary proclamation be issued declaring the amendment a part of the organic law of this State.

B. F. LOONEY,
Attorney General.

*See Cartledge vs. Wortham, 153 S. W., 298.

HOME RULE BILL—INDEPENDENT SCHOOL DISTRICTS.

City may not amend charter provisions relating to Independent School District, such can only be done by Legislature. (Const.: Sec. 5, Art. 11; Sec. 10, Art. 11; Sec. 3, Art. 7; Special Laws, Thirty-second Legislature, Secs. 56 and 57, Chap. 45.)

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JUNE 13, 1913.

Mr. E. W. Morris, President School Board, Abilene, Texas.

DEAR SIR: We have your letter of the 10th instant, reading as follows:

"The City of Abilene was granted a special charter by the Thirty-second Legislature. 'Special Laws, 1911, page 247, Chapter 45,' Art. 7 of said act on page 265 'Special Laws, 1911' creates the City of Abilene as defined in the act, an independent school district, providing that it shall be governed by the same rules and regulations as provided for independent school districts under the general law, except as otherwise provided in said act.

"Can Sections 56 and 57, Art. 7 of said act, which relate to the creating and regulating the 'Abilene Independent School District' be amended at an election held in the city under the provisions of the 'home rule enabling act' passed by the last Legislature. In other words is that part of the act creating the Abilene Independent School District such a part of the municipal charter as can be amended under the home rule act, or would it have to be amended under the general laws of the State relating to independent school districts."

By the amendment of 1912 to Section 5 of Article 11, cities having more than five thousand inhabitants may by a majority vote adopt or amend their charters, which amendment is made effective by an act of the Thirty-third Legislature, known as the Home Rule Bill, which bill becomes effective July 1, 1913.

The above amendment and the act of the Legislature, based thereon, are applicable only to the ordinary municipal affairs of the city and has no reference whatever to the creation of independent school districts or the creation of such town as a separate or independent school district.

The authority of the Legislature to create school districts, either by special or general act, is found in Section 3 of Article 7 of the Constitution, in the following words:

"and the Legislature may also provide for the formation of school districts by general or special law, without the local notice required in other cases of special legislation."

The authority of the Legislature to constitute a city or town a separate or independent school district is found in Section 10, Article 11, of the Constitution.

The only constitutional authority conferred upon the Legislature to create independent school districts is found in the two articles referred to above, and it was by virtue of Section 10, Article 11, the Legislature acted in creating your city an independent district.

In the enactment of your special charter the Legislature combined two separate and distinct acts authorized by the Constitution in the two articles above referred to; that is, under Section 5 of Article 11, prior to the amendment of 1912, it granted its charter, and under Section

10, Article 11, it created your city a separate and independent school district, in reality combining in one act two authorized acts which might have properly been the subject of two separate and distinct acts. The granting of a special charter for the management of the affairs of a city, and the constitution of such a city a separate and independent school district, while related, are in no sense dependent purposes and are separate and distinct rights conferred by warrant of constitutional authority.

Under our Constitution all independent school districts must be created by the Legislature, either by a general law prescribing the method of incorporating as is done in Article 2850 et seq., R. S., 1911, or by special act of the Legislature by an act for that purpose, and there is no authority for the delegation of such power to the inhabitants of cities and towns, although such cities and towns may adopt their own charters under amended Section 5 of Article 11 of the Constitution above referred to. In fact, the only authority granted in said amendment is to amend or adopt charters of such cities and towns, with no mention to independent school districts, which are expressly provided for in Section 5, Article 7, and Section 10, Article 11, of the Constitution, and no attempt has ever been made to so amend these last named articles so that the voters of a city or town could in any manner by charter or ordinance alter, repeal or amend the Constitution or general laws of the State upon the subject of independent school districts.

We are, therefore, of the opinion, and so advise you, that you have no authority, either under the amendment to Section 5, Article 7, of the Constitution, or the Home Rule Bill, to amend your charter with reference to the creation of your city as an independent school district, as is set out in Sections 56 and 57 at pages 265, Special Laws, Thirty-second Legislature, and that the city must operate under the general laws relating to independent districts, as set out in the act until the Legislature amends that portion of your charter, and that the Legislature alone has the authority to amend or repeal said portion.

With respect, I am

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

CITIES—HOME RULE ACT—EXTENSION OF TERRITORY.

Under the Home Rule Act cities of more than five thousand inhabitants may place anything in their charters not inconsistent with the Constitution of the State or with the general laws of the State.

Provisions having been made by the general laws of the State for the extension of city limits, any provision placed in a charter of a city inconsistent therewith would be null and void.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MARCH 5, 1914.

Hon. Brent C. Jackson, Assistant County Attorney, Denton, Texas.

DEAR SIR: Under date of February 9th, you submitted to this Department the following questions:

"The proposition is this: A city municipal corporation of over five thousand inhabitants desires to form a new charter under the Home Rule Act of the last Legislature. There is at present a commission appointed by the mayor engaged in the work of preparing this charter. It is proposed to extend the boundaries and limits of said city so as to include territory immediately adjacent thereto but not within the present city limits. The questions arising therefrom are as follows:

"First: Has the commission in making such charter the authority to define and fix the limits of said city so as to include territory not now within its limits?

"Second: If it has such authority, then may it include such adjacent territory by a vote had in the entire territory, that is, by vote of all qualified voters both within the present city limits together with those sought to be brought into the city?

"Third: In case the limits can be so extended, then will those so brought in be required to pay taxes assessed by the city within its limits, or will they be exempt from special school or poll taxes or any taxes that may have been voted upon the city by a vote of the people before acceptance of the charter as is proposed here? It is further provided in the charter that should the extension be illegal, then the present city limits shall constitute the limits of the city under the new charter. Under the contingency stated would the charter be regularly adopted as to the present limits?"

Replying thereto, beg to call your attention to Sec. 5, Art. 11, of our State Constitution, which section was adopted at an election held November 5, 1912:

"Cities having more than five thousand (5000) inhabitants may by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State; * * *"

Sec. 4 of the enabling act, putting into effect the above quoted section of the Constitution, passed at the regular session of the Thirty-third Legislature, provides:

"That by the provisions of this act it is contemplated to bestow upon any city adopting the charter or amendment hereunder the full power of local self-government, and among the other powers that may be exercised by any such city, the following are hereby enumerated for greater certainty:

"The creation of a commission, aldermanic or other form of government; the creation of offices, the manner and mode of selecting officers and prescribing their qualifications, duties, compensation and tenure of office.

"The power to fix the boundary limits of said city, to provide for the extension of said boundary limits and the annexation of additional territory lying adjacent to said city, according to such rules as may be provided by said charter."

If there were no limitations in the act itself or in the Constitution with respect to the power of a city chartered under said act, clearly the power to fix the boundary limits of said city, to provide for the extension of said boundary limits and the annexation of additional territory lying adjacent to said city, would be plenary; but the Constitution as well as Sec. 1 of the enabling act is a limitation upon the powers to be exercised by such city. By the express terms of both no charter or any ordinance passed under said charter shall contain any provision incon-

sistent with the Constitution of the State or of the general laws enacted by the Legislature of the State.

The question therefore is, do the general laws of the State make any provision for the extension of the boundaries of cities? If so, cities chartered under the act under consideration can not lawfully place in their charters any provision regulating the extension of their boundaries in conflict with the provisions of said general laws.

Chapter 1, Title 22, Revised Statutes of 1911, deals with the general provisions relating to cities. Article 781 of said chapter deals with the question of extending the boundary limits of cities. Said article provides as follows:

"Whenever a majority of the inhabitants qualified to vote for members of the State Legislature of any territory adjoining the limits of any city incorporated under, or accepting the provisions of, this title, to the extent of one-half mile in width, shall vote in favor of becoming a part of said city, any three of them may make affidavit to the fact, to be filed before the mayor, who shall certify the same to the city council of said city. The said city council may, by ordinance, receive them as a part of said city; from thenceforth the territory so received shall be a part of said city; and the inhabitants thereof shall be entitled to all the rights and privileges of other citizens, and bound by the acts and ordinances made in conformity thereto, and passed in pursuance of this title."

It is thus seen that in order for cities to extend their boundary limits it is necessary that the question be submitted to the qualified voters residing within the territory to be annexed, and if a majority of the qualified voters of said territory vote in favor of being annexed to the city, the same may be done by following the procedure set out in the above quoted article. There is no provision made in law, so far as we are aware, that would authorize cities to extend their limits without first submitting the question to the qualified voters of the territory to be annexed. Inasmuch as this provision is made by the general laws of the State, we are of the opinion that cities amending their charters under the Act of the Thirty-third Legislature, commonly known as the Home Rule Act, can not provide in their charters for the extension of their boundary limits in a manner inconsistent with the provisions of the above quoted statute. Such cities may place in their charters provisions regulating the taking in of additional territory, but such provisions must be in harmony with the general laws on this question. If in conflict, in our opinion they would be null and void. We do not believe it would be lawful for the commission appointed by your mayor now engaged in the work of preparing a new charter for your city to take in additional territory without first submitting the question to a vote of the qualified voters residing in the territory to be annexed.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

CONSTITUTIONAL LAW—LEGISLATURE—INDEPENDENT SCHOOL DISTRICTS—SCHOOL TAX—INDEBTEDNESS.

Legislature is without power, in the creation of an independent school district, to transfer indebtedness of city, incurred for school building purposes, to the independent school district, without a vote of the taxpayers of such school district.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JUNE 17, 1913.

Hon. C. E. Gilmore, Wills Point, Texas.

MY DEAR SIR: We have examined the record in the matter of Wills Point waterworks bonds and find the same correct, except in the following particular:

We notice that the statement of indebtedness of your city shows its only indebtedness to be city warrants for city scrip to the amount of \$2112, which indebtedness is due out of and incurred for the general fund of your city. However, there has been brought to our attention an Act of the Thirty-third Legislature, Senate Bill 396, incorporating the Wills Point Independent School District, with territory co-extensive with the city limits of the city of Wills Point, and attempting to transfer the indebtedness of the city of Wills Point, incurred for school purposes, to the Wills Point Independent School District. Neither the record nor said act of the Legislature discloses the amount of the indebtedness sought to be transferred to the independent school district, and inasmuch as your city is seeking to issue a series of bonds which will consume its entire taxing power, the question of the amount of the indebtedness attempted to be transferred by the act of the Legislature becomes a material one. We understand from your brother that this indebtedness amounts to the sum of \$10,500.

The act of the Legislature above referred to provides that the indebtedness of the city, incurred for school building purposes, shall be assumed by the independent school district without a vote of the qualified property taxpaying voters of the independent school district. We beg to call your attention to Article 7, Section 3 of the Constitution, which provides:

“* * * and the Legislature may authorize an additional ad valorem tax to be levied and collected within all school districts, heretofore formed or hereafter formed, for the further maintenance of public free schools, and the erection and equipment of school buildings therein, provided that a majority of the qualified property taxpaying voters of the district, voting at an election to be held for that purpose, shall vote such tax not to exceed in any one year 50 cents on the \$100 valuation of the property subject to taxation in such district,” etc.

This section of the Constitution expressly requires that no tax can be levied upon the school district except by a vote of the taxpayers within the district, and so much of the act of the Legislature incorporating the Wills Point Independent School District and attempting to transfer the bonded indebtedness of the city of Wills Point to the school district without such vote of the taxpayers thereof, we think, must be held to be a nullity; nor do we think that an election now held within the independent school district would satisfy the Constitution, or that said

portion of the act imposing this burden upon the school district is absolutely void.

In the case of *Cummings vs. Gaston*, 109 S. W., 477, which case arose out of an act of the Legislature creating the Bowie Independent School District, including the city of Bowie, Texas, with added territory, and the transferring of the pre-existing bonded indebtedness of the city of Bowie to the school district, thus making such indebtedness a charge against the taxpayers in the added territory, it was held that the Legislature had no such power, the court saying:

"It was clearly the intention of the Legislature to transfer this pre-existing bonded indebtedness of the city of Bowie, amounting to \$7500, to the inhabitants of the new independent school district, thus making it a charge upon the taxpayers, owners of property in the added territory, not originally liable for its payment. We are, therefore, of opinion that the Legislature in attempting to transfer this indebtedness to the inhabitants of the new district, without their consent, exceeded its power."

This case is on all fours with the case above. The city of Wills Point and the Wills Point Independent School District are two separate and distinct corporations, as much so as the city of Bowie and the Bowie Independent School District, and it can not be inferred from that decision, we think, that the court would have held that, had the limits of the city of Bowie and the Bowie Independent School District been co-extensive, its decision would have been different. For the very reason stated in the opinion, the court could not have held otherwise than that the tax could not be imposed upon the school district without a vote of the taxpayers thereof.

In the case of *Crabb vs. Celeste Independent School District*, 146 S. W., 528, the Supreme Court held that under Article 7, Section 3, of the Constitution, an independent school district could not levy a school tax upon the inhabitants of the added territory without a vote of the taxpayers residing therein; that where a power is expressly given by the Constitution, and the mode of its exercise is prescribed, such mode is exclusive. The court said:

"A careful review of all the authorities to which we have been cited reveals nothing that would demand or authorize this court to place a different construction upon Section 3, Article 7, of the Constitution, than that, where an independent school district votes a special tax, pursuant to the authority conferred by said section of the Constitution, and afterwards extends the boundaries of such district, the existing special tax so authorized cannot be levied and collected against the property in such extension until such assessment is authorized by a vote of the qualified taxpaying voters of the district as extended."

It will, therefore, be seen that the construction of both of our Courts of Civil Appeals and of the Supreme Court placed upon that section of the Constitution, is that no tax can be levied upon a school district until such tax has been voted by the taxpayers of such district.

Nor do we believe that the Legislature can interfere in a matter of private contract, affecting vested rights in property acquired through lawful means and by authority and sanction of law, and say to the holders of the city's obligations that they shall hereafter look to the independent

school district for the payment of their debt. However, upon this point we will take neither the time nor space to discuss it.

It is our conclusion that the Legislature was without authority to transfer the bonded indebtedness of the city of Wills Point, incurred for school building purposes, to the Wills Point Independent School District without a vote of the qualified property taxpayers of said district, and that so much of the act of the Legislature creating the Wills Point Independent School District as attempts to so transfer such city indebtedness, is void, and in determining the amount of bonds your city can issue, its pre-existing indebtedness must be taken into consideration and accounted for.

Yours very truly,

W. M. HARRIS,
Assistant Attorney General.

CONSTITUTIONAL LAW—INDEPENDENT SCHOOL DISTRICTS.

Article 16, Section 30a, of the Constitution, providing that the Legislature may prescribe a term of office of six years for boards of trustees of educational and other institutions of the State does not apply to boards of trustees of independent school districts; and the Act of the Thirty-third Legislature, Special Laws, Regular Session, Chapter 93, providing a six-year term of office for the board of trustees of the San Antonio Independent School District is not only void as to term of office of trustees, but the balance of said act is so inseparably connected with said provision that the whole act must fall.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, OCTOBER 24, 1913.

Hon. Martin J. Arnold, San Antonio, Texas.

MY DEAR SIR: The Department has received, examined and found regular the transcript of the proceedings had by the board of trustees of the San Antonio Independent School District in the matter of the issuance of \$390,000 worth of bonds sought to be issued by said district for the purpose of obtaining funds for the purchase of grounds for the public schools of said district and for constructing, remodeling, equipping and repairing public school buildings therein. We have also received the printed and executed bonds of the district in the said amount of \$300,000, which are proper in form and in accordance with the order of the board of trustees authorizing their issuance; but the Department declines to approve said bonds for the reasons hereinafter stated.

In this connection, we take occasion to reply to your communication of recent date, reply to which was deferred until such time as the transcript and bonds had been presented to the Department for approval. In said communication you ask our opinion on two questions, the answers to which the San Antonio Independent School District is vitally interested in.

The first question propounded therein is whether or not the added Section 30a of Article 16 of the Constitution, adopted November 5, 1912, is applicable to boards of trustees of independent school districts.

Said Section 30a of Article 16 of the Constitution, reads as follows:

"The Legislature may provide by law that the members of the Board of Regents of the State University and boards of trustees or managers of the educational, eleemosynary and penal institutions of the State, and such boards as have been, or may hereafter be established by law, may hold their respective offices for the term of six (6) years, one-third of the members of such boards to be elected or appointed for two (2) years in such manner as the Legislature may determine; vacancies in such offices to be filled as may be provided by law, and the Legislature shall enact suitable laws to give effect to this section."

It is our opinion that the language of said section of the Constitution:

"The Legislature may provide by law that the members of the Board of Regents of the State University and boards of trustees or managers of the educational, eleemosynary and penal institutions of the State,"

has reference only to State institutions. We are unable to discern any difference in meaning of the language "State institutions" and "institutions of the State." The section of the Constitution, in our opinion, has reference to State institutions as contradistinguished from local institutions, and in so far as said section is applicable to educational institutions, it has reference to "State educational institutions" as contradistinguished from "local school districts," and may be read thus:

"The Legislature may provide by law that the members of the Board of Regents of the State University and boards of trustees or managers of the educational * * * institutions of the State may hold their respective offices for the term of six years."

The language immediately following the language above quoted "and such boards as have been, or may hereafter be established by law," has reference to like boards or to other *State boards*, which may by the Legislature be created for the administration of the affairs of such State institutions. Clearly, in our opinion, the doctrine of *ejusdem generis* is applicable to the language of the section just referred to. See the cases of *Farmers & Mechanics National Bank vs. Hanks*, 137 S. W., 1124; *Ex parte Muckenfuss*, 107 S. W., 1131; *Lewis' Sutherland on Statutory Construction*, Sec. 422; 36 Cyc., 1119.

In the case of *Ex parte Muckenfuss*, 107 S. W., 1131, it was held that the words "other" or "any other," following an enumeration of particular classes, are to be read as "other such like" and to include only others of like kind or character. It is a rule often applied that the meaning of a doubtful word may be ascertained by reference to the meaning of the words associated with it.

In the case of *Farmers & Mechanics National Bank vs. Hanks*, *supra*, the court said:

"It is a prime rule of construction that where in a statute general words follow a designation of particular subjects the meaning of the general words will be restricted by the particular designation in such statute. This is known as the rule of *ejusdem generis*, and is a rule of almost universal application."

In said case last above quoted from, the following judicial definitions or statements of the rule are approved by the court:

"When general words follow an enumeration of particular things, such words must be held to include only such things or subjects as are of the same kind

as those specifically enumerated. 'The rule is that where words of a particular description in a statute are followed by general words that are not so specific and limited, unless there be a clear manifestation of a contrary purpose, the general words are to be construed as applicable to persons or things or cases of like kind to those designated by the particular words.' 'It is a principle of statutory construction everywhere recognized and acted upon, not only with respect to penal statutes, but to those affecting only civil rights and duties, that where words particularly designating specific acts or things are followed by and associated with words of general import, comprehensively designating acts or things, the latter are generally to be regarded as comprehending only matters of the same kind or class as those particularly stated. They are to be deemed to have been used, not in the broad sense which they might bear if standing alone, but as related to the words of more definite and particular meaning with which they are associated.' The general rule is supported by numerous cases. Lewis' Sutherland on Statutory Construction, p. 422. The same general doctrine, perhaps more particularly applicable to the case in hand, is thus stated in Endlich on Interpretation of Statutes, p. 568: 'But the general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words; or, in other words, as comprehending only things of the same kind as those designated by them, unless, of course, there be something to show that a wider sense was included.'

"The same rule is also thus clearly stated in 36 Cyc., p. 119: 'By the rule of construction known as *ejusdem generis*, where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The particular words are presumed to describe certain species and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that, if the Legislature had intended the general words to be used in their unrestricted sense, they would have made no mention of the particular classes.'

The above construction is the construction placed upon the language of said Section 30a by the Legislature of this State in the enactment of Chapter 103 of the General Laws of the Regular Session of the Thirty-third Legislature, putting into effect this section of the Constitution. Said chapter provides for the holding of office by the boards of trustees and governing boards of the various State institutions, naming them, as follows: University of Texas, Agricultural and Mechanical College of Texas, the Normal Colleges, the College of Industrial Arts for Women, the Blind Institute, the Deaf and Dumb Institute, the Deaf, Dumb and Blind Institute for Colored Youths, the Confederate Home, the Confederate Woman's Home, the State Asylums for the Insane, the State Epileptic Colony, and the State Orphan Home.

While the Constitution and laws of this State provide for the formation of independent school districts and for public free schools throughout the State, and the levy of taxes by such school districts for their maintenance, and provides also for the distribution of the State available school fund among such districts, as suggested in your letter, as a part of the State system of free schools, yet it will be remembered that such districts are governed by local authorities, the taxes are local taxes and the fact that the State distributes to such school districts their pro rata part of the State available school fund would not, in our opinion, render them "*State educational institutions.*" It will also be remembered that the very article of the Constitution which authorizes the formation of independent school districts by special law denominates such laws as "local laws."

It might be that the courts of this State would resort to the journals of the Legislature to determine the intention of that body in the submission of the amendment to the people, and it would possibly also take judicial notice of leading issues in a State political campaign wherein the candidate of each of the opposing factions advocated the term of six years for the board of all State institutions.

It will suffice to say that the Department has heretofore in many instances held that said Section 30a of Article 16 of the Constitution has reference to the governing boards and boards of trustees of the various *State institutions* and not to local boards.

By an inspection of the local and special laws of the Regular Session of the Thirty-third Legislature, Chapter 93 thereof, we find that Section 2 of the act creating the San Antonio Independent School District reads as follows:

"Sec. 2. From and after the passage of this act, said San Antonio Independent School District shall be under the management and control of nine trustees, who shall be called the San Antonio School Board. On the second Tuesday in April, 1913, an election shall be held by the qualified voters of said district for the purpose of electing nine trustees.

"Three of said trustees elected in April, 1913, shall hold their terms of office for six years and until their successors are elected and qualified, and three of said trustees elected in April, 1913, shall hold their offices for the term of four years, and three of said trustees elected in April, 1913, shall hold their offices for the term of two years. When elected, said nine trustees elected in April, 1913, shall determine by lot among themselves which three shall hold their terms of office for six years, and which three of them shall hold their terms of office for four years, and which three of them shall hold their office for two years. Every two years an election shall be held by the qualified voters in said independent school district for the purpose of electing three trustees and the terms of said trustees, when elected, shall be six years and until their successors shall have been elected and shall have qualified."

It appears from your letter that the validity of said bonds has been questioned by Judge J. T. Sluder of your city in an opinion to his clients, a carbon copy of which opinion you attach to your letter, and you desire our opinion as to the validity of said law and the bonds sought to be issued by the district.

If our first premise is correct—that Section 30a of the Constitution giving to the boards therein referred to six-year terms of office does not apply to board of trustees of independent school districts—then it would appear that the act incorporating the San Antonio Independent School District is invalid and the bonds could not be approved.

So much of Article 16, Section 30, of the Constitution, as is pertinent to the question under discussion, reads as follows:

"The duration of all offices not fixed by this Constitution shall never exceed two years."

The position of school trustees is an office within the meaning of the above quoted section of the Constitution.

Kimbrough vs. Barnett, 93 Texas, 301, 55 S. W., 120.

Rowan vs. King, 55 S. W., 123.

And the term of office of school trustees is not fixed elsewhere in the Constitution, and, unless it is so fixed by the added Section 30a of Article 16, such terms of office would have to be fixed by the Legislature in

accordance with Article 16, Section 30, so as to limit the term of office to not longer than two years.

As a matter of first impression, we were inclined to the opinion that the Constitution should be read into the act and that an attempt to evade the Constitution would not be attributed to the Legislature, and by such construction the trustees would hold their offices for the length of time prescribed by the Constitution, and no longer. See the case of Callahan vs. McGown, 90 S. W., 322. In that case it was held by the Court of Civil Appeals, Fifth District, that the provision of a city charter placing the police and fire departments under a civil service commission and declaring that the appointees thereof should hold their positions during good behavior was not invalid as violative of the Constitution, Article 16, Section 30, providing that the duration of offices not fixed by the Constitution shall never exceed two years, but that the provision meant that the appointee should hold office during good behavior, not exceeding the constitutional limit.

But the Supreme Court of this State, in the case of Kimbrough vs. Barnett, 93 Texas, 301, 55 S. W., 120, held that an act of the Legislature providing for a term of office of four years for trustees of an independent school district, being violative of Article 16, Section 30, of the Constitution, limiting the duration of offices to two years, was void; that the whole of the act, being so dependent upon and inseparably connected with the provisions of the act giving to school trustees a four-year term, and providing for alternate elections, rendered the entire act ineffectual. This decision was rendered by the Supreme Court on February 5, 1900.

At a subsequent date this same question reached the Supreme Court of this State, on certified question, and it was again held, as in the case of *Ex parte Barnett*. (See *Rowan vs. King*, 56 S. W., 104.)

It will, therefore, be seen that each time that this question has reached the Supreme Court of the State it has held adversely to the authority of the Legislature to prescribe a term of office for school trustees greater than the two-year term prescribed by the Constitution, and that such an act of the Legislature is ineffectual, not only as affecting the term of office of trustee, but that the act as a whole must fall. In view of these decisions of the Supreme Court, and for the reasons above stated, the Department is disposed to hold that said act creating the San Antonio Independent School District void as a whole, and declines to approve the bonds voted by it.

However, we assure the board of trustees of the district of our disposition to give them every opportunity available for an early test of the question should they be disposed to do so.

Yours very truly,

W. M. HARRIS,
Assistant Attorney General.

CITIES AND TOWNS—ADDITIONAL TERRITORY.

(Articles of Statute construed: Articles 777, 781, 1035, R. S., 1911.)

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, FEBRUARY 21, 1913.

Mr. A. C. Dunn, City Secretary, Rosebud, Texas.

DEAR SIR: This Department is in receipt of your favor of the 19th inst., as follows:

- "The people living just outside our present city limits in a strip 160 feet wide, and running parallel with the incorporation lines for about 750 feet want to come into the city limits; can they be admitted or not? We have been informed that no section less than one-half mile wide can be admitted. Our town is incorporated under the general incorporation laws of the State."

Replying thereto, beg to state that whether or not this territory can be admitted depends upon whether or not Rosebud is incorporated under the cities and towns act or the town and village act.

The Revised Statutes of 1911, Article 781, under the head of cities and towns, provides:

"Whenever a majority of the inhabitants qualified to vote for members of the State Legislature or any territory adjoining the limits of any city incorporated under, or accepting the provisions of, this title, to the extent of one-half mile in width, shall vote in favor of becoming a part of said city, any three of them may make affidavit to the fact, to be filed before the mayor, who shall certify the same to the city council of said city. The city council may, by ordinance, receive them as a part of said city. * * *"

Under Chapter 14 of Title 22, which chapter relates to towns and villages, Article 1035 thereunder provides:

"When ever a majority of the inhabitants who are qualified voters of any territory adjoining the limits of any town or village, incorporated or hereafter incorporated under the provisions of this chapter, shall vote in favor of becoming a part of said town or village, any three of them may make affidavit to such fact, and file such affidavit with the mayor of said town or village, and the mayor shall certify same to the council of said town or village. Thereupon, such council may, by ordinance, receive such inhabitants as a part of said town or village; thenceforth the territory so received shall be a part of said town or village, and the inhabitants shall be entitled to all the rights and privileges of other citizens and bound by all the acts and ordinances made in conformity thereto, and passed in pursuance of this chapter; provided, however, that the area of no town or village shall ever exceed that of cities or towns, as provided for in Article 777, Chapter 1, Title 22, Revised Statutes of Texas."

Article 777, Revised Statutes, provides:

"No city or town in this State shall be hereafter incorporated under the provisions of the general charter for cities and towns contained in Title 22 of the Revised Civil Statutes of this State, with a superficial area of more than two square miles, when such town or city has less than two thousand inhabitants, nor more than four square miles, when such city or town has more than two thousand and less than five thousand inhabitants, nor more than nine square miles, when such city or town has more than five and less than ten thousand inhabitants. * * *"

Article 781, quoted above, has been construed in the case of the City

of East Dallas vs. The State, 11 S. W., 1030, and particularly that portion thereof reading as follows: "To the extent of one-half mile in width" means that the territory to be annexed may be less than but shall not exceed one-half mile in width.

You will note from the above that if your town is incorporated under cities and towns that the limitations upon additional territory will be found in Article 781, which provides that additional territory shall not exceed, as construed in the case cited, one-half mile in width, while if your town is incorporated under towns and villages the only limitation placed upon the extent of new territory taken in will be that the area of Rosebud shall not exceed that as laid down in Article 777, as applied to the number of inhabitants within your town.

Respectfully,

C. W. TAYLOR,
Assistant Attorney General.

AUTOMOBILES—CITIES AND TOWNS.

1. Article 815, Revised Penal Code, 1911, relating to speed of automobiles, is valid.
2. Until a city prescribes the built-up portion of the city Article 815 has no application.
3. Ordinance of city prescribing a penalty different from that prescribed in Article 815 is unenforceable and can not be held to meet the requirements of said article relating to fixing of limits of built-up portion of the city.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MAY 17, 1913.

Hon. L. J. Truett, County Attorney, McKinney, Texas.

DEAR SIR: We have your favor of May 14th, which, after quoting Article 815, Revised Criminal Statutes, 1911, then reads as follows:

"The municipal officers of the city of McKinney have never done anything toward fixing the limits of "the built-up portions" of the city, as suggested in the above article, further than the adoption of an ordinance regulating the speed of automobiles, etc. Within the corporate limits of the city, that portion of the ordinance being as follows:

"That it shall be unlawful for any person to ride or drive any automobile, motor car, or any kind of machine or vehicle run by any kind of propelling power at a faster rate of speed than eight (8) miles per hour in, along or across any public square, street or alley within the corporate limits of the city of McKinney."

"The penalty for a violation of the State statute above quoted is a fine of not less than five nor more than one hundred dollars, while the penalty provided by the ordinance above quoted for a violation of its provisions is a fine of not less than five nor more than two hundred.

"I desire an opinion from your Department in reference to the validity of the above statute and ordinance.

"1. Is that portion of Article 815, inhibiting a greater rate of speed than eight miles an hour within the built-up portions of a city, town or village, valid and enforceable under the Constitution and laws of Texas? I cite you to *Jannin v. State*, 51 S. W., 1127.

"2. Is that portion of Article 815, inhibiting a greater rate of speed than eight miles an hour within the built-up portions of a city, town or village, en-

forcible where no action has been taken by the municipal authorities of such city, town or village in the matter of fixing the limits of the built-up portions of the city, town or village, as provided in said article?

"3. Does the adoption of the above ordinance by the city of McKinney meet the requirements of Article 815 as to fixing the limits of the built-up portions of the city, as provided in the article?

"4. In the event that the 'eight-mile-an-hour' part of Article 815 is invalid under the Constitution and laws of Texas, then is the city ordinance valid and enforceable in the city court of the city of McKinney?

"On account of the confusion prevailing with reference to the interpretation and construction of Article 815, I shall be obliged if you will give me your opinion on the above as soon as you can do so."

Replying thereto, and answering your inquiries in the order named, we beg to say:

1. It is a well recognized principle of the law of the State that the Legislature is the lawmaking power, and that it cannot delegate that authority, nor can it grant the power to any person to make or unmake a law, or the right to say whether or not a law shall take effect and be in force. This doctrine is well established in the case of *Jannin vs. State*, 51 S. W., 1127, cited by you. This case, however, was where the law made it an offense for persons other than agents of railway companies to sell tickets, provided the railway company should have printed on such ticket that it was a penal offense to sell same, thereby leaving it optional with the railway company as to whether or not they would create a criminal offense, and on account of such the court held the law invalid. The same objection was applicable to the statute making it a penal offense for one to defraud a keeper of a boarding house or hotel, provided such keeper should have posted a copy of the law, etc., thereby placing the effect of the penal law within the option of the keeper of such boarding house or hotel.

The case presented by you is essentially different from the facts in the *Jannin* case. In this instance it is not left to the option of anyone to say whether or not a penal law should be in effect or to make the doing of any particular thing penal, but the authority here granted is to make and define a certain district within which an act of the Legislature carrying penalties for its violation shall become operative, and is analogous to local option as applied to sale of intoxicants and stock law precincts. There is a distinction to be made between authorizing the creation of a district within which the law may operate, or authorizing the appointment of an officer to enforce the law, and granting the option to any particular person to create a penal offense. In the first instance the law is in general effect throughout all the State for the benefit of such towns or cities, the authorities of which may see fit to establish a district within which the same may operate. The action of the city authorities is prescribing the district by fixing the limits of the built up portion of the town; is not the making of a law nor creating a penal offense, but is the creation of a district within which an already valid law may become operative, and in no way affects the law as it stands. The law as passed by the Legislature is perfect in its terms and does not need the aid or assistance of anyone to make it effective in so far as its terms are concerned, but merely requires the creation of a district within which to operate as it stands.

Stanfield vs. State, 83 Texas, 317.

Johnson vs. Martin, 75 Texas, 33.

This section of the law was before the court in the case of Byrd vs. State, 139 S. W., 620, and was upheld as valid, and while the particular clause of the section under discussion here was not directly considered by the court the entire section generally was considered as a whole and held valid.

You are, therefore, advised that, in the opinion of this Department, the section quoted is valid and enforceable.

2. Answering your second question, we advise that, as said in answer to No. 1, above, the act of the municipal officers in fixing the boundaries of the built up portion of the town creates the district within which the law may operate, and until such district is created and the limits thereof fixed by the municipal authorities, the law is in abeyance so far as that particular territory is concerned, although in existence and ready to operate when such district may be created.

You are, therefore, advised that, until such district is created as prescribed by law, such law has no application and is not enforceable.

3. The answer to your third question necessarily involves the answer to your fourth question; so we combine the two in one.

The penalty prescribed by Article 820, Criminal Statutes, for a violation of Article 815, is a fine of not less than five dollars nor more than *one hundred dollars*. You state that the penalty prescribed for a violation of your city ordinance is a fine of not less than five nor more than *two hundred dollars*. Thus it will be seen there is a conflict in the penalty prescribed by the State law and the ordinance of the city. While a city may adopt an ordinance making penal the same offense defined in a State law, yet it has no authority to enact an ordinance, the penalty for the violation of which is greater or less than the penalty prescribed by the State law, and any ordinance coming within this rule is void.

Ex parte McHenry, 103 S. W., 390, and cases cited therein.

The penalty prescribed by your ordinance being less than that prescribed by the State law, the ordinance is void, and being void could not be valid for any purpose, and, therefore, could not be held to be a fixing of the limits of the built up portions of your city.

You are, therefore, advised that the ordinance of your city is invalid and unenforceable in the city court of your city, and that being void it cannot be held to meet the requirements of Article 815, Criminal Statutes, relating to the fixing of limits of the built up section of the city, if indeed it could be held to do so if valid for other purposes.

The effect of the above holdings is that the municipal officers of your city not having fixed the limits of the built up portions thereof, that section prohibiting the running of automobiles in such city at a greater rate of speed than eight miles per hour is not operative, and the city having no valid ordinance upon the subject the only provision of the law applicable to the question is that of the general law prohibiting the driving of automobiles or motor vehicles upon any road, street or driveway at a greater rate of speed than eighteen miles an hour, which will be found in the first clause of Article 815, Penal Code.

Of course, corporation courts being courts of concurrent jurisdiction

with those of justice of the peace within the limits of the city, your corporation court could entertain jurisdiction of causes arising under the first clause of Article 815, Penal Code, above referred to, within the limits of the city.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OFFICERS—CITY MARSHAL—TAX ASSESSOR AND COLLECTOR.

Same person can not hold both offices of assessor and collector of taxes.
Office of city marshal can not be abolished during term of present incumbent.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 16, 1913.

Mr. Jas. C. Perry, City Attorney, Palacios, Texas.

DEAR SIR: This Department is in receipt of your favor, in which you say your town is located within an independent school district, and that heretofore taxes have been assessed and collected by different parties, for the city and for the independent school district; you state that the city marshal has had the collection of your taxes, and you wish to know if you can abolish the office of city marshal, and have your city taxes and the taxes for the independent school district assessed and collected by the same party.

Replying thereto, we beg to say that, under the provisions of Article 809 of the Revised Civil Statutes, 1911, cities of less than 3000 may, by ordinance, abolish the office of city marshal; provided, in the same ordinance, they confer the duties of the city marshal upon any peace officer of said county. But this article further provides that when a city marshal has been elected by the people he shall not be removed during his term of office under the provisions of that article.

It would, therefore, be the opinion of this Department that you could not, during the term of the city marshal to which he was elected, abolish the office.

Replying further to your interrogatory, we beg to say that the same party could not act as assessor and collector for both the city and the independent school district, for the reason that it would be a violation of Section 40 of Article 16, which provides:

"No person shall hold or exercise 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."

And, as the office of tax assessor and collector is not excepted from the provisions of the Constitution, the same person cannot hold both offices.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

CORPORATION COURTS—CASES APPEALED—COSTS.

1. In cases appealed from corporation courts where the conviction is had in the court to which appeal is taken, and the defendant pays fine and costs to county clerk or sheriff, said officer or officers, would be entitled to their commissions on the fine, or judgment, as if the cause had originated in their court.

2. If defendant fails to pay fine and costs, or any part thereof, county clerk should issue commitment and the balance when collected should be paid officer entitled to receive same except fine and trial fee which should be turned into county treasury, less officer's commission for collection.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 20, 1913.

Hon. Hughes Oliver, City Auditor, Dallas, Texas.

DEAR SIR: We thank you very much for your complimentary remarks regarding the Attorney General's Department, and assure you that we are endeavoring to place the Department upon a plane so that it can be the greatest service to the people.

We beg to answer your several questions as follows:

1. In cases appealed from corporation courts where the conviction is had in the court to which the appeal is taken, and the defendant pays fine and costs to the county clerk or sheriff, the said officer, or officers, would be entitled to their commissions on the fine, or judgment, just as if the cause had originated in their said court, or the court of which they are officers. The officers' cost accruing while said cause was in the corporation court belongs to the officer performing the work, with the exception of the city attorney's fee, which would belong to the county attorney, unless upon agreement he surrenders it to the city attorney. In other words, to make the case plain, I will state a hypothetical case, as follows: "A" is fined \$1.00 in the corporation court for drunkenness—the cost is taxed as follows:

Recorder's cost.....	\$ 1 70
Police	2 80
Witness fees	6 00
Fine	1 00
City attorney	10 00

Total.....\$21 50

"A" appeals his case to the county court, and is there convicted and fined \$10.00. The clerk should tax the cost as follows:

Recorder's cost.....	\$ 1 70
Police	2 80
Witness fees in corporation court.....	6 00

) Total\$10 50

In addition to this should be added the cost in county court. Suppose the sheriff summons one more witness:

Sheriff fees	\$ 0.50
County clerk	1 50
Trial fee	5 00
County attorney fee.....	10 00
Fine	10 00
	<hr/>
Total	\$37 50

Of this sum each officer would be permitted to collect his fee except the city attorney. The city attorney's fee can only be once charged, and, the final trial being had by the county attorney, he would be entitled to the fee. The \$1.00 fine imposed in the recorder's court cannot be collected, for the final judgment was for \$10 instead of \$1.00.

Now, answering your second inquiry, should the defendant fail to pay this fine, and the cost, or any part of same, the county clerk should issue commitment, and the balance when collected should be paid to the officer entitled to receive same, except the fine and trial fee, which should be turned into the treasury of the county, less, of course, the officer's commission for collection.

Your third inquiry is answered above. Article 921, R. S., 1911, provides as follows:

"Appeals and judgments rendered by such corporation courts shall be heard by the county court, except in cases where the county court has no jurisdiction, in which counties such appeals shall be heard by the district courts of such counties, unless in such county there is criminal district court, in which case the appeal shall be from the corporation courts to the said criminal district court; and, in all such appeals to such county court, district court or criminal court, the trial shall be de novo, the same as if the prosecution had been originally commenced in that court. Said appeals shall be governed by the rules of practice and procedure for appeals from justices' courts to the county court, as far as the same may be applicable."

It will be readily seen that this article is ample authority for our position in this matter.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

ORDINANCE OF CITY COUNCIL—PUBLICATION.

The requirement in Section 2 of Chapter 147, Acts of the Thirty-third Legislature, that ordinances submitting an amendment or amendments to city voters shall not be submitted until twenty days notice has been given by publication for ten days, is complied with by publication once each week for two weeks in a city or town having only a weekly paper.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, SEPTEMBER 20, 1913.

Hon. Robert L. Cole, Houston, Texas.

DEAR SIR: The Attorney General is in receipt of your favor of September 19th, calling attention to the latter provision of Section 2 of

Chapter 147 of the General Laws of the Thirty-third Legislature, which reads as follows:

"Provided that no ordinance shall be passed submitting an amendment or amendments until twenty days notice has been given of such intention by publication for ten days in some newspaper published in said city. By twenty days is meant from the first date said notice is published."

It appears that there is no daily newspaper published in Houston Heights, and that the only paper published therein is a weekly issued on Friday of each week. You state that there is an uncertainty in the minds of your people as to whether or not a publication of an ordinance passed by the city council of the city of Houston Heights in the weekly paper should be made for two weeks or whether you should attempt to comply literally with the above quoted act and publish such ordinance for ten consecutive times in the issues of this paper, which would necessitate a publication of ten weeks, as the paper is published only one day in the week.

It is not the custom of this Department to reply to inquiries from city officials, nor in fact under the law are we required to do so; however, as this is a matter of general public importance, important not only to the city of Houston Heights, but also to all other cities in the State, we will answer your inquiry in the hope that it will be of service to you as well as serve as general information for a large class of people throughout the State.

The authorities cited by you, it seems to us, are amply sufficient to establish the contention made by you, that a publication in your weekly newspaper one time for two consecutive weeks will answer the requirements of this statute, and, for the purpose of this opinion, we take the liberty of quoting from your letter that quotation from the case of *Smith vs. Atlanta*, 51 S. E., 741, which reads as follows:

"The case turns upon the proper construction to be placed upon the words 'at least as many as ten days before the adoption of such ordinance.' It is said that the use of the word 'many' carries with it the idea of continuous publications as to the days, whereas if the word 'much' had been used, a different construction might have been placed upon the provision. We can not concur in this view. The purpose of the charter was to give notice to those interested in the passage of the ordinance at least as many as ten days before it was passed, that such an ordinance was under consideration. In other words, the ten days was the time the party was allowed to investigate the matter after it was brought to his knowledge that a proceeding affecting his property would be passed upon by the city authorities. He was entitled to ten days' notice before the action was taken; but, he was not entitled to notice every day for ten days."

We also adopt from your letter the quotation from 21 Am. and Eng. Ency. of Law, page 973, as follows:

"A requirement that an ordinance shall be published for a certain length of time is not usually construed to mean that it shall be published daily for that length of time, but it must be published in every issue of the paper selected during such period."

In addition to this quotation, we will cite the authorities cited: *Richter vs. Harper*, 95 Mich., 221.

State vs. Hardy, 7 Neb., 377.

Lawson vs. Gibson, 18 Neb., 137.

Hull vs. Chicago, etc., Ry. Co., 21 Neb., 371.

Union Pac. Ry. Co. vs. McNally, 54 Neb., 112.

Union Pac. Ry. Co. vs. Montgomery, 49 Neb., 429.

Hoboken vs. Greer, N. J. L., 265.

The purpose of publication of an ordinance before it shall become a law is to advise the people of the contents of the same, but it is not incumbent upon the city to keep such ordinance continuously before the eyes of the public. A publication for one time, provided that one time is for the sufficient length of time prior to the taking effect of the ordinance to meet the requirements of the statute, would be sufficient unless the statute should by express terms provide that publication should be made upon each day for a certain number of consecutive days.

When the method of publishing the ordinance is specified in the statute or charter, a substantial compliance with that method is essential. A municipal charter required every ordinance to be published for the space of twenty days in at least one newspaper before it could go into effect, and it was held that an ordinance would go into effect in twenty days after its publication in the first number of the paper; that twenty days need not intervene between the first and the last insertion; that it is clearly sufficient if it be published in each number of the paper issued within the twenty days, and probably sufficient if there is but one insertion twenty days after which the ordinance will go into effect.

Dillon on Municipal Corporations, Sec. 605.

When the statute required that ordinances should be published for at least one week in some newspaper published in the city, it was held that publication for one day in a daily newspaper is not sufficient; it should be published in each issue thereof for one week.

Union Pac. Ry. Co. vs. Montgomery, 49 Neb., 429.

Union Pac. Ry. Co. vs. McNally, 84 Neb., 112.

But if the newspaper selected is only published weekly, then it has been held that one insertion is sufficient under this statute.

State vs. Hardy, 7 Neb., 377.

Union Pac. Ry. Co. vs. Montgomery, 49 Neb., 429.

In the case of State vs. Hardy, above cited, the city council of the city of Lincoln had enacted an ordinance placing the license tax for the sale of malt, spirituous and vinous liquors at one thousand dollars per annum and repealing all ordinances theretofore passed, under which former ordinances a tax of \$325 had been levied and collected. The relator in that case tendered \$325 in payment for a license and submitted that the ordinance levying a one thousand license tax was void for the alleged reason that the same was not published as required by law for the period of one week within one month after the same purports to have been passed. The court in that case said:

"It is admitted that there was one publication of the ordinance in a newspaper published within the time required. This publication fills the requirement of the law."

The case of Union Pacific Ry. Co. vs. Montgomery, above cited, was one where the city council of the city of South Omaha had enacted an

ordinance limiting the rate of speed at which railway trains might be operated within the city. The railway company in this case objected to the introduction of the ordinance; among other grounds, for the reason that it was not duly published. The proof of the publication of this ordinance was made by the city clerk in his certificate attached thereto, as follows:

"* * * That said ordinance was published in the South Omaha Daily Stockman, a newspaper printed and published in the City of South Omaha, Nebraska, on the 5th day of September, A. D. 1888."

"By Section 51, Chapter 14, Article 2, of the compiled statutes, relating to cities of the second class having more than 5000 and less than 10,000 inhabitants, it is provided that 'all ordinances of a general nature shall, within one month after they are passed, be published in some newspaper published within the city, or in pamphlet form, to be distributed or sold as may be provided by ordinance; and every ordinance fixing a penalty or forfeiture for its violation shall, before the same takes effect, be published for at least one week in the manner above prescribed.'"

The court said:

"That the passage and approval of the ordinance in question was sufficiently verified by the certificate of the city clerk given above is not controverted, but it is insisted that such certificate does not disclose that the ordinance was published for the time required by said Section 51; and we think this contention is well founded. The ordinance fixes a penalty for its violation, and, under the provisions of said Section 51, such an ordinance must be published at least for one week before it could become effective. The certificate of the clerk shows that it was published but once in a daily paper. The publication having been made in a daily paper, it should have been continued in each issue thereof for one week. One insertion alone did not meet the requirements of the statute. (Lawson vs. Gibson, 18 Neb., 137; Hull vs. Chicago, B. & Q. R. Co., 21 Neb., 371.) Had the paper in question been published weekly, then one insertion therein, doubtless, would have been sufficient. (State vs. Herdy, 7 Neb., 377.)"

"We are asked to indulge the presumption that the Daily Stockman, in which the ordinance was published, was a weekly newspaper. This we can not do, since its name implies that it was a daily and not a weekly publication."

"It is urged that the same presumption prevails in favor of the validity of an ordinance that there is in favor of the validity of a judgment or of an act of the Legislature. Grant it. But it will not be presumed that a legislative enactment was duly passed or proved when the contrary appears. So we can not presume that this ordinance was published in the mode provided by law, when it is manifest from the certificate of the city clerk that the opposite is true."

In the above case it will be seen that the paper in which the publication was made was a daily paper, and the court held in that case that if the publication was made in a daily paper it should have been continued in each issue thereof for the length of time required by law, and that one insertion alone did not meet the requirement; but this case further holds that had the paper in question been published weekly, then one insertion therein doubtless would have been sufficient.

It is perfectly clear to our minds that the statute in question here intends that the publication of such ordinance shall be commenced twenty days prior to the passage thereof, and that the publication in the paper shall continue for ten days, but we cannot read into this article that it requires of any city council the impossible task of pub-

lishing an ordinance in a daily paper within said city for ten consecutive days where there is no daily paper published therein.

Commonwealth vs. Allen, 89 N. E., 918.

If there was a daily paper published in the city of Houston Heights, then we believe it would be incumbent upon the city council to publish such ordinance for ten consecutive days in such daily paper. We make this deduction from the peculiar wording of the statute. It is provided that the ordinance "shall not be passed until twenty days' notice has been given by publication for ten days in some newspaper published in the city," and then provides that by twenty days is meant from the first date said notice is published.

Taking the two clauses together, we construe it to mean that the ordinance shall not be passed until twenty days after the day of the first publication, and that such publication shall be continued for ten days; but, as above said, the law does not require an impossible task, and we do not feel constrained to hold that in a city where the only paper or papers published were issued but upon one day during the week that this statute would require ten publications in a weekly paper, thereby causing the publication to run for ten consecutive weeks, for in a case of that character then the ordinance could not be passed twenty days after the first insertion of the published notice. It is clear that the ordinance may be passed twenty days after the first insertion of the notice in the newspaper, and, if the rule were adopted requiring ten insertions of the notice, then this provision of the statute could not be taken advantage of, but the publication of the ordinance would be delayed for ten weeks, and, as above said, we do not think any such interpretation could be placed upon this statute, nor was such contemplated by the Legislature enacting the same.

We, therefore, beg to advise that in our opinion the requirement of the statute would be complied with by a publication of your ordinance in the weekly paper for two successive weeks, and that the ordinance could be passed by the council after the expiration of twenty days from the date of the first publication.

Thanking you on behalf of this Department for the very able manner in which you have submitted your question—you have briefed it carefully and given us your views upon the subject, and we are glad that our further investigation has led us to agree with you in your interpretation of the law—I am, with great respect,

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

RESIDENCE—PARTY RESIDING JUST WITHOUT CITY LIMITS NOT ELIGIBLE TO RUN FOR AND HOLD OFFICE.

A party whose actual place of abode—residence—is outside the city limits, although a part of his land on which the residence is located may be within such city limits, would not be a qualified voter in a city election; nor would he be eligible to the office of mayor of such city.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 12, 1913.

Hon. Sam R. Sayers, County Attorney, Lufkin, Texas.

DEAR SIR: This Department is in receipt of your favor of March 3, in which you ask if a citizen who is a "liner," that is, one line of the city boundary runs through the lot on which his house is located, and this party has been voting and paying a city poll tax, and now he offers for mayor of the city of Lufkin, the question is raised that he cannot act because he is not wholly within the city, and whether in the opinion of this Department he would be eligible to that office.

Replying thereto, beg to say that Article 792 of the Revised Statutes of 1911 provides in substance that no person shall be elected mayor unless he possesses the qualifications of an elector and shall have resided twelve months next preceding the election within the limits of the city.

We understand from your letter that the boundary line of the city runs through the yard of the prospective candidate for mayor. You do not state whether the line runs so as to include the residence within the limits of the city, but we assume from the tenor of your letter that the actual residence occupied by the prospective candidate is without the city boundaries, and that a portion of his yard lies within the city boundary. In the opinion of this Department, if the above assumption is correct, the party would be as much a foreigner to the city as though the lines did not touch his property, and the fact that he may have heretofore paid his poll tax in the city and has other property wholly within the city and pays his taxes thereon would not aid him any, and unless he so resided within the city limits for twelve months next preceding the election, he would not in the opinion of this Department be eligible to the office of mayor. Again, if he does not reside within the city, he is not a qualified voter within the city. This answers your first question.

It is, therefore, the opinion of this office that a party residing as above indicated would not be a qualified voter; neither would he be eligible to the office of mayor of your city.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

EMINENT DOMAIN—MUNICIPAL CORPORATIONS—PUBLIC HIGHWAYS.

1. The power of eminent domain may be delegated by a State to a municipal corporation.

2. A municipal corporation may condemn property already devoted to public use when the substituted use would be of paramount importance to the public and can be attained in no other practical way.

3. If a municipal corporation condemns the public highway over which a county has jurisdiction, the measure of damage would be the reasonable amount it would take to procure another highway in the place of the one taken and to put the same in as good condition as the one taken.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, DECEMBER 11, 1913.

Hon. John W. Baskin, County Attorney, Fort Worth, Texas.

DEAR SIR: Under date of December 4, 1913, we have the following communication from you:

"I write you for the purpose of obtaining an opinion from your Department as to a controversy existing between the city of Fort Worth and Tarrant county.

"The City of Fort Worth is engaged in the construction of a large reservoir on the west fork of the Trinity river about eight or nine miles west of the City of Fort Worth. When this reservoir is completed it will probably cover some five or six thousand acres of land and extend up the west fork of the river some ten or twelve miles, and when so completed and filled with water it will put out of commission what is known as the Nine Mile Bridge northwest of the City of Fort Worth, being on one of the public roads of Tarrant county crossing the West Fork river. The original cost of this bridge was probably about \$2000 and would now be worth probably twelve to fifteen hundred dollars. When the reservoir is filled it will submerge several hundred feet of the roadway adjacent to the above named bridge.

"The City of Fort Worth is operating under a special charter passed by the Thirty-first Legislature of the State of Texas, and became a law on the 10th day of March, 1909. Under this charter the city is given the right and power to provide the city with water and for this purpose make, establish, regulate and maintain public wells, pumps, artesian wells, cisterns, and reservoirs, etc., and in addition to the above it is given the express authority 'to pass ordinances for the condemnation of property for the purpose of establishing, enlarging and maintaining a system of water works, whether within or without the limits of such city, conforming the mode and manner of the same as far as applicable to the rules now prescribed for cities and towns for the general laws of the State in the condemnation of property for the construction of sewers or sewerage systems.'

"It will be necessary for the city to flood this roadway and bridge in the construction and maintenance of the aforesaid reservoir, which is being constructed by the city for the purpose of furnishing an adequate water supply to said city and its inhabitants.

"The City of Fort Worth's contention and position on this matter is that the city has the right to condemn this bridge and roadway and pay the county a reasonable cash market value for the property taken as provided for in the civil statutes on the question of condemnation and that the city can not be required to rebuild and replace this bridge and roadway at an expense of probably ten or fifteen times the cost of the old structure and roadway. The contention of this office and of the county is that the city has the right to flood the roadway and bridge, but that the city must replace same so as to continue the road although the cost may be greatly in excess of the value of the old bridge and roadway. The questions I desire answered by your Department are as follows:

"1. Has the city the right to condemn this bridge and roadway?

"2. If the city has the right to condemn this bridge and roadway, then what is the measure of the county's damages in the premises?

"3. Can the city be required to replace this bridge and roadway with another bridge and roadway, in that vicinity, even though the cost of same might many times exceed the market value of the property taken by the city?"

Under the provisions of Section 1, Chapter 6, of the charter of the city of Fort Worth, the board of commissioners of said city has the power and authority to pass ordinances for the condemnation of property for the purpose of establishing, enlarging and maintaining a system of waterworks, whether within or without the limits of said city. The charter also provides that the mode and manner of condemning property by said city shall conform to the rules prescribed for cities and towns under the general laws of the State in the condemnation of property for the construction of sewers or sewerage systems.

By referring to Article 1003, R. S., 1911, we find that the power to condemn property, either within or without the city limits, for the construction of sewers or sewerage systems is granted to cities and towns. In all cases in which such cities and towns exercise such rights, just compensation must be made to the owner or owners of the property thus taken for public use.

The statute further prescribes that the rules for condemning property for railroads shall apply to all condemnation proceedings brought by cities and towns for the purpose of establishing and constructing sewers or sewerage systems. Inasmuch as the charter of the city of Fort Worth confers upon the city the same powers of condemnation as are conferred by the general laws of the State upon cities and towns for the establishment of sewers and sewerage systems, and inasmuch as said charter specifically provides that the rules prescribed by the statute to be followed by cities and towns in such condemnation proceedings shall govern in all such proceedings brought by the city of Fort Worth, it is clear that the rules for condemning property for railroads should govern and apply to such proceedings brought by the city of Fort Worth under its charter.

That the Legislature had the right and authority to delegate the power of eminent domain to the city of Fort Worth there can be no doubt.

Galveston vs. Brown, 67 S. W., 156.

Parris vs. Mason, 37 S. W., 447.

Marshall vs. Allen, 115 S. W., 849.

The question, however, raised by your first inquiry is: Can the city of Fort Worth condemn property already devoted to public use when the result would be to destroy such use? We think the rule announced by the Supreme Court in the case of Sabine & E. T. Ry. Co. vs. Gulf & I. Ry. Co., 46 S. W., 784, answers this inquiry. In that case the Supreme Court said:

"The law does not authorize the condemnation of property which has already been dedicated to a public use when such condemnation would practically destroy the use to which it had been devoted. No express authority is given by our statutes to condemn such property and the authority can not be implied from the general power conferred by the law, unless the necessity be so great as to make the enterprise of paramount importance to the public and it can not be practically accomplished in any other way."

It is our opinion, therefore, that a public highway, although dedi-

cated to a public use, can be condemned and taken by the city of Fort Worth for reservoir and waterworks purposes, provided the extension of the waterworks system of said city is of so great importance to the public as to demand that the public use of less importance be set aside for its benefit, and provided further that the waterworks improvements could not be made in any other practical way.

In answer to your next question, beg to advise that in our opinion the rules governing the measure of damages in railroad condemnation proceedings would apply in the case under consideration.

Article 4426, R. S., 1895, authorizes and empowers railway companies to construct their roads along and upon public highways, but requires such railways to restore such highway to its former state or to such state as not to necessarily impair its usefulness.

It is our opinion that if the city of Fort Worth should condemn and take for public use a bridge and road already dedicated to public use it would be incumbent upon it to restore such public highway so taken to its former state, or at least to such state as not to impair its use. The public highway should be placed in as good condition for public use, regardless of the question of cost to the city, as the old highway at the time it was appropriated. If the city should fail to do this, we think the county would be entitled to recover as damages the reasonable amount it would take to procure another highway in the place of the one taken and to put the same in as good condition as the one taken.

St. Louis Ry. Co. vs. Grayson Co., 73 S. W., 764.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

DISTRICT CLERK—CRIMINAL PROCESS.

Clerk should decline to issue any process until such order is made by the court or the attorneys have made the affidavit required by statute.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 3, 1913.

Hon. I. W. Briscoe, District Clerk, Greenville, Texas.

DEAR SIR: You desire to know under Article 114, Penal Code of 1911, if you would be authorized to issue criminal process except upon the order of the court or upon written application signed and sworn to by the defendant or State's counsel, especially directing your inquiry to that part of such article which relates to State's witnesses.

We beg to advise you that in our opinion you should have the order of the court or an application sworn to by the defendant or State's counsel before you issue process in a criminal case. Article 538, Code of Criminal Procedure, provides that "at any time before the first day of the meeting of any term of the district court in any county of this State, it shall be the duty of the clerk, upon application of the district or county attorney, to forthwith issue a subpoena for any witness who resides in the county." * * *

The order of the court in our opinion does not necessarily mean that the court should order the process in each separate case, but we believe that a general order of the court to the effect that the district clerk should issue the criminal process for all witnesses in all criminal cases in behalf of the State where the names of such witnesses appear on the back of the indictment, unless otherwise instructed to be a sufficient authority for the clerk to issue such process without the court having, in each particular case, made an order applicable to that case only. This order by the court could be embraced in any language conveying his idea as to the issuance of criminal process in behalf of the State. Of course, he should limit the authority of the clerk, so that he could not issue process in cases where arrangements had been made for pleas of guilty, except for such witnesses as would be necessary to make the formal proof upon plea of guilty. The object of the statute is to prevent the clerk from unnecessarily issuing process, thereby causing heavy expenses to the State, and we think the court and district attorney can agree upon a proper order for the issuance of all witnesses.

You have assumed the correct position in declining to issue any process until such order is made by the court or the attorneys have made the affidavit required by statute.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

COSTS—MISDEMEANOR CASES—FELONY.

Where a person is charged with a felony, but convicted of a misdemeanor, no costs can lawfully be collected from the State by any officer. In such case the costs should be charged against defendant.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 4, 1913.

Hon. N. N. Rosenquest, County Judge, Stephens County, Breckenridge, Texas.

DEAR SIR: In answer to your letter of the 2nd instant, addressed to this Department, you are advised that in the opinion of this Department where a person is charged with a felony but convicted of a misdemeanor no costs can lawfully be collected from the State by any officer. Article 1124, C. C. P., 1911, provides:

"Any cases where the defendant is indicted for a felony, and is convicted of an offense less than a felony, no cost shall be paid by the State to any officer."

Article 1123, C. C. P., 1911, provides:

"All fees accruing under this account shall be due and payable at the close of each term of the district court after approval, except as provided for in Subdivisions 8 and 9 of preceding article, which shall be paid when approved by the judge, under whose order the writ was issued; provided, that in all cases when the defendant shall be finally convicted of a misdemeanor the sheriff or constable shall be required to pay back to the State Treasurer a sum of money equal to the amount he may have received from the State in

such cases, and the said sheriff or constable and their bondsmen shall be responsible to the State for such sums."

Subdivision 4, Article 1133, C. C. P., 1911, provides:

"In all cases where the defendant, charged with a felony, is convicted of a misdemeanor, all fees received by a district clerk shall be refunded by him to the State."

Under these articles of the statutes, it is clear that no officer is entitled to collect costs from the State, if a party, charged with a felony, is finally convicted of a misdemeanor. In such cases, the costs should be charged against the defendant.

If, in such cases officers have collected costs from the State, we think the proper proceeding would be for them to return to the State Treasurer the amount collected in such case, and charge the same against the defendant and collect from him.

Yours truly,

B. F. LOONEY,
Attorney General.

CONSTRUCTION OF STATUTE—MURDER.

Under Chapter 116, Acts Thirty-third Legislature, repealing Articles 1140, 1141, 1142 and 1144, R. P. C., 1911, and substituting in lieu thereof Articles 1140 and 1141, in effect abolishing the degrees of murder, where offense is committed prior to taking effect of new law, parties should be tried under the new law as to murder in first degree, unless he elect to be tried under former law, but as to murder in second degree he must be tried under former law. Chapter 116, Thirty-third Legislature; Articles 15, 16, 17 and 18, R. P. C.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JULY 1, 1913.

Hon. Marrero Herring, Assistant County Attorney, Groesbeck, Texas.

DEAR SIR: This Department is in receipt of your communication of June 27th, reading as follows:

"I desire an opinion from your Department upon Section 1, Chapter 116, page 238, of the laws of the last Legislature. Section 1, in express terms, repeals Article 1140 of the Revised Penal Code of the State of Texas, 1911. This Article, 1140, defines murder. The new statute repeals the present law against murder without a 'saving clause.' We now have several murder cases on our docket, and I desire to know under what law these cases should be tried. Should these defendants be tried under the old Article 1140, which has, in express terms, been repealed by the new Article 1140, or should these cases be tried under the new Article 1140, which has not been violated? You will notice that the new law makes no provision for the trial of defendants under the old Article 1140."

The Act of the Thirty-third Legislature referred to by you is Chapter 116, Acts Thirty-third Legislature, and, same being brief, we will here copy same:

"Section 1. That Articles 1140, 1141, 1142, 1144, Revised Penal Code of the State of Texas, 1911, be and the same are hereby repealed, and that there be inserted in lieu thereof Articles 1140 and 1141, which shall read as follows:

"Article 1140. Every person with sound memory and discretion who, with malice aforethought, shall unlawfully kill any person within this State shall be guilty of murder. Murder is distinguished from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide, or manslaughter, or which excuse or justify the homicide.

"Article 1141. The punishment for murder shall be death or confinement in the penitentiary for life or for any term of years not less than five.

"Sec. 2. All laws and parts of laws in conflict herewith are hereby repealed.

"Sec. 3. The fact that the present law defining murder divides the same into two degrees, to wit: first degree murder and second degree murder, and the fact that such definitions of murder or divisions of murder are creating complications in the trial of those charged with murder, creates an emergency and an imperative public necessity requiring the suspension of the constitutional rule requiring bills to be read on three several days and said rule is hereby suspended, and this act shall take effect from and after its passage, and it is so enacted."

The articles of the Penal Code of 1911 thus repealed are 1140, 1141, 1142 and 1144.

Of the articles thus repealed, Article 1140 defines murder; Article 1141 distinguishes the two degrees of murder; Article 1142 defines the duty of the jury in finding the degree of murder and fixing the punishment; and Article 1144 prescribes the punishment for murder in each of the two defined degrees. By the new act two articles, numbered 1140 and 1141, are inserted in lieu of the four articles thus repealed, which two articles merely define murder and fix the punishment, without reference to degrees thereof; in fact, the effect of the bill is merely to abolish the degrees of murder and repeals such articles as go to the procedure under the old statute, but are useless under the new. While the word "repeal" is used as to all the former articles, yet as to Articles 1140 and 1144 the effect of the new law is merely an amendment of those articles and a change of number of Article 1144 to 1141, and in effect is a substitution of the new for the old. There is no attempt to abolish the statute relating to murder as defined in former Article 1140 nor to change the penalty therefor, as prescribed in former Article 1144. Murder as defined in Article 1140 of the Penal Code is the identical crime defined in the new act, there being eliminated in the new act only that clause relating to malice aforethought, to wit, "*either express or implied*" dealing alone with the character of malice prompting the commission of the crime, and upon which differentiation in the character of malice aforethought is based the subsequent article establishing the two degrees of murder. The identical crime is denounced in the new law as that denounced in the old. Whether under the rules laid down in the former statutes, the crime was committed in pursuance of a formed design, of a sedate and deliberate mind to kill, thereby constituting the offense murder in the first degree, or under facts which show no excuse, justification or extenuation, thereby making applicable the rule of implied malice and constituting the offense murder in the second degree, is immaterial, and if committed under either of the definitions above the crime would be that of murder. Murder has a distinct legal significance as distinguished from other grades of homicide defined and denounced by our laws, and it is

only with that class of homicide denounced as murder that we are dealing.

The punishment prescribed for murder under the old law, disregarding for the time being the two degrees of murder, is as in 1144, Code of 1911:

"Death or confinement in the penitentiary for life * * * or confinement in the penitentiary for not less than five years."

The punishment for murder prescribed by the new law is as follows:

"Death or confinement in the penitentiary for life or for any term of years not less than five."

It, therefore, appears that the same crime is denounced and the same punishment is imposed in the new law as under the old, the only difference being that in the old law the crime was divided under two heads by the articles which have been repealed and not substituted.

However, there is no escaping the fact that in the new law the rule of procedure has been changed and the rights of the accused have been affected, in that under the old law, had the jury found the defendant guilty of murder in the second degree, he would thereby have been acquitted or murder in the first degree and could not thereafter have been put upon trial for the higher offense. It, therefore, becomes necessary to determine under which law the new act or the former provisions of the Penal Code a defendant should be tried for an offense committed prior to taking effect of the Act of the Thirty-third Legislature on July 1, 1913.

We are not without statutory provision upon this subject, and we desire to quote here Article 15, 16, 17 and 18, Penal Code, 1911, as follows:

"Art. 15. When the penalty for an offense is prescribed by one law and altered by a subsequent law, the penalty of such second law shall not be inflicted for a breach of the law committed before the second shall have taken effect. In every such case the offender shall be tried under the law in force when the offense was committed, and if convicted, punished under that law; except that when by the provisions of the second law the punishment of the offense is ameliorated, the defendant shall be punished under such last enactment, unless he elect to receive the penalty prescribed by the law in force when the offense was committed."

"Art. 16. The repeal of a law, where the repealing statute substitutes no other penalty, will exempt from punishment all persons who may have offended against the provisions of such repealing law, unless it be otherwise declared in the repealing statute."

"Art. 17. When by the provisions of a repealing statute a new penalty is substituted for an offense punishable under the act repealed, such repealing statute shall not exempt from punishment a person who has offended against the repealed law while it was in force, but in such case the rule prescribed in Article 15 shall govern."

"Art. 18. If an offense be defined by one law and by a subsequent law the definition of the offense is changed, no such change or modification shall take effect as to offenses already committed: but all offenders against the first law shall be tried, and their guilt or innocence determined in accordance with the provisions thereof."

There can be no contention that the repeal of a law and the failure

to substitute another penalty will operate as a release of offenders indicted under the repealed law.

Article 16, Penal Code.

Filze vs. State, 13 Texas Crim., 392.

Kenyon vs. State, 31 Texas Crim., 13.

Sullivan vs. State, 32 Texas Crim., 50.

There is, however, in this case within the meaning of Article 17, above quoted, a substitution of penalties under the repealed act, in that now that offense which constituted murder in the first degree and was punishable by death or confinement in the penitentiary for life, under the new law may receive the same punishment for a term of years not less than five; while that offense constituting murder in the second degree and punishable by confinement in the penitentiary for a period of not less than five years, under the former law, may now be punished by death or confinement in the penitentiary for life. Thus we have in the same act both a decrease of punishment and an increase thereof as applied to different grades of the same offense. So, different penalties having been substituted, we are directed by the terms of Article 17, Penal Code, to look to Article 15, Penal Code, for the rule to follow in proceeding to trial upon an indictment charging an offense committed while the law was in force. Article 15 provides that where the penalty is altered by the new law that the penalty of the new law shall not be inflicted, but that the offender shall be tried under the law in force at the time he committed the offense, *except* that when the punishment is ameliorated by the second law he shall be punished under the last enactment *unless* he elect to receive the punishment prescribed by the former law.

The above four articles of the Penal Code became the law of this State by the Act of August 26, 1856, which took effect February 1, 1857, and appears in Oldham & Whitis' Digest of Laws of Texas, Penal Code, as Articles 14, 15, 16 and 17 and have, under slight changes in numbers been the law of this State since that date.

Cases to which such articles have application have arisen from time to time since their enactment, and the decisions are unanimous to the effect that where by a subsequent law the penalty is changed, and a crime has been committed prior to taking effect of the new law, the offender shall be tried under the repealed law, unless the penalty has been ameliorated, in which event he shall be tried under the new, and in that event he shall be tried under the new unless he elect to be tried under the old.

Maul vs. State, 25 Texas. 166.

Wall vs. State, 18 Texas. 683.

Noftsinger vs. State, 7 Texas Crim., 301.

McInturff vs. State. 20 Texas Crim.. 335.

Blount vs. State, 34 Texas Crim., 640.

Ledbetter vs. State, 29 S. W., 479.

Kendall vs. State, 55 Texas Crim., 139.

Roberts vs. State, 17 Texas Crim.. 148.

Gill vs. State, 30 Texas Crim.. 514.

Johnson vs. State, 28 Texas Crim., 562.

We will quote from the Noftsinger and McInturff cases cited above.

the defendant may be convicted of either degree of murder (or of the lesser grade of homicide, etc.). "Murder," as used in the former statute, was a generic term applying to two classes of homicide, each of which, while the punishment inflicted for one was infinitely greater than that imposed for the other, was equally comprehended by the term, and upon a general charge of murder both that of first and second degree are included. So, when the degrees and the difference in punishment are abolished, then it becomes apparent that in so far as that state of facts which would constitute murder in the second degree under the former statute is concerned the punishment has been increased to the extent of a possible death or life imprisonment, while under the former law the punishment could have been only for a term of years not less than five. In addition to this, if under the former law a defendant was found guilty of murder in the second degree, he could not again be put upon trial for murder in the first degree and be subjected to a possible death or life imprisonment sentence. Under the present law, however, a defendant, who had been convicted and received a sentence of a term of years and who had obtained a new trial, could on such second trial, if convicted, receive a sentence of death or imprisonment for life. On the other hand, the punishment for murder in the first degree has been decreased to the extent that the defendant may receive a sentence for a term of years. Therefore, there has been not only a decrease of punishment but an increase as well. This phase of the question was under discussion in the case of *Maul vs. State*, supra, in which the court uses this language:

"It is alone in reference to the punishment that the offense is spoken of in this article of the code. Therefore, where there are several offenses embraced in the same indictment, as in this case, they must be treated as distinct offenses by the court, in instructing the jury upon the penalty attached to each by the law. And it is only when the punishment of some one or all of them is ameliorated by the new law that a defendant has a right 'to elect to receive the penalty prescribed by the law in force when the offense is committed.' If any one of them, thus included in the same indictment, is ameliorated, he may elect as to that one.

"The punishment of the offense, of which the defendant was convicted, an aggravated assault, was greatly increased in both its minimum and its maximum limits. A penalty was imposed by the jury, much greater than that which could attach to the offense when it was committed. This was, therefore, as to this offense, not a case in which the question of election arose at all. The defendant never 'elects' to be tried under the new law. That follows as a legal consequence, when the punishment is ameliorated. But when it is ameliorated then he may elect to receive the penalty prescribed by law when the offense was committed.

"Thus the penalty inflicted may be less, but can never be greater than that imposed by the law when the offense was committed. This is plainly the object of the law." (Art. 14, Penal Code.)

We, therefore, conclude, and so advise you, that the penalty for what was murder in the first degree under the former law having been ameliorated by the new, by the reduction of the term of sentence, the defendant as to that charge should be tried under the new law, and the court should in its charge so instruct the jury, unless the defendant elect to receive the punishment under the old law. The penalty for what was murder in the second degree under the former law having been increased to a possible death or life imprisonment sentence, then,

At the time of the commission of the murder in the Noftsinger case, the only punishment under the law for murder was death. Subsequent to the murder and prior to the trial a new law went into effect prescribing the alternative punishment of death or imprisonment in the penitentiary for life. Defendant elected to be tried under the old law, and received the death sentence. The court said:

"By Article 15, Chapter 1, of the Penal Code, it is declared that 'when the penalty for an offense is prescribed by one law and altered by a subsequent law, the penalty of such second law shall not be inflicted for a breach of the law committed before the second shall have taken effect. In every such case the offender shall be tried under the law in force when the offense was committed, and, if convicted, punished under that law; except that when by the provisions of the second law the punishment of the offense is ameliorated the defendant shall be punished under such last enactment, unless he elect to receive the penalty prescribed by the law in force when the offense was committed.' In pursuance of this provision, defendant on his trial moved the court in writing to permit him to elect to receive the punishment fixed by the law in force at the time the crime was alleged to have been committed; that if convicted he did not desire to receive the punishment fixed by the law now in force. His motion was granted by the court, and the jury was appropriately charged with regard to the punishment under the old law."

In the McInturff case the defendant was convicted and his punishment fixed at life imprisonment in the penitentiary. The defendant on appeal presented the theory that there was no punishment prescribed for murder since the substitution of the alternation of death or life imprisonment. We quote from that opinion as follows:

"In no sense can we conceive how a mere remedy which ameliorated punishment and insures solely to the benefit of the party to be punished can be considered as coming within the prohibition of retroactive or *ex post facto* laws; and this is particularly obvious to our minds where the party himself has it in his power to decline the ameliorated punishment and elect to be punished under the law as it was when the crime was committed. This, Noftsinger did, and perhaps he went to the gallows on account of his temerity. (Noftsinger v. The State, 7 Texas Crim. App., 301.) * * *

"When the punishment for an offense is ameliorated by statute after its commission, the defendant upon conviction must be punished according to the latter enactment unless he elect to receive the penalty affixed by the former law, and such election must be made before verdict. (Maul v. The State, 25 Texas, 166; Veal v. The State, 8 Texas Crim. App., 474; Perez v. The State, 8 Texas Crim. App., 610.) If appellant desired to be punished under the old law, he should have made his election, and the court doubtless would have accorded him the right. Having failed to do so, the duty of the court to give him the benefit of the ameliorated punishment was imperative."

Other cases cited above hold the same doctrine, but for brevity we will content ourselves with the quotations above, which conclusively establish the rule that, where the penalty is the same or increased, the defendant must be tried under the former law, but where there is an amelioration of the penalty, he must be tried under the new, unless he elect to be tried under the old.

The question now arises, does the new law ameliorate the punishment for murder? Under the usual form of indictment for murder there is combined the charge the two degrees of murder without a specific allegation of the two degrees, the charging part of the indictment simply being: "Did unlawfully with malice aforethought kill," under which

as to that phase of the indictment, the defendant must be tried under the old law, and the court in its charge should so instruct the jury. In other words, where the penalty has been ameliorated or increased, the defendant is entitled to be tried under the law prescribing the smaller penalty, unless, as stated, where the new law ameliorates the penalty he elects to be tried under the old, and if there be a doubt as to whether the penalty is ameliorated, the defendant should be given the benefit of the doubt and the right of election accorded.

From the above, it follows that, where a defendant stands charged by indictment with murder in the second degree committed prior to taking effect of the act of the Thirty-third Legislature, he should be tried under the former law, as the penalty which might be inflicted under the new law is greater than that under the former law, and he has no right to elect to be tried under the new.

With respect, I am,

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

CRIMINAL LAW—HABEAS CORPUS PROCEEDINGS—WITNESS FEES.

1. Habeas corpus proceedings brought for the purpose of removing a restraint, occasioned by violation or supposed violation of the criminal laws of the State of Texas, are criminal cases. All other habeas corpus proceedings are civil.

2. If a person charged with a felony in this State sues out a writ of habeas corpus and an out-of-county witness is subpoenaed for the purpose of appearing and giving testimony upon said hearing, such witness would be entitled to the fees and mileage prescribed by statute for out-of-county witnesses in felony cases.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 16, 1914.

Hon. W. P. Lane, Comptroller of Public Accounts, Capitol.

DEAR SIR: It appears from the records before us that one Burt Humphreys was indicted by the grand jury of Gaines county for the offense of robbery with firearms; that after he was arrested on said charge, he sued out a writ of habeas corpus before Judge Spencer of the Seventy-second Judicial District; that said habeas corpus proceeding was set down for hearing on the 4th day of December, 1913, at Seminole, Gaines county, and that witnesses were summoned to be present and give testimony on said day; that among the witnesses so summoned by the State was one W. A. Boyd, who resided out of the county where said hearing was had. Mr. Boyd, in obedience to the subpoena, appeared at Seminole to testify as a witness in said cause, and being an out-of-county witness, made out his account against the State for the fees and mileage provided by the statute for out-of-county witnesses in felony cases, secured the approval of the district judge to said account, and sent it to your Department for audit and payment. You declined to pass the account for payment on the ground that a habeas corpus proceeding is civil in its nature and, therefore, the law does not

authorize the payment of fees by the State in such cases. You desire the opinion of this Department as to the correctness of your position.

If you are correct in your contention that a habeas corpus proceeding, brought for the purpose of inquiring into the nature and cause of the restraint where a violation of the criminal laws of the State has been charged, is a civil proceeding, you were unquestionably correct in declining to allow and pass for payment this account, for, it is made absolutely clear by the witness fee bill that the State is liable for witness fees in felony cases only.

We do not think, however, that all habeas corpus proceedings are civil proceedings; some are civil and some are criminal. The cause of restraint must be looked to in each case in order to determine the nature of the proceeding. If the restraint is caused by reason of a violation, or supposed violation, of the criminal laws of this State, the habeas corpus proceeding to remove said restraint or to inquire into same, must be classed as a criminal case, but if such restraint is not brought about by reason of a violation, or supposed violation, of the criminal laws, the habeas corpus proceeding to remove such restraint, or to inquire into same, must be classed as a civil case.

We are cognizant of the fact that a different rule is adhered to by the Federal courts. The Federal courts declare that the writ of habeas corpus is a remedy which the law gives for the enforcement of the civil right of personal liberty, and, therefore, all such proceedings are civil cases.

In the case of *Ex parte Tom Tong*, 108 U. S. Reports, page 558, the Supreme Court of the United States said:

"The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty, notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right which he claims as against those who are holding him in custody under the criminal process. If he fails to establish his right to his liberty, he may be detained for trial for the offense; and, if he succeeds, he must be discharged from custody. The proceeding is one instituted by himself for his liberty; not by the government to punish him for his crime. This petitioner claims that the Constitution and a treaty of the United States gave him a right to his liberty, notwithstanding the charge that has been made against him, and he has obtained judicial process to enforce that right. Such a proceeding on his part is, in our opinion, a civil proceeding, notwithstanding his object is, by means of it, to get released from custody under a criminal prosecution."

The doctrine thus announced by the Supreme Court of the United States has been adhered to by the courts of other jurisdictions. However, under our Constitution and system of jurisprudence, this rule has not and does not now obtain within this State.

Under our Constitution the Court of Criminal Appeals has appellate jurisdiction co-extensive with the limits of the State in all criminal

cases of whatever grade, with such exceptions and under such regulations as may be prescribed by law. If the writ of habeas corpus were a civil remedy in all cases, it clearly follows that under our Constitution and laws of our State based thereon the Court of Criminal Appeals could not entertain appellate jurisdiction of any habeas corpus proceeding. However, by tracing the decisions of the Court of Criminal Appeals it will be found that this court has taken jurisdiction in habeas corpus proceedings brought for the purpose of inquiring into a restraint occasioned by a violation of the law, or a supposed violation of the law. It has entertained jurisdiction of all such cases upon the ground that they were criminal and not civil cases. This same question has also been to the Supreme Court of our State and that court has also declared that all habeas corpus proceedings based upon a violation, or a supposed violation, of the criminal laws were criminal and not civil cases, and, therefore, the Court of Criminal Appeals had exclusive appellate jurisdiction thereof.

In the case of *Legate vs. Legate*, 28 S. W., 281, in an opinion rendered by our Supreme Court, the distinction is clearly defined and the rule for determining whether a habeas corpus proceeding is criminal or civil is clearly announced. The following excerpt from said opinion seems to be decisive of the question here involved:

"Under the present Constitution and laws appeals from the district court lie in civil cases to the Court of Civil Appeals, and in criminal cases to the Court of Criminal Appeals. It is, therefore, important in the case of appeal from the judgment of a district court in a habeas corpus proceeding to determine whether the case be of a criminal or civil nature, in order to make the appeal returnable to the proper court. The purpose of a writ of habeas corpus is to inquire into and remove any unlawful restraint upon the liberty of a person. If in this proceeding it appears that such person is restrained by reason of his supposed violation of some criminal law, or quasi-criminal law, as an offense against the person or contempt of court, then the proceeding must be classed as a criminal case, although upon the whole case the court should be of opinion that the act for which such person is detained does not constitute a violation of such law, or that the evidence is totally insufficient to establish the act or that the supposed law does not exist or is void; but, if such person is not restrained by reason of some supposed violation of law, then the proceeding must be classed as a civil case. It is the cause of restraint which determines whether the proceeding to remove the restraint be a criminal or a civil case."

So in order to determine the nature of habeas corpus proceedings it is necessary to determine the character of restraint complained of, and if the restraint is brought about by reason of a violation of the criminal law of the State, then proceedings brought for the purpose of removing or inquiring into the same must be classed as criminal cases, but if the restraint be not occasioned by reason of a violation of the law, the habeas corpus proceeding brought for the purpose of removing or inquiring into same must be classed as civil cases. For other authorities on this question, see:

Ex Parte Calvin, 40 Crim. App., 84.

Ex Parte Reed, 34 Crim. App., 9.

Ex Parte Berry, 34 Crim. App., 36.

Ex Parte Singleton, 161 S. W., 123, and authorities there cited.

Our Legislature evidently considered a habeas corpus case arising out

of a criminal prosecution to be a criminal case, for they made provision in the sheriffs' criminal fee bill for the payment of sheriff's fees for conveying a witness attached by such officer in a habeas corpus proceeding out of his county, and, further, in the act of the Thirty-third Legislature, at its called session, provision is made for the payment of in-county witnesses in felony cases, but it was specifically provided that such in-county witnesses should not receive fees in habeas corpus cases. If the habeas corpus proceeding had been considered by the Legislature as a civil case, there would have been no necessity for such provision in the bill, because the witnesses would not have been entitled to a fee. Inasmuch, however, as the Legislature made this provision, it clearly evidences the fact that they considered a habeas corpus proceeding arising from criminal prosecutions a criminal case.

As above stated, our courts by reason of our Constitution and laws based thereon have made this distinction in habeas corpus cases, and, notwithstanding the rule laid down by the Supreme Court of the United States, we think the opinions of our State courts in matters of this character should be followed.

We are, therefore, of the opinion that if a person be charged by indictment with a felony and he should sue out a writ of habeas corpus for the purpose of removing or inquiring into the restraint placed upon him by reason of such prosecution, out-of-county witnesses subpoenaed to appear and give testimony upon such hearing would be entitled to the witness fees and mileage prescribed by statute for out-of-county witnesses in felony cases.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

COMMITMENT—CAPIAS PRO FINE—FEES—JUSTICE OF THE PEACE.

1. Commitment may lawfully issue in all misdemeanor cases wherein judgments involve pecuniary fines only, if the defendants are present when judgments are rendered and fail to satisfy same.

2. Commitments may lawfully issue in all misdemeanor cases wherein the judgments involve a jail penalty.

3. If defendants are not present when judgments in misdemeanor cases are rendered against them, or if they escape from custody thereafter, a capias pro fine is the proper process to issue for the apprehension of said parties and for the enforcement of judgments in such cases.

4. A juror in justice court is entitled to 50 cents in each case he sits as a juror in the justice court regardless of the result of the trial. However, he cannot collect more than \$1.00 for any one day's service.

5. A justice of the peace is primarily responsible for the manner in which he keeps his docket. Judgments should be entered in all cases disposed of by such officer.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 21, 1914.

Hon. J. J. Strickland, County Attorney, Palestine, Texas.

DEAR SIR: Under date of March 9, 1914, we have the following inquiries from you:

"1. In the justice court where a man is arrested and brought into open court and enters a plea of guilty, without any witnesses actually having been summoned, or found guilty, what is the proper costs to tax in such a case where the fee and costs are paid in cash at the close of trial?

"2. Also the proper costs in the case above mentioned where he does not at once pay the fee and costs but the commitment is issued?

"3. Does the law require a commitment in cases such as mentioned above?

"4. If the justice of the peace issues a commitment but fails to enter a judgment of the docket on his court or any other officer of the county responsible or required to see that judgments are entered on the docket?

"5. Are officers authorized to collect costs until judgment is written on the docket of the court?

"6. Where a jury trial is had in criminal cases in justice court and the verdict is not guilty, is the county clerk required to issue jury scrip in such cases?

"7. Anderson county has a special road law. Are the officers of Anderson county entitled to more than fifty cents on the dollar for fines worked out on the county roads? (See Section 4, Anderson county special road law, approved March 24, 1911)."

Replying to your interrogatories in the order in which they appear, we beg to advise you as follows:

1. It is impossible for us to answer your first and second questions for the reason that they involve questions of fact. We do not know and could not say the amount of costs that should be collected in the cases outlined by your two questions without first knowing the amount of work actually done by the officers. When an affidavit is filed with a justice of the peace, it becomes his duty to issue a warrant for the arrest of the party against whom the complaint is made, and if any witnesses are called for it is also his duty to issue a subpoena for said witnesses, and in the event the party comes in afterwards and pleads guilty or is convicted on the charge, it is legitimate and right for the justice of the peace to tax and collect as costs in the case for all such work actually done by him. The constable is likewise entitled to tax and collect his cost for the work actually and necessarily performed by him in said case. The proper and legitimate costs in cases vary with each case, depending upon the amount of work done by the officers in each. Certainly only the legitimate cost that has accrued in each case should be taxed and collected; that is, the officers should tax as costs and collect only for the work actually and necessarily done by them.

2. Your third question calls for an ascertainment of the legal meaning or definition of the term "commitment," its office under our system of jurisprudence and in what cases the same may be properly issued.

We know a great deal of uncertainty or confusion has existed among the officers of this State for a number of years with respect to the office of the commitment and in what cases such a writ should properly issue. This question, so far as we have been able to ascertain, has never been judiciously determined in this State, nor do the records of this Department show that an opinion has been given covering all phases of this question. For this reason we have gone into the matter very carefully and thoroughly, with the view of pointing out the true office of the commitment and of determining in what cases the same may issue for the purpose of enabling the different officers throughout the State to know how to tax their costs with respect thereto.

In the first place, we will determine the legal significance of the term

“commitment.” Our statute nowhere undertakes to define this term. We must, therefore, look elsewhere for a legal definition thereof. Bouvier defines “commitment” as follows:

“It is a warrant or order by which a court or magistrate directs a ministerial officer to take a person to prison.

“The word ‘commit’ in a statute has a technical meaning, and a warrant which does not direct an officer to commit a party to prison, but only to receive him into custody and safely keep him for further examination, is not a commitment.”

The *Cyclopedia of Law and Procedure* defines a “commitment” in the following language:

“The act of sending to prison—an order for sending to prison; the warrant or mittimus by which a court or magistrate directs an officer to take a person to prison.”

In *Words and Phrases* we have the following judicial definitions of the term:

“Commitment has in law a well defined meaning, and signifies the act of sending an accused or convicted person to prison.” (*Guthman v. People*, 67 N. E., 821.)

“A commitment is a warrant or order by a court or magistrate directing a ministerial officer to take a person to prison.” (*Commonwealth v. Barker*, 133 Mass., 399.)

“The words ‘committing any person to jail,’ as used in a statute relating to the fee bill of a sheriff, relate to the execution by the sheriff of an order or warrant of commitment made or issued by some officer exercising judicial functions.” (*State v. Clerk*, 70 S. W., 489.)

“A statute authorizing a sheriff to charge a certain fee for every person committed to jail and a certain fee for every person discharged from jail, held that the words ‘committed’ and ‘discharged’ should be construed to mean a technical committal and discharge, and could not be so liberally construed as to authorize the sheriff to charge for taking out and for returning a prisoner to jail in the course of the proceedings against him.” (*Lee v. Ionia County Supervisors*, 36 N. W., 83.)

It is clear, therefore, that the commitment means an order or warrant issued by a person exercising judicial functions to a ministerial officer authorizing and commanding such officer to place the person in jail or in prison.

A review of our statutes, in which this term is used, shows that the purpose of this writ is to commit to prison for some specific purpose.

Article 438, C. C. P., authorizes a district judge to commit to jail any witness who unlawfully refuses to testify before a grand jury. For the purpose of carrying out this order or decree of the judge, a commitment would properly issue.

Article 130, C. C. P., authorizes justices of the peace to commit to jail for a period of one year any person who refuses or fails to execute a peace bond when same has been judicially required. For the purpose of carrying out this this order, a commitment would properly issue.

Article 308, C. C. P., authorizes magistrates to commit to jail a defendant in an examining trial proceeding until the bond required of said defendant should be given. In such cases commitments would properly issue.

Our courts have the right and authority to inflict jail punishments in

contempt proceedings, and for the purpose of executing the orders or decrees of said courts in such cases commitments would properly issue.

Commitments may properly issue also under certain circumstances for the purpose of enforcing the collection of judgments in misdemeanor cases.

Article 1012, C. C. P., provides:

"The judgment, in case of conviction in a criminal action before a justice of the peace, shall be that the State of Texas recover of the defendant the fine assessed and costs, and that the defendant remain in custody of the sheriff until the fine and costs are paid; and, further, that execution issue to collect the same."

Article 1013, C. C. P., provides:

"If the defendant be not in custody when judgment is rendered, or, if he escapes from custody thereafter, a *capias* shall issue for his arrest and confinement in jail, until the fine and costs are paid, or he is legally discharged."

Article 1003 provides:

"Whenever, by the provisions of this title, the peace officer is authorized to retain a defendant in custody, he may place him in jail or any other place where he can be safely kept."

If, therefore, the defendant in a criminal case before a justice of the peace be present and in the custody of the peace officer when the judgment is rendered, if he does not satisfy the judgment immediately the justice of the peace by his judgment should provide that he remain in the custody of the sheriff until the fine and costs are paid. Under this provision of the judgment the sheriff would be authorized to place the party in jail until he satisfied the judgment.

Article 871, C. C. P., provides:

"When judgment has been rendered against a defendant for a pecuniary fine, if he is present, he shall be imprisoned in jail, until discharged as provided in Article 867; and a certified copy of such judgment shall be sufficient to authorize such imprisonment, without further warrant or process."

The above quoted article of the statute has reference to the enforcement of a criminal judgment in a case where a pecuniary fine only has been entered, and as we view it the certified copy of the judgment is simply a commitment issued by the proper authority to the peace officer commanding such peace officer to imprison the defendant until the judgment be satisfied. As will be seen from a reading of this article of the statute, this writ may issue against a defendant in a criminal case where pecuniary fine only has been rendered against him in all cases where the defendant is present at the time of the rendition of the judgment.

Article 872, C. C. P., deals with the question of the enforcement of the judgment when the defendant is not present. Said article reads as follows:

"When a pecuniary fine has been adjudged against a defendant, and he is not present, a *capias* shall forthwith issue for his arrest: and the sheriff shall execute the same by placing the defendant in jail until he is legally discharged."

This statute deals with the question of the enforcement of a criminal

judgment in cases involving pecuniary fines only where the defendant is not present at the time of the rendition of the judgment. If the defendant be not present at the time such judgment is rendered, then the proper process for the enforcement of same is the *capias pro fine*. This writ also authorizes the sheriff to take the body of the person named therein and to place him in jail until the judgment is satisfied.

Articles 879 and 880, C. C. P., deal with the question of enforcing judgments in misdemeanor cases where punishment is by both fine and imprisonment. Article 879 reads as follows:

“When, by the judgment of the court, a defendant is to be imprisoned in jail, the sheriff shall execute the same by imprisoning the defendant for the length of time required by the judgment; and, for this purpose, a certified copy of such judgment shall be sufficient authority for the sheriff.”

The certified copy of the judgment in such case is simply a commitment under the law.

Article 880 reads as follows:

“When a *capias* is directed to be issued for the apprehension and commitment of a person convicted of a misdemeanor, the penalty of which, or any part thereof, is imprisonment in jail, the writ shall recite the judgment and command the sheriff to place the defendant in jail, to remain the length of time therein fixed; and this writ shall be sufficient to authorize the sheriff to enforce such judgment.”

The statute requires the personal presence of a defendant in the county court in all cases wherein the punishment or any part thereof may be imprisonment in the county jail. Therefore, the proper writ to issue in all such cases for the enforcement of such judgments is a commitment commanding the sheriff to incarcerate the defendant in jail for the length of time prescribed by the judgment, and until the fine and costs in said case are paid in full. If for any reason such a prisoner should escape, then by the provisions of Article 880, above quoted, a *capias pro fine* should issue for his apprehension and commitment.

With respect to the enforcement of judgment in misdemeanor cases, we think the difference between the commitment and the *capias pro fine* is simply this: if the defendant is present at the time the judgment is rendered against him and does not satisfy the same, a commitment should issue by the court commanding the sheriff to incarcerate the prisoner until the judgment is satisfied, but if the defendant be not present at the time the judgment is rendered against him, or if he should escape from custody after the judgment is rendered against him, the proper writ to issue for his apprehension and for the enforcement of the judgment against him would be the *capias pro fine*.

In such a case as the one outlined by you we do not believe either a commitment or *capias pro fine* should issue, for the reason that there would be no necessity therefor. If a person goes before a justice of the peace and enters a plea of guilty to a misdemeanor offense over which the justice has jurisdiction and pays his fine and costs, the justice of the peace would not be authorized in such a case to issue a commitment, because the judgment has already been satisfied, and there is no legal reason for issuing such writ. However, if a person should plead guilty

or be convicted before a justice of the peace for a misdemeanor over which the justice has jurisdiction and should fail to satisfy the fine and costs, it would be the duty of the justice of the peace, the defendant being present, to issue a commitment for the enforcement of such judgment, or, if the defendant should not be present at the time of the rendition of the judgment or should escape from the custody of the peace officer, the justice of the peace in such event should issue a *capias pro fine* for the purpose of enforcing said judgment. The sheriff or constable in whose hands the commitment is placed for execution would be entitled to charge a fee of one dollar for executing the same and a fee of one dollar for the release of the prisoner, provided said officer actually commits to the jail the person named in the commitment and actually releases from the jail said person. Such officer would not be entitled to the fee for committing and releasing unless the commitment actually occurred.

In the case of *Lee vs. Board of Supervisors of Ionia County*, reported in the 36 N. W. Rep., page 83, the Supreme Court of Michigan, construing the statute of that State, very similar in many respects to our own statute, held that the sheriff was authorized to collect fees for committing and discharging a prisoner only in cases where such officer technically committed and discharged the prisoner. In discussing the question, the court used the following language:

"The statute seems to us too plain for discussion. The terms 'committed' and 'discharged' are words of recognized legal meaning and refer only to the beginning and end of the term of imprisonment. Between those periods the prisoner, unless he escapes, is in continuous custody; and whether in jail or out of jail, in charge of an officer, his going through the prison door in either direction is no more an interruption of his imprisonment than going into the prison ward and retiring from the court room to his cell. The language speaks for itself and cannot have any double meaning or be warped by any supposed meagerness of the sheriff's compensation."

If a commitment should be issued by a justice of the peace or a county clerk and placed in the hands of the sheriff or constable for execution, if the party named in such commitment should satisfy the judgment by paying the fine and costs to the officer before he was actually committed to jail, we do not think the peace officer would be entitled to charge the fees prescribed by the statute for commitment and release; but, upon the other hand, if the officer actually committed the prisoner before the judgment was satisfied, he would be entitled to the statutory fees for committing and releasing the prisoner.

We desire to make ourselves absolutely clear on this question, and for that purpose we shall reiterate the character of cases in which the commitments and *capias pro fines* may issue for the enforcement of judgments in misdemeanor cases:

1. (a) The commitment may issue either out of the justice court or out of the county court in cases where the judgment involves only a pecuniary fine, provided the defendant against whom the judgment is rendered is present in court at the time of the rendition of the same and does not satisfy the judgment before the issuance of such process.

(b) The commitment may issue in all cases in the county court wherein the punishment or any part thereof assessed by the judgment is

imprisonment in the county jail. In order for this character of judgment to be entered lawfully the defendant must be personally present in court, and, therefore, the proper writ to issue for the execution of this kind of a judgment is the commitment.

2. (a) If the defendant is not present when the judgment is entered against him in the justice court or in the county court in cases wherein the judgments involve only pecuniary fines, or, if he has escaped from custody, the proper writ to issue for the purpose of enforcing the judgment under such circumstances would be the *capias pro fine*.

(b) In cases wherein the judgment involves both a pecuniary fine and jail imprisonment, if the defendant escapes from custody, the *capias pro fine* would be the proper process to issue for the purpose of apprehending him and enforcing judgment rendered against him.

We desire to emphasize the fact that in all cases both in the justice and county courts wherein the judgments involve only pecuniary fines, if the defendants are present and satisfy said judgments by paying the fine and costs in full, commitments should not issue, because no legal ground exists therefor, and in all cases wherein commitments have been lawfully issued by proper authority for the purpose of enforcing the judgments, the officer to whom the writ is directed should execute the same by placing the person named therein in jail until the satisfaction of the judgment, but if the judgment be for pecuniary fine only and the party against whom said judgment is rendered tenders to the officer the amount of the judgment, both fine and costs, before he has been committed to jail, the officer under the law is bound to accept said payment in satisfaction of the judgment, and he would not be authorized thereafter to commit said party to jail in order to be able to collect the fee for committing and for releasing. A peace officer can only commit the prisoner under a writ of commitment in cases involving only a pecuniary fine for the purpose of collecting the judgment, and if the judgment can be collected without committing the prisoner, the office of the commitment has been served. The peace officer is only required to commit in such cases in order to collect the judgment, and if it becomes necessary to commit the prisoner for such purpose, the committing officer would be entitled to his fees for committing and releasing.

3. The justice of the peace is primarily responsible for the manner in which he keeps his docket. He should certainly enter judgments in all cases disposed of in his court, and we believe before he could lawfully issue a commitment he would first have to have a judgment entered up on his docket as the basis for such commitment. While it is not made by statute the duty of the county attorney to see that the judgments are properly entered, yet we believe this is a duty that such officers should assume. He is a representative of the State and as such representative he should see to it that proper judgment entries are made in all cases to which the State is a party.

4. Under certain circumstances we believe that officers would be authorized to collect their costs before the judgment is actually written on the docket. For instance, if a person should come before the justice of the peace and state to such officer that he had committed an offense over which said justice of the peace had jurisdiction and should state that he desired to pay his fine and costs, there would be nothing illegal

in the justice collecting such fine and costs and thereafter entering the proper judgment on his docket.

5. Article 1113, Chapter 66, Acts of the Thirty-second Legislature, answers your question with respect to the pay of jurors in criminal cases in justice courts. Said article reads as follows:

"Each juror who serves in the trial of any criminal case in any court of criminal jurisdiction, or who has been sworn as a juror for the term or week, shall receive two dollars and fifty cents (\$2.50) for each day and for each fraction of a day he may serve or attend as such juror; provided, that this provision shall not extend to mayors' and recorders' courts, taking cognizance of offenses against municipal ordinances; provided, further, that the jurors in justice courts, who serve in the trial of criminal cases in such courts, shall receive 50 cents in each case they may sit as jurors; provided, that no juror in such court shall receive more than one dollar (\$1.00) for each day or fraction of a day he may serve as such juror."

This article of the statute authorizes the payment of jurors who sit in the trial of criminal cases in justice courts, regardless of the result of the trial. Such jurors are entitled to fifty cents a case whether the verdict be guilty or not guilty; provided, however, the juror in the justice court shall not receive more than one dollar per day for his services.

6. We answer your seventh and last question by enclosing herewith copy of an opinion rendered by this Department on April 10, 1913, to the Hon. E. V. Swift, county judge of your county. This opinion construes Section 4 of the special road law of Anderson county as it affects fees of the officers of the courts of said county.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

OFFENSES—COURTS—JURISDICTION.

The district court has exclusive original jurisdiction of misdemeanors involving official misconduct.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 8, 1913.

Hon. F. B. Caudle, County Attorney, Mt. Vernon, Texas.

DEAR SIR: In your letter of April 7, 1913, addressed to this Department, you state that you have some cases against a tax collector for failure to do his duty in collecting occupation taxes and posting delinquent tax lists, and you desire to know whether the district or county court would have jurisdiction of such cases.

Replying thereto, you are respectfully advised that Article 140, P. C., 1911, makes it a misdemeanor punishable by fine of not less than fifty nor more than five hundred dollars for a tax collector knowingly to permit any person, firm or association of persons to engage in or pursue any occupation taxable under the law without first paying the tax.

Article 144, P. C., 1911, makes it a misdemeanor punishable by fine of not less than three hundred nor more than one thousand dollars for

the tax collector to fail to make out and post between April 1st and 15th of each year a list of the delinquent taxpayers.

Thus it is seen that both these offenses named in your letter are misdemeanors, and, in order to determine whether the district or county court has jurisdiction of same, it must be determined whether such offense involve official misconduct or not.

Section 8 of Article 5 of our Constitution provides that the district court shall have original jurisdiction in all cases of misdemeanors involving official misconduct.

Article 90, C. C. P., 1911, provides:

"The district court shall have exclusive original jurisdiction in cases of misdemeanor involving official misconduct."

Article 6033 R. S., 1911, provides that under the head of "Official Misconduct" shall be included any wilful or corrupt failure, refusal or neglect of any officer to perform any duty enjoined upon him by law.

Mechem on Public Officers defines "Official Misconduct" to be the official doing of a wrongful act or the official neglect to do an act which ought to have been done, although there was no corrupt or malicious intent.

The question of what constitutes official misconduct has been passed upon frequently by our higher courts, and the rule deduced from these decisions is: That a failure on the part of an officer to perform any duty imposed upon him by law constitutes official misconduct within the purview of the Constitution and the Code, and the district court alone has jurisdiction of such offenses. A leading case on this question is *Hatch vs. The State*, 10 Texas Crim. App., 515; also see *Bolton vs. The State*, recently decided by the Court of Criminal Appeals, but not yet reported.

We, therefore, advise you that the district court would have jurisdiction of the offenses mentioned in your letter, they being misdemeanors involving official misconduct.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

PUBLIC ROADS—HIGHWAYS—OBSTRUCTION OF SAME.

Whether the act of obstructing a road or highway is a crime depends upon the surrounding and incidental facts. It would have to be shown that the act of obstruction was wilful.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, FEBRUARY 3, 1913.

Hon. William H. Davis, County Attorney, Crystal City, Texas.

DEAR SIR: In your letter to this Department of date January 25, 1913, you say:

"Complaint has been made to me of parties allowing wells to flow on and across the public roads in such manner as to make them almost impassable and in other instances of parties irrigating and allowing water to break through

the ditches and flood the roads. In the first instance the well is owned by a bank at Eagle Pass. Will the law of obstructing a public road fit such cases? I do not desire to institute suits unless they can be carried through successfully and while the sentiment is with us, still I am not satisfied that a conviction will hold."

It does not appear that our courts have construed just what the word "obstruction" means as used in the law contemplating prosecutions for obstructing the public highway. Statutes defining crimes, unless the phraseology they employ has been itself legally defined, must be interpreted as their language is understood by mankind at large, according to the everyday import of the words. *U. S. vs. Williams*, 28 Fed. Cas., 631.

Any manner of obstructing the highway of a character such as to be a common or public nuisance is indictable at common law. *State vs. Holeman*, 29 Ark., 15.

And the question as to whether anything within a highway is to be deemed a nuisance is a question of fact for the jury. *First Mich.*, 273.

In our opinion the question of whether the particular acts complained of would constitute an obstruction of the highway would be for the jury under appropriate instructions.

It has been held in the State of Indiana that backing water over a public highway by the erection of a mill dam is an offense. *State vs. Phipps*, 4 Ind., 515.

In California it has been held that where owners of land adjacent to a highway construct a system of artificial ditches converging at a culvert crossing such highway so as to discharge unnatural quantities of water on the lower lands on the opposite side of the highway, the owner of such lower land cannot dam the culvert on the highway for the purpose of protecting the lower lands. *Meyers vs. Nelson*, 44 Pac., 801.

The owner of land adjoining a highway has no right to drain his land into a ditch in such highway by means of a dam which carries the water in a different direction from its natural flow. *Davis vs. Highway Commissioners*, 143 Ill., 9, 33 N. E., 58.

Where a party proposes to erect a mill dam under a statute giving that right he has no right to erect the same so as to have the overflow therefrom interfere with the use of a public highway, and such overflow constitutes an obstruction. *Benard vs. Cross*, 8 Kans., 248.

On the other hand, it has been held in the State of Arkansas that the obstruction of the mouth of a slough is not an obstruction of a road, although it resulted in washing out the road at high water. *Roberts vs. State*, 84 Ark., 477.

In general, an obstruction of a highway may consist of anything that renders the highway less commodious. See 37 Cyc., 247, for illustrations.

As stated before, we believe that whether or not these acts constitute the crime of obstruction depends upon the surrounding and incidental facts and circumstances. The prosecution being criminal, of course, it would have to be shown that the fact of obstruction was wilful.

Yours truly,

LUTHER NICKELS,
Assistant Attorney General.

COMMISSIONERS COURT—FURNISHING LIGHTS, ETC.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MARCH 1, 1913.

Hon. A. M. Turney, County Judge, Alpine, Texas.

DEAR SIR: You propounded three questions to this Department, which are as follows:

"Have the commissioners court the legal right to contract for any pay for lighting the streets of the town of Alpine?"

"Have the commissioners court the right to contract for and pay for a light at the court house gate, also lights for two county bridges in the town of Alpine?"

"Shall the county furnish lights for the sheriff and his family when they are occupying the county jail in all rooms occupied by said family?"

Answering your first and second questions together, you are advised that the commissioners court would be authorized to contracts for lights necessary for the use of the courthouse in its ordinary and proper usage as such, but when the question passes beyond this; that is to say, when the lights are not for the necessary and proper use of the courthouse as such, they should not be provided. In other words there would be no authority in law to use the taxpayers' money to provide lights for the purpose of beautifying the streets or lighting same for the citizens of Alpine, but would only be authorized to purchase and pay for such lights as would be necessary to light your courthouse in a proper manner, making it a proper and convenient place for the transaction of the county's business. It would all resolve itself into this question: Are the lights to be purchased for the necessary usage of the courthouse or are they being purchased for the use of the citizens of Alpine? If the lights are purchased for the necessary and proper use of the courthouse, then they should be paid for by the county, but if for the use of the citizens of Alpine, then the price should be borne by the city authorities.

In regard to your third question as to whether or not you should furnish lights for the county jail, would say that the placing of a strict construction of the law would possibly require that the sheriff provide the lights used by himself and family and pay for same out of his individual funds. However, as you have constructed a jail and residence altogether, we do not believe that it would be illegal for you to pay for the entire lighting system of the jail, which includes the residence portion of the same. This is on the theory that the county derives some benefit from the sheriff's residence in the jail.

Of course, strictly speaking, the county is under no obligation to furnish a residence for the sheriff. However, as you have made this arrangement, which on the whole is a good one, we do not think that it would be improper for the whole light bill to be paid by the county. Neither would it be improper for your county to decline to pay for same. The line of distinction is so delicate that we would warrant you in taking either view of the situation.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

COMMISSIONERS COURT—JAIL JANITOR.

Commissioners court is without authority to pay for jail janitor, provided such janitor performs the duties of jailer. (Article 52, C. C. P.; article 1143.)

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JUNE 14, 1913.

Hon. M. Kleberg, Jr., County Judge, Ballinger, Texas.

DEAR SIR: You desire to know if the commissioners court has authority, under the law, to allow the sheriff a jail janitor.

Replying to this inquiry, we advise you that the commissioners court would have the authority to have the courthouse janitor, or if it was absolutely indispensable, to have a separate janitor to perform his duties at the jail; that is, such duties as usually devolve upon a janitor. His duties, however, must be confined to cleaning out the building and performing the usual duties which devolve upon a janitor. He would not be authorized, and, indeed, the commissioners court cannot pay him if a part of his duties is to wait on the prisoners or to do any of the duties that usually devolve upon a jailer, for the reason that the statute imposes upon the sheriff the duty of paying for his own jailer.

Article 52, C. C. P., provides that the sheriff may appoint a jailer to take charge of the jail, but no compensation is provided for this jailer to be charged against the county, for Article 1143 provides that the sheriff, with the consent of the commissioners, may employ a jail guard, which is to meet an emergency in case the jail is insecure or there is any particular necessity for the time being to have a guard, but provides that "there shall not be any allowance made for board of such guard, nor shall any allowance be made for jailer or turnkey, except in counties having fifty thousand population or more." While the commissioners court may have certain duties to perform at the jail by the janitor, no part of this janitor's duty should be to perform any duty which would devolve upon a jailer. The customary and ordinary way, in small counties, is to have the courthouse janitor perform such janitor's duty as would usually devolve upon an ordinary janitor, and, as stated above, the janitor could not carry a key to the jail, nor could he run errands for those in jail, nor wait on the prisoners, but his duty should be confined to cleaning up the jail and performing ordinary duties devolving upon janitors.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

COMMISSIONERS COURT—COUNTY ENGINEER.

County commissioners have not the authority to create the office of county engineer, but have the authority to hire a competent engineer to do a specific service.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, FEBRUARY 28, 1914.

Hon. A. D. Dyess, County Attorney, Temple, Texas.

DEAR SIR: You state that your county is now in the act of spending about \$1,000,000 in the construction of good roads and bridges; that your commissioners court thinks it would be advisable to have a county engineer to supervise the erection of all bridges and buildings of all highways in Bell county. You state that the question has arisen as to whether or not the commissioners court would have the right to create the office of county engineer or to appoint a county engineer and pay for his services out of a proper fund of the county, and you desire to be advised if your county has such right.

In reply to your inquiry, we advise you that it would be folly for the people of your county to tax themselves to the enormous amount of \$1,000,000 for the erection of bridges and the construction of roads and yet not have the power to pay for the most essential thing to the proper construction of such bridges and roads; that is, to pay for the services of a competent engineer. We think your county would have a right to employ an engineer to perform certain work that you may designate he shall perform, and you would have authority to pay him a proper compensation for his service. This compensation should come from the road fund of the district in which is situated the road or bridge which required his services.

There is no authority in law for your commissioners court to create the office of county engineer, but you can hire engineering work done and make with any competent person a proper contract to pay him for his services. The effect of such employment should not be the creation of a new office in the county, but should be on a different basis; that is, the employment of a man to perform a certain service, the idea being that you have not the power to create an office and appoint an officer and to give to him the name of a county engineer and place him upon the payroll of the county in this manner. You can hire him by paying him so much per day, or so much per week, or so much per month to perform a certain work, designating what he shall do for this service, and if the work performed is in a certain road district which has voted bonds for improvement, the length of time in which he is working in the district or the service which he performs in that district should be charged against the funds of that district, and where all of the work is done in, say, two or three districts, you could, among yourselves, agree upon a proper basis to prorate his salary among the several districts.

The advice that we have given in regard to this matter is our construction of the general law upon this subject, advising you at the same time that if your special road law deals with this subject its provisions should be regarded and respected.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

TAX COLLECTOR—OFFICIAL BONDS—COMMISSIONERS COURT.

The statute requiring that tax collectors' bonds should be approved by the commissioners court within twenty days is directory and the commissioners court would have the authority to approve the bond after the expiration of twenty days and before the officer assumes charge of the office.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MAY 16, 1914.

Hon. W. P. Lane, Comptroller of Public Accounts, Capitol.

DEAR SIR: You propound to this Department the following inquiry, which is embraced in a letter from Judge J. R. Monroe to you:

"By an oversight I failed to send you the within certificate of the appointment of Mr. Jacobo C. Guerra as tax collector of Starr county.

"You will note that the bonds were filed within twenty days after the appointment of Mr. Guerra, but more than twenty days expired before the approval of the bonds. I am informed that your opinion is that the appointment of Mr. Guerra is not legal by reason of the fact that the bonds were not filed and approved within twenty days after his appointment. If such be the law will you kindly cite me to some authorities as this is a matter of great importance to us for our future government. I find no authority sustaining your position, if such it be, except the statute requires that the bonds shall be 'given' within twenty days after the appointment which was done in this case, but not approved."

Replying to the above inquiry, we advise you that in the opinion of this Department the statutory requirement that the bond of the tax collector should be approved within twenty days after his appointment is directory. If the bond is approved before he assumes to discharge the duties of his office, it will be sufficient. Bearing out our opinion, we call your attention to Section 126 of Black on Interpretation of Law, which section is as follows:

"When a statute specifies the time at or within which an act is to be done by a public officer or body, it is generally held to be directory only as to the time, and not mandatory, unless time is of the essence of the thing to be done, or the language of the statute contains negative words, or shows that the designation of the time was intended as a limitation of power, authority, or right."

And also the case of *Swenson vs. McLaren*, 21 S. W., 300, in which case it was held that the statutory requirement that the commissioners court should divide their counties into school districts before the first Monday in October, 1884, was directory. The provision of the statute construed by the court is as follows:

"It shall be the duty of the county commissioners court of all counties not exempted from this section, to subdivide their respective counties into school districts at least one month before the first Monday in October, 1884."

The court, as stated, held that this provision was directory, and quoted with approval from Section 448 of *Sutherland on Statutory Construction*.

In the case of *McRoberts vs. Winant*, 15 Abb. Pr. N. S., 210, it was held that statutes fixing the time for public officers to file their official bonds are merely directory. They may file such bonds at any time before entering upon the duties of their office. It was also held that a

statutory provision requiring that grand jurors "shall be summoned at least five days before the first day of the court" was directory and that grand jurors summoned thereafter would be legal. It must appear from the statute enacted that time was of the essence of the transaction and that the Legislature negated any other time than that mentioned in the statute or intended the mentioning of the time as a limitation, in order for the time mentioned to be construed to be mandatory.

There is nothing in the statute relating to the filing of tax collectors' bonds and approving same which would indicate that a bond approved after the expiration of twenty days would not serve all the purposes of the statute, provided the bond was filed before the officer assumed to discharge the duties of the office.

It is, therefore, the opinion of this Department that the tax collector's bond approved by the commissioners court after the expiration of twenty days, but before the officer assumed to discharge the duties of his office, would meet the requirement of law.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

COUNTY JUDGE—COMMISSIONERS COURT—COUNTY SUPERINTENDENT.

The statute requiring the county judge and commissioners court to ascertain the population of the county by report of the number of scholastics by the county superintendent is directory and is sufficient if the report was made at the September term.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 4, 1914.

Hon. A. M. Kent, County Attorney, Brownsville, Texas.

DEAR SIR: We have your communication of some weeks ago, in which you enclose a letter from J. T. Canales, stating the question you desire to propound to this Department as follows:

"The commissioners court did not certify to the population of this city and the various precincts of this county at their August term, for the year 1913, but they did so at their September term, and for this reason the Comptroller refuses to consider said census and refuses to issue any new permits based upon said census or based upon any previous census, to wit, the census for the year 1912."

Your inquiry calls for a construction of Article 7445 of the Revised Civil Statutes of 1911. This article is as follows:

"The Comptroller of Public Accounts of the State of Texas shall not issue any permits to any person or firm for any city or town or justice precinct of any county in excess of the number of permits actually issued and existing on the twentieth day of February, 1909, in such city or town, or justice precinct, respectively, unless said number of permits are less than one for each five hundred inhabitants, in which event he shall, if applied for, issue permits not exceeding one for each five hundred inhabitants of such city or town or justice precinct. In case the number of permits issued and existing on the twentieth day of February, 1909, for said city or town or justice precinct is in excess of one for each five hundred inhabitants, the number of permits existing on the

twentieth day of February, 1909, as applied for, shall be granted; but that number shall not be increased until the number of inhabitants of such city or town or justice precinct increases to the extent that the permits issued and actually in existence on February 20, 1909, is less than one for each five hundred inhabitants; but the provisions of this article shall not apply to hotels now in existence, or which may hereafter be opened, when located in the business section of a city or town having a population of over twenty thousand; and provided that in granting permits for license as a retail liquor dealer, or a retail malt dealer, the Comptroller of Public Accounts shall give preference to those applicants who apply for a permit to do business at the places and locations in said city or town, or justice precinct, where permits had heretofore been issued and granted; provided, further, that at least one permit may be issued in any city, town or justice precinct, where local option is not in force. The population of each city, town and justice precinct in the State shall be ascertained by the commissioners court of such county at the August term thereof of each and every year in the following manner: It shall be the duty of the superintendent of public instruction for such county, upon the request of such commissioners court, to inform such commissioners court of the total school census of each city and town and justice precinct; and it shall be the duty of the commissioners court in determining the population of such city, town or justice precinct to estimate the population at the rate of six persons for every one name on such scholastic census, and upon such basis, at the August term of said court of each year, to ascertain and determine the population of such city, town and justice precinct, and to enter an order and decree upon the minutes of said court finding and determining what such population is, and shall send a certified copy thereof to the Comptroller of Public Accounts of the State of Texas."

It will be noted that the above article contains this sentence:

"The population of each city, town and justice precinct in the State shall be ascertained by the commissioners court of such county at the August term thereof of each and every year in the following manner: It shall be the duty of the superintendent of public instruction for such county, upon the request of such commissioners court, to inform such commissioners court of the total school census of each city and town and justice precinct; and it shall be the duty of the commissioners court in determining the population of such city, town or justice precinct to estimate the population at the rate of six persons for every one name on such scholastic population at the rate of six persons for every one name on such scholastic census, and upon such basis, at the August term of said court of each year, to ascertain and determine the population of such city, town and justice precinct, and to enter an order and decree upon the minutes of said court finding and determining what such population is, and shall send a certified copy thereof to the Comptroller of Public Accounts of the State of Texas."

While it is plain that this statute directs that the population of the city or town or justice precinct shall be ascertained at the August term of the court, we are of the opinion that this article is directory only; that it points out the manner and method and the time for ascertaining the population, and while this provision directs the administrative officers how to proceed and when to proceed it is a direction only. It is not mandatory and will not make void the census when ascertained after the manner directed at another time. The essential fact to be determined is the population and not that it be determined in a specific way and based upon a report made by the county superintendent at the August term of the court.

To aid us in a proper construction of this article, we call attention to Section 448 of Sutherland on Statutory Construction. Among other things, this section states:

"Provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory. Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards. In other words, as the cases universally hold, a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory, unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered as a limitation of the power of the officer. And it was accordingly held that a brigade order, constituting a courtmartial, issued in July, when by the militia law it was made the duty of the commandant of the brigade to issue such order on or before the first day of June in every year, was valid. A provision that an appeal bond be executed before an appeal is perfected, when not a part of the essential steps to take an appeal, is directory. So is a provision that an officer shall take his official oath within a certain period, or give his official bond, even where the issue of a commission to him is prohibited until such bond is given; for it would be attended with mischievous consequences if in such cases all the official acts of such delinquent were held void. His acts, if he in fact filled the office, would doubtless be valid. There could be no collateral inquiries affecting the right of a de facto officer to act. A statute which provides that commissioners to locate a county seat shall meet at a time and place provided for, that a majority shall constitute a quorum to do business, 'and that the commissioners may adjourn to some other place or time, and may adjourn from time to time until the business before them may be completed,' is directory merely, and the commissioners have the power to elect a chairman and empower him to fix the time of the next meeting." (Sutherland on Statutory Construction, page 575.)

In the case of *Smith vs. Crittenden*, 16 Mich., 152, the court held:

"A statute required the township clerk to certify on or before the first Monday of October of each year to the supervisor of his township the amount of the town indebtedness growing out of the payment of bounties. Where such certificate was not made within that period, but was within a week afterwards, and seasonably to answer the intended purpose, it was held good, and the provision so far directory. The information was to enable the supervisor to include the amount certified in the tax levy."

In the case of *People vs. Doe*, 1 Mich., 51, the court held that a statute requiring the court on the first day of the term to assign cases for trial on particular days was directory.

In the case of the *State vs. Harris*, 17 Ohio, 608, the court held that where a statute directs a tax to be levied at a given time and it was omitted it may be levied at a different time.

In Section 451, Sutherland, this doctrine is announced:

"Statutes directing the mode of proceeding by public officers are directory, and are not to be regarded as essential to the validity of the proceedings themselves unless so declared in the statutes."

In the case of *People vs. Cook*, the court says:

"Statutes directing the mode of proceeding of public officers are directory, and are not to be regarded as essential to the validity of the proceedings themselves, unless it be so declared in the statute.' The qualification further on in the opinion is: 'Unless there is something in the statute itself which plainly shows a different intent.'" (*People vs. Cook*, 14 Barb., 259.)

In other words, unless fair consideration of the statute shows that the Legislature intended compliance with the provisions in relating to the

manner of proceeding to be essential to the validity of the proceeding, it is to be regarded as directory merely.

In the case of Galveston Railway Company vs. Dunlavy, 56 Texas, 256, the courts of this State held that a statute which required the instructions to the jury to be in writing is directory. While the weight of authority now seems to be contrary to the doctrine announced in this case, still we give the case to illustrate the extent the courts have gone in holding statutes relating to the duties of public officers to be directory. Of course, the doctrine upon which the courts recede from the opinion in this case is not that they do not agree with the correct rules, but they conclude that the statute which directs that the charges should be in writing was a direct expression of the lawmakers to the effect that that was the exclusive mode in which the charge should be presented to the jury and is, therefore, mandatory.

It seems to be clearly the intention of the Legislature that there should be a uniform method throughout the State for ascertaining the number of saloons which might be allowed in wet territory, which was the object in enacting the statute requiring that this be done in a certain manner, and at the August term of court. There is nothing in the act which would indicate that the Legislature desired to put any limitation upon the number of saloons in wet territory in case the law was not complied with strictly. It would be a harsh rule which would deprive a person of the legal right to pursue the business of selling intoxicating liquor simply because of some neglect or failure to perform a duty by a public officer.

We, therefore, conclude, and so advise you, that the statute under consideration in so far as it designates the August term of the court as the time at which the population should be ascertained as a basis for establishing saloons is directory and that a compliance with this statute by filing the necessary reports and making the necessary certificates at the September term of the court would be a substantial compliance with the provisions of the act and would constitute a proper basis for determining the number of saloons Brownsville would be entitled to.

Very respectfully yours,

W. A. KEELING,
Assistant Attorney General.

COMMISSIONERS COURT—REPAIR OF PUBLIC ROAD.

Commissioners court of one county has no authority to expend the funds of that county for the maintenance and repair of a public road situated within another county. (Articles 2241 and 6949 construed.)

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, DECEMBER 29, 1913.

Hon. Pat N. Fahey, County Attorney, Navasota, Texas.

DEAR SIR: We have your letter of December 22nd, enclosing a draft of your opinion given to Mr. A. E. Tuck, county commissioner, to the effect that the commissioners court of Grimes county can legally appro-

priate money from the road and bridge fund of Grimes county to pay for repairs done and bridges built on the Navasota-Washington road between the Navasota and Brazos rivers in Brazos county.

It appears that this particular piece of road is within Brazos county; that heretofore certain citizens of the town of Navasota "purchased the road and those who owned the fee thereof; that subsequently this road was deeded to Grimes county for road purposes for the benefit of the citizens of Grimes county, primarily, and of the public generally; that the county accepted the road for the purposes designated and a deed from the citizens' committee was made to the county and accepted by the county," etc.

The question arises whether or not under these facts the commissioners court of Grimes county is authorized to use that county's funds for the repair and maintenance of this piece of road situated within Brazos county.

We take it to be established law that Grimes county had the power to accept and hold the title to the land on which the road in Brazos county is situated. R. S., 1911, 6951, 1369. *Bell County vs. Alexander*, 22 Texas, 350. *Scaff vs. Collin County*, 16 S. W., 314.

The act of the citizens of Navasota who had bought the fee to the land on which the road is situated in deeding the same to Grimes county for the purposes stated undoubtedly operates to make the piece of road a public highway by dedication, nor is it necessary that the county of Brazos accept or recognize the road to be a public road in order for it to become a public highway. *Porter vs. Johnson*, 140 S. W., 469; *Porter vs. Johnson*, 151 S. W., 599.

As a general proposition, it is true that a trustee, by accepting the trust, becomes bound to execute it. 39 Cyc., 293, and "every corporation has by implication the power to do whatever is necessary to carry into effect the purposes of his creation. Whatever may be fairly regarded as incidental to or consequential upon those things that are authorized will not be held to be ultra vires unless expressly prohibited. 10 Cyc., 1097, 1098.

By Article 6949, R. S., 1911, the commissioners court is charged with the duty of seeing that the road and bridge fund of their county "is judicially and equitably expended on the roads and bridges of their county," etc. It is undoubtedly true that in many, if not in most, instances, the word "of" denotes ownership or possession. *State vs. Kurnick*, 15 N. E., 481. *State vs. King*, 51 Atl., 102. *Carlisle vs. Marshall*, 36 Pa., 397, and if such is the meaning of the word as used in Article 6949 the commissioners court of Grimes county would have the authority to spend the county's money for the maintenance of this road. We have come to the conclusion that such is not the meaning of the word as used in that article.

In many instances the word "of" is synonymous with the word "in." *Ivey vs. State*, 37 S. E., 398.

The powers conferred upon the commissioners court are specified in Article 2241, R. S., 1911. Subdivisions 3, 4, 5 and 6 of said article read as follows:

3. To lay out and establish, change and discontinue public roads and highways.

4. To build bridges and keep the same in repair.
5. To appoint road overseers and apportion hands.
6. To exercise general control and superintendence over *all* roads, highways, ferries and bridges *in* their counties.

It will be noted that the performance of these duties is by this article and other statutes limited to the territory of the county, it being conceded that the road in question is a public highway, then under the provision of Subdivision 6 of Article 2241 quoted above the commissioners court of Brazos county and not the commissioners court of Grimes county has the power, and it is its duty "to exercise general control and superintendence" over it. It is a road or highway, and it is *in* Brazos county. These two facts are sufficient to place it within the jurisdiction of the court in Brazos county. The fact that the fee to the land on which the road is situated is in Grimes county does not alter the power or duty of Brazos county with reference to the road. As a general proposition, the fee to the land upon which a highway is built usually rests in some individual, resident or non-resident, corporation, domestic or foreign, etc. The fact that the fee to the land rests in Grimes county no more clothes that county with the authority or invests it with the duty to control, maintain and superintend the road than would the fact that the existence of the fee in an individual or private corporation make it the duty of the individual or corporation to maintain and repair the road. The highway easement exists absolutely independent of the fee simple title, and it is the easement which the proper county must protect and secure the use of for the public. The control of this easement by the statute is given to Brazos county, and the duty to provide for its public use is laid upon the commissioners court of Grimes county.

There being no lawful duty to maintain or repair the road laid upon Grimes county and no lawful authority to superintend, the control of the road being given to the commissioners court of that county, the expenditure of Grimes county's fund for the maintenance and repair of a road within Brazos county cannot, we believe, be justified by law.

Yours truly,

LUTHER NICKELS,
Assistant Attorney General.

OFFICERS—COUNTY COMMISSIONERS—RESIDENCE.

1. When a county commissioner changes his residence to another county, he vacates his office, and it becomes the duty of the county judge to fill the vacancy.
2. The law contemplates that a county commissioner shall reside in his precinct, and when he leaves and remains away for such a time as to necessarily neglect or abandon the duties of his office a vacancy exists.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, DECEMBER 30, 1913.

Judge J. B. Allred, Emory, Texas.

DEAR SIR: Under date of the 26th inst., you write this Department that one of your county commissioners has moved to Lone Oak, in

Hunt county, and another has moved to Alba, in Wood county, and you express the opinion that thereby they have vacated their offices, but that your county attorney and also District Judge Pierson are of the contrary opinion.

You further state that this Department has approved a bond issue by one of your common school districts, and that it is the purpose of your county to invest your permanent school fund in these bonds, and it is with a view of ascertaining the legality of these bonds that you are writing this Department.

Section 14 of Article 16 of the Constitution of this State provides:

"All civil officers shall reside within the State, and all district or county officers within their district or counties, and shall keep their offices in such places as may be required by law; and failure to comply with this condition shall vacate the office so held."

Section 18 of Article 5 of the Constitution provides, among other things:

"Each county shall in like manner be divided into four commissioners precincts, in each of which there shall be elected by the qualified voters thereof one county commissioner, who shall hold his office for two years and until his successor shall be elected and qualified. The county commissioner 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 the State or as may be hereafter prescribed."

In addition to the provision of the Constitution first quoted, which contemplates that a commissioner shall be elected from the precinct and that he shall reside within the boundaries of said precinct, the particular duties imposed by law on members of the commissioners court seems to further corroborate the idea that the commissioner must be a resident of the commissioner's precinct that he represents. It is, therefore, my opinion that, where a member of the commissioners court moves from the county and changes his residence to any other county, he thereby vacates his office, and it is the duty of the county judge to fill such vacancy under the provisions of the following statute:

"Article 2240. In case of vacancy in the office of commissioner, the county judge shall appoint some suitable person living in the precinct where such vacancy occurs to serve as commissioner for such precinct until the next general election."

Under the general rule at common law a man's legal residence is not changed when he leaves it for temporary purposes and transient objects, meaning to return when those purposes are accomplished and objects attained.

I am of the opinion, however, that the rule with reference to a change of residence by an official whose personal presence in his county or precinct is required by law is different from the general rule applicable to others.

The Constitution of this State requires all officers to reside within their counties or districts; it also requires that in each commissioner's precinct a county commissioner shall be elected by the voters thereof,

and when a vacancy occurs the statute requires that the county judge shall appoint "some suitable person *living in the precinct* where such vacancy occurs."

The duties devolved by law on a county commissioner are varied and are changing from day to day as the exigencies of public business and public necessity require. Among other duties, he is to look after the establishment, change, laying out, repair and working of the public roads and bridges; he shall see to the appointment of road overseers and the apportionment of hands; shall provide and keep in repair all the public buildings of the county and to audit, adjust and settle all accounts against the county and in favor of the county; he shall provide for the support of paupers and such idiots and lunatics as cannot be admitted into the asylums; shall provide for the burial of paupers; he shall levy taxes for county purposes and is required as a member of the equalization board to pass on all tax values, etc. No one except someone familiar with the affairs of his precinct and who constantly keeps in touch by personal contact can possess a personal knowledge of the public's business so as to be able to render an efficient service to the public. The personal presence of someone "living" in the precinct seems to be required.

I am not attempting to pass upon the question whether or not vacancies exist in the offices of county commissioner in your county, because each case will have to depend upon its own peculiar facts, but I am attempting to give you the general rules of law, and, as I view it, the different considerations that should be taken into account in determining whether or not a vacancy does or does not exist by reason of the removal of an officer from the county or precinct for which he was elected and which he is to represent.

I would say, therefore, that where the residence of any county officer is changed to another county, unless it is for a temporary purpose and to accomplish some special object which will not cause a protracted absence for such a period of time as to necessarily involve the abandonment or neglect of those duties imposed by law, such a removal would constitute a vacancy, even though the permanent residence is not thereby changed.

However, I do not believe that this doubt, if any, as to whether vacancies exist in these two offices, should affect the validity of the bonds that you mention. In the first place, the county judge and the two remaining members of the commissioners court constitute a quorum for the transaction of business, and in fact can transact all business of the county legally except the levying of a tax. Again, I do not believe the action of these commissioners, even if they have vacated the office by change of residence, could be attacked in a collateral proceeding. In other words, as long as they appear and discharge the duties of their offices they are to be regarded as *de facto* officers, and their acts will be upheld as valid and cannot be called in question in any collateral proceeding.

For the several reasons, it is my opinion, and I so advise, that the bonds, being in other respects valid, you could so far as the question you

raise is concerned safely invest your permanent school fund in the same.

Yours truly,
B. F. LOONEY,
Attorney General.

COMMISSIONERS COURT—QUORUM.

Three members of the commissioners court constitute a quorum for the transaction of all business, except the levying of taxes.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 31, 1913.

Hon. Will P. Brady, District Attorney, Pecos, Texas.

DEAR SIR: Under date of January 22, 1913, you ask the ruling of this Department upon the following questions:

"1. Do three commissioners constitute a legal court, and can they enter an order showing the election of a county judge?"

"2. If three commissioners do not constitute a quorum of the court, and their action in attempting to elect the judge is invalid, then is the present acting judge such a de facto officer as will permit him to assist in the levying of taxes?"

"3. If Reeves county has not a legally elected and qualified county judge, then what proceedings must be taken to fill the vacancy?"

Answering your questions in the order in which they appear, you are respectfully advised that in the opinion of this Department *three* members of the commissioners court constitute a quorum for the transaction of all business, except the levying of taxes. Article 2237, R. S., 1911, provides that four commissioners together with the county judge shall compose the commissioners court, and the county judge when present shall be the presiding officer of this court; that is, under this article of the statute, the commissioners court is composed of five members—the county judge and the four county commissioners.

Article 2238, R. S., 1911, provides that any three members of the commissioners court, including the county judge, constitute a quorum for the transaction of any business, except that of levying a county tax.

There have been two constructions placed upon this statute at variance with each other; one by our civil courts and the other by our Court of Criminal Appeals. In the case of *West vs. Burk*, 60 Texas, 51, it was held that three members of the commissioners court in the absence of the county judge did not constitute a quorum of said court for the transaction of business. The rule announced in this case is that where only three of the commissioners are present the county judge must also be present in order to constitute a quorum. The court construed the language of the statute to mean that three commissioners and the county judge had to be present in order for the court to transact any business.

This identical question was before the Court of Criminal Appeals in the case of *Racer vs. The State*, 73 S. W., 968. In this case *Racer* was prosecuted for violating the local option law, and the validity of the

law was attacked on the ground that the county judge was not present when the order for the election was made. In disposing of this contention, the presiding judge of said court, Judge Davidson, used the following language: "This is wholly immaterial. The commissioners court is authorized to transact its business whenever there is a quorum present, and this consists of three members," citing the articles of the statute under consideration. While, of course, we have great respect for the opinions of our civil courts, and ordinarily would follow them in civil matters, yet in this case we feel constrained to agree with the position taken by the Court of Criminal Appeals in the Racer case, because it appears to more clearly reflect the intention of the Legislature.

2. If we are in error in our construction of this statute, yet we are of the opinion that the person elected by the three commissioners as county judge would be a *de facto* officer, and his official acts could not be collaterally attacked.

3. If three commissioners do not constitute a quorum of the commissioners court, the county judge and one of the county commissioners of Reeves county being dead, there is no provision of law whereby such vacancies can be filled. You will have to look to the Legislature for relief.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

COMMISSIONERS COURT—COMMISSIONERS PRECINCTS—BOUNDARIES.

Commissioners court has authority at any time to change the boundary lines of commissioners precincts.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, APRIL 24, 1913.

Hon. James A. Cooley, County Judge of Kaufman County, Kaufman Texas.

DEAR SIR: You propound the following question to this Department:

"Has the commissioners court the power to change the commissioner's precinct line which re-establishes the line of two or more of the commissioners' precincts?"

Replying thereto, we beg to say that Section 18 of Article 5 of the Constitution provides, in effect, that counties shall be divided from time to time for the convenience of the people into precincts (having reference to justice precincts) and provides that the present county courts shall make the first division, and subsequent division shall be made by the commissioners court provided for by the Constitution. Then follows in this section the following words: "Each county shall in like manner be divided into four commissioners' precincts in each of which there shall be elected by the qualified voters thereof one county commissioner, etc."

We take it that the only construction that could be placed upon the language just quoted above with reference to the division of counties into commissioners precincts would be that the county should be divided and commissioners precincts formed in the same manner as justice precincts are formed and that the commissioners court would have like authority to divide the county from time to time for the convenience of the people into commissioners precincts and to change the same at any time it should appear in the wisdom of the commissioners court to be for the convenience of the people.

In the case of *Martin vs. Mitchell*, 32 Civil Appeals, 385, which was a case involving the question of change of boundary lines of commissioners precincts, the court used the following language:

"In ordering the election the boundaries of the three commissioners' precincts to be affected were not only recognized but were designated as the boundaries of said precincts by the commissioners court, which would itself seem sufficient to correct the original error, since it is within the power of the commissioners court at any time to change precinct boundaries." (See *Dowlen v. Rigsby*, 43 S. W., 271, 1101; *State v. Rigsby*, 17 Texas Civ. App., 171.)

You are, therefore, advised that, in the opinion of this Department, the commissioners court has the authority at any time to change the boundary lines of commissioners precincts.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

COMMISSIONERS COURT—COUNTY SUPERINTENDENT.

The commissioners court is without authority to appropriate and pay an amount in excess of \$100 per year for the expenses incident to the running of the county superintendent's office.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, DECEMBER 20, 1913.

Hon. W. F. Doughty, Superintendent of Public Instruction, Capitol.

DEAR SIR: Under date of December 16th you propound to this Department the following question:

"Is the commissioners court of a county limited to \$100 in making allowances for the expenses of the office of the county superintendent, or has it not the right to go beyond that amount as in case of other county officers, when in their judgment the efficiency of the office would be impaired by not meeting all reasonable and legitimate expenses connected with the proper administration of its affairs?"

Replying thereto, beg to advise you that Article 2758, R. S., 1911, stipulates the salaries that should be paid county superintendents, and, in addition to the salaries, said article provides:

"* * * that the county superintendent shall be allowed any sum not to exceed one hundred dollars per year for stamps, stationery, expressage and printing, to be paid by the commissioners court out of the county general fund."

In our opinion this language is mandatory and not merely directory.

We, therefore, respectfully advise you that the commissioners court of a county is without authority to appropriate and expend an amount in excess of \$100 per year for the expenses incident to the running of the county superintendent's office.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

OFFICERS—NOTARIES PUBLIC.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MAY 21, 1913.

Mr. A. L. Pinkston, County Clerk, Shelby County, Center, Texas.

DEAR SIR: We have your favor of May 17th as follows:

"I have before me the list of notaries public for this county as certified to me by the Secretary of State, and among the names appear those of all four of the county commissioners, the county superintendent of public instruction, the county attorney and the county surveyor, and will thank you to advise me if such officers are entitled to be qualified as such notaries."

Replying thereto, we beg to say that 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."

It will, therefore, be observed that a person may hold any of the offices enumerated in the statute and any other civil office of emolument. This, of course, would be subject to the exception that a person could not hold one of the offices named and any other office, the duties of which would conflict with the duties of the office held, enumerated in the section of the Constitution above quoted. The office of notary public is named in the Constitution as one of those offices which may be held by a person holding another civil office of emolument. None of the offices named in your letter carry any duties with which the duties of the office of notary public would conflict, and we are, therefore, of the opinion, and so advise you, that county commissioners, county superintendent of public instruction, county attorney and county surveyor may qualify as notary public. See *Figures vs. State*, 99 S. W., 412.

The following officers may also be notaries public: County commissioner, county superintendent of public instruction, county attorney, and county surveyor.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

FOOD AND DRUG LAWS—PROSECUTION—INFORMATION.

It is not necessary for the Food and Drug Commissioner to appear in person and make affidavits in prosecutions for violation of food and drug laws; he can furnish the data to the county attorney, and he can in turn furnish it to the sheriff or some peace officer who can make the necessary affidavit upon information and belief.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MAY 14, 1913.

Hon. J. S. Abbott, Food and Drug Commissioner, Capitol.

DEAR SIR: You state to this Department that in some counties of the State you have been requested to appear before the county attorney in person and make affidavits charging violations of the Pure Food and Drugs Act. You desire to know if it is a fact "that you or one of your deputies shall be required to sign a complaint in order that a prosecution may be had under the provisions of this act." You further desire to know if these complaints can be signed by sheriffs, deputies or marshals, or in fact anyone else upon information and belief.

Replying to your inquiry, we beg to advise you that any person in this State who has good reason to believe and does believe that an offense against the laws of this State has been committed can appear before the county attorney and file an affidavit setting out this fact, and it will then be the duty of the county attorney to file his information and prosecute said cause. Any person who is a creditable witness will be competent to make such complaint.

It is the duty of all peace officers of this State, such as sheriffs, marshals, policemen and constables, to file such complaints when the information is presented to them. There is no difference between the enforcement of the Pure Food and Drugs Act than any other law. If a murder has been committed in a county, it is not necessary in order to begin the prosecution that some person who saw the killing should make the affidavit, but it is sufficient if from all the information he obtains he has good reason to believe and does believe that a person committed the offense; it would then be his duty to institute proceedings by making affidavit against the suspected party.

Under Article 269, Section 2, the law provides that a complaint must state that the accused has committed some offense against the laws of the State, naming the offense, or, if the complainant does not know this fact, he can state that he has good reason to believe and does believe that the accused committed the offense. Upon information obtained from any reliable source, if a peace officer has good reason to believe and does believe that an offense has been committed, it is his duty to at once file complaint so that the case can be tried. This being the method of instituting criminal prosecutions, liberal construction should be given it so that offenses which need prosecution should not be neglected, and for this reason it is only necessary that the peace officer making the complaint should state that he has good reason to believe and does believe that the offense has been committed. 45 Texas Crim. Rep., 462. 76 S. W., 436, 124 S. W., 922, 35 Texas Crim. Rep., 571, or 34 S. W., 754, are authorities for this proposition.

Now, as a method of procedure, this Department would suggest to

you that you make an affidavit, setting out the facts in your possession, and which facts would in your judgment constitute a violation of the Pure Food and Drugs Act, you swear to this statement of facts and present it to the county attorney, who in turn presents this statement of facts to some peace officer, which statement of facts should be sufficient warrant for him to make the affidavit upon which the prosecution should be based. In other words, you furnish to him sworn testimony which should apprise him of all the facts necessary for him to make the affidavit upon his own accord; that is to say, when you apprise him in a sworn affidavit of the true existence of a certain statement of facts it then becomes the duty of the peace officer to institution a prosecution in order that the courts may try the case and determine the guilt or innocence of the party. In our opinion, this practice would be most wholesome and would simplify the procedure to the end that guilty parties could be speedily prosecuted. To our minds it would be unreasonable to require that the Pure Food Commissioner obtain the evidence and make a separate trip to the various courts for the purpose of filing an affidavit, and then return to that county for the purpose of furnishing proof upon final trial. In fact, such a construction would nullify the entire act, for the reason that it is neither practical nor efficient method of enforcing this law, and there is no more reason to require of the Pure Food Commissioner this duty than there would be to require that all other criminal prosecutions be had after the same manner. It is the duty of all peace officers to investigate and enforce all laws upon the statute books, and when the information is presented to them it is their duty to institute and immediately file proceedings. This is frequently done in gaming cases, for the county attorneys sometimes procure affidavit from some person that a number of persons had violated the gaming law. When the peace officer sees this affidavit, upon information and belief he at once proceeds to file complaints against all of the parties. Of course, he was not present and did not see the game. He simply states that upon information and belief he institutes the prosecution.

We, therefore, advise you to set out fully in an affidavit by you or some other creditable person the statement of facts which would be necessary for the institution of criminal proceedings and furnish this to the county attorney, whose duty it will be to present it to some peace officer, whose duty it will be to file the necessary affidavit with the county attorney.

Sincerely yours,

W. A. KEELING,
Assistant Attorney General.

PURE FOOD LAW—MILK—WHEN ADULTERATED.

Skimmed milk added to whole milk, and the result sold as whole milk, is a violation of law.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, AUGUST 26, 1913.

Hon. J. S. Abbott, Food and Drug Commissioner, Capitol.

DEAR SIR: You enclose to this Department some correspondence, the effect of which is to show that the Dairy and Food Commissioner has fixed the minimum standard for milk to contain not less than 3.25 per cent butter fat, and you desire to know if a dairyman can skim his milk partly and sell it for whole milk, provided it contains 3.25 per cent butter fat, or the minimum of the standard fixed by the Dairy and Food Commissioner.

This question involves a construction of that part of the Pure Food and Drugs Act which was amended in 1909, Session Acts, page 166.

Section 1, which provides:

"That no person, firm or corporation, shall, within this State, manufacture for sale, have in his possession with the intent to sell, offer or expose for sale, or sell or exchange any article of food, drink * * * which is adulterated or misbranded within the meaning of this act."

In Section 2, Subdivision "c," it is provided:

"In case of food; first, if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

"Second. If any substance has been substituted wholly or in part for the article.

"Third. If any valuable constituent of the article has been wholly or in part abstracted, or if the product be below that standard of quality, strength or purity represented to the purchaser or consumer, the article of food shall be deemed to be adulterated."

The proper and legitimate construction of this act, as applied to the facts in this case, should be if it be determined from the facts of the case, that any substance has been mixed with the milk so as to reduce or lower its quality or strength, or if any valuable constituent of the article has been wholly or in part abstracted, or if the product (the milk) be below that standard of quality, strength and purity represented to the purchaser or consumer, it will be deemed to be adulterated. The pure food authorities in the exercise of the authority conferred upon them by this act have adopted as part of the rules governing them in their duties, that no milk will be permitted to be sold when it contains less than 3.25 per cent butter fat; in other words, they establish this as the minimum for butter fat they will permit the milk to contain and be subject to sale.

Dr. Wiley in his celebrated work on "Foods and Their Adulteration," Part IV, in treating the subject "Milk," says:

"There is a great variation in the composition of milk in different breeds of cattle, and also in different individuals of the same breed; for instance, the Holstein breed of cattle affords a milk with a very low content of fat, sometimes as low as 3.25 per cent, and in individual cases lower. On the other hand, the Jersey breed of cattle affords a very high content of fat, sometimes reaching as high as 6 per cent, and in individual cases very much higher."

In view of the fact that it will be seen that 3.25 per cent is a very low per cent, if not the lowest per cent, whole milk can contain, while a good or average grade of milk will contain a much higher per cent, the object of the passage of the Pure Food Act was to secure a good, wholesome and pure food for the people, and, in order to do this, they provided that no substance could be mixed with the food, and, for the purposes of this opinion, we will state here, could be mixed with milk, so as to reduce or lower its quality or strength, nor could any valuable constituent of the milk, or part thereof, be taken from it; if so, it would be considered adulterated. This forces us to the conclusion which we believe is the only legitimate and fair construction deducible from the act in question, and that is, that if a dairyman takes from the milk of his cows any part of the butter fat, or adds to it any skimmed milk, even though he lets the per cent remain above 3.25, he will be guilty under this act of having adulterated the milk. It was never the intention of the act to permit a dairyman to reduce the standard of his milk to the lowest minimum permitted under the law, and permit him to sell this to the public as whole milk. When a person buys milk from a dairyman he is entitled to the whole milk; that is, if the dairyman purports to sell him unskimmed milk. If this milk, however, contains less than 3.25 per cent butter fat, its sale is prohibited, but if the milk contains 6 per cent butter fat the person buying the milk gets the whole milk. If we were to give this act a different construction, the result of it would be to permit the dairymen of this State to force upon the people milk of a very low standard of butter fat, while they have the right to buy milk of a high per cent of butter fat.

In the correspondence, we observe that the dairyman in Houston would skim a part of his milk, and would mix the skimmed milk with unskimmed milk until he reduced the per cent of butter fat to 3.25, the minimum permitted in law. There is no doubt in our minds that this is clearly a violation of at least two provisions of the Pure Food Act, as follows:

1. He has mixed a substance with the whole milk, to wit, unskimmed milk, which lowers its quality and strength.
2. He has taken from it a valuable constituent or part of a valuable constituent, to wit, butter fat, both of which constitute violations of the Pure Food Act.

You are, therefore, advised that any person in this State who removes or adds to the whole milk, any skimmed milk, which reduces the quality and strength of the whole milk, or who attempts to sell whole milk which is below the standard of 3.25 per cent, is guilty of selling adulterated milk, and should be prosecuted under the laws of this State.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

COUNTY ATTORNEY—PRACTICE—CORPORATION COURT.

1. Under Section 5, Article 21, of the State Constitution, county attorneys have the right and authority to appear and represent the State in the corporation courts of their respective counties in all cases to which the State may be a party.

2. Although it is the right and authority of the county attorneys to appear and represent the State in corporation courts, yet there is no provision made by law for compensating such officers for services thus rendered.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MARCH 6, 1914.

Hon. Mark McGee, County Attorney, Brownwood, Texas.

DEAR SIR: At your request we have given the question of your right to collect fees in corporation courts for services rendered by you in said courts in representing the State further consideration, and we are convinced that our former opinion to you was correct.

There appears to be two incorporated towns in your county—Bangs and Blanket. Each of these towns has a corporation court, but no city attorney to represent the State in prosecutions brought in said courts. Under such circumstances, you contend that you as county attorney have the right to appear and represent the State in said courts and to collect fees for such service.

We do not think there can be any question about your right and authority to appear and represent the State in said courts. You would have that right even though there was a city attorney at each place.

Article 5, Section 21, of the Constitution, provides that the county attorney shall represent the State in all cases in the district and inferior courts in their respective counties, and shall receive as compensation only such fees, commissions and perquisites as may be prescribed by law. Passing upon this provision of the Constitution, the Supreme Court of this State in the case of the State of Texas vs. Moore, county attorney, 57 Texas, 307, had this to say:

"The powers granted to county attorneys in reference to representing the State in all cases in the district and inferior courts in their respective counties is broad and comprehend alike cases civil and criminal, except so far as the Constitution itself confers power upon the Attorney General to represent the State in those cases. It must be presumed that the Constitution, in selecting the depositaries of a given power, unless it be otherwise expressed, intended that the depositary shall exercise an exclusive power with which the Legislature could not interfere by appointing some other officer to the exercise of the power."

The corporation courts in Brown county, being inferior courts of the State, there is no question but that the county attorney has the exclusive right to appear in said courts and represent the State in all cases pending therein to which the State is a party. This question was clearly discussed and passed upon by the Court of Civil Appeals, Galveston district, in the case of Howth vs. Greer et al., 90 S. W., 211. A writ of error was denied by the Supreme Court in said case.

The same question was also passed upon by the Court of Civil Appeals of the Austin district in the case of Upton vs. City of San Angelo et al., 94 S. W., 436, and the same doctrine was announced as was announced

in the Howth vs. Greer case. Therefore, it is the well settled law of this State that the county attorney under the provisions of the Constitution has the authority to appear and represent the State in corporation courts of his county in all cases to which the State is a party.

The other part of your question as to whether the county attorney would have the right to collect the fees for the services rendered by him in said city courts has also been decided by the courts of this State. This question was directly presented in the case of Howth vs. Greer, above cited, and the court held that although it was the privilege and right of the county attorney to appear in the corporation courts of his county and represent the State in such courts in all cases to which the State was a party, yet such officer would not be authorized to collect fees for such service because the Legislature had failed to make provision for the payment of county attorneys for rendering such service. In the disposition of this question in said case the following language was used by the court:

"It is also claimed by the plaintiff in error that he is entitled to certain fees for all prosecutions and convictions by him in the corporation court, and the court below was asked for a mandamus compelling the recorder to tax such fees for his benefit, and that the city marshal and the clerk of the corporation court be required to collect and turn over to him such fees. The Constitution provides 'that county attorneys shall receive as compensation only such fees, commissions and perquisites as may be prescribed by law.' In the case of State of Texas v. Moore, it was said: 'It is not believed that any well considered case can be found in which a public officer has been permitted to collect fees unless the same are provided for and the amount thereof declared by law.' In that case it was held that, although the county attorney had the right and was charged with the duty to represent the State in the prosecutions of the cases against defaulting tax collectors, the Legislature not having provided any compensation therefor and fixed the amount thereof, he was not entitled to any compensation. The Legislature, in dealing with the subject immediately in hand, while conferring upon the county attorney the right to represent the State in prosecutions in the corporation court, expressly provides that 'in all such cases the county attorneys shall not be entitled to receive any fees or other compensation whatever for such services.' Having absolute power under the Constitution over the whole question of compensation for services of the county attorney, to provide such fees as it might think proper, or to provide none, if it thought proper, the Legislature had clearly the right to make the provision above recited in the corporation act, with regard to the compensation of the county attorney."

Article 914, R. S., 1911, provides that there shall be taxed against and collected of each defendant in case of his conviction before such court (meaning corporation court) such costs as may be provided for by ordinance of said city, town or village; but in no case shall the council or board of aldermen of any such city, town or village prescribe the collection of greater costs than are prescribed by law to be collected of defendants convicted before justices of the peace.

Article 913, R. S., 1911, provides that all costs and fines imposed by said court (meaning corporation court) in any city, town or village in any prosecution therein shall be paid into the city treasury of said city, town or village for the use and benefit of the city, town or village.

Article 911, R. S., 1911, provides that in all prosecutions in said court (meaning corporation court), whether under an ordinance or under the provisions of the Penal Code, the "complaint shall commence in the

name of the State of Texas and shall conclude against the peace and dignity of the State," and where the offense is covered by an ordinance the complaint may also conclude as contrary to the said ordinance; and all prosecutions in such court shall be conducted by the city attorney of such city, town or village or by his deputy; but the county attorney of the county in which said city, town or village is situated may, if he so desires, also represent the State of Texas in such prosecutions, but in all such cases the said county attorney shall not be entitled to receive any fees or other compensation whatever for said services and in no case shall the said county attorney have the power to dismiss any prosecution pending in said court unless for reasons filed and approved by the recorder of said court.

The above articles of the statute were passed by the Legislature in 1899. In 1907 the Thirtieth Legislature at its Regular Session provided that county attorneys who in cities of over 30,000 and under 40,000 population according to the United States census of 1900 represent the State in misdemeanor cases in the corporation courts thereof shall receive for such services the same fees as are now provided for by law for similar services in justice courts, and in no case shall there be charged more than one fee, as provided by law.

From these provisions it is clear that the Legislature did not intend that county attorneys who represent the State in corporation courts should be compensated for such service except the county attorneys who represent the State in corporation courts in cities of over 30,000 and under 40,000 population according to the United States census of 1900. Your contention that the county attorney should be entitled to the fees when he performs the services in said courts is met by the statement that the law has made no provision therefor, except as above shown, and under the general rule that an officer is not entitled to compensation for the performance of services unless specific provision therefor has been made by law, the conclusion is inevitable that county attorneys who represent the State in corporation courts are not entitled to any fees as compensation for such services unless the services are rendered in corporation courts in cities of over 30,000 and under 40,000 population according to the United States census of 1900.

The fact that the corporation courts in your county have no city attorneys could not change this rule, because no provision is made in the statute for compensating county attorneys for services rendered in the city courts under any circumstances except as above shown and without such provision no authority exists for such officer to collect fees in such courts.

We think it is unquestionably clear that you have the right and the authority to appear in the city courts of your county and represent the State in said courts in all cases to which the State is a party, but that you would not be entitled to the fees for such services because you would not come within the provision of the statute enacted by the Thirtieth Legislature, the corporation courts of your county being in cities of less than 30,000 population.

For a thorough discussion of the questions involved in this opinion, see Section 5, Article 21, State Constitution; Articles 911 to 914, R. S., 1911; *Howth vs. Greer et al.*, 90 S. W., 211; *The State of Texas vs.*

Moore, 57 Texas, 307; Moore vs. Bell, 66 S. W., 45; Jackson vs. Swayne, 47 S. W., 711; Upton vs. City of San Angelo et al., 94 S. W., 436.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

COUNTY COMMISSIONERS—PURCHASE OF SUPPLIES—COUNTY DE-
POSITORY.

1. It is unlawful for county commissioners to purchase supplies from a mercantile company where the manager is county commissioner and who also has stock in the company.

2. It would be unlawful for a bank to be county depository where the county judge or any commissioner owned stock in the bank.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 10, 1913.

Hon. J. A. Brooks, County Judge, Falfurrias, Texas.

DEAR SIR: Your letter to us is as follows:

"Is it lawful for a county to consider bids or purchase supplies from a mercantile company whose manager is a county commissioner, who also has stock in the company. Will the commissioner lay himself liable if he should receive as manager of the mercantile company warrants (county) in payment for goods purchased from said company? Is it lawful for a bank to handle the business of a county, and to be the depository for the county, if one or more of the commissioners should have stock in the bank, thereby being interested in the bank, and would such county commissioner be liable under act, 250 Penal Code of Texas? The only decision that I find is in Vol. 10, S. W., page 760, in which the commissioner sold two mules."

In answer, we beg to call your attention to Article 2239, R. S., 1911, which contains this language:

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

We, therefore, give you as our opinion the following:

1. It would be unlawful for the county commissioners to purchase supplies from a mercantile company where the manager is county commissioner and who also has stock in the company.

2. We think the county commissioner who should receive county warrants as manager of a mercantile company in payment for goods would clearly and undoubtedly violate the law, and subject himself to impeachment.

3. It would be unlawful for a bank to be the county depository where the county judge or any commissioner owned stock in the bank. It is the clear policy of the State to have its officers free and untrammelled in the discharge of their duties, and compels them to take an oath that they will not be interested directly or indirectly in an adverse manner.

Yours truly,

W. A. KEELING,
Assistant Attorney General.

SALARIES—COUNTY OFFICERS—CURRENT EXPENSE FUND.

It would be unlawful for a commissioners court to make any arrangement whereby the county official could be paid in full while other warrants of the county are discounted.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 11, 1913.

Hon. R. J. McMurray, County Judge, Anahuac, Texas.

DEAR SIR: The following letter has been received from you by this Department:

"Having built a new court house and jail and a good many other improvements in the county, it has placed the funds of the county considerably behind, so much so that our scrip has to be discounted at about 20 per cent, and I desire to know if the commissioners court has any authority to create a current expense fund to meet the actual yearly expense such as salaries of officers, etc.

"It is held in the case of the City of Sherman vs. Shobe, 1 Texas Ct. Rep., p. 25, 'That it is only upon the surplus of the general revenues of the county, which remain after the current expenses have been paid, that a general creditor has a claim.'

"The same opinion is held by the Supreme Court in the case of Pendleton vs. Ferguson, 13 Texas Ct. Rep., p. 1013, et seq.

"I would like to know if this would apply to counties."

Our answer to the above is as follows:

Article 1439, R. S., 1911, does not authorize you to create a new fund for the payment of county officers' salaries and thus give them a preference or priority.

Articles 1432 and 1438 are mandatory and have a dual purpose, viz.: The protection of the county in the correct classification of its funds, and the protection of the creditors of the county. In case of Clarke & Courts vs. San Jacinto County et al., 45 S. W., 315, decides this point by saying: "This is an imperative requirement which imposes a duty upon the county and confers a right upon its creditors, and there is nothing in the other provisions to qualify either."

It would, therefore, be unlawful for you to make any arrangement whereby the county officials could be paid in full while other warrants of the county are discounted.

Yours truly,

W. A. KEELING,
Assistant Attorney General.

COUNTY JUDGE—DEPUTIES.

Construing Chapter 142, Acts of the Thirty-third Legislature. It is necessary to have the permission of the county judge to the appointment of deputies.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, AUGUST 22, 1913.

Hon. Olin Culberson, Hon. Ruth Roberts, Hillsboro, Texas.

DEAR SIRS: You direct our attention to Article 3903, Revised Civil Statutes for 1911, and the amendments thereto by the Thirty-third Leg-

islature on page 286. We advise you that in our opinion it is necessary to have the approval of the county judge to the appointment of deputies in counties having a population of 37,500 or over. This act provides as follows:

"Whenever any official named in Articles 3881 to 3886 (which includes the county clerk) shall require the service of deputies or assistants in the performance of his duties he shall apply to the county judge for authority to appoint same."

Another provision in the same act is as follows:

"The county judge in issuing his order granting authority to appoint deputies or assistants shall state in such order the number of deputies or assistants authorized and the amount to be paid each," etc.

We believe that it is clear from the reading of the entire amended act that it was the intention of the law for the officers named to obtain the permission of the county judge to employ a deputy, specifying in his application the salary which he proposes to offer the deputy. We believe that it is necessary to have the county judge's permission, and are of the opinion that if the county clerk should employ the assistants without applying to the county judge and obtaining an order from him, that he would have to pay such assistants out of his private funds and could not charge it against the fees of his office.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

COUNTY OFFICERS—PRIZES OR PREMIUMS—PURCHASE OF SUPPLIES.

County officers can not receive prizes or premiums for their own personal benefit as a consideration for the purchase of supplies or goods for the benefit of the county. This would violate their oaths of office. (Article 50 of the Penal Code.)

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, OCTOBER 28, 1913.

Hon. C. B. Felder, County Judge, Wichita Falls, Texas.

DEAR SIR: You state to this Department that certain manufacturing chemists and certain iron manufacturing companies, manufacturing road machinery, culverts, etc., are offering certain premiums or rewards which go to the officers personally in case the goods of the manufacturing company are purchased for the benefit of the county. You state that a certain manufacturing company doing business outside this State proposes to sell road machinery and iron culverts to your county, and, as an inducement, offers to pay the expenses of the officers of your county, particularly the county judge and commissioners court, to Terre Haute, Indiana, for the purpose of inspecting the goods they propose to purchase, and, as shedding light upon the proposition, you enclose the following letter, which was received by you:

"Dear Sir: The Annual Corn Show and Manufacturers' Exhibition will be held in Terra Haute from November 10th to 17th, 1913. There will be a band

concert every day and the display of fire works will be the best ever held in Indiana. The Wabash river front will be used for the display of fire works and the Boosters' Club will make this week the largest and best ever held in the Middle West.

"Premium lists for the corn exhibits will be mailed out to hundreds of farmers and scores of them are arranging for a display of different farm products. The, as well as other manufacturers of the city, are arranging for a banner exhibition and this will certainly be something worth while. We are inviting you and the other members of your board to come and take in the Corn Show and Industrial Exhibition.

"Please read over this letter and advise us if you and the other members of your board can come and if transportation has not already been sent you, advise us at once, and we will arrange for it.

"A complete program of the week will be mailed you, also premium lists for corn exhibitions and you surely want to take advantage of this and make your trip to Terre Haute, see the corn show and visit the factory of the at the same time. This trip will be very interesting and instructive and as you do not have an opportunity every year to see something of this kind we hope you will take this matter up with the other members of your board and advise us when you can come. We are personally making arrangements to take care of five hundred officials and if you come during this week, you will find officials in Terre Haute from all parts of the United States.

"Please take the enclosed addressed envelope, and advise us at once if you are coming."

You also enclose the following communication from a certain chemical manufacturing company, and desire to know the opinion of this Department in regard to officers accepting the prizes therein offered:

"Here in your hands is the greatest offer you ever received. We will send you entirely free of charge, one of the finest most classy, genuine Waltham gold watches you ever saw—a high grade, superfine timepiece and a watch that any millionaire would be proud to carry and show to his friends.

"We will make you an outright present of this watch, and make just one request of you. Sign and return the enclosed 'approval order' authorizing us to send you, strictly on 30 days trial and approval, a half barrel of Chemo Insect & Germ Destroyer, at \$1.65 per gallon, with the following positive and distinct understanding:

"If you are not delighted with this magnificent premium watch, after showing it to your jeweler, and after using it for one month, or if you do not find that Chemo gives entire satisfaction, you can return the watch and what remains of Chemo after trial, at our expense, and not one red cent will be charged for quantity used in making the test.

"The premium represents actual saving in expenses, and we give you the benefit of it, with mail orders only. We are buying these premiums with the money we formerly paid salesmen, and you could not get Chemo for one penny less without the watch.

"Just read the terms of the 'approval order' and observe that it is all one-sided and all in your favor. You don't take one single particle of risk. You see the premium, and try out the Chemo before you decide. Then you and you alone are the judge. That's fair isn't it? This is purely an introductory offer, and is for early acceptance only. Therefore, we urge you to sign and return the 'approval order' today."

We call your attention to Article 2239, which contains the oath taken by the board of county commissioners, which is as follows:

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

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

And also Article 174 of the Penal Code, which is as follows:

"If any person shall bribe or offer to bribe any executive, legislative or judicial officer after his election or appointment, and either before or after he shall have been qualified or entered upon the duties of his office, with intent to influence his act, vote, opinion, decision or judgment on any matter, question, cause or proceeding which may be then pending or may thereafter by law be brought before such officer in his official capacity, or do any other act or omit to do any other act in violation of his duty as an officer, he shall be punished by confinement in the penitentiary for a term not less than two nor more than five years."

We do not believe that it would be lawful for the board of county commissioners to receive their transportation to a far distant point, when it appears that the design and object of offering the transportation is in order to furnish a personal benefit to the members of the commissioners court, which, in the case presented by you, is to give them an opportunity to visit the Corn Show at Terre Haute, Indiana, which would be a personal benefit and pleasure to each member of the commissioners court if they were to accept same. Indeed, it would not make the benefit any more substantial if the agent or employe of the company should offer the county judge and members of the commissioners court a sum of money equal to the railroad fare and expenses to Indiana, if they should purchase the goods from them. Why is it necessary for a county judge and the commissioners court to travel hundreds of miles to inspect the factory that turns out road machinery, when the road machinery itself or the bridges and culverts may be sent at a much less expense than the article that is being purchased is there inspected? What difference does it make to the citizenship of the county if a million dollar factory turns out a piece of road machinery or a five hundred thousand dollar factory? It's the machinery the commissioners court are buying; it's the material the commissioners court are buying, and samples of both machinery and material can be supplied at a small expense at the railroad station for inspection by the county judge and commissioners court in any place where they are contemplating an extensive purchase. It occurs to our minds that the idea of transacting their business in this manner is to provide a personal compensation to the county judge and the commissioners court, which personal compensation in this instance is a pleasure trip to a far distant point, and we believe that the county judge and commissioners court would be violating their oaths of office if they were to accept this personal benefit, for they would be interested both directly and indirectly in the contract, because, if they did not purchase their goods from the company, they would not in honor bound be expected to retain the expenses for the pleasure trip. To show that this is the real object, the case of the Chemo Company is a still plainer one. In this instance the

company proposes to sell chemo at \$1.65 a gallon, and, as an inducement for its purchase, they offer the purchasing agent a watch, which according to the description made by them is of a very high value, and, indeed, almost as valuable as the shipment of chemo. This watch is intended for the personal use of the person who buys the chemo, and, while the chemo goes to the county, the watch goes to the purchasing agent. This, in our opinion, is in violation of Article 50 of the Penal Code, relating to bribery. The writer can see no distinction between a person giving the commissioners court or the purchasing agent a watch for their personal benefit, provided they will purchase a certain amount of goods from them, and an offer to pay them so much cash for their own personal benefit if they will place the order with the company. We think offers of this kind are offers to bribe, and we do not think that officers of this State should entertain such a proposition for a moment.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

OFFICERS—SALARY COUNTY JUDGE AND COMMISSIONERS OF GALVESTON COUNTY—HOUSE BILL NO. 805 (THIRTY-THIRD LEGISLATURE).

A bill which provides salary of \$100 per month to be paid county judge and each commissioner of Galveston county is unconstitutional.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 29, 1913.

Hon. O. B. Colquitt, Governor, Capitol.

DEAR SIR: Under date of the 29th inst., you transmit to this Department House Bill No. 805, recently passed by the Legislature, and ask for an opinion as to the constitutionality of the measure.

The full purpose and intent of this act is set forth in Section 1 thereof, which is as follows:

"Section 1. Each county commissioner and the county judge of Galveston county shall receive from the county treasury, to be paid on the order of the commissioners court, the sum of \$100 per month, which shall be full compensation to said commissioners of Galveston county, including the county judge, for performing all their duties as members of the commissioners court of said county, as required by law."

Section 2 of this act is as follows:

"Sec. 2. All laws in conflict herewith are hereby expressly repealed."

It will be seen that this is a special law applicable alone to Galveston county, and prescribes a definite compensation in the way of a salary for the members of the commissioners court different from the law as applicable to every other county in the State.

The general laws controlling other counties on this subject are as follows:

Article 3852, R. S., 1911, reads:

"For presiding over the commissioners court, ordering elections, and mak-

ing returns thereof, hearing and determining civil cases and transacting all other official business not otherwise provided for, the county judge shall receive such salary from the county treasury as may be allowed him by order of the commissioners court."

Article 3870 reads:

"Each county commissioner and the county judge, when acting as such, shall receive from the county treasury, to be paid on order of the commissioners court, the sum of \$3.00 for each day he is engaged in holding a term of the commissioners court, but such commissioners shall receive no pay for holding more than one special term of their court per month."

It is the opinion of this Department that this act is void and in direct conflict with Section 56, Article 3, of the Constitution, which provides:

"The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing * * * Regulating the affairs of counties, etc."

There can be no material distinction between the question now under consideration and the question of construction involved in the case, recently decided by the Supreme Court, from Bell county, its style being Bell County, Plaintiff in Error, vs. W. E. Hall, Defendant in Error.

Bell county was among the list of counties coming under the operation of the auditor's law that was first enacted by the Twenty-ninth Legislature and afterwards amended by the Thirtieth Legislature. The Thirty-first Legislature passed an act exempting Bell county from the provisions of the Auditor's law. In the case above mentioned the only question involved was as to the constitutionality of the act of the Thirty-first Legislature exempting Bell county from the operation of the law. Without prolonging this communication, we will make the following quotation from the opinion of Associate Justice Phillips in disposing of the case for the Supreme Court:

Judge Phillips says:

"The Honorable Court of Civil Appeals for the Third District held on this appeal that the act was within the constitutional prohibition. (138 S. W., 178.) Upon a careful consideration of the question, we concur in this conclusion, and do not regard it necessary to supplement the able opinion written in the case by Chief Justice Key. In relieving Bell county from the operation of the general law this act in effect changed the administration of its affairs in every particular provided by the general law, and thus by indirection regulated its affairs as effectually as though it had directly and affirmatively prescribed a different method for their management. The judgment of the Court of Civil Appeals reversing the judgment of the district court and remanding same is affirmed."

The Bell county case, above, is directly in point, and hence there is no escape from the conclusion that this act in question is a special or local act applicable to Galveston county only; and changes the general law providing a method of compensation different from that prescribed for the same officers in all the other counties of the State.

Yours truly,

B. F. LOONEY,
Attorney General.

COUNTY AUDITOR—DUTIES, ETC.—EMPLOYMENT OF COUNSEL.

A county auditor is an accountant, and his duty is to keep accurate account of the receipts and disbursements of the county. It does not come within the scope of his authority to institute proceedings of any kind or character necessitating the employment of counsel.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MARCH 31, 1913.

Hon. I. B. Reeves, House of Representatives, Capitol.

DEAR SIR: This Department is in receipt of your favor of March 31, 1913, in which you propound the following questions:

- "1. Has a county auditor the right to employ the services of others to aid in the collection of delinquent taxes?
- "2. Has the county auditor the right to engage counsel other than the county attorney?"

Replying thereto in the order named, we beg to say that the county auditor under Article 1577, R. S., 1911, has the authority and power to adopt and enforce such regulations not inconsistent with the Constitution and laws that he may deem essential to a speedy and proper collection, checking and accounting of the revenues and other funds and fees belonging to the county. Nowhere in the law authorizing the appointment of the county auditor does it appear that the county auditor has any authority to appoint anyone to aid or assist in the collection of delinquent taxes. In fact, the only officer or employe that the county auditor has any authority to appoint is an assistant county auditor and such clerical help as may be necessary, and these appointments can only be made with the consent of the county judge or of the commissioners court. The matter of the collection of delinquent taxes is in charge of the tax collector until at such time as the commissioners court of the county shall deem it expedient to contract with some person to enforce the collection of the delinquent State and county taxes, as is set out in Article 7707, and it is provided in this article that the Comptroller is authorized to join in said contract on behalf of the State for collecting State taxes.

It is, therefore, the opinion of this Department that a county auditor is without authority of law to employ anyone to assist or aid in the collection of delinquent taxes, but that the employment of any additional assistance for this purpose shall be made by the commissioners court of the county as is set out in Article 7707 of the Revised Statutes of 1911 above referred to.

Replying to your second question, beg to say that it is made the duty of the county attorney to give advice to the assessor of taxes and collector of taxes or the treasurer of the county upon request touching their duties concerning the revenues of the State or county, and, assuming that your second question bears upon your first, we would construe this article to mean that it would be the duty of the county attorney to advise the tax collector and those working under or through him, in all matters concerning the collection of the revenues of the county and State. See Article 356, R. S., 1911. In Article 7691 of the Revised

Statutes of 1911 it is made the duty of the county attorney to represent the State and county in all suits against delinquent taxpayers.

In Article 7707 above referred to it is provided that where a county attorney fails or refuses to bring suit for the collection of delinquent taxes when requested so to do by the commissioners court or the delinquent tax collector, then the contractor for the collection of such delinquent taxes shall be authorized to employ some other attorney to file these suits in the name of the State, and nowhere in the law is it provided that the county auditor shall have any authority whatsoever to employ an attorney in matters of this character. There is nothing in the Auditor's Law, which is now Chapter 2, Title 29, of the Revised Statutes of 1911, which would authorize a county auditor to employ an attorney for any purpose.

A county auditor, as the same implies, is an accountant, and his duty, generally speaking, is to keep accurate account of the receipts and disbursements of the county. It does not come within the scope of his authority to institute proceedings of any kind or character necessitating the employment of counsel. The exercise of his duty makes it incumbent upon him to check up and verify the accounts of the various officers of the county collecting and disbursing money, and to verify and countersign all warrants drawn upon the treasurer of the county, except warrants for jury service, and to make report to the commissioners court in tabulated form of the accounts of the various officers of the county, and of the funds belonging thereto.

You are, therefore, advised that the county auditor is without any authority in our opinion to employ counsel in any matter, and that such advice as he may be in need of should be rendered him by the county attorney of his county.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

COUNTY AUDITOR—DUTIES OF—HAS NOT AUTHORITY TO ACT AS DELINQUENT TAX COLLECTOR—COMMISSIONERS COURT—CONSTRUCTION OF LAWS—TAX ASSESSOR—BONDSMEN.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 18, 1913.

Hon. I. B. Reeves, House of Representatives, Capitol.

DEAR SIR: Your propound to us several interrogatories which are as follows:

- "1. How often is the county auditor required to make his reports, and what is the penalty for his refusal to do so, and does this apply to every officer?
- "2. Has the auditor any right to contract for the books, stationery, fixtures, machinery, material, etc., of the county, or any of its precincts?
- "3. Has the county auditor the right to act as delinquent tax collector?
- "4. Has the county commissioner or the county auditor authority to borrow on the county's credit \$80,000 without a vote of the people?
- "5. Should the auditor pay the tax assessor money in excess of fees due

him? Who would be responsible for the return of the money—the tax assessor and his bondsmen, or the auditor and his bondsmen?”

Replying to your inquiries in their order, you are advised:

1. Article 1421 (Revised Civil Statutes of 1911) requires certain officers of the county, naming them, to report at each regular term of the commissioners court. The commissioners court is now required by law to meet once in each month in regular session. It, therefore, follows that certain officers of the county must make monthly reports to the commissioners court.

Article 1469 requires the county auditor to carefully examine and report on all the reports filed by the officers required to file reports in Article 1421, making it necessary for the county officer to check and report on the reports of certain of the county officers once in each month. Article 1470 requires him to check the books and examine all the reports of the tax collector, treasurer, and other officers in detail, verifying the footings and correctness of same; and shall stamp his approval thereon. Article 1471 requires that he shall examine the treasurer's report. We think, therefore, that a careful reading of the articles relating to the duties of the county auditor requires him to check each officers' account, including his books and reports, and to file a quarterly report on the fines with the commissioners court.

The only criminal offense, it seems, relating to the auditor is the one providing for punishment for bribery in Article 179 of the Penal Code. Of course, like any other officer, he is liable to civil prosecution and impeachment for refusing to do his duty.

2. Answering your second question, Article 1479, Revised Statutes, 1911, provides that the county auditor shall receive the bids for books, blanks, supplies, etc., and shall present such bids, when so secured, to the commissioners court, who shall finally act upon the bids and who has the right to reject any and all of them, if they so desire. In making such contracts the county auditor acts under the direction of the commissioners court, and has no authority to make the contracts unless the court authorizes him to do so, but it is his duty to secure the bids for the benefit of the court.

3. The county auditor would not have the right to act as delinquent tax collector for your county, provided he should directly, or indirectly, make any charge for such service. He could, however, render this service for the county without compensation, and there would be no law against it. Nevertheless, it would be a violation of the law for the commissioners court to pay him anything for such service. This can be made plain by reading Article 1463, Revised Statutes, 1911, which requires that he shall include in his oath that he will not personally be interested in any contract with the county.

4. In answering this question, we find that the Supreme Court of this State has practically construed away the safeguards drawn around the commissioners court in the matter of contracting debts. In the case of *Bell County vs. Lightfoot*, reported in the 138 S. W., 381, the court holds that the commissioners court can make as many orders as it sees fit in incurring indebtedness to any amount not exceeding \$2000, and this will be valid. This would enable the commissioners court at one

session to make as many orders for the issuance of indebtedness as they see fit; provided, they do not issue more than \$2000 each time. While this decision seems to lay down an absurd rule, still, it is the law of the land, and we cannot avoid it. It seems, therefore, that there remains no inhibition against the commissioners court incurring an indebtedness to almost any amount; provided, of course, they do it with small orders, etc. This, of course, does not reach your question, which was that the commissioners court carried an overdraft to the amount of \$80,000, which was afterwards liquidated by the tax money of the county. While this seems to be very poor business, and subject to severe criticism, still, the law is silent upon penalties affecting it.

5. Primarily, the tax assessor and his bondsmen are liable, and, secondarily, the auditor and his bondsmen are liable; upon the failure of the assessor and his bondsmen to respond, the auditor and his bondsmen are liable for the whole amount. Both the assessor and his bondsmen and the auditor and his bondsmen should be made parties to the suit for the recovery of such money.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

COUNTY ATTORNEY—ASSISTANTS—CONVICTS.

County attorney can employ assistant, who is stenographer, and have him work with grand jury as such.

A convict is entitled to credit upon his fine and costs at the rate of \$3.00 per day for every day spent in jail after having filed affidavit stating that he is unable to pay the fine and costs.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 8, 1913.

Hon. George L. Fearn, County Auditor, Dallas, Texas.

DEAR SIR: In your communication to this Department of January 2nd, you propound several interrogatories, which will be set forth and answered herein seriatim:

1. Has the county attorney authority to employ a stenographer for the grand jury and have him paid out of the jury fund? If it is essential that he should have such stenographer, should not the stenographer be regarded as an assistant and paid as such, his salary being charged to the maximum earnings for the year?

The only authority given to county attorneys to employ any character of help or assistance is the authority given to employ assistants. The qualifications of an assistant are not prescribed, and for this reason we believe that the county attorney would have authority to employ an assistant who is a stenographer for the purposes mentioned. There is no provision in what is known as the stenographers' law for the employment of a stenographer for this purpose, and under the provisions of Article 3903, Revised Statutes, 1911, it would be necessary for the salary of such assistant to be paid out of the excess of fees of office.

2. Under Articles 878, C. C. P., when or under what conditions is a convict entitled to receive a credit of \$3 per day upon his fine and costs? If a conviction is had today and commitment issued and the convict lies in jail until the 10th instant and is then sent to the road, could he for any reason be allowed anything for the time he spent in jail?

In order to answer this question intelligently, it will be necessary to briefly review the constitutional and statutory provisions bearing upon the same subject.

Section 3, Article 16, of the Constitution, reads as follows:

"The Legislature shall make provision whereby persons convicted of misdemeanors and committed to the county jails in default of payment of fines and costs shall be required to discharge such fines and costs by manual labor, under such regulations as may be prescribed by law."

This constitutional provision produced what is now Article 6232, Revised Statutes, 1911, authorizing the commissioners court to erect workhouses and to establish county farms where such convict labor may be utilized. For a like reason, among others, the Legislature by statute has permitted the county authorities to cause the convicts to be employed upon the public roads, bridges or other public works of the county, when such labor cannot be utilized in the workhouse or on the county farm. (Revised Statutes, Article 6238.) When such work is done on the public streets or roads or county farm, credit shall be given therefor at the rate of 50 cents per day. (Revised Statutes, Articles 6244.)

The foregoing provisions of the statutes, while enacted in response to the mandatory language of the Constitution, are, nevertheless permissible and directory only in form. This is necessarily true, for the reason that there would be no power or remedy whereby compliance therewith on the part of the commissioners court could be forced if they constituted all the statutory law on the subject.

But this is not all. Article 878, C. C. P., gives the convict the right, absolutely, to claim the benefits of the objects of the foregoing statutes, or, in the alternative, the right to have himself hired out at manual labor, in the event the commissioners court has not made provision to utilize his labor upon public works, or does not care to utilize such labor in that way. In other words, the regulations having been prescribed by law in obedience to the Constitution, then the language of the Constitution to the effect that the convict shall be required to discharge his fine and costs by manual labor inures to his benefit and is mandatory of his right.

It follows that the word "may," as used in Article 878, C. C. P., must be construed to mean "shall." For like reason, when the county authorities have either failed to make provision for the use of such labor or having made the provision, for any reason do not care to or fail or refuse to use it in that way and give credit therefor, then under a subsequent "rule of law" the convict is entitled to a credit upon his fine and costs, as a matter of right, at the rate of \$3 for every day he is required to spend in jail, after claiming his right by filing the required affidavit. Or, as said by the Court of Criminal Appeals in the case of

Ex Parte Jones, 38 Texas Crim. App., 143: "In order to secure the advantages of the provisions of said article, the party invoking the same must make the affidavit required, that he is unable to pay the imposed fine and costs. When this has been done, he may be hired out or put to work as provided by that statute. In case he is not put to work or hired out, he must be discharged after having remained in prison a sufficient length of time to satisfy the fine and costs at the rate of \$3 per day."

We are aware of the statement contained in an earlier opinion of the same court, to the effect that it is only where there is no workhouse and no public improvements upon which the convict can be put to work and where the county authorities fail to hire him out, that he can claim the benefits of the article. (Ex Parte Bogle, 20 Texas Crim. App., 128.) But since that decision the same court has held it to be the mandatory duty of the county authorities to hire out the convict or put him to work upon the filing of the affidavit (Ex Parte Hall, 34 Texas Crim. App., 618), and in the Jones case, cited above, it appeared, affirmatively, that there was a county farm upon which the convict may have been put to work, and the statement quoted in that case seems to have been the last expression of the court upon this subject and is clearly in line with our holding, as stated above.

The convict would be entitled to credit upon his fine and costs at the rate of \$3 for every day he was allowed to remain in jail after having filed the affidavit required by the article.

Yours very truly,

LUTHER NICKELS,
Assistant Attorney General.

COUNTY SUPERINTENDENT—COMPENSATION.

Compensation of county superintendent must be paid quarterly.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 8, 1913.

Mr. Grover C. Lowe, County Superintendent, Woodville, Texas.

DEAR SIR: In your letter of date January 1st, you ask if there is anything in the law that would prevent the county superintendent from receiving his allowance once a month, instead of quarterly.

The answer to your inquiry is to be found in the following language of Article 2758, Revised Statutes, 1911, to wit:

"The compensation herein provided for (that is, for the county superintendent) shall be paid quarterly by the county treasurer on the order of the commissioners court; provided, that the salary for the quarter ending on the second Monday in November shall not be paid until the county superintendent presents a receipt from the State Superintendent of Public Instruction showing that he has made all reports required of him."

We conclude that this provision cannot be avoided and that the allowance must be paid quarterly.

Yours very truly,

LUTHER NICKELS,
Assistant Attorney General.

SCHOOL TRUSTEES—QUORUM.

1. Quorum of board of school trustees may through a majority of such quorum transact business.
2. Where members are present and decline to vote, they will be counted as concurring in the result of the vote.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, DECEMBER 30, 1913.

Hon. W. F. Doughty, Superintendent of Public Instruction, Capitol.

DEAR SIR: Under date of the 23rd inst., you state, in a communication to this Department, that the school board at Premont, Texas, is composed of seven members—five American whites and two Mexicans; that the two Mexican members refrain from taking any part in the proceedings when there arises a division among the other members; that at a recent meeting there were present four of the white members and two Mexicans. A question arose concerning the payment of the wife of one of the members for work done as assessor and collector for the Premont Independent School District; that the Mexican members declined to vote, and this left the decision of the question to the four other members; that the proposition to allow the bill received two votes, the negative received one vote and the presiding officer declined to vote, as there was no tie.

Upon this statement you propound the following questions:

1. Was the vote of the two members as described above legal authority for the treasurer's drawing a warrant against the school fund of the Premont Independent School District for the purpose mentioned?
2. What constitutes a majority vote of a board of seven trustees of an independent school district?
3. If only a quorum is present, say, four members, can the action of the majority of the quorum, say, three members, bind the entire board?
4. In case a quorum of the board of trustees of an independent school district of four members, including the president of the board, who in accordance with the by-laws of the board votes in case of a tie, is present, and in case two members of the board vote *vea* on any measure, the third voting "no" and the president ruling that there is no tie and that he is not required to vote, does the action of the two members of the board voting "yea" bind the entire board of the independent school district?

Answering your questions, beg to call your attention to Article 2891, Acts of 1911, which reads:

"The trustees (of independent districts) chosen under this chapter shall meet within twenty days after the election, or as soon thereafter as possible, for the purpose of organizing. A majority of said board shall constitute a quorum to do business; and they shall choose from their number a president; and they shall choose a secretary, a treasurer, assessor and collector of taxes, and other necessary officers and committees."

Under the statement contained in your letter, it is apparent that a quorum was present, and we believe it is a principle well recognized that a majority of a quorum can always transact business.

The question you propound, however, involves something more than this, for the reason that two members declined to vote upon the proposition, and we are led to inquire the effect had upon the result because of the refusal of the two members to vote. It seems to be generally well recognized where members of a body such as the board of school trustees are present, a mere refusal to vote on the part of a few cannot defeat the action of the majority of those actually voting. As long as they are present and are accorded the privilege of voting, it is their duty to act, and they will be regarded present for the purpose of making a quorum and their silence is usually construed as a concurrence in the action of a majority of those who do vote. Mr. Dillon in his work on *Municipal Corporations*, Vol. 2, Section 527, states the rule as follows:

"Minorities of councils and other deliberative bodies sometimes resort to obstructive tactics to defeat measures which they have reason to believe the majority favor. One of such methods is by a refusal to vote, by reason whereof a measure may be deprived of the support of a majority of the council present and participating. But the courts have steadfastly adhered to the rule that when members are present at a meeting, a mere refusal to vote on the part of some of the members cannot defeat the action of the majority of those actually voting. As long as the members are present in the council chamber and have an opportunity to act and vote with the others, it is their duty to act, and they will be regarded as present for the purpose of making a quorum and rendering legal the action of the council. Slightly divergent views have been expressed by the courts as to the effect of a refusal of members of a council to vote, although the courts are unanimous in declining to permit such refusal to defeat an expression of the will of the body. Thus in some jurisdictions it is said that silence or refusal to vote is concurrence, as it is the duty of the silent members to express their opinion if they desire to oppose the question before the council, and if they fail to perform their duty they must be taken as assenting to the action of the majority of those who do vote.

"In *Somers vs. Bridgeport*, 60 Conn., 521, the Board of Police Commissioners consisted of the mayor and four members. The mayor had only a vote in case of tie. On a motion to appoint policemen two members announced that they would not vote, but remained in the room. The resolution was put and received two votes in its favor, no other votes being cast. The mayor declared that the resolution was carried. The two non-voting members protested against this ruling. It was held that the silence of the non-assenting members was concurrence and the resolution was legally passed. It was also held that the previous declaration that they would not vote and the protest against the ruling were unavailing. Carpenter, Justice, said: 'Sound policy requires that business interests should not suffer by their inaction. Had they voted against the resolution there would have been a tie, and the mayor would then have given the casting vote. Had he voted in the affirmative the legality of the appointment could not have been questioned. But they did not vote although present. Their presence made a quorum. A quorum was present and all who voted voted in the affirmative. Why was not the mayor justified in declaring the resolution passed? The silence of the non-voting members was acquiescence, and acquiescence was concurrence. Their previous declaration and their subsequent protest availed nothing. The test is not what was said before or after, but what was done at the time of the voting.'

"In *Attorney General vs. Shepard*, 67 N. H., 383, Chief Justice Doe said: 'There were seven aldermen. Four were a quorum. Six were present. Three voted for the adoption of the amendment and the refusal of the other three was inoperative. In the absence of express regulation, a proposition is carried in a town meeting or other legislative assembly by a majority of the votes cast. The exercise of law-making power is not stopped by the mere silence and inaction of some of the lawmakers present. An arbitrary, technical and exclusive method of ascertaining whether a quorum is present operating to prevent the performance of official duty and obstruct the business of government is no part of our common law. The statute requiring the presence of four

aldermen does not mean that in the presence of four a majority of the votes cast may not be enough.

"In *Mount v. Parker*, 32 N. J. L., 341, of the six members present three voted in favor of a motion, two voted against it, and one refused to vote. It was held that the motion was carried, the court saying: 'It being the well established law that where no specified number of votes is required but a majority of the board regularly convened are entitled to act, a person declining to vote is to be considered as assenting to the votes of those who do.'

"In *State vs. Green*, 37 Ohio St., 227, a city council consisted of eighteen members, all of whom with the mayor were present, the mayor presiding. A motion was made to elect the clerk, nine members protesting. On roll call on the motion to elect, the nine protesting members refused to vote and the vote as taken stood nine yeas and no yeas, no other candidate having been placed in nomination. One of the non-voting members objected on the ground that no quorum voted, but this objection was overruled and the clerk declared elected. It was held that there was only one nomination, it was competent to elect by motion; that the members present could not by refusal to vote defeat the election or divest the body of its power to act; and that the legal effect of their refusal to vote was an acquiescence in the choice of those voting; and that the fact that the mode of voting was objected to and that objection was also taken that no quorum voted, did not change the legal effect of the vote.

"In the case of *Rushville Gas Company vs. Rushville*, 121 Ind., 206, in discussing a situation of this kind, the court, through Elliott, Judge, said: 'The rule is that if there is a quorum present and a majority of the quorum vote in favor of a measure it will prevail, although an equal number should refrain from voting. It is not the majority of the whole number of the members present that is required. All that is requisite is a majority of the number of members required to constitute a quorum. If there had been four members of the council present and three had voted for the resolution and one had voted against it or had not voted at all, no one would hesitate to affirm that the resolution was duly passed, and it can make no difference whether four or six members are present, since it is always the vote of the majority of the quorum that is effective. The mere presence of inactive members does not impair the right of the quorum to proceed with the business of the body. If members present desire to defeat a measure, they must vote against it, for inaction will not accomplish their purpose. Their silence is acquiescence rather than objection. Their refusal to vote is in effect a declaration that they consent that the majority of the quorum may act for the body of which they are members.'

Applying the doctrine of the above text and decisions, we are of the opinion, and so advise you, that the vote of the two members of the Pre-mont School Board in the instance expressed by you in favor of allowing the bill constituted the action of the quorum present; that the two members of the board declining to vote are to be considered as concurring in the result of the vote of those who actually voted.

Answering your second and third questions together, will say that the statute makes it plain that four members constitute a quorum for the transaction of business, and a majority of a quorum can always bind the board by its action.

We believe our answers to the above sufficiently answers your fourth interrogatory.

There is apparent, however, from the statement of the case given by you a more serious question than the one you have raised, and that is the apparent disregard of our law prohibiting nepotism.

You state that this question arose over a proposition to pay the wife of one of the members of this school board for work done as assessor and collector of this independent school district.

We assume, of course, that the wife of a member of this board was appointed by the board assessor and collector, and that the services she performed as such was a direct result of this appointment or employment.

Article 381, Penal Code, defines nepotism as follows:

"Subject to the exceptions set forth in Article 384 (which excepts notaries public), it shall hereafter be unlawful for any officer of this State, or for any officer of any district, county, city, precinct, school district or other municipal subdivision of this State, or for any officer or member of any State, district, county, city, school district or other municipal board, or judge of any court created by or under authority of any general or special law of this State, to appoint, or to vote for, or to confirm, the appointment to any office, position, clerkship, employment or duty of any person related within the second degree by affinity or within the third degree by consanguinity to the person so appointing or so voting, or to any other member of any such board or court of which such person so appointing or voting may be a member, when the salary, fees, wages, pay or compensation of such appointee is to be paid for, directly or indirectly, out of or from public funds or fees of office of any kind or character whatever."

Article 385 provides:

"No executive, legislative, judicial or ministerial officer or other person included within any of the provisions of Article 381 shall approve any account or authorize the drawing of or drawing warrant or order, or pay any salary, fees, wages, pay or compensation of such ineligible officer or person, knowing him to be so ineligible."

Article 386 provides the following penalty:

"Any violation of any of the provisions of this law shall constitute a misdemeanor involving official misconduct, and shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars."

The law also further provides for the removal from office of any officer found guilty of violating this law.

So it would seem that the members of this school board have, doubtless unwittingly, violated this law.

Yours very truly,

B. F. LOONEY,
Attorney General.

ATTORNEYS—LICENSE.

Party not licensed to practice law has no authority to represent litigant before any court.

Law construed: Revised Statutes, Art. 309 et seq.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JUNE 9, 1913.

Hon. J. B. Randolph, County Judge, Junction, Texas.

DEAR SIR: We have your recent communication asking if a party who is not licensed to practice law is authorized to represent litigants and charge fees.

Replying thereto, we beg to state that it is the contemplation of the

laws of this State that no person shall be allowed to practice as an attorney in the courts of this State without first having procured a license to pursue such occupation as is set out in Article 309 et seq., Revised Statutes of 1911. An attorney is, in a sense, an officer of the court, and he has no right to appear in court unless he is duly commissioned so to do any more than would a third person have the right to appear as any other officer of the court. It has been decided in this State that a party who is not licensed to practice law has no authority to institute litigation in the courts.

Harkins vs. Murphy and Bolanz, 112 S. W., 136.

We are also inclined to the opinion that a party representing a client in litigation could not collect fees for such services unless such party be a duly licensed attorney. See *Lange vs. Fritze*, 54 S. W., 36. This case does not decide this point clearly, but uses language which strongly intimates, should the identical question be presented to the court, the court would hold that the party would not be entitled to collect the fee. Of course, a party might be employed to render services requiring no legal ability, and would be entitled to compensation for such, but, as above stated, we are inclined to the opinion that a fee could not be collected for purely legal services unless the party attempting to collect same should be a duly licensed attorney.

But be this as it may, we think it would clearly be the duty of the court, upon it being made known to the court, that a party representing clients was not a duly licensed attorney, to forbid and prohibit such party from appearing in the court as attorney for litigants. The purpose of our law in prescribing the attainments necessary before license will be issued is to protect the people from imposition by unskilled and unlearned parties attempting to practice the profession. There is no penal statutes inhibiting the practice of law without a license, and it, therefore, becomes more essential that the judges of the courts carefully guard the right, not only of the court, but of the litigants, against a party appearing therein as an attorney who is not duly licensed to practice that profession.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

PROFESSOR IN THE UNIVERSITY OF TEXAS—PUBLIC OFFICERS—LIEUTENANT-GOVERNOR.

A public officer in this State can not at the same time hold a position of one of the professors in the University of Texas.

This opinion holds that Hon. Will H. Mayes while Lieutenant Governor of Texas can not accept the position of Professor of Journalism in the University. (Section 40, Article 16, Section 16 of Article 16 of the Constitution.)

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, SEPTEMBER 22, 1913.

Board of Regents of the University of Texas, Austin, Texas.

GENTLEMEN: You have propounded to this Department for its solution the question whether under the Constitution and laws of this

State Hon. Will H. Mayes, duly elected and acting Lieutenant-Governor of Texas, can legally accept the appointment to the professorship of Journalism in the University of Texas and continue to hold the office of Lieutenant-Governor while at the same time discharging the duties devolving upon him as Professor of Journalism in the University.

A proper and exhaustive investigation of this subject leads us to determine the status of the Lieutenant-Governor and of a professor in the University of Texas, and while it is an indisputable fact that the Lieutenant-Governor is an officer within the meaning of the Constitution and laws of this State, yet we will later on in this opinion discuss this question more at length; but we first desire to determine the exact legal status of a professor in the University and the relationship such a position bears to the State government and classify such person among the servants of the government.

The State can only act through representatives, and such representatives are divided into two classes primarily. The first class is that of officers, who may be either elected by a vote of the people or receive their commissions by appointment by virtue of some provision of the Constitution or statute, who take the oath of office and are generally required to enter into bond for the faithful performance of their duties and such other obligations as are imposed by the statute and who exercise some function of government.

The second class in the broader sense designates all other servants of the government as employees of the government or some of its agencies or institutions, who hold their position by reason of contract made and entered into by and between such person and some officer or agent of the State government who is authorized or directed to make such contract by some provision of the Constitution or statutes of the State. Such employee takes no oath and executes no bond and may be discharged at the pleasure of the appointing power. The tenure of his position is fixed by the contract made and entered into between such employee and the appointing power, or it may terminate according to the contract at the pleasure of the appointing power.

Under one or the other of the above two classifications a professor in the University must fall; that is, he must either be an officer of the State or he must be an employee, and we will now direct our attention to fixing the status of a professor as one or the other.

The University of Texas is a creature of the Constitution, to which we must look for the fundamental principles giving the power to and authorizing its establishment and providing for its maintenance and future development and efficiency.

Section 10 of Article 7 of the Constitution of this State, providing for a University, reads as follows:

"The Legislature shall as soon as practicable establish, organize and provide for the maintenance, support and direction of a University of the first class, to be located by a vote of the people of this State, and styled 'The University of Texas,' for the promotion of literature, and the arts and sciences, including an Agricultural and Mechanical department."

Section 38a of Article 16 fixes the term of office of the Board of Regents of the University.

Section 48 of Article 3, in the fifth paragraph thereof, enumerating the purposes for which the Legislature shall have the right to levy taxes or impose burdens upon the people, provides with reference to the University as follows:

"The support of public schools, in which shall be included colleges and universities established by the State; and the maintenance and support of the Agricultural and Mechanical College of Texas."

Therefore, we see that the University of Texas is a creature of the Constitution, and that all of the acts of those in authority in the government administration of the University must be founded upon and in pursuance of the provisions of the Constitution above quoted or of some act of the Legislature in pursuance thereof.

As a result of the above quoted provisions of the Constitution, the University has been established and laws have been enacted providing for its proper and efficient management. The government of the University of Texas is vested in a Board of Regents, as is provided by Article 2636, Revised Statutes of 1911, reading as follows:

"The government of the University shall be vested in a board of eight regents, selected from different portions of the State, who shall be nominated by the Governor and appointed by and with the advice and consent of the Senate."

The employment of professors and the fixing of their salaries by the Board of Regents is regulated by the provisions of Article 2639, Revised Statutes, which reads as follows:

"The regents shall elect a chairman of the board of regents from their own number, who shall hold his office during the pleasure of the board. They shall establish the departments of a first class university, determine the offices and professorships, appoint a president, who shall, if they think it advisable, also discharge the duties of a professor, appoint the professors and other officers, fix their respective salaries, and they shall enact such by-laws, rules and regulations as may be necessary for the successful management and government of the University; they shall have power to regulate the course of instruction and prescribe, by and with the advice of the professors, the books and authorities used in the several departments, and to confer such degrees and to grant such diplomas as are usually conferred and granted by universities."

Not only does the employment of the teachers and the fixing of their salaries devolve upon the Board of Regents of the University, as set out and determined by the above quoted article, but the Regents have the power to remove any professor when in their judgment the interest of the University may require, which will be seen by the provision of Article 2640, which reads as follows:

"The regents shall have power to remove any professor, tutor or other officer connected with the institution, when, in their judgment, the interest of the University shall require it."

It will thus be seen that a professor in the University secures his appointment from the Board of Regents, with whom he contracts for a certain fixed salary and the term of his employment is fixed by such contract subject to the limitations placed thereon by law; that he may be discharged at any time in the judgment of the Board of Regents

that such act would be for the best interest of the University. A professor in the University takes no oath, he is required to execute no bond, and, as above said, is subject to discharge at any time.

We think it clear from the nature of the contract of employment of a professor in the University as above set out that he could only be classed as an employee of the State government and not as an officer of the government. He exercises none of the functions of the government, but, on the other hand, is employed by an officer to do such things under the direction of those officers as they may deem best for the interest of the University.

There are various definitions of officers and of employees, and discussions of the distinction made between the two laid down in the decisions of the courts of this country. In the case of *Hendricks vs. The State*, 49 S. W., 705, it there appears a discussion of what it takes to constitute one a public officer. The court in that case, in defining an officer, quoted from *Mechem on Public Officers*, Section 1, as follows:

"A public office is the right, authority and duty granted and conferred by law by which for a given period, either fixed by law or ending at the pleasure of the creating power, an individual is invested with some portion of the sovereign function of the government to be exercised by him for the benefit of the public. The individual so invested is a public officer."

The decision in said case further states:

"Among the criterions given for determining whether an employment is a public office or not, or the delegation of a portion of the sovereign powers of the government, are the requirement of an official oath, that the powers are granted and conferred by law and not by contract, and the fixing of the duration of the term of office." (*Mechem*, Sec. 2 et seq.)

The case of *Fredericks vs. The Board of Health of the Town of West Hoboken*, 82 Atl., 528, was one where a sanitary inspector whose duties were defined by law had been appointed for a term of three years at a salary of fifteen hundred dollars a year. The board under whom he served reduced the salary during the term to a thousand dollars a year. *Fredericks* sued for the difference. In that case the court said:

"If the appellee held an office, the district court erred in deciding that his acceptance thereof established a contractual relation. The first question therefore is whether or not the inspector appointed by a local board of health is the incumbent of an office. The courts of this State have frequently been called upon to decide what an office was and to distinguish an office from a position as well as from a mere employment. From these decisions the following definition of an office may be adduced:

"An office is a place in a governmental system created or organized by the law of the State which either directly or by delegated authority assigns to the incumbent thereof the continuous performance of certain permanent public duties. * * * A position is analogous to an office in that the duties that pertain to it are permanent and certain, but it differs from an office in that its duties may be non-governmental and not assigned to it by any public law of the State."

The case of *State ex rel. Stage vs. Mackey* was a quo warranto proceeding to prevent the usurpation of the position of a deputy building inspector. From that case we quote as follows (74 Atl., 761):

"The position in question is one to which the ordinance creating it attempted to attach important powers and functions of government belonging to the sovereignty, and therefore was a 'public office,' as distinguished from a mere employment or agency resting on contract, and to which such powers and functions are not attached. Perkins vs. New Haven, 53 Conn., 214, 216, 1 Atl., 825; Seymour vs. Over-River School District, 63 Conn., 502, 509, 3 Atl., 552; Rylands vs. Pinkerton, 63 Conn., 176, 182, 28 Atl., 110, 22 L. R. A., 653. 'A public office is a right, authority, and duty created and conferred by law, by which * * * 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.' Meacham on Public Officers, Sec. 1. 'It implies a delegation of a portion of the sovereign power to and possession of it by the person filling the office.' United States vs. Hartwell, 6 Wal., 385-393 (18 L. Ed., 830); Opinion of Justices, 3 Greenl. (Mo.), 431, 482; Patton vs. Board of Health, 127 Cal., 388, 394, 59 Pac., 702, 78 Am. St. Rep., 66. It is a trust conferred by public authority for a public purpose, and involving the exercise of the powers and duties of some portion of the sovereign power. Clark vs. Kaston, 146 Mass., 43, 45, 14 N. E., 795; Attorney General vs. Drohan, 169 Mass., 534, 835, 48 N. E., 279, 61 Am. St. Rep., 301; People vs. Kiple, 171 Ill., 44, 71, 49 N. E., 229, 41 L. R. A., 775."

Another distinction between an officer and an employe will be found in 29 Cyc., 1366, as follows:

"Opposed to the conceptions of office and officer are those of employment and employe. While an office is based upon some provisions of law, an employment is based upon the contract entered into by the government with the employe." (Baltimore vs. Lyman, 84 Am. St. Rep., 524.)

The case of Baltimore vs. Lyman, supra, involved the question of whether or not the city superintendent of public instruction was an officer. In that case there was a full discussion of the distinction between an officer and an employe, and particularly of those essentials necessary to constitute one an officer, and we quote from that case, at page 526, as follows:

"Judge Cooley, in the case of Throop vs. Langdon, 40 Mich., 683, where it is held that the position of chief clerk in the office of the assessors of the city of Detroit was not an office, says: 'The officer is distinguished from the employe in the greater importance, dignity, and independence of his position; in being required to take an official oath and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance in office, and usually, though not necessarily, in the tenure of his position. In particular cases other distinctions will appear which are not general.' In Olmstead vs. Mayor, etc., 42 N. Y., Sup. Ct., 482, it was held that one who receives no certificate of appointment, takes no oath of office, has no term or tenure of office, discharges no duties, and exercises no powers depending directly on the authority of law, but simply performs such duties as are required or him by the persons employing him and whose responsibility is limited to them, is not an officer and does not hold an office. And in the recent case of School Commrs. vs. Goldsborough, 90 Md., 207, 44 Atl., 1055, we said: 'Civil officers are governmental agents; they are natural persons in whom a part of the State's sovereignty is vested or reposed, to be exercised by the individuals so intrusted with it for the public good. The power to act for the State is confided to the person appointed to act. It belongs to him upon assuming the office. He is clothed with the authority which he exerts and the official acts done by him are done as his acts and not as the acts of a body corporate.'"

An employe is thus defined by Judge Freeman, in his note on the case of Mayor and City Council of Baltimore vs. Lyman, 84 Am. St. Rep., at page 527:

“Officer—One who receives no certificate of appointment, takes no oath of office, has no term or tenure office, discharges no duties and exercises no powers depending directly on the authority of the law, but simply performs such duties as are required of him by the persons employing him, and whose responsibility is limited to them, is not an officer, although those employing him are public officers, and his employment is in and about a public work or business: See the monographic note to Thomson vs. Kyle. 63 Am. St. Rep., 193. Consult, also, the recent case of Patton vs. Board of Health, 127 Cal., 388, 78 Am. St. Rep., 66, 59 Pac., 702.”

The above quoted decisions are of value on determining the abstract question of what is an office and what is an employment, but we are not without authorities upon the specific question of whether professors in the University or teachers in the public schools are officers or employees.

In the case of the State vs. Gray, 91 Mo. App., 444, we find the following language:

“While school directors come well within the definition of a public officer, in that they take an oath of office and exercise sovereignties by the levy of taxes, etc., yet it would hardly be contended that school teachers in the State public schools are officers notwithstanding they receive stated salaries for stated terms. So it has been held that a professor in a State university was not a public officer. Butler vs. the Regents, 32 Wis., 124.”

In the Butler case above referred to the plaintiff, Butler, was a professor in the University of Wisconsin. Butler instituted this suit for the recovery of salary for a certain period, alleging that he was an officer and entitled to his compensation as the incumbent of such office for the time designated. The Regents defended upon the ground that Butler was an employee of the board, and that his compensation was limited by the terms of the contract made and entered into between Butler and the board. The court in that case held that Butler was an employee and in all things limited to the terms of his contract. The court said:

“The learned counsel for the defendants has argued with great ingenuity that the plaintiff was a public officer, and not a mere servant or employee of the board of regents by whom he was appointed a professor in the university; that the act of 1866 (Ch. 144) abolished the old corporation known as ‘the regents of the University of Wisconsin,’ and established in its stead a new and different corporation designated by the same name; and that the plaintiff’s term of office as a professor necessarily terminated with the life of the corporation which elected him. We are unable to agree with the counsel of his first proposition. We do not think that a professor in the university is a public officer in any sense that excludes the existence of a contract relation between himself and the board of regents that employed him, in respect to such employment. It seems to us that he stands in the same relation to the board that a teacher in a public school occupies with respect to the school district by which such teacher is employed; and that is purely contract relation.”

We, therefore, must conclude, as we are abundantly warranted in doing from the above quoted decision, that a professor in the University of Texas is not an officer of this State, but is simply an employee of the Board of Regents of the University, who holds his position by virtue of the contract alone. He takes no oath, he executes no bond and he is subject to discharge at the pleasure of the Board of Regents.

In addition to being an employee of the State, a professor in the University may become, in a limited sense, an agent of the State government, for the reason that the Regents are officers of the State exercising certain functions of government. Their expenses are paid by the State and upon them devolves the maintenance of a University of the first class, as provided in the Constitution.

Constitution, Art. 7, Sec. 10.

R. S., Art. 2651.

20 Texas Crim. App., 178.

People vs. McKee, 68 N. C., 429.

People vs. Bledsoe, 68 N. C., 457.

Park vs. Stanley, 8 Am. Rep., 488.

The Board of Regents, in governing the University, employ the officers and prescribe certain rules delegating to the professors certain functions of the Regents, particularly in the matter of discipline of the students and carrying into effect the rules for managing the University. In this way a professor in the University is to this extent an agent of the Board of Regents. His authority, it is true, is limited, but, nevertheless, it is vital and existent. From this reasoning we deduce that a professor in the University is in a limited sense an agent of the State, but it is also clearly very true that he is an appointee of the State, acting through its Board of Regents. As a general rule, those servants of the State government who are elected by ballot are officers of the State, but the fact that the Board of Regents sitting as a board for the election of professors of the University may vote by ballot does not change the relationship of the professors from that of an appointee to that of an officer. He is, nevertheless, an appointee of the board.

23 Am. and Eng. Ency., 339.

Conger vs. Gilmer, 23 Cal., 73.

Wickersham vs. Britton, 93 Cal., 34.

Sturges vs. Spofford, 45 N. Y., 446.

We, therefore, conclude that should Mr. Mayes accept the position of Professor of Journalism in the University he would be an employee of the State government and also, in a limited sense, an agent of the government, but not to such an extent would he be an agent that he could be deemed an officer of the government in that he directly exercised any of the functions of the government.

LIEUTENANT-GOVERNOR.

We come now to consider Mr. Maves' status of Lieutenant-Governor of the State of Texas. Not only is the Lieutenant-Governor an officer under the Constitution of this State, but he is one of the very highest officers known to the Constitution. He is a member of the Executive Department of the State government, classed with the Governor, the Secretary of State, Comptroller of Public Accounts, Treasurer, Commissioner of the General Land Office and Attorney General, as appears from Section 1 of Article 4, which reads as follows:

"The Executive Department of the State shall consist of a Governor, who shall be the chief executive officer of the State, a Lieutenant Governor, Secre-

tary of State, Comptroller of Public Accounts, Treasurer, Commissioner of the General Land Office and Attorney General."

So it appears that should Lieutenant-Governor Mayes accept the position of Professor of Journalism in the University of Texas while at the same time holding the office of Lieutenant-Governor, he would occupy the position of being at one and the same time an officer of the State and also an employee or agent of the State; and in this connection we beg to call your attention to Section 33 of Article 16 of the Constitution, which 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."

An analysis of the above quoted section of the Constitution results in the following: That the accounting officers of this State are prohibited from drawing or paying a warrant upon the treasury in favor of any person for (a) salary, (b) compensation; as (1) agent, (2) officer, (3) appointee, if such person at the same time holds any other (1) office, (2) position of honor, (3) position of trust, or (4) position of profit, under this State or the United States.

Mr. Mayes is the Lieutenant-Governor of this State, and under the Constitution as above quoted and discussed that is an office. It is likewise a position of honor and trust, and while it could hardly be said, owing to the very nominal salary paid, that it is a position of profit, yet there is a compensation attached to the office of Lieutenant-Governor, which, be it great or small, is intended as a remuneration for the time devoted to the office.

It is very clear, therefore, that Mr. Mayes, so long as he is Lieutenant-Governor, could not under the Constitution draw pay from the State, as (1) agent, (2) officer, (3) appointee of the State.

As we have above endeavored to show that a professor in the University of Texas is an appointee, or in a limited sense an agent, therefore, Mr. Mayes could not draw a salary from the State as Professor of Journalism in the University.

The converse of the above proposition is also true, and, therefore, Mr. Mayes, so long as he was the agent or appointee of the State as a Professor of Journalism in the University, could not draw his pay as Lieutenant-Governor of the State, that being an office within the meaning of the Constitution.

Therefore, should Mr. Mayes accept the position of Professor of Journalism in the University and at the same time hold and exercise the duties of the office of Lieutenant-Governor, he could not draw pay for either such office or such position.

THE LIEUTENANT-GOVERNOR ACTING AS GOVERNOR.

We have quoted Section 1 of Article 4 of the Constitution of this State constituting the Lieutenant-Governor of this State a member of the Executive Department.

Section 16 of Article 4 of the Constitution provides for the election of the Lieutenant-Governor and prescribes his duties and powers as such, among which is that he shall preside over the Senate, and in case of the death, resignation or removal from office, inability or refusal of the Governor to serve or his impeachment or absence from the State, the Lieutenant-Governor shall exercise the powers and authorities pertaining to the office of Governor. This section reads as follows:

“There shall also be a Lieutenant Governor, who shall be chosen at every election for Governor by the same electors, in the same manner, continue in office for the same time, and possess the same qualifications. The electors shall distinguish for whom they vote as Governor and for whom as Lieutenant Governor. The Lieutenant Governor shall by virtue of his office, be President of the Senate, and shall have when in Committee of the Whole, a right to debate and vote on all questions; and when the Senate is equally divided to give the casting vote. In case of the death, resignation, removal from office, inability or refusal of the Governor to serve, or of his impeachment or absence from the State, the Lieutenant Governor shall exercise the powers and authority appertaining to the office of Governor until another be chosen at the periodical election, and be duly qualified; or until the Governor return, or his disability be removed.”

Section 17 of Article 4 provides for the compensation of the Lieutenant-Governor, while Section 18 of Article 4 provides for a succession to the Governorship, which section we quote and is as follows:

“The Lieutenant Governor, or President of the Senate, succeeding to the office of Governor, shall, during the entire term to which he may succeed, be under all the restrictions and inhibitions imposed in this Constitution on the Governor.”

We call particular attention to the latter part of this section applicable to the Lieutenant-Governor upon succeeding to the office of Governor, which provides that he shall be “under all the restrictions and inhibitions imposed in this Constitution on the Governor.”

The restrictions and inhibitions imposed on the Governor by the Constitution are set out in Section 6 of Article 4 of the Constitution, which reads as follows:

“During the time he holds the office of Governor, he shall not hold any other office; civil, military or corporate; nor shall he practice any profession, and receive compensation, reward, fee, or the promise thereof for the same; nor receive any salary, reward or compensation or the promise thereof from any person or corporation, for any service rendered or performed during the time he is Governor, or to be hereafter rendered or performed.”

Under the above quoted section the Governor is prohibited from engaging in any profession and receiving any compensation, reward or fee therefor or the promise thereof, provided that he shall not receive any salary or compensation or promise thereof from any person or corporation for any service rendered or performed during the time he is Governor or to be thereafter rendered or performed.

It is, therefore, perfectly apparent that at such time and during such period that Mr. Mayes as Lieutenant-Governor should be called upon to discharge the functions of the office of Governor that he could not discharge the duties of Professor of Journalism in the University of Texas. This condition is brought about frequently on account of the absence

of the Governor from the State or from his inability to act from other causes.

In the framing and adoption of the Constitution of this State there seemed to be a fixed and determined purpose in the minds of the framers of the instrument and the voters who adopted it that no person in this State should hold more than one office except as was provided for in the Constitution, and it also seemed to be the purpose in the adoption of this Constitution that no person should receive employment from the State government in more than one capacity.

Section 40 of Article 16 of the Constitution, relating to officers, 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."

This section was intended to prevent one person from at the same time holding more than one office; but the framers of the Constitution were not content with this limitation, but inserted therein a section (Section 33 of Article 16) relating to employment; and it is very clear that these two sections were inserted for the express purpose of preventing one man from holding two positions or a double position, the wisdom of which two provisions cannot be questioned, as it is from an examination of Constitutions generally usually considered for the best interest of the people that no one man should hold more than one office or position.

We, therefore, beg to advise you that Hon. Will H. Mayes, while acting as Lieutenant-Governor of this State, could not legally hold the position or employment of a Professor of Journalism in the University of Texas.

With great respect,

Yours very truly,

C. M. CURETON,

First Assistant Attorney General.

C. W. TAYLOR,

Assistant Attorney General.

COUNTY CLERKS—NEW COUNTIES.

The county clerk of a new county is entitled to fifteen cents per hundred words for transcribing and comparing the records of the county from which the new county was created, and in so far as the amount to be paid by the county is concerned it is immaterial what the county clerk may pay his deputies who do the work.

It is the duty of the commissioners court to furnish, at the expense of the county, blank record books. R. S., 1911, Articles 6772, 6775.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, OCTOBER 27, 1913.

Hon. V. W. Taylor, County Attorney, Alice, Texas.

DEAR SIR: The Department is in receipt of your communication of recent date, from which it appears that your county clerk has made a

contract with an abstract company to transcribe the deed records of the county from which your county was created, and has appointed two members of the abstract company as his deputies to do the work, agreeing to pay the abstract company 15 cents per hundred words, and the abstract company in turn makes a contract to refund to the county clerk $2\frac{3}{4}$ cents per hundred words. You further state that the contract entered into by the county clerk and the abstract company calls for transcription only and does not obligate the persons doing the work to verify the transcription, and also binds the county to furnish the blank books for such work. You desire to know if this contract is legal.

In our opinion, Article 6772, Revised Statutes of 1911, makes it the duty of a county clerk to transcribe or have transcribed by sworn deputies the records relating to the real estate in a new county from the old county from which the new county was organized, and Article 6775 fixes the compensation of the county clerk at 15 cents per hundred words for comparing and verifying the copy, and in as far as your county clerk has attempted to escape the verification of the copies made, then he has exceeded his authority and it would be his duty to see to it that a proper certification of the transcribed record is made.

It is clearly the duty of the commissioners court to provide at the expense of the county the blank books necessary to be used upon which to transcribe the records, as is shown by the first part of Article 6772. The latter part of this article, in which it is provided that the clerk shall provide a separate record book for each county in event a county is created from the territory of more than one county, does not carry with it the idea that the clerk shall provide this book at his own expense, but this portion of the article is merely directing the procedure that the clerk must follow in transcribing the records from the different counties in order that there may be no confusion of the records of the new county, and that the records of that portion of the territory taken from each county shall be separate.

Replying to that portion of your letter with reference to the contract made by the county clerk with his deputies to receive back $2\frac{3}{4}$ cents per hundred words, we beg to say that we do not believe this comes within the meaning of Article 113 of the Penal Code, for the reason that the clerk by the terms of the statute is entitled to the 15 cents per hundred words for transcribing and verifying the record, and it is immaterial to the county,—waiving for the time being the question of appointment and pay of deputies under the fee bill,—as to what amount he shall pay his deputies. The clerk is entitled to 15 cents per hundred words and unless he is prohibited from doing so by the fee bill he may pay his deputies any amount he sees fit. The contract made by the clerk to pay the deputies 15 cents per hundred words and then receive back $2\frac{3}{4}$ cents per hundred words is the same in effect as if he had originally contracted to pay his deputies $12\frac{1}{4}$ cents for the work. Under our view of the statute the amount to be paid for this work must be paid to the county clerk, and there will be no authority for issuing a warrant to the deputies in payment for their services under a contract for the full amount of 15 cents per hundred words.

If your county was under the fee bill, it would be our ruling in this case that the county clerk would be required to appoint deputies and

pay them salaries in the manner and in the amounts as specified in Articles 3881 et seq. of the Revised Civil Statutes, but the question of whether or not a county is under the fee bill and the county officials are limited in the salaries to be paid to their deputies is a mooted one in this State and is now or soon will be before the higher courts of the State in a case from Harris county for determination, and as this is before the courts we will refrain from expressing an opinion at this time.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

COUNTY ATTORNEY—APPEARING AGAINST STATE.

The county attorney could not appear in the county or district court representing defendants against the State where he had represented them before election to office. Neither could he appear as prosecuting attorney in such a case.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MAY 13, 1913.

Hon. P. C. Maynard, County Attorney, Bastrop, Texas.

DEAR SIR: This Department is in receipt of your favor of May 6th, in which you say that you have recently been appointed county attorney and that, at the time of your appointment, you represented several parties in the district and county courts adversely to the State. You wish to know if you could appear in behalf of the defendants in those cases which you had prior to your appointment as county attorney. You state that your fees have been paid in some cases.

Replying thereto, beg to say that Article 40, C. C. P., provides as follows:

"District and county attorneys shall not be of counsel adversely to the State in any case, in any court, nor shall they, after they cease to be such officers, be of counsel adversely to the State in any case in which they have been of counsel for the State."

Under this statute, we do not believe that you could appear in either the county or the district court in the cases in which you are employed, before your appointment, in behalf of defendants which would be adversely to the State. This statute prohibits the prosecuting attorneys from appearing in any case in any court adversely to the State, and as you could not, of course, appear as prosecuting attorney in those cases, you could not take part in the cases at all. It seems to us that the only thing that you can do is to make such arrangements with your former clients as would be just and equitable between you both.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

COUNTY CLERK—MARRIAGE LICENSE—AGE OF CONTRACTING PARTIES—
OATH REQUIRED.

Where the county clerk is in doubt as to the age of the contracting parties he shall require an oath from some party other than the contracting parties as to their ages before issuing marriage license.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, APRIL 19, 1913.

Mr. L. U. Castleberry, County Clerk, Canton, Texas.

DEAR SIR: In your communication of April 16th, you submit the following questions:

"Does a clerk of the county court violate the law if he issues marriage license to a man who makes affidavit that he is 21 years of age and that the lady he is to marry is 18 years of age and that there are no legal objections to their marriage?"

Replying thereto, we beg to say that Articles 409 and 410 of the Penal Code read as follows:

"Article 209. If the clerk of any county court, or other officer authorized by law to issue a license for marriage, shall, without the consent of the parent or guardian of the party applying, issue a marriage license to a male person under the age of 21 years, or to a female under the age of 18 years, he shall be fined not exceeding one thousand dollars."

"Article 410. Where both parents of any minor may be alive, the consent of the father alone shall be sufficient to authorize the issuance of license to the minor."

Article 2957 of the Revised Statutes of 1895 reads as follows:

"No clerk shall issue a license without the consent of the parent or guardian of the parties applying, unless the parties so applying shall be, in the case of the male 21 years of age, and the female 18 years of age."

The above article was amended by the Thirty-second Legislature, page 63 of the acts, by inserting, among other things, the following: "And if there be any doubt in the mind of the clerk of the county court issuing such license, he shall not issue said license, unless there shall be presented to him a certificate under oath from their parent or guardian, or some person *other than the contracting parties* that the contracting parties have attained the ages aforesaid."

You are, therefore, advised that upon all occasions when there is any doubt in your mind as to the age of the contracting parties as to whether or not they are of legal age, you should only act upon the oath of some party other than the contracting parties, and that an oath to the effect that the contracting parties were of legal age made by one of the parties would be no protection to you under the law.

Kindly show this letter to your county attorney, who will have the time to go more into detail on this matter than we have done, and get his further advice in the premises.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General

ELECTIONS—STOCK LAW—CONSTRUCTION OF LAW.

A freeholder can vote in a stock law election provided he is a qualified voter.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 11, 1913.

Mr. P. C. Beauchamp, Maude, Texas.

DEAR SIR: This Department is in receipt of your favor of the 7th, asking whether in a county or precinct election on a stock law a voter must be a real estate taxpayer, or whether he can vote on his poll tax receipt.

Replying thereto, beg to refer you to Articles 7217 and 7244 of the Revised Civil Statutes of 1911, which govern this matter. The first has reference to the running at large of hogs and certain other animals, and the second has reference to the running at large of horses and certain other animals, but each of them provide as follows:

"No person shall vote at any election under the provisions of this chapter unless he be a freeholder and is a qualified voter under the Constitution and laws."

You will note that the provision is that he must be a freeholder and otherwise a qualified voter. The law does not provide that he shall not vote unless he has paid a property tax, and we are, therefore, of the opinion that a freeholder can vote in a stock law election, provided he is a qualified voter under the law.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

STOCK LAW ELECTIONS—CITIES AND TOWNS—COMMISSIONERS COURT.

1. Under the law, stock law elections may be held for the entire county, including the incorporated cities thereof.

2. The commissioners court of a county has the authority to exclude incorporated cities of a county in calling an election to determine whether or not stock should be prohibited from running at large; in which event, the petition for the election should describe the incorporated cities by metes and bounds and state that said cities would not be included in the election, and the residents of said cities would not be authorized to vote or participate at said election.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JANUARY 28, 1914.

Hon. Edward H. Moss, County Attorney, La Grange, Texas.

MY DEAR SIR: Under date of January 23, 1914, we have the following communication from you:

"Fayette county has a law prohibiting the running at large of hogs, sheep and goats. Article 2709, Revised Statutes of 1911.

"This law, or rather election, was held and carried before there was a penalty for permitting the above named animals to run at large.

"The citizens wish to petition the commissioners court to order an election to determine whether or not said animals, as above named, shall be permitted

to run at large in Fayette county so that if anyone violates the law they will commit a misdemeanor. This election is to be held in the entire county of Fayette.

"There are five (5) incorporated towns in the county of Fayette. Should the petition state that the citizens of said incorporated towns haven't signed the petition nor will they be permitted to vote at said election, and, further, should said petition give the boundaries of said towns?"

Replying thereto, beg to advise you that, in our opinion, if you desire to hold a stock law election for the entire county of Fayette, it would not be necessary to exclude the five incorporated towns situated in said county, but the petition should show that the election will be held for the county as a *whole* and the signers of said petition, as freeholders, could be from any portion of the county.

Article 7209 of the Revised Statutes (1911) provides as follows:

"Upon the written petition of fifty freeholders of any county, or upon the petition of twenty freeholders of any subdivision of a county, the commissioners court of such county shall order an election to be held in said county or subdivision, on some day named in the order, for the purpose of enabling the freeholders of such county or subdivisions to determine whether hogs, sheep or goats shall be permitted to run at large in such county or subdivision."

Under this statute, the commissioners court of a county is clearly authorized to order an election for the entire county, as well as any subdivision of a county.

It is true that Article 860 (Revised Statutes, 1911) authorizes incorporated cities to establish and regulate public pounds, and regulate, restrain and prohibit the running at large of horses, mules, cattle, sheep, swine, goats, and to authorize the distraining, impounding and sale of the same for the cost of the proceedings and the penalty incurred, and to order their destruction when they cannot be sold, and to impose penalties on the owners thereof for a violation of any ordinance, but we do not think that these provisions of the statute take such cities out from under the operation of the general statute based upon the constitutional provisions authorizing and empowering the commissioners court of a county to submit to the entire county the question of whether or not hogs, cattle, sheep, goats, etc., should be permitted to run at large in the county.

In the absence of a stock law in the county, there is no question but that the incorporated cities have the authority, under the statute, to pass the necessary ordinances to prohibit the running at large of horses, mules, cattle, sheep, swine and goats. The fact that such cities have such authority, however, would not take them out from under the operation of the statute authorizing the election for the entire county.

The question as to the legality of an election held for the entire county including incorporated cities was passed upon in the case of *Roberson vs. The State*, 63 S. W., 884. In this case it appears that the stock law, prohibiting the running at large of cattle, etc., had been voted upon and adopted by Ellis county as a *whole*, and that one Bill Roberson was tried in the county court of Ellis county and convicted for permitting his cattle to run at large in violation of the law thus adopted by the county. Upon his trial, he was found guilty; whereupon, he appealed his case to the Court of Criminal Appeals, raising

many questions as to the validity of the law. One of his contentions was, that the election was invalid, because that persons not interested in the law and not authorized, under the law, to participate in the election, towit: persons living in incorporated cities, were permitted to vote at said election; that is, under his contention, the election to have been valid would necessarily have had to exclude all of the incorporated cities in the county of Ellis, because, under the statute, said cities have the right to deal with this subject exclusively. In deciding this question, the Court of Criminal Appeals used this language:

"Appellant also insists that a new trial should be granted because the evidence shows that persons not interested in the law, towit, in the cities which have been incorporated and have separate stock laws, were allowed to vote at this election. There is nothing in the law authorizing the election which disqualifies this class of citizens from voting, provided they are freeholders."

This opinion of the court has never been modified or overruled, therefore it stands as the law today.

Also, our Supreme Court, in the case of *Armstrong vs. Traylor & Elmore*, 30 S. W., 440, in construing Section 23 of Article 16 of our State Constitution, said:

"We further hold that Section 23 of Article 16 of the Constitution authorized the Legislature to pass a law regulating live stock, making it applicable to the entire State, or it might have exempted *any county* or counties from the operation of such law. The Legislature might also have enacted a law regulating live stock *in any given county* or in any subdivision of such county, or it might, as it did in this instance, pass a law not to be in force in *any county* or part of a county until adopted."

Also, in the case of *Graves vs. Rudd*, 65 S. W., 63, the Court of Civil Appeals upheld the stock law as voted by the entire county of Grayson, in which decision reference was made to the opinion of the Court of Criminal Appeals in the case of *Roberson vs. The State*, *supra*, which opinion was by the Court of Civil Appeals approved. Writ of error was applied for and denied in the case of *Graves vs. Rudd*. We, therefore, have the opinion of the Court of Criminal Appeals and the Supreme Court of this State upholding the validity of the stock law election in which the citizens of the entire county participated and in which incorporated cities were included.

We are, therefore, of the opinion, as so advise you, that, under the law, it would be perfectly legal for your commissioners court to call an election for your entire county submitting the question to the freeholders of the county as to whether hogs, sheep and goats should be permitted to run at large in your county.

We also believe that your court would have the authority, if it so desires, to exclude incorporated cities of your county from the election; in which event the petition should be prepared similar to the one which you enclose. It should be shown by the petition that the incorporated cities of the county were excluded, and the boundaries of the incorporated cities should be given and stated in the petition, and, in the event such cities should be excluded, it would not be proper, of course, for the residents of such cities to vote at or to participate in said election.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

OFFICERS—JUSTICE OF THE PEACE—REQUIRED TO KEEP DOCKET.

It is the duty of a justice of the peace to keep his docket as prescribed by Article 969, Code Criminal Procedure, and to file a transcript of same as prescribed by Article 970, Code Criminal Procedure, and the wilful or negligent failure to perform such duty would constitute a violation of the provisions of Articles 294 and 295, White's Penal Code.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, MAY 21, 1913.

Hon. Richard G. Maury, Criminal District Attorney, Houston, Texas.

DEAR SIR: Replying to your inquiries of May 1, 1913, beg to advise you that in the opinion of this Department Articles 969 and 970, C. C. P., are mandatory, and detail a part of the duties imposed upon the office of justice of the peace. It is as much the official duty of a justice of the peace to keep his docket in the manner prescribed by Article 969, C. C. P., and to file a transcript of same as prescribed by Article 970, C. C. P., as it is for such officer to make settlement with the county for the fines collected in his court.

It is the opinion of this Department that if any justice of the peace should wilfully or negligently fail to perform the duties imposed upon him by said articles, above referred to, he would be deemed guilty of a misdemeanor and could be punished by fine not exceeding \$200. (See Articles 294 and 295, White's Penal Code.)

Neglect to do an act which ought to have been done, or the failure to perform any and all acts required by law to be performed, constitutes official misconduct. We are, therefore, of the opinion that this offense is a misdemeanor involving official misconduct, and the district court would have exclusive jurisdiction of same. Under Article 6028, R. S., 1911, it is our opinion that a conviction by a petit jury of a justice of the peace on such a charge would work an immediate removal from office of such officer.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

DELINQUENT CHILD ACT—DEPENDENT CHILD ACT—PROCEEDINGS—
TUBERCULOSIS COLONY.

1. A proceeding under the Delinquent Child Act is a criminal case or cause of action, and under Article 1154, Code Criminal Procedure, 1911, a county judge would be entitled to \$3.00 to be paid by the county for each case tried and finally disposed of under said act.

2. Proceedings under the Dependent Child Act are civil proceedings and the county judge under Article 3851, Revised Statutes, 1911, would be entitled to \$3.00 for each case finally disposed of by trial or otherwise, to be paid by the commissioners court of the county; provided, the conditions as prescribed in said Article of the statute exist.

3. The proceedings required to be taken by county judge in placing a patient in the Tuberculosis Colony are neither civil nor criminal cases, and as no provision is made in the act for compensating the county judge for the services rendered, he is not, therefore, lawfully entitled to compensation for such services.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, DECEMBER 24, 1913.

Hon. B. F. Gafford, County Attorney, Sherman, Texas.

DEAR SIR: Under date of November 15th, you submitted to this Department the following questions:

"1. Is the county judge entitled to a fee of \$3.00 in cases brought under the Delinquent Child Act?

"2. Is the county judge entitled to a fee of \$3.00 in cases brought under the Dependent Child Act?

"3. Is the county judge entitled to a fee of \$3.00 for services rendered in committing persons to Tuberculosis Colony?"

We will consider your inquiries in the order in which they appear. Article 1154, C. C. P., 1911, provides:

"There shall be paid to the county judge by the county the sum of three dollars for each criminal action tried and finally disposed of before him."

The questions, therefore, necessary to determine in order to arrive at a proper conclusion with reference to the matters embraced in your first inquiry are: Is a case of delinquency a criminal action? If so, under what conditions would the fee in such cases be due and payable?

A criminal case or a criminal action is a public prosecution for a crime or misdemeanor.

In re Schultz's, Lessee, vs. Moore (Ohio), Wright, 280-281.

A criminal case is one which involves a wrong or injury done to the public for the punishment of which the offender is prosecuted in the name of the whole people.

Grimball vs. Ross (Ga.), Tupchart, 175.

A prosecution for crime in the name of the State for a violation of its criminal laws is a criminal case.

Holliman vs. City of Hawkinsville, 109 Ga., 107, 34 S. E., 214.

The term "criminal cases" means prosecutions under the laws of a State.

People vs. Manistee County Sup'rs, 26 Mich., 422-424.

Chapter 112, Acts Thirty-third Legislature, Regular Session, amends Article 1197, C. C. P., and makes delinquency an offense and defines what constitutes such offense; that is, if a male child under 17 years of age or a female child under 18 years of age, violates any of the criminal laws of the State or any city ordinance, or if they should do any of the other things denounced by said act, the person thus offending would be guilty of delinquency.

Article 1199 as amended by said Chapter 112, provides that all proceedings under said act shall be begun by sworn complaint and information filed by the county attorney as in other cases under the laws of this State.

Said act gives both the district and county courts jurisdiction of such offenses; provides for a trial of all such cases and affixes a penalty for the offense, which the offender, if found guilty, must suffer.

In actions brought under this statute, we have a case filed in a court of competent jurisdiction; brought in the name of the State of Texas; begun by sworn complaint and information filed by the county attor-

ney; the person against whom the charge is made is arraigned before the court for trial, and if found guilty must suffer a punishment. We must conclude, therefore, that such a case, by every test, falls within the meaning and definition of a criminal action.

Section 12 of said Chapter 112, provides that no cost or expense incurred in the enforcement of the act shall be paid by the State, but provision is nowhere made in said act to relieve the county of paying any cost that can be legally and properly charged against it in the enforcement of the act.

If cases brought under the act are criminal actions, then under the provisions of Article 1154, C. C. P., supra, the county judge would be entitled to \$3.00 to be paid by the county for each of such cases tried and finally disposed of before him. There must be a trial and a final disposition of the case, however, before the county judge could lawfully collect the \$3.00 from the county.

"A trial is an examination before a competent tribunal according to the laws of the land of the facts put in issue in a cause for the purpose of determining such issue."

Bouv. Law Dictionary.

A final disposition of a case is a conclusive, decisive disposition of it. It seems under the Delinquent Child Act that cases arising thereunder cannot be finally disposed of until the party charged has finished serving the punishment assessed against him, for by the terms of the act the court is given plenary power over the judgment so long as said delinquent is discharging the conditions imposed by same. The judgment committing the dependent to the care of any person or institution is at all times subject to change by further orders of the court. We have reached the opinion, however, that a county judge would be entitled to a fee of \$3.00 to be paid by the county for each case tried and finally disposed of by him under this act.

It seems clear to us that cases brought under the Dependent Child Act are civil causes. By the terms of said act it is provided that the proceedings brought thereunder shall be brought either in the district or county court by petition filed by any resident of the county having knowledge of a child who appears to be dependent or neglected. This petition is filed as petitions in other civil actions. Provision is also made for the issuance of citation, service of citation and a regular hearing to determine whether or not the facts alleged in said petition be true. It is provided that the court may hear the evidence or a jury may be demanded to hear the evidence and try the issues. We believe cases of this character fully meet the definition given of civil causes or civil actions.

Article 3851, R. S., 1911, provides as follows:

"For every case of lunacy disposed of by the county judge, he shall receive three dollars, to be paid out of the county treasury. For each civil cause finally disposed of by the county judge, by trial or otherwise, he shall receive a fee of three dollars, to be taxed against the party cast in the suit; provided, that, if the party cast in the suit has filed his oath of inability to pay costs, then the county judge shall be allowed by the county commissioners court such compensation as they may deem proper, not to exceed three dollars for each State case."

We believe the provisions of the above quoted article would apply to the compensation of county judges in proceedings brought under the Dependent Child Act.

Replying to your third inquiry, we are of the opinion that the county judge would not be entitled to a fee of \$3.00 for the work required by him to be done in placing patients in the State Tuberculosis Colony. Such proceedings had by the county judge could not be termed a trial or adjudication of a civil cause or action, nor the trial or adjudication of a criminal case. We would, therefore, not be entitled to compensation under either of the above quoted statutes, and as no provision is made in the act creating the Tuberculosis Colony for compensation for the county judge, we must conclude that it was not the intention of the Legislature that he should receive pay for the services thus rendered.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

TUBERCULOSIS COLONY.

The county should pay transportation going home of a patient who is indigent and who has been dismissed and sent home from State Tuberculosis Colony.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 24, 1913.

Dr. Ralph Steiner, State Health Officer, Capitol.

DEAR DOCTOR: We have your communication submitted to your Department by John Clegg, storekeeper and accountant of the State Tuberculosis Colony No. 1, and by your Department referred to us. Your communication desires a ruling relative to the transportation of indigent patients to their homes upon dismissal.

Replying thereto, we beg to say that Section 19 of the act establishing such colonies provides that the expenses of the clothing and transportation of indigent public patients shall be paid by the county from which the patients are sent. It will be noted that this provision is, that transportation shall be paid by the county and does not expressly designate that the transportation in going to and returning from the colony shall be paid by the county. There can be no question but what that it should also include the transportation in returning from the colony after dismissal from the institution. Of course, this construction would be upon the theory that the patient, after remaining in the institution for any length of time, would be, upon his or her dismissal therefrom, still classed as an indigent patient. Of course, if by any chance or turn of fortune, the patient during the time he was at the Colony had become able to pay his own transportation home, the county would not be called upon to pay his transportation, but, as above stated, it was intended that the transportation in going from the home county to the colony is intended to be covered by this clause. Neither, it seems to us, could there be any other construction placed upon the act than

if he still remained unable to pay the same, in the opinion of this Department, the county would be liable therefor.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

REVISED STATUTES—ADOPTION OF—REPEALING LAWS.

1. In construing a revision of the statutes the presumption is that the codifiers and the Legislature did not intend to change the laws as they formerly stood.
2. Repeals by implication are not favored.
3. Redemption of unused railway tickets.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JANUARY 24, 1913.

Hon. G. H. Crane, City Attorney, Como, Texas.

DEAR SIR: In your communication to this Department of date December 21st, you say:

"I notice that in the Revised Civil Statutes of 1911 a paragraph or article relating to the retention by railroads of unused parts, or whole unused tickets. Please advise me if that law has been repealed."

It appears that the article mentioned by you, which was Article 4560d of the Revised Statutes of 1895, has been omitted from the revision of 1911, and it is true that Section 4 of the final title of the Revised Statutes of 1911 declares 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. The article referred to, viz.: Article 4560d, R. S., 1895, is not expressly continued in force.

Section 17 of the final title of the Revised Statutes of 1911 provides that no laws, general or special, enacted by the Thirty-second Legislature, shall be in any way affected by the repealing clause of this title, but any and all of said laws shall continue to be the law of this State, this act of revision to the contrary notwithstanding.

The revised Penal Code of 1911 was enacted as a general law at the session of the Thirty-second Legislature of 1911, being same session at which the Revised Civil Statutes were enacted. The provisions of Article 4560d, Revised Statutes of 1895, are continued in Articles 1527, 1528 and 1529 of the Penal Code of 1911.

You are advised, therefore, that the article has not been repealed, but is in full force and effect. We believe that this is true by reason of the express provision of Section 17, final title of the Revised Statutes. In this conclusion, we are supported by the fact that in construing a revision of the statutes the presumption is that the codifiers and the Legislature did not intend to change the laws as they formerly stood.

Braun vs. State, 49 S. W., 620.

Ex Parte Cox, 109 S. W., 369.

. Phipps vs. State, 36 S. W., 753.

Repeals by implication are not favored. The civil remedy therefor provided by Article 4560d, R. S., 1895, continues in force, notwithstanding the fact that it may be found embodied in what is termed the Penal Code of Texas.

Yours truly,
LUTHER NICKELS,
Assistant Attorney General.

POOL TABLES—LICENSE.

No provision in the statute which prohibits a party buying an unexpired license from running the business at another and different place from that of the original purchaser.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, MARCH 12, 1913.

Mr. N. A. Ensor, Tax Collector, Belton, Texas.

DEAR SIR: This Department is in receipt of your favor of March 10th, in which you desire an opinion on whether a party buying the unexpired license and operating pool tables can conduct the tables at a place other than that at which the original purchaser conducted the business.

Replying thereto, we beg to say that Article 7364 and Article 7365, R. S., 1911, provide for the transfer of the license, and we find no provision in the statute which prohibits the party buying an unexpired license from running the business at another and different place from that of the original purchaser. Your confusion doubtless arose from a consideration of Article 7435 of the Revised Statutes of 1911 bearing on the application for retail liquor dealer's license, which article provides that the particular location must be set out in the application for license, and that the business cannot be conducted at any other place than as set out in the original license, except through the procedure as set out in Article 7433 of the Statutes.

We would be glad for you to take this matter up with your county attorney, and, if this letter is not clear to him, let him write us further in the matter.

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

DIVORCES—INDETERMINATE SENTENCE ACT.

(Chapters 97 and 132, Acts of the Thirty-third Legislature.)

Requirement of twelve months' residence does not apply to divorce cases filed prior to the passage of the act, but the procedure set out in the new act relating to the trial of cases does apply.

The Indeterminate Sentence Act applies to cases where parties were indicted prior to July 1, 1913.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, JULY 16, 1913.

Hon. Joe Y. McNutt, County Attorney, Franklin, Texas.

DEAR SIR: This Department is in receipt of your communication in which you propound two questions, as follows:

"1. Does the new divorce law which goes into effect July 1, 1913, affect divorce suits filed prior to that date?

"2. Does the indeterminate sentence apply to cases where the parties were indicted before July 1, 1913?"

Replying to your first question, we beg to say that by the Acts of the Thirty-third Legislature amending Article 4632, certain additions have been made thereto, the first of which requires that at the time of the filing of a suit for divorce the party must have been an actual bona fide inhabitant of the State "*for a period of twelve months.*" The part of the last sentence in quotation has been added by the amendment; prior thereto the statute did not prescribe the length of time that petitioner must have been an actual bona fide inhabitant of the State, other than the following clause, providing that he or she must have resided in the county six months next preceding the filing of the petition for the suit, which was, in effect, the requiring of only six months' residence in the State, but under the new law twelve months' residence is required. It will be noted that this requirement relates to the filing of the petition, and is a condition precedent to the filing, and has no reference to the procedure upon trial, and, therefore, the new act requiring a residence within the State of twelve months does not apply to suits filed prior to the taking effect of the new law, for the reason that, if such application should be made, then such act would be retroactive and in violation of Section 16 of Article 1 of the Constitution.

Mellinger vs. Houston, 68 Texas, 37.

Ex Parte Combs, 38 Texas Crim., 651.

Capp vs. Garvey, 41 S. W., 381.

The remainder of the added portions of this act, beginning at the word "provided" in the sixth line of the amended article relates to the remedy upon the trial. It is provided that the suit shall not be heard, or divorce granted before the expiration of thirty days after the filing of same, and, it is provided, further, that neither party to a divorce, where granted upon the ground of cruel treatment, shall marry any other person for a period of twelve months after the granting of the divorce, etc. These provisions relating to the procedure and remedy are not retroactive in their effect, and consequently not in violation of Section 16 of Article 1 of the Constitution, but are applicable to cases filed prior to the taking effect of the new act.

Barnes vs. Jemison, 86 Texas, 118.

Ex Parte Roper, 134 S. W., 334.

Replying to your second question with reference to the Indeterminate Sentence Act, we beg to say that in the opinion of this Department a defendant is entitled to be tried under this act, although he may have been indicted prior to the taking effect of the act. This act, in effect, has reference to procedure and remedy as discussed in the above reply to your first question, and the authorities cited there are applicable in this case. In addition to the above, we beg to say that the effect of the Suspended Sentence Act is to bring about, in a sense, an amelioration of the penalty. While the minimum penalty for any act has not been decreased, yet at the same time the general effect of the Indeterminate Sentence Act is that it will inure to the benefit of the defendant, and

by an amelioration of the penalty, and where such is the case the defendant is entitled to all the benefits of the new law.

Noftsinger vs. State, 7 Texas Crim., 30.

McInturff vs. State, 20 Texas Crim., 335.

Gill vs. State, 30 Texas Crim., 514.

Trusting that the above is clear, I am, with respect,

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

AUTOMOBILES.

Party having registered as the owner of automobile and obtained a number, upon the sale of such automobile, may retain the number and attach same to a new machine purchased by him. Article 814, Penal Code.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, JUNE 26, 1913.

Mr. A. L. Mays, County Clerk, Jasper, Texas.

DEAR SIR: We have your favor of June 25th, in which you state that owners of automobiles in your county take the position that when they purchase a car and have same registered, and later dispose of the car and purchase a new one, they are entitled to the number on the old car, and are not required to register the new car, and you wish to know if this is a correct interpretation of the law. That portion of the Act of 1907 referred to by you is now Article 814 of the Revised Penal Code of this State, and in order that our discussion of this matter may be clear we desire to quote herein a portion of that article:

"All owners of automobiles or motor vehicles shall, before using such vehicles or machines upon the public roads, streets or driveways, register with the county clerk of the county in which he resides, his name, which name shall be registered by the county clerk in consecutive order, in a book to be kept for that purpose, and shall be numbered in the order of their registration, * * *"

A careful reading of the portion of the article above quoted will make it apparent that it is the owner of such automobile, and not the machine, which is registered, and the name of the owner takes the registration number and that the machine, though the clerk may give the make of the machine, does not take the number. In other words, when the owner of an automobile pays to the county clerk 50 cents and obtains a registration number, he has a property right in such number and may retain or dispose of the same as he may see fit. Of course, when the owner of a machine sells the same to a party who has not registered, then it would be the duty of the purchaser to apply to you for registration and obtain a number, and the person so selling such machine would be entitled to use his old number on any new machine that he purchased. The object and purpose of this law in requiring that the owner of machines register with the county clerk and display such registration number upon such machines is that in event of accident or violation of the laws of this State parties may readily determine who is

the owner of such machine so violating such law, which they can ascertain at once by applying at your office, and it is immaterial which machine the owner was using when violating the law.

We, therefore, beg to advise you that, in the opinion of this Department, when the owner of a machine registers in your office, obtains a registration number and uses that number upon an automobile or motor vehicle, that upon sale of such vehicle he may retain such number and use same upon any motor vehicle thereafter purchased.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

HIGHWAY COMMISSION BILL—SENATE BILL NO. 8 (THIRTY-THIRD LEGISLATURE)—CONSTITUTIONAL CONSTRUCTION.

As the Constitution fixes the term of office at two years, the fact that the bill fixes it indefinitely would not invalidate the law. The bill is not a bill for raising revenue, which must originate in the House of Representatives.

ATTORNEY GENERAL'S DEPARTMENT,

AUSTIN, TEXAS, APRIL 10, 1913.

Hon. O. B. Colquitt, Governor, Capitol.

DEAR SIR: This Department is in receipt of your communication of April 7th, asking an opinion as to the constitutionality of certain features of Substitute Senate Bill No. 8, enacted by the Thirty-third Legislature, creating a State Highway Commission, etc. Your letter is as follows:

"Substitute Senate Bill No. 8 is a bill entitled 'An Act creating a State Highway Department, and establishing a State Highway Commission and the office of State Highway Engineer; prescribing the duties of each and fixing the compensation of said State Highway Engineer; requiring the registration of motor vehicles, prescribing rules and regulations therefor, authorizing said commission to issue licenses and assign numbers to owners of motor vehicles, fixing the fees charged therefor, and providing for penalties for violation thereof, making appropriation to carry out the provisions of this act, and declaring an emergency.'

"My purpose in writing you on the subject of this measure is to propound to you two inquiries:

"1. The caption creates the office of State Highway Engineer, and his salary is fixed at \$3600 per annum, and he is made an employe of the Highway Commission. The question I desire to ask you in connection with this provision is, since the caption makes Highway Engineer an office, does not the Constitution, limiting the terms of office to two years, apply to him, and is the section of the bill which makes him an employe of the Highway Commission, and subject to hold his office indefinitely, constitutional?

"2. The Constitution provides that all revenue bills must originate in the House of Representatives. Substitute Senate Bill No. 8 provides for the collection of an annual tax of one dollar on all motor vehicles and three dollars on all automobiles. I estimate that this will bring in a revenue of approximately \$300,000 per annum. Does this provision of the bill come within the limitations of the Constitution requiring revenue bills to originate in the House of Representatives?

"3. The bill also fixes the terms of office of the Highway Commissioners at six years instead of two years, as provided in the Constitution. The amend-

ment to the Constitution authorizing the appointment of members of Boards of Regents of eleemosynary and charitable institutions for a period of six years does not seem to me to apply to the office of commissioners. I would be glad to have your opinion on this subject, however."

Replying to your three inquiries in the order in which they are propounded, we will first consider the question of whether or not the constitutional provision limiting the terms of office to two years would apply in the case of State Highway Engineer, created by the bill, and if so would the fact that the bill provides the engineer may hold office indefinitely render that section unconstitutional.

The proper and effective consideration of this question necessitates a division thereof into two heads. First, is the State Highway Engineer an officer within the meaning of the Constitution? Second, if the State Highway Engineer is an officer within the meaning of the Constitution, then is not his term of office fixed at two years by the Constitution, thereby rendering nugatory the provisions of the bill stipulating that he shall be an employee of the Commission and serve unless and until removed, in so far as they constitute him an employee and not an officer?

That portion of the Constitution of Texas bearing upon the subject reads in part as follows:

"The duration of all offices not fixed by this Constitution shall never exceed two years." * * * Article 16, Section 30.

The office of State Highway Engineer is not one of those offices the terms of which are fixed by the Constitution.

Taking up the first subdivision of the question as set out above, let us determine by the rules of law who is an officer and what duties, rights and privileges go to make and constitute one an officer within the meaning of the law, and then, applying those principles to the State Highway Engineer provided for in the bill, we may determine whether he falls within the rule and would be an officer within the meaning of the Constitution. In the caption of the bill there is stated as one of the purposes thereof "the establishing the office of State Highway Engineer," while in the body of the bill it is stipulated "The State Highway Engineer shall be an employee of the State Highway Commission." It will thus be seen that the caption of the bill and the designation contained in the body thereof are not in accord with the question of whether the State Highway Engineer is an officer or employee. However, it is a well established rule of construction that a name or term used to designate the effect of the act will not control the act if by the entire act and all the provisions thereof another and different meaning is expressed. So, although the term "employee" is used to designate the State Highway Engineer, yet, if from a reading of the entire act the intent and purpose of the Legislature is made to appear that it was to create an office, the designation of such as an employee will not control, but the incumbent will be an officer within the meaning of the act.

To determine whether the Legislature intended the incumbent of the position of State Highway Engineer to be an officer or an employee, let us look to the act itself and glean from the act those things necessary to

be done by the appointee of the board before he can enter upon his duties, and what his duties are after he shall assume same.

In the first place, the caption of the act designates the position as an office in the following language:

“* * * and establishing a State Highway Commission and the office of State Highway Engineer. * * *”

Section 3 of the act provides that as soon as practicable after the taking effect of the act and prior to October 1, 1913, the said State Highway Commission shall elect a State Highway Engineer * * * who shall receive a salary not to exceed four thousand dollars per annum, in the discretion of the Commission.” Said section also provides that the Engineer shall be an employee of the State Highway Commission, shall hold his position unless and until removed by said Commission.

Section 4 of the act provides that the State Highway Engineer, before entering upon the duties of his office, shall file his oath of office with sufficient bond to the State of Texas in such sum as in the judgment of the Commission may be necessary, conditioned upon the faithful performance of his duties, said bond to be approved by the State Highway Commission and then filed with the Secretary of State.

Section 5 of the bill provides that the State Highway Engineer may appoint at his discretion such assistant engineers, clerks and other assistants as may be necessary by and with the advice and consent of the said Commission.

Section 6 of the bill provides that the State Highway Commission and the State Highway Engineer shall constitute the State Highway Department, which shall be provided with suitable office room in the State building at the Capital, and further provides that the office shall be in charge of the State Highway Engineer.

Section 8 of the bill provides that the State Highway Engineer shall be Secretary of the Commission and have charge of the records of the department, and shall keep a record of the proceedings and orders of the department; shall cause to be made and kept a general highway plan of the State and collect information and compile statistics relative to the mileage, character and condition of highways in the different counties of the State, the costs of roads in different counties, and shall adopt standards for the construction of roads and bridges, advise county and city officials with reference to the construction of same, and may call upon said officials for information and reports, etc.

Section 9 of the bill provides that the State Highway Department shall maintain a laboratory for the analysis and testing of road material at such place as may be designated by the Engineer and with the approval of the Commission he shall purchase all necessary fixtures, engineering instruments and supplies and to build such demonstration roads for counties, political subdivisions or district when requested to do so at the expense of such counties or districts, or to build specimen roads at the expense of the State highway fund.

Section 10 provides that with the approval of the Commission he may employ labor to carry out the provisions of this act and to co-operate with the civil engineering department of the various schools and colleges in the State.

The remaining portions of the bill provide for the licensing and assigning of numbers to owners of motor vehicles within the State and the collection of fees therefor. All such are to be under the supervision of the Engineer, he being in charge of the department.

It will thus be seen that before the State Highway Engineer can enter upon the duties of the position it will be necessary for him to take the oath of office and enter into such bond as the Commission may require, which bond is to be approved by the Commission and filed by the Secretary of State. He then enters upon the discharge of his duties as are fully set out in the bill.

From the above requirements necessary to be complied with before the Engineer can enter upon the duties of his office, and a consideration of the duties of the office to be performed by him, we must reach a conclusion as to whether he is an officer or an employee. There are various definitions of officers laid down in the decisions of the courts. The case of *Hendrix vs. The State*, 20 T. C. A., 178, was a proceeding for the removal of a school trustee, and the question arose as to whether the appellant was an officer, and, therefore, the district court had authority to remove him. The court in that case, in defining an officer, quoted from *Mechem on Public Officers*, Section 1, as follows:

"A public office is the right, authority and duty granted and conferred by law by which for a given period, either fixed by law or ending at the pleasure of the creating power, an individual is invested with some portion of the sovereign function of the government to be exercised by him for the benefit of the public. The individual so invested is a public officer."

The decision in said case further states:

"Among the criterions given for determining whether an employment is a public office or not, or the delegation of a portion of the sovereign powers of the government, are the requirement of an official oath, that the powers are granted and conferred by law and not by contract, and the fixing of the duration of the term of office." *Mechem*, Section 2 et seq.

The case of *Fredericks vs. The Board of Health of the Town of West Hoboken*, 82 Atl., 528, was one where a sanitary inspector whose duties were defined by law had been appointed for a term of three years at a salary of fifteen hundred dollars a year. The board under whom he served reduced the salary during the term to a thousand dollars a year. *Fredericks* sued for the difference. In that case the court said:

"If the appellee held an office, the district court erred in deciding that his acceptance thereof established a contractual relation. The first question, therefore, is whether or not the inspector appointed by a local board of health is the incumbent of an office. The courts of this State have frequently been called upon to decide what an office was and to distinguish an office from a position as well as from a mere employment. From these decisions the following definition of an office may be adduced:

"An office is a place in a governmental system created or organized by the law of the State which either directly or by delegated authority assigns to the incumbent thereof the continuous performance of certain permanent public duties. Illustrations are the keeper of a common jail, county collector, superintendent of buildings, receiver of taxes, but not a clerk in a city department. (Citing authorities.) A position is analogous to an office in that the duties that pertain to it are permanent and certain, but it differs from an office in that its duties may be non-governmental and not assigned to it by any public law of the State. Illustrations, a bridge tender, a guard in a county jail, a

janitor of a courthouse, a deputy warden of an alms house, a keeper of a reservoir, a janitor of a police station, an office janitor of a city hall. (Citing authorities.)

"An employment differs from both an office and a position in that its duties which are non-governmental are neither certain nor permanent.

"It is clear from the illustrations afforded by the cases cited and from the definitions derived from the decisions themselves that the appellee held either an office or a position, and it is equally clear that as between these two he held an office. Boards of health are governmental agencies by which the public law of the State is locally exerted. The inspectors appointed under these State laws perform therefor public duties that are certain, continuous and permanent, and that are derived from and constitute a direct participation in a governmental system created or recognized by the law of the State. The place in question, therefore fulfills all of the terms of the definition of an office, and is, as a glance at the illustrations will show, more closely assimilated to the examples of an office than to mere positions such as janitors, bridge tenders, and the like.

"Concluding as we do that the appellee held an office, the judgment in his favor cannot be sustained upon the ground that he had a contract with the board of health as to the amount of his compensation." *Fredericks vs. Board of Health Town of West Hoboken*. 82 Atl., 528.

The case of *State ex rel. Stage vs. Mackey* was a quo warranto proceeding to prevent the usurpation of the position of a deputy building inspector. From that case we quote as follows (74 Atl., 761):

"The position in question is one to which the ordinance creating it attempted to attach important powers and functions of government belonging to the sovereignty, and, therefore, was a 'public office,' as distinguished from a mere employment or agency resting on contract, and to which such powers and functions are not attached. *Perkins vs. New Haven*, 53 Conn., 214, 215, 1 Atl., 825; *Seymour vs. Over-River School District*, 53 Conn., 502, 509, 3 Atl., 552; *Rylands vs. Pinkerton*, 63 Conn., 176, 182, 28 Atl., 110, 22 L. R. A., 653. 'A public office is a right, authority, and duty created and conferred by law, by which * * * 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.' *Mechem on Public Officers*, Section 1. 'It implies a delegation of a portion of the sovereign power to and possession of it by the person filling the office.' *United States vs. Hartwell*, 6 Wall., 385, 393 (18 L. Ed., 830); *Opinion of Justices*, 3 Greenl. (Me.), 481, 482; *Patton vs. Board of Health*, 127 Cal., 388, 394, 59 Pac., 702, 78 Am. St. Rep., 66. 'It is a trust conferred by public authority for a public purpose, and involving the exercise of the powers and duties of some portion of the sovereign power.' *Clark vs. Easton*, 146 Mass., 43, 45, 14 N. E., 795; *Attorney General vs. Drohan*, 169 Mass., 534, 535, 48 N. E., 279. 61 Am. St. Rep., 301; *People vs. Kipley*, 171 Ill., 44, 71, 49 N. E., 229, 41 L. R. A., 775."

Another distinction between an officer and an employee will be found in 29 Cyc., 1366, as follows:

"Opposed to the conceptions of office and officer are those of employment and employee. While an office is based upon some provision of law, an employment is based upon the contract entered into by the government with the employee." *Baltimore vs. Lyman*, 84 Am. St. Rep., 524.

The case of *Baltimore vs. Lyman*, supra, involved the question of whether or not city superintendent of public instruction was an officer. In that case there was a full discussion of the distinction between an officer and an employee, and particularly of those essentials necessary to constitute one an officer, and we quote from that case, at page 526, as follows:

"Judge Cooley, in the case of *Throop vs. Langdon*, 40 Mich., 683, where it is held that the position of chief clerk in the office of the assessors of the city of Detroit was not an office, says: "The officer is distinguished from the employee in the greater importance, dignity, and independence of his position; in being required to take an official oath and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance in office, and usually, though not necessarily, in the tenure of his position. In particular cases other distinctions will appear which are not general." In *Olmstead vs. Mayor, Etc.*, 42 N. Y. Sup. Ct., 482, it was held that one who receives no certificate of appointment, takes no oath of office, has no term or tenure of office, discharges no duties, and exercises no powers depending directly on the authority of law, but simply performs such duties as are required of him by the persons employing him and whose responsibility is limited to them, is not an officer and does not hold an office. And in the recent case of *School Commissioners vs. Goldsborough*, 90 Md., 207, 44 Atl., 1055, we said: "Civil officers are governmental agents; they are natural persons in whom a part of the State's sovereignty is vested or reposed, to be exercised by the individuals so intrusted with it for the public good. The power to act for the State is confided to the person appointed to act. It belongs to him upon assuming the office. He is clothed with the authority which he exerts and the official acts done by him are done as his acts and not as the acts of a body 'corporate.'"

Applying the above rules of law to the position of State Highway Engineer, as provided for in the bill, we find that before the position or office can be assumed by the appointee he must first take the oath of office and give such bond as may be required by the Commission, and in the discharge of his duties in such position he exercises some portion of sovereign function of government in that he collects what is in effect a license tax from the owners of motor vehicles. We find that the rights, authorities and duties exercised and performed by the incumbent of the position or office are created and conferred by law and for a period of time ending at the pleasure of the board who gives him his appointment.

We are, therefore, of the opinion that the State Highway Engineer is an officer within the meaning of the Constitution.

Having determined that the State Highway Engineer is an officer, the fact that the bill by its terms and provisions makes his term of office indefinite, or, as the language is used in the bill, "He shall hold his office until or unless removed by the Commission," brings us now to a consideration of whether or not this provision of the bill violates the section of the Constitution which provides that the duration of all offices not fixed by the Constitution shall never exceed two years.

The bill in itself not fixing the term or duration of the office constituted by the bill, we then resort to the Constitution itself to determine the term of office, and the Constitution having declared that the duration of offices not fixed by the Constitution shall never exceed two years, and a proper construction of the acts of the Legislature being that life should be given to them and not destroyed for want of a definite meaning, it is the opinion of this office that a proper construction of the meaning of the bill in hand, viewed under the constitutional provision above referred to, would be that the term of office of the State Highway Engineer would be for two years, and that the first incumbent of the office would assume his duties on October 1, 1913, and his term of office would expire on two years from that date.

The second question propounded is whether the fact that the bill will

produce revenue will bring it within the meaning of the provision of the Constitution requiring that all bills to raise revenue to originate in the House of Representatives, and, as this bill originated in the Senate, would it be void on that account.

The provision of our Constitution relating to the origin of revenue-raising bills is substantially the same as the provisions of the Constitution of the United States relating to the same subject, and the Constitution of the United States was in turn borrowed from the House of Commons. The true meaning of this language in our Constitution has been construed to be that all bills to levy taxes in the strict sense of the word, and not bills for other purposes which may incidentally create a revenue, fall within the provision of the Constitution that such bills shall originate in the House of Representatives. *Day Land & Cattle Co. vs. State*, 68 Texas, 545.

Judge Story, in his commentaries on the Constitution of the United States, uses the following language:

"Section 880. What bills are properly 'bills for raising revenue,' in the sense of the Constitution, has been matter of some discussion. A learned commentator supposes that every bill which indirectly or consequentially may raise revenue is, within the sense of the Constitution, a revenue bill. He therefore thinks that the bills for establishing the postoffice and the mint, and regulating the value of foreign coin, belong to this class, and ought not to have originated (as in fact they did) in the Senate. But the practical construction of the Constitution has been against his opinion. And, indeed, the history of the origin of the power already suggested abundantly proves that it has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue. No one supposes that a bill to sell any of the public lands, or to sell public stock, is a bill to raise revenue, in the sense of the Constitution. Much less would a bill be so deemed which merely regulated the value of foreign or domestic coins, or authorized a discharge of insolvent debtors upon assignments of their estates to the United States, giving a priority of payment to the United States in cases of insolvency, although all of them might incidentally bring revenue into the treasury."

The bill before us must be classified in accordance with its terms and the purpose of the Legislature in determining whether the intendment thereof is a revenue-producing measure or the revenue-producing features thereof merely incident to the real purposes of the bill. From a reading of the entire bill it is evident that the primary intent and purpose of the Legislature in its enactment was the creation of a Board of Highway Commissioners and providing for its organization and prescribing its duties. The fact that by the terms of the bill in the operation of the board and the discharge of its duties under the bill an uncertain revenue may be produced, does not bring the bill within the meaning of a bill for raising revenue. That the bill may be a revenue-producing measure is not questioned, but there is a wide distinction between a "revenue-producing measure" and "a bill for raising revenue." In the first the revenue is an incident to the bill, while in the latter revenue for the support of the general government is the only object. This distinction is clearly made in the case of *United States vs. James*, 13 Blatchford, 208, and from that case we desire to quote:

"Certain legislative measures are unmistakably bills for raising revenue. These impose taxes upon the people, either directly or indirectly, or lay duties, imposts

or excises, for the use of the government, and give to the persons from whom the money is exacted no equivalent in return, unless in the enjoyment, in common with the rest of the citizens, of the benefit of good government. It is this feature which characterizes bills for raising revenue. They draw money from the citizen; they give no direct equivalent in return. In respect to such bills it was reasonable that the immediate representatives of the taxpayers should alone have the power to originate them. Their immediate responsibility to their constituents, and their jealous regard for the pecuniary interests of the people, it was supposed, would render them especially watchful in the protection of those whom they represented. But the reason fails in respect to bills of a different class. A bill regulating postal rates for postal service, provides an equivalent for the money which the citizen may choose voluntarily to pay. He gets the fixed service for the fixed rate, or he lets it alone, as he pleases and as his own interests dictate. Revenue, beyond its cost, may or may not be derived from the service and the pay received for it, but it is only a very strained construction which would regard a bill establishing rates of postage as a bill for raising revenue, within the meaning of the Constitution. This broad distinction existing in fact between the two kinds of bills, it is obviously a just construction to confine the terms of the Constitution to the case which they plainly designate. To strain those terms beyond their primary and obvious meaning, and thus to introduce a precedent for that sort of construction, would work a great public mischief. Mr. Justice Story, in his 'Commentaries on the Constitution' (Sec. 880), puts the same construction upon the language in question, and gives his reasons for the views he sustains, which are able and convincing. In Tucker's Blackstone only, so far as authorities have been referred to, is found the opinion that a bill for establishing the postoffice operates as a revenue law. But this opinion, although put forth at an early day, has never obtained any general approval; but both legislative practice and general consent have concurred in the other view.

"Another question has arisen, which has some similarity with that under discussion, and which, unless adverted to, might give rise to misapprehension. Thus, in *United States vs. Bromley*, 12 How., 88, the question was, whether an act of Congress which gave a writ of error in any civil action brought by the United States for the enforcement of the revenue laws of the United States, embraced within its meaning an act to reduce rates of postage and to prevent frauds on the revenue of the Postoffice Department. It was held that the latter act was, within the meaning of the former, a revenue law of the United States, and that the writ of error could be sustained. The court says: 'Revenue is the income of a State, and the revenue of the Postoffice Department, being raised by a tax on mailable matter conveyed in the mail, and which is disbursed in the public service, is as much a part of the income of the government as moneys collected for duties on imports.' All this may be conceded, without involving the conclusion that such a law is an act for raising revenue.

"The case of *Warner vs. Fowler*, 4 Blatchf., C. C. R., 311, though involving other statutes, was put substantially upon the same ground as the preceding case. It was an action against a postmaster for not delivering certain letters. The defendant claimed that, in detaining them, he acted under the laws in relation to the Postoffice Department, and that he was entitled to have the suit removed to the United States Circuit Court, under the statute, as being for an act done under the revenue laws of the United States. This claim was sustained by Judge Ingersoll, holding the Circuit Court in this district. The decision was, in my opinion, correct, upon the ground that, while the postoffice laws are revenue laws, within the meaning of the statutes cited, they are not laws for raising revenue, within the provision of the Constitution."

From the holding in the above case, it is clear that while an act may be a revenue-producing measure, yet at the same time it is not an act for raising revenue; that is, that an act may by its terms and the operation thereof be a revenue-producing measure, yet the object and purpose of the act is not the raising of revenue for the support of the general government. It will be noted that upon questions of jurisdiction and the right to writ of error in causes involving the enforcement of

the revenue laws of the United States, acts of Congress which incidentally produce a revenue are held to be revenue laws of the United States, but these holdings do not attempt to go to the extent of holding that revenue laws are acts for raising revenue. The case of *United States vs. James*, above referred to, in the concluding portion thereof, speaking with reference to revenue laws, uses this language:

"The decision was, in my opinion, correct, upon the ground that, while the postoffice laws are revenue laws within the meaning of the statutes cited, they are not laws for raising revenue within the provision of the Constitution."

The conditions and facts under which the above language was used are identical with the conditions and facts now under consideration. It might well be said that the present bill is a revenue law, but that it is not a law for raising revenue within the provision of the Constitution. If an act to regulate postage by raising or lowering the same is not an act for raising revenue, could it be successfully contended that an act providing for the establishment and maintenance and prescribing the duties of a Board of Highway Commissioners, which incidentally provides a means of raising revenue to carry out the purposes of the board, be termed an act for raising revenue within the meaning of the Constitution?

It is the opinion of this Department that while the bill in question is one which may produce a revenue, yet at the same time it is not a bill for raising revenue which must originate in the House of Representatives within the contemplation of Section 33 of Article 3 of the Constitution of Texas, and that such a measure is not inhibited by the provision of the Constitution referred to.

The third question propounded by Your Excellency is whether or not the board created by this bill is one of those boards provided for in the amendment to the Constitution of 1912 which provides that members of boards may hold their office for six years, and whether the fixing of the term of office of the members of the Board of State Highway Commissioners at six years would be in violation of the Constitution. That portion of Section 30a of Article 16 of the Constitution in question reads as follows, to wit:

"Section 30a. The Legislature may provide by law that the members of the Board of Regents of the State University and board of trustees or managers of the educational, eleemosynary and penal institutions of the State, and such boards as have been or may hereafter be established by law, may hold their respective offices for the term of six years. * * *"

The particular clause of this section of the Constitution to which our attention is directed is that which reads as follows:

"And such boards as have been or may hereafter be established by law."

And the particular question may be further narrowed to the correct definition and meaning in the clause of the word "such."

It has been held that the word "such" as used in statutes is a descriptive and relative word and refers to the last antecedent unless the meaning of the sentence would thereby be impaired. When used by way of reference to any person or thing it shall apply to the person or thing last mentioned. "Such" as used in an act providing that the tax collector must perform such duties means duties of that kind and of

like kind thereof, not necessarily identical. 7th Word and Phrases, 752.

The rule that the word "such" refers to the last antecedent is well established in certain cases, and such a construction is entirely proper in those instances where the word is used without limitation as descriptive of things or acts to follow, and those cases limit such acts or things to the class already set out and enumerated. To illustrate: If the language of the Constitution in the present case had been "and all or any such boards may hold their respective offices for the term of six years," then the above rule would apply and the six-year term of all future boards would be limited to those of the class already enumerated, to wit, Board of Regents of the State University, board of trustees or managers of the educational, eleemosynary and penal institutions of the State.

Mr. Webster defines the word "such" as follows: "Such (a): of that kind; of the kind like; resembling; similar—followed by *that* or *as* introducing the word or proposition which defines the similarity or the standard of comparison. The indefinite adjective "all" and "any" precede "such."

Particular attention is here called to the word "as" following the word *such* in the clause of the Constitution under discussion. This clause reads:

"And such boards *as* may have been or may hereafter be established by law."

Applying the definition of Mr. Webster, that when the word "such" is followed by "as" or "that" introducing a word or proposition which defines the similarity or standard of comparison, we find the proposition introduced by the word "as" to be "have been or may hereafter be established by law." In order to get the true meaning of the clause, it is permissible to interpolate it as follows:

"And such boards *as* those boards that may have been or may hereafter be established by law."

When thus read it appears clear that those boards that may have been or may hereafter be established may hold their respective offices for a term of six years, and under this view it is perfectly apparent to our minds that the definition of the word "such" as given by Mr. Webster, as applied to the use of that word in the present case, is that boards "of that kind"; "of the kind like"; "resembling"; and "similar" to those boards that have been or may hereafter be established by law. We cannot bring ourselves to the conclusion that the language used in the Constitution intends to limit all boards to such boards as that of Regents of the University, trustees or managers of educational, eleemosynary and penal institutions. To do so would be to destroy the meaning of the language, for if thus limited it would be absolutely useless for the reason that the boards of all the institutions enumerated are and have for a long while been created. It is our opinion that the word "such," as used in this clause, is intended to convey the idea that boards other than those enumerated that have been created or may hereafter be established may hold their respective offices for the term of six years.

With our view of Section 30a of Article 16 of the Constitution as

above set out in our opinion, and we so advise you, that the provision of the bill providing that members of the State Highway Commission shall hold their respective offices for a term of six years is not a violation of the Constitution, but that such board is within the contemplation of the Constitution as one of those boards to be thereafter created, whose members shall hold office for a term of six years.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

HIGHWAY COMMISSION BILL—CONSTRUCTION OF CONSTITUTION.

An attempt upon the part of the Legislature to create an office and at the same time to fill said office, is without warrant under the Constitution.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, APRIL 18, 1913.

Hon. O. B. Colquitt, Governor, Capitol.

DEAR SIR: This Department is in receipt of your communication of April 17th, reading as follows:

"I acknowledge your favor of April 10, replying to mine of April 7, asking an opinion of your Department as to the constitutionality of certain features of Substitute Senate bill No. 8, passed by the Thirty-third Legislature, and providing for the creation of a State Highway Commission, etc.

"I desire to propound to you the following additional inquiry:

"Section 1 of Substitute Senate bill No. 8 provides for the creation of a highway commission composed of five members. It makes the Commissioner of Agriculture, the professor of civil engineering in the University of Texas, and the professor of civil engineering in the Agricultural and Mechanical College of Texas members of said Highway Commission. The bill makes the term of office of Highway Commissioner six years. The effect of the provision of the bill is to entail by appointment of the Legislature the control of the Highway Commission upon the Agricultural Department, the University of Texas, and the Agricultural and Mechanical College of Texas. Two of the members provided for by Section 1 are to be appointed by the Governor with the advice and consent of the Senate. The other three members provided for and named by the Legislature are not confirmed by the Senate.

"Is the provision constitutional, and can the Legislature in this manner create an office and fill it and empower the officers thus created and filled with authority in turn to fill by appointment the office of Highway Engineer as defined in the caption and provided for in the body of the bill?"

A reply to this communication necessarily involves a supplemental opinion to that rendered by this Department to you on April 10th with reference to the constitutionality of certain provisions of what is known as the Highway Commission bill. The very limited time in which we have to render you this opinion in order that it may be of service to you on tomorrow, renders it impossible to make an extended research of the matter and precludes a lengthy opinion upon the question submitted.

The question submitted by Your Excellency is whether or not the control of the Highway Commission vested by the Legislature in the Agricultural Department, the Board of Regents of the University of

Texas and the Board of Trustees of the A. and M. College is constitutional, and whether the Legislature in this manner can create an office and fill it and empower the officers thus created and filled with authority in turn to fill by appointment the office of Highway Engineer.

We take it that there can be no serious contention but that the Highway Commissioners appointed under the provisions of this bill are public officers within the meaning of the law, and we will not go into a lengthy discussion of the question, but merely submit the following authorities as being in point and decisive of the matter:

Arnold vs. The State, 71 Texas, 239.

Kimbrough vs. Barnett, 93 Texas, 310.

Hendrix vs. The State, 49 S. W., 705.

Jones vs. Shaw, 15 Texas, 578.

29 Cyc., pp. 1362-1363.

State vs. Kennon, 7 Ohio State Reports, 547.

Having determined that the members of the State Highway Commission are officers within the meaning of the law, the further question then presents itself: Has the Legislature the power to create an office and fill the same?

Referring to the Constitution of Texas, we find that Article 2, Section 1, of the same, reads as follows:

"The powers of the government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative to one, those which are executive to another, and those which are judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

By Article 3, Section 9, of the Constitution of this State, it is provided that each house of the Legislature of this State may choose its own officers, and nowhere else in the Constitution is it provided that the Legislature may in any case elect an officer. It is limited by the terms of the Constitution to the election of those officers necessary to conduct the affairs of the Legislature. The appointment to office in this State is an executive function, and under the provisions of the Constitution the legislative branch of the government is without authority to usurp the functions of the executive department, and any attempt upon the part of the legislative department of the government to appoint to office within this State would be an usurpation of the executive function and would be in the face of the Constitution and void.

In the case of State of Indiana ex rel. Jamison vs. Denny (4 L. R. A., 79), in construing the provisions of the Constitution of that State, which are similar if not identical with those of the Constitution of this State, the Court held that the Legislature could not create offices and fill the same. We quote from that case the following language:

"We think it plain that the power to provide by law the manner or mode of making an appointment does not include the power to make the appointment itself."

The above case is one clearly in point in the matter under discussion, and we cite it with confidence that it sustains the position we take in the present matter.

It has been held that acts creating officers and naming the parties to fill them were valid, but to the extent only of the creation of the office, and were held invalid in so far as the Legislature attempted to designate who should fill the offices.

McCornick vs. Pratt, 17 L. R. A., 249.

People vs. Clayton, 4 Utah, 421.

Clayton vs. Utah Territory, 132 U. S., 632.

The two conclusions reached above lead us now to the consideration of the question as to whether or not the Legislature in prescribing the manner of the creation of the Board of Highway Commissioners and limiting the Board of Regents of the University and the Board of Trustees of the A. and M. College to the selection of the two respective members of the Board of Highway Commissioners to a professor in the civil engineering department of the respective institutions, is a filling of the office within the meaning of the Constitution and decisions above referred to. There could be no possible legal objection to an enactment by the Legislature of this State which prescribes the qualifications of an officer, but any attempt on the part of the Legislature to limit the holding of an office to any particular class of persons would be a restriction incompatible with the principles of a free government. If the Legislature could restrict the holding of office of Highway Commissioner to the professors of the particular branch of learning in the University or A. and M. College, they could as well restrict the holding of an office to the members of a faculty of any institution of learning within the State of Texas, or they could restrict the holding of any office to persons engaged in any particular occupation or calling. Again, by the provisions of Articles 2639 and 2274 of the Revised Civil Statutes, 1911, the Board of Regents of the University of Texas and the Board of Directors of the A. and M. College have authority, and it is their duty, to prescribe the course of study in the respective institutions, and while the Constitution of this State provides that the University of Texas shall be a first-class University, it is not necessarily implied that there shall be a Department of Civil Engineering, and the respective boards would, should the whim or caprice strike them, have the authority to abolish the course of study of civil engineering in their respective institutions. Again, it is possible, though not probable, for the corps of teachers in the Civil Engineering Department of these two institutions to be reduced to one professor, and in that event it would necessarily devolve upon the Board of Regents and the Board of Trustees to appoint that one professor to the office of State Highway Commissioner. While a contingency of this character might not arise, yet we are warranted in supposing any possible condition of facts that might arise. Again, under the provisions of the Constitution and the bill in question, the office of member of the Board of State Highway Commission has a term of six years and this presents the question of whether or not, should the officer so chosen for any reason cease to be a professor in the respective institutions, would that vacate his office of State Highway Commissioner? We will not enter into a discussion or attempt to solve this question, but simply present it as one of the uncertainties of the stability of the office created by the bill.

Willis vs. Owens, 43 Texas, 55.

State ex inf. Hadley vs. Washburn, 67 S. W., 592.

State vs. Kennon, 7 Ohio St., 546.

State vs. Stanley, 66 N. C., 59.

State vs. Tate, 68 N. C., 546.

We, therefore, conclude that the provision of the bill above referred to being an attempt upon the part of the Legislature to create an office and at the same time to fill said office, is without warrant under the Constitution, and for that reason is void and of no effect.

There are other questions raised by Your Excellency in your last communication which we deem of serious nature, but from our holding, as above, it is unnecessary that we decide same, and, as above stated, the time within which this communication has to reach you is so limited, we will forego any further discussion of the matter.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

LIVE STOCK SANITARY COMMISSION.

By B. F. Looney, Attorney General.

Under the provisions of the law, either of the Commissioners of the Live Stock Sanitary Commission would be entitled to receive \$5.00 per day for the time actually and necessarily employed by such Commissioner in the discharge of the duties imposed on him by law, and he would also be entitled to receive the actual and necessary traveling expenses incurred and paid while traveling in the necessary discharge of his duties, said per diem and expenses to be drawn from the treasury on warrants of the Comptroller issued in favor of the Commissioner on filing with the Comptroller an itemized account properly verified by affidavit. (Opinion Book 34, page 272.)