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MONTHLY REPORT

OF THE

ATTORNEY GENERAL

OF THE

STATE OF TEXAS

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GERALD C. MANN
ATTORNEY GENERAL

VOLUME 1, NUMBER 7

AUGUST, 1939

FIRM FOUNDATION PUBLISHING HOUSE
Austin, Texas

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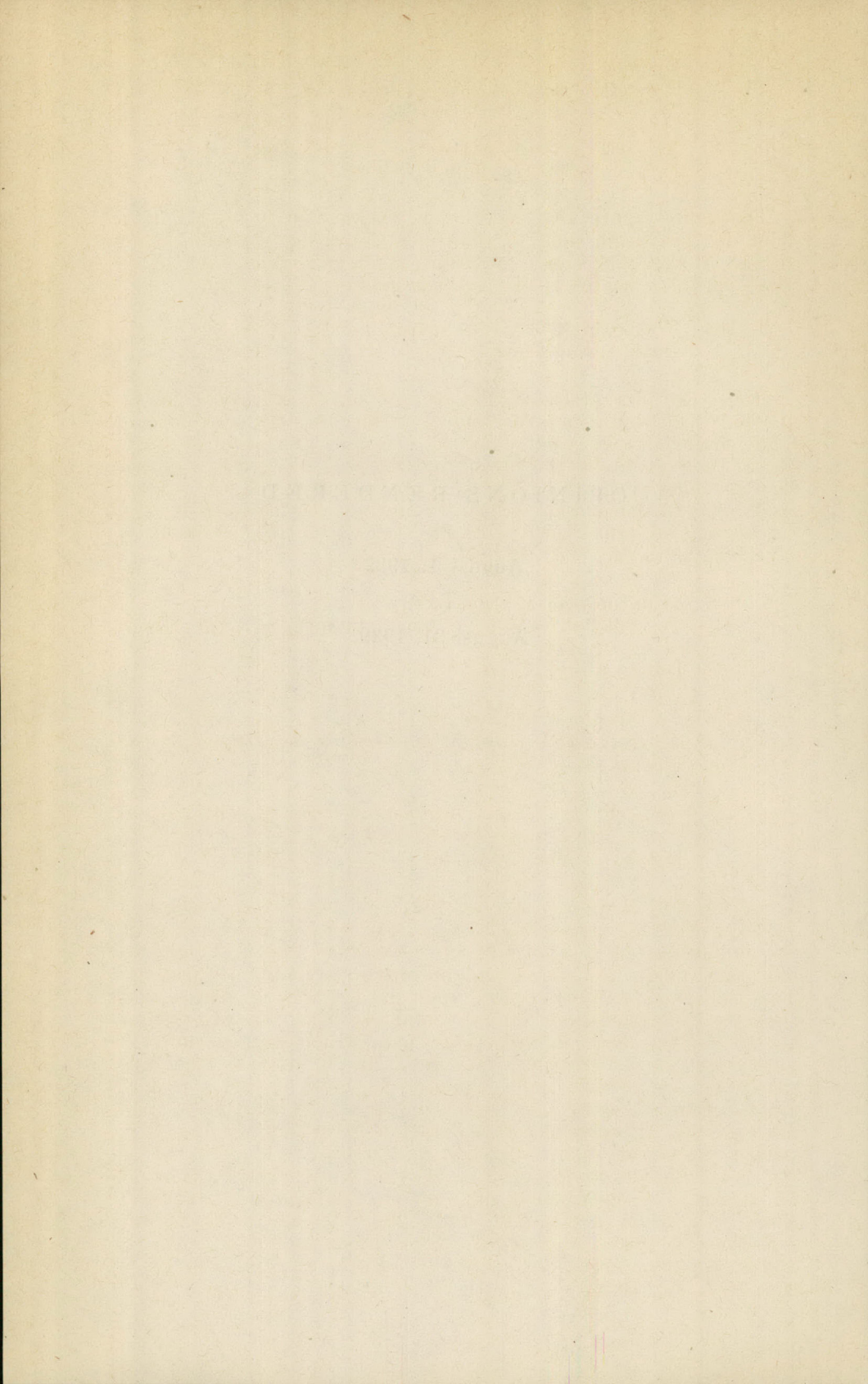
FIRM FOUNDATION PUBLISHING HOUSE
Austin, Texas

OPINIONS RENDERED

August 1, 1939

To

August 31, 1939



0- 266 To: J. D. Hall, State Board of Control
Date: July 31, 1939

The State Board of Control has the authority to repair a dam on the Guinn land in Cherokee County to furnish water to the Rusk State Hospital under the terms of a deed dated October 5, 1883, and granting an easement to the State.

0- 564 To: Clark Wright, State Board of Control
Date: August 28, 1939

House Concurrent Resolution No. 66, 42nd Legislature, R. S., p. 946, (declaring it to be the policy of the State to use American made materials) does not have the effect of amending or modifying the statutes of the State, and the State Board of Control has the same powers and the same discretion which was vested in it prior to the passage of the resolution. Art. 646, R. C. S.; *Caples v. Cole*, 104 S. W. 203, 129 Tex. 370; *City of Waco v. McCraw*, 97 S. W. (2d) 717, 127 Tex. 268.

0- 638 (Conference Opinion 3073)
To: Ralph Logan, County Attorney, Tom Green
County
Date: July 21, 1939

Conference Opinion 3073 reaffirms and supplements letter opinion 0-638, reported in Vol. I, No. 3, *Monthly Report of the Attorney General*, at p. 112.

0- 730 To: T. E. Allday, Auditor of Oil & Gas Royalties,
The University of Texas
Date: August 31, 1939

Section 4 of Chapter 6, Acts of 1921 and Section 14 of Chapter 71, Acts of 1925, when construed so as to release and extinguish the obligations and liabilities of permittees (of the right to drill and explore for oil and gas on university lands) to pay the Two Dollar per acre cash price upon the issuance of a lease and the Two Dollar per acre annual rental payment required during the life of the lease, or either of them, which such permittees agreed and bound themselves to make at the time of their applications for permit under Chapter 83, Acts of 1917, clearly violate constitutional provisions inasmuch as the State has not received an adequate consideration in return for the purported release of such obligation and liability. Section 12 of Art. VII; Section 15 of Art. VII; Section 53 of Art. III; Section 55 of Art. III; Section 51 of Art. III, Constitution of Texas. *State v. Robinson*, 30 S. W. (2d) 292; *Theisen v. Robinson*, 8 S. W. (2d) 646; *Stephens Co. v. Mid-Kansas Oil & Gas Co.*, 254 S. W. 290; *Group No. 1 Oil Corporation v. Bass*, 283 U. S. 279, 75 L. Ed. 1032.

0- 795 To: Sam Bain, County Attorney, Leon County
Date: August 4, 1939

A county auditor may be appointed for Leon County under the provisions of Art. 1646, R. C. S., and by complying with the mandatory requirements of Art. 1647. The salary of such county auditor is provided in Art. 1645, R. C. S., and no greater or less amount may be fixed by the commissioners' court.

The Commissioners' Court of Leon County has no legal authority to employ a clerk to keep all accounts in which the county is interested and have an auditor check them at regular periods.

0- 804 To: George C. Betts, Veterans State Service Officer,
Date: August 18, 1939

Under H. B. 1004, Acts 1939, 46th Leg., R. S., county clerks and other officials named therein are required to issue certified copies of marriage certificates at the instance of ex-service men to help establish their claims to compensation from the Federal Government. Arts. 6591, 6600, and 4606, R. C. S.

0- 820 To: Geo. H. Sheppard, Comptroller of Public Ac-
counts
Date: August 3, 1939

Under the facts submitted to this department there are no admission taxes due on the "National Air Show" sponsored by the Fort Worth Junior Chamber of Commerce under the terms of Art. 7047a (19), V. A. C. S.; *Ex Parte Roquemore*, 60 Tex. Cr. R. 282, 131 S. W. 1101, 32 L. R. A. (H. S.) 1186; *State v. Chamberlain*, 112 Minn. 52, 127 N. W. 444, 21 Ann. Cas. 679; *City of Clinton v. Wilson*, 257 Ill. 580, 101 N. E. 192.

0- 831 To: J. P. Bryan, County Attorney, Brazoria County
Date: August 25, 1939

Certain "bond proceeding" contracts (described to this office) entered into between a county and a bond broker, insofar as such contracts provide for the preparation of orders, notices, or other legal documents, and the furnishing of a legal opinion upon the validity of the bond issue, constitute contracts to practice law. If such contracts are entered into by persons who are not licensed to practice law in this State, the same are illegal, for the reason that the subject matter of and the consideration agreed to be paid by the bond broker for such contracts constitute illegal transactions. Art. 430a, P. C.; *Montgomery v. Utilities Insurance Co.*, 117 S. W. (2d) 486.

0- 834 To: Jack Wiech, County Attorney, Cameron County
Date: August 12, 1939

A deputy assessor and collector of taxes of a branch office in a city or town, other than the county seat, having a population in excess of 7,000 inhabitants, is authorized to collect and retain 25c for receipts issued by him showing a payment of property taxes, in an amount not to exceed \$1,200.00 per annum, as his compensation. In this connection Art. 7256, R. C. S., supersedes Art. 1605, R. C. S. Art. 3902, R. C. S., is not applicable.

0- 856 To: James E. Kilday, Director, Motor Transportation Division, Railroad Commission of Texas
Date: August 10, 1939

The term "oil field equipment" as used in Sec. 6(a) of Art. 911b, R. C. S., as amended, means only such tools, apparatus and machinery as is needed in the drilling and operation of oil and gas wells. Such equipment must be peculiar to oil fields and their operation, and the Railroad Commission has the authority to issue a general order without notice and hearing applying to holders of all Special Commodity Permits, authorizing the transportation of oil field equipment, restricting such operations to the transportation of oil field equipment as before defined. *Greer v. Railroad Commission*, 117 S. W. (2d) 142.

0- 858 To: Gordon C. Cass, County Attorney, Lampasas County
Date: August 19, 1939

The Sheriff of Lampasas County, ex officio tax assessor-collector, who is compensated on a fee basis is entitled to receive the \$1.00 fee provided by Art. 7331, R. C. S., as amended, for preparing redemption certificates and receipts. Art. 7246, R. C. S.

The County Clerk of Lampasas County, who is compensated on a fee basis, is entitled to no fees under Art. 7331, R. C. S., in connection with the issuance of redemption certificates and receipts, but is entitled to \$1.00 in each tax suit in which final judgment is entered and the costs finally collected out of the proceeds of such sale, provided, however, that he shall not in any event receive more than his maximum compensation as provided by law. Arts. 7332, 7333, R. C. S.

0- 874 To: Z. Gossett, Banking Commissioner of Texas
Date: August 19, 1939

Lien instruments taken by national banks are not subject to the stamp tax imposed by Art. 7047e, R. C. S., as amended, and *this exemption comes from the inability of the State to levy such a tax against national banks.* *Federal Land Bank v. Crasland*, 43 Sup. Ct. 385; *Des Moines National Bank v. Fairweather*, 44 Sup. Ct. 23; *1st National Bank v. Anderson*, 46 Sup. Ct. 135; *Gully v. 1st National Bank*, 81 Fed. (2d) 502; Sec. 548, Title 12, U. S. C. A.; Opinion 0-267.

To be entitled to the exemption from taxation under Art. 7047e, R. C. S., as amended, lien instruments taken by state banks (whether or not members of the Federal Reserve System) must be taken in carrying out a governmental purpose as expressed in an Act of Congress or of the Legislature. Art. 492, R. C. S.

0- 886 (Conference Opinion 3077)
To: Walter C. Woodward, Chairman, Board of Insurance Commissioners
Date: August 8, 1939

Provisions of a proposed insurance policy providing for the assignment to the issuing company by the insured of all his dividend earnings and all his right, title, and interest in such policy to the extent of his, as well as the beneficiary's, indebtedness of every kind and character are void. Arts. 3832a, 4764b, 5068a, 4808, 4809, 4811, 4812, 4819, 4733, V. A. C. S.; *First Texas State Insurance Company v. Smalley*, 228 S. W. 550.

0- 891 To: John C. Marburger, County Attorney, Fayette County
Date: August 18, 1939

A commissioner's court has no authority to grant a lease of right-of-way of a public road to a gravel company. Arts 784, P. C.; 6674a, R. C. S.; 21 Tex. Jur. 704; *El Paso Electric Company v. Leeper*, 42 S. W. (2d) 863.

Gravel trucks passing only temporarily across public roads or highways, must, under the provisions of Art. 6675a-2, R. C. S., be registered and obtain a license.

0-906A To: V. C. Marshall, Chairman, Texas Soil Conservation Board, Temple
Date: August 31, 1939

This opinion is amendatory and supplementary to Opinion 0-906, reported in Vol. I, No. 6, *Monthly Report of the Attorney General*, at p. 217, with reference to the use of contingent funds in the appropriation for the Texas Soil Conservation Board.

0- 958 (Conference Opinion 3078)
To: Walter C. Woodward, Chairman, Board of Insurance Commissioners
Date: August 12, 1939

Real estate may not constitute all or any portion of the capital stock of a casualty insurance company created under Title 78, Ch. 18, R. C. S., at the time of its incorporation nor may any part of the capital stock of such a casualty insurance company be invested in real estate at any time after incorporation.

Art. 4993, R. C. S., as amended by H. B. 928, 46th Leg. Arts. 4705 and 4706, R. C. S., as amended, apply only to casualty insurance companies and other companies created under Ch. 2, Title 78, R. C. S.

All or any portion of the funds of a stock casualty insurance company, over and above its capital stock, may be used for the purchase of a building for the transaction of its business (the limitations in Art. 5006, R. C. S., having been removed by its repeal) and it may acquire and hold other real estate with such funds under Secs. 2, 3 and 4 of Art. 5007, R. C. S., as amended, subject to the limitations in Art. 5008, R. C. S., as amended.

0- 963 To: Edgar Pfeil, County Attorney, Guadalupe
County
Date: August 7, 1939

The determination of whether or not a person is under arrest for speeding (in order to entitle a constable to an arrest fee under Art. 1065, C. C. P.) turns upon the answer to the question of whether or not the constable would have permitted the motorist to leave if he had attempted to do so at the time the constable stopped him. If the constable would not have permitted him to do so, the driver was under arrest regardless of whether or not the constable took the motorist's bond.

Before a constable or other officer is entitled to \$1.50 fees for taking and approving a bond, he must comply with Arts. 273, 277, C. C. P.; consequently, bond could not be taken without requiring sureties and the appearance ticket signed by a motorist does not constitute a bond.

Before a constable or other officer is entitled to charge \$1.00 for a commitment in a misdemeanor case, there must be a legal order of commitment issued by the court upon a valid judgment, and the officer must serve such commitment by placing the defendant in jail, as directed in the commitment. Art. 1065, C. C. P. The term "commitment" in such Article means a commitment after conviction of the defendant, either to lay out his fine and costs or to serve a jail sentence, or both.

A constable or other officer may not legally charge for more than one commitment in any misdemeanor case, or for more than one release in any misdemeanor case, and he cannot charge either of these fees unless he actually earns said fees as required by law. Arts 1011, 1065, C. C. P.

If a constable or other officer has a defendant in his custody, and releases the defendant from the force and effect of a judgment restraining him, then the constable or other officer would be entitled to a \$1.00 release fee. Art. 1065, C. C. P.

0- 981 To: James W. Witherspoon, District Attorney,
Hereford

Date: August 9, 1939

Non-residents of Texas (residents of New Mexico) and owners of duly registered motor vehicles in the state of their residence may operate such vehicles in Texas to carry agricultural products raised *exclusively by them* to Hereford, Texas, for the purpose of purchasing goods, wares and merchandise and for the purpose of going to and from their regular place of employment in Hereford, Texas. Art. 827b, P. C. However, Sec. 5 of Art. 827b, P. C., will not apply to exempt a non-resident owner of a duly registered vehicle *hauling the agricultural products of another in return for labor or for hire*, but such non-resident must comply with the provisions of Sec. 2, Art. 827b, P. C.

This opinion holds in accordance with Opinion 0-1043 reported in Vol. I, No. 6, *Monthly Report of the Attorney General* at p. 228, with respect to non-resident operators of passenger motor vehicles employed in Texas. Art. 827b, P. C.

The term "occasional trips" as used in Sec. 5, Art. 827b, P. C., means "any number of casual trips into the State," and the non-resident owner of a passenger motor vehicle may make any number of such trips into the State of Texas without securing a temporary registration fee.

0- 985 To: T. M. Trimble, First Assistant State Superintendent of Public Instruction

Date: August 15, 1939

The county school authorities of Atascosa County may draw and approve vouchers against the available school fund of the county for the purpose of paying current and delinquent county and district taxes against school land owned by said county (acquired by foreclosure of vendor's lien) in La Salle County, Texas (Art. 7150a, V. A. C. S.) subject to the following limitations and conditions:

A. Such lands must have been classified as agricultural or grazing school land. Sec. 6a, Art. VII, Texas Constitution; Art. 7150a, V. A. C. S.; *Childress County v. Morton I. S. D.*, 95 S. W. (2d) 1031.

B. The county is not liable under Art. 7150a for taxes accruing during the time the land was owned by purchaser from the county, or until the land was reacquired by the county on foreclosure of its vendor's lien. However, these taxes were secured by a lien which the county could either elect to discharge by paying the taxes or allowing the land to be sold for taxes. *Childress County v. State*, 92 S. W. (2d) 1011.

C. Only that portion of the county available school fund which represents rental or other income or revenue from the *particular school land involved while the same was owned by the county and not privately owned*, can be used for paying the taxes in question. Art. 7150a, V. A. C. S.; Opinion 0-215.

D. Such payment of taxes may be made under Art. 7150a, V. A. C. S., only after the annual apportionment of the county available school fund by the county school trustees, acting with the county superintendent, on a pro rata basis according to the scholastic population, in accordance with Arts. 2685 and 2692, and Art. 2827, R. C. S.

Attorney's fees and court costs incident to the foreclosure of a vendor's lien retained by Atascosa County on the sale of its school lands in 1927 are not payable from any of the constitutional or statutory school funds. Art. 2827, R. C. S. However, both of such items of expense are payable from the general fund of the county. *Dallas County v. Club Land and Cattle Co.*, 66 S. W. 294; *Brazoria County v. Padgitt, et al.*, 160 S. W. 1170; Art. 2868, R. C. S., and where the land is sold at sheriff's sale upon foreclosure of the vendor's lien, the funds in the hands of the sheriff may lawfully first be applied to the payment of court costs. *McLennan County v. Graves*, 64 S. W. 861.

0- 991 (Conference Opinion 3075)

To: Walter C. Woodward, Chairman, Board of Insurance Commissioners

Date: August 3, 1939

Conference Opinion 3075 expressly overrules letter opinion 0-991 reported in Vol. I, No. 5, *Monthly Report of the Attorney General* at p. 205.

A Texas insurance examiner conducting an examination in a foreign state of a company incorporated therein and having a permit to transact business in Texas is entitled to compensation equal to the compensation paid by that particular state to an examiner conducting an examination of a Texas company in Texas and having a permit to transact business in such foreign state. Art. 4690a and 4690b, V. A. C. S., as amended by S. B. 397, Acts, R. S., 46th Leg.

The Commissioner of Life Insurance has discretion to determine into which classification of examiners established by a foreign state a Texas examiner should be placed in the event the classifications of Texas and such foreign state are not identical or in the event there is no recognized charge for such service. Arts. 4690a and 4690b, V. A. C. S., as amended by S. B. 397, Acts, R. S., 46th Leg.

0-1002 To: J. B. Engledow, Assistant County Attorney,
Limestone County
Date: August 7, 1939

Justices of the peace, sheriffs and constables may not legally be paid any fees for services in examining trials unless the defendant is brought before the justice and is either given an examining trial or waives the same. Arts. 1020, 1027, 1052, 296, 298, 299, C. C. P.

In case a defendant waives an examining trial in open court, justices of the peace and constables are entitled to their fees the same as if a trial were had. Arts. 299, 1020, C. C. P.; Opinion 0-794 modified.

In a proper case a constable is entitled to mileage fees under Art. 1029, C. C. P., in addition to the fee or fees provided for attending an examining trial. Art. 1020, C. C. P.

Sec. 17b, Art. 3912e, V. A. C. S., controls over the language used in Art. 1020, C. C. P., and precinct officers on a salary basis (justices of the peace and constables) are not to be "paid by the state" for fees provided in Art. 1020.

0-1005 To: Olin Culberson, Director, Gas Utilities Division,
Railroad Commission of Texas
Date: August 31, 1939

The Railroad Commission of Texas has full jurisdiction and authority to inspect a container for liquefied petroleum gas of the Continental Oil Company located in Wichita Falls, Texas, which is a stationary one used exclusively in storing liquefied petroleum gas in this State. Arts. 6053, 6053a, V. A. C. S.

0-1006 To: Geo. H. Sheppard, Comptroller of Public Accounts
Date: August 23, 1939

Under the General Departmental Appropriations Bill, S. B. 427, R. S., 46th Leg., a department head is not authorized to break down a budget salary item and make two half-time positions out of the same.

0-1013 To: Geo. H. Sheppard, Comptroller of Public Accounts
Date: August 10, 1939

The Comptroller of Public Accounts is not authorized to pay items of expense to the Rio Grande Compact Commissioner for the fiscal year ending August 31, 1939, from funds created by S. B. 211, an emergency appropriation act by the 46th Leg., for the reason that this is not a claim provided for by pre-

existing, valid law. Acts 1929, 41st Leg., 1st C. S., Ch. 9; Sec. 44, Art. III, Constitution of Texas. The Comptroller of Public Accounts is authorized to pay the salary of the Rio Grande Compact Commissioner for the months of January through April, 1939.

0-1019 (Conference Opinion 3079)

To: F. E. Rightor, Secretary, Texas State Board of
Registration for Professional Engineers

Date: August 10, 1939

An applicant for a certificate of registration as a professional engineer in Texas, making application under the reciprocity provision, Section 21, S. B. 74, Acts 1937, R. S., 45th Legislature, Art. 3271a, R. C. S., must fulfill the minimum requirements for "applications" contained in Section 13 of the Act, and in accordance therewith must give five references.

0-1031 To: T. M. Trimble, First Assistant State Superintendent of Public Instruction

Date: August 18, 1939

All school buses of the county are a part of the county transportation system and under the jurisdiction of the county superintendent and county board of trustees. Section 10 of H. B. 933, Acts, 46th Leg.; Art. 2687a, R. C. S.

School districts which receive no transportation aid and school districts which supplement transportation aid from the Equalization Fund may not employ bus drivers related within the prohibited degree to members of the board of trustees of the school district. Art. 432, 433, 435, P. C.

0-1038 To: Joe J. Fisher, District Attorney, San Augustine
Date: August 4, 1939

The Commissioners' Court of Jasper County does not have the authority to set aside 10% of the delinquent taxes belonging to the county to pay the salary of a stenographer for the county attorney to assist in the filing of delinquent tax suits.

0-1055 To: James E. Kilday, Director, Motor Transportation Division, Railroad Commission of Texas
Date: August 9, 1939

The transportation broker insurance endorsement form and bond submitted to this office by the Railroad Commission of Texas are sufficient to meet the requirements of S. B. 75, 46th Leg.

0-1056 To: W. K. McClain, Criminal District Attorney,
Georgetown
Date: August 9, 1939

The Granger Independent School District has legal authority to purchase a bus to transport its own students to and from school; Ch. 12, H. B. 23, p. 312, 1st C. S., 35th Leg., 1917; Arts. 2687a, 2696, 2813, R. C. S.; and when a county-wide system of bus transportation has been set up, the receiving district may purchase a bus for the purpose of transporting students of high school age of its own district and those of the district where the children reside outside of the home district that are in attendance at the Granger Independent School District school. Sec. 10 Rural Aid Law of 1937.

0-1057 To: G. A. Walters, County Attorney, San Saba
County
Date: August 22, 1939

Taxing units holding a judgment for ad valorem taxes and a foreclosure of the tax lien are not authorized to accept a deed to the property in satisfaction of the judgment, but the procedure provided by statute for judicial sale should be followed. Arts. 7326, 7345b, V. A. C. S.

0-1058 To: Edgar E. Payne, County Attorney, Hockley
County
Date: August 3, 1939

Under Art. 3941, R. C. S., the County Treasurer of Hockley County is entitled to a commission on moneys received as a gift or grant from the federal government for the construction of a county jail and also a commission from the proceeds resulting from the sale of bonds.

0-1066 To: T. T. Sanders, Jr., Assistant Criminal District
Attorney, Edinburg
Date: July 29, 1939

The County Clerk of Hidalgo County (being upon a salary basis) is not entitled to a fee for recording a deed executed by the sheriff in the name of the State of Texas as grantee at execution sale, property having been bid in by the State to satisfy a judgment in its behalf on a bail bond. Art. 3912e, V. A. C. S.; *McLennan Co. v. Boggess*, 137 S. W. 346; *Burke, County Clerk, v. Bexar County*, 271 S. W. 132. Arts 4401-4403, R. C. S.

The agent and attorney of the State of Texas buying property for the State at execution sale to satisfy a judgment of the State is authorized by and with the advice of the Attorney General, at any time to sell or otherwise dispose of such property so purchased in the manner acquired and upon such terms and conditions as the Attorney General may deem most advantageous to the State. The proceeds of such sale will be applied to the judgment and costs; the balance, if any, to be

deposited to the credit of the general revenue fund with the State Treasurer. When such sale is consummated, the deed is to be executed and delivered by the Attorney General to the purchaser. Arts. 4401, 4402, 4403, R. C. S.

0-1074 To: Mrs. Violet S. Greenhill, Chief, Division of
Child Welfare, State Board of Control
Date: August 18, 1939

The foster parent of a boarding home for children does not have an insurable interest in the child or children boarded in the home when unrelated by either blood or affinity to such children; and where the insurable interest rests on relationship alone, as distinguished from a reasonable expectation of a pecuniary benefit or advantage from the continued life of the insured, this relationship must be as close as the second degree. *Wilton v. New York Life Insurance Company*, 78 S. W. 403; 24 Tex. Jur. 767.

Under the provisions of Art. 695(a), Section 8, in conjunction with Art. 4442(a), V. A. C. S., the Division of Child Welfare of the State Board of Control may prescribe reasonable and uniform regulations requisite to issuing licenses to foster parents of boarding homes, and may prohibit the taking of insurance on the life of a child by a foster parent having no insurable interest either where the foster parent or the estate of the child is named beneficiary.

0-1075 To: T. M. Trimble, First Assistant State Superin-
tendent of Public Instruction
Date: August 3, 1939

The phrase "purchasing school and gymnasium equipment" includes the purchase of those articles that are usual and necessary in proper and efficient management of a school of the class and kind of that in question; i. e. maps, globes, furniture and fixtures within the school building proper and basket ball backboards, basket ball goals, etc., for the gymnasium, shower bath equipment for showers, lockers for the school building and for the dressing rooms of the gymnasium, and such equipment as is necessary on the outside of the building or buildings in question as is right for proper administration, instruction and supervision of recreation for children attending.

0-1082 To: M. R. Bullock, County Attorney, Pecos County
Date: August 15, 1939

The ad valorem tax which counties may levy for the erection of public buildings and other permanent improvements under Sec. 9 of Art. VIII, Constitution of Texas, is the proper tax to be levied for public park purposes authorized by Art. 6078,

R. C. S., and this levy should be charged to the permanent improvement fund of the county current operating expenses; however, it should be paid from the county general fund.

0-1084 To: Charley Lockhart, State Treasurer
Date: August 12, 1939

Federal Savings and Loan Associations are not exempt from the levy of the stamp tax on certain secured notes and obligations filed for record with the county clerk. Art. 7047e, V. A. C. S.; Sec. 1462, et seq., Ch. 112, Title 12, V. A. C. S.; Sec. 1421, et seq., Ch. 11, Title 12, V. A. C. S.

0-1086 To: T. M. Trimble, First Assistant State Superintendent of Public Instruction.
Date: August 7, 1939

The Board of Trustees for the Reagan County Independent School District under existing laws are not entitled to be compensated for their duties. Acts 1925, Special Laws, 39th Leg., Ch. 155, H. B. 470, p. 456.

0-1094 To: James E. Kilday, Director, Motor Transportation Division, Railroad Commission of Texas
Date: August 10, 1939

A consignee who accepts goods at a point prior to destination and transports the same in his own trucks to destination, incurring a freight allowance, is not a "motor carrier" or "contract carrier" within the meaning of Art. 911b, R. C. S., and is not required to have a permit from the Railroad Commission. 13 C. J. S. 26.

0-1096 To: James E. Kilday, Director, Motor Transportation Division, Railroad Commission of Texas
Date: August 21, 1939

When two separate and distinct certificates of convenience and necessity authorizing operation as a common carrier motor carrier come into common ownership of one person or company and such common owner has maintained the services required under each of the certificates, the Railroad Commission of Texas has the discretionary authority to approve the transfer or assignment of a portion of the route covered by one certificate (common to the other certificate) to another common carrier motor carrier with connecting lines. Art. 911b, R. C. S.; *Railroad Commission v. Red Arrow Freight Lines*, 96 S. W. (2d) 735; *Thompson v. Foster*, 105 S. W. (2d) 343.

0-1098 To: Richard S. Morris, County Attorney, Armstrong County
Date: August 11, 1939

The commissioners' court has no authority to allow a county attorney a specific sum per month or a percentage for delinquent tax collections. The only compensation the county attorney may receive for such services is as set out in Arts. 335 (personal property collections) and 7332 (realty collections), R. C. S., nor may the county attorney recover on a *quantum meruit* for services performed. *Baldwin v. Travis Co.*, 88 S. W. 480. Opinion 0-815.

A county attorney who has received a specific sum per month or a percentage for delinquent tax collections is liable to the county for such compensation above the fees or compensation allowed for such services under Arts. 335 and 7332, R. C. S.

0-1102 To: Guy Turner, County Auditor, Denton County
Date: August 3, 1939

Under Art. 3899, V. A. C. S., the county may pay for the meals of a sheriff on a salary basis when he is on official business away from the county seat, either in or out of the county.

0-1106 To: J. A. Guest, County Attorney, Camp County
Date: August 15, 1939

An independent school district has the right to collect delinquent taxes assessed and levied for school purposes by the city prior to the time the city schools were separated from municipal control. Sec. 3, Art. VII, Sec. 10, Art. XI, Texas Constitution; Arts. 2768, 2771, 7783b, R. C. S.; *Temple I. S. D. v. Proctor*, 97 S. W. (2d) 1051; 56 C. J. 271.

0-1107 To: James E. Kilday, Director, Motor Transportation Division, Railroad Commission of Texas
Date: August 23, 1939

This opinion passes upon the validity of certain rules and regulations contained in Motor Bus Docket No. 1345 appertaining to the management and government of bus terminals. Art. 911a, R. C. S.

0-1108 To: Chas. E. Reagon, District Attorney, Falls County
Date: August 7, 1939

Action of the County Board of School Trustees of Falls County in approving by order in 1932 corrected field notes of the boundaries of two common school districts (thereby transferring a portion of the territory of one of the school districts into another district) did not operate to change the boundary lines (as established in 1895) between the two school districts. In order to have accomplished that result at that time it was necessary that Arts. 2742e and 2742f, V. A. C. S., be strictly complied with. *Board of School Trustees of Young County v. Bullock C. S. D.*, 55 S. W. (2d) 538.

0-1109 To: Geo. H. Sheppard, Comptroller of Public Accounts

Date: August 11, 1939

The Comptroller of Public Accounts is not authorized to approve county depository pledge contracts secured by legally issued warrants of municipalities. Art. 2547, V. A. C. S.

0-1111 To: Bert Ford, Administrator, Texas Liquor Control Board

Date: August 3, 1939

The legislature, by employing the language "particular political subdivision," in subdivision 18 of Sec. 15, Art. 666, P. C. (Retail Pharmacy Liquor Permits) intended to refer to "incorporated city" or "precinct" and not "county."

0-1112 To: H. P. McMillan, County Auditor, Robertson County

Date: August 19, 1939

The commissioners' court may not legally allow a stipulated monthly sum for expenses for precinct officers compensated on a salary basis. Arts. 3899(b), 3912e, V. A. C. S.

0-1113 To: Charley Lockhart, State Treasurer

Date: August 7, 1939

The recording stamp tax provided for in Art. 7047e, V. A. C. S., is not due on instruments and obligations taken by or on behalf of a county or city.

0-1115 To: Patrick D. Moreland, Commissioner, Texas Unemployment Compensation Commission

Date: August 5, 1939

Under Arts. 4401-4403, R. C. S., a representative of the Texas Unemployment Compensation Commission is authorized to buy in for the State, by and with the advice and consent of the Attorney General, property sold by virtue of an execution or sale upon a judgment in favor of the State under the Texas Unemployment Compensation Act.

When such property is bid in for the State under Arts. 4401-4403, R. C. S., the Attorney General in the name of the State is the proper officer to pass title to subsequent purchasers from the State.

The subsequent sale under Arts. 4401-4403, R. C. S., by the Attorney General to purchasers from the State is to be made in the manner and upon such terms as the Texas Unemployment Compensation Commission and the Attorney General may deem

most advantageous to the State. Moneys realized on the sale will go first to pay off the judgment debt due the Texas Unemployment Compensation Commission, and the residue, if any, should be paid into the General Revenue Fund of the State.

Arts. 4401 and 4403, R. C. S., providing for the purchase by the State of property sold at execution sale to satisfy judgments in favor of the State, apply to both sales of real estate and personal property.

0-1119 To: J. J. Brown, Director, Rehabilitation and Crippled Children's Divisions, Board for Vocational Education
Date: August 10, 1939

The State Board of Control has the power to designate a space in the State Capitol Building and to set apart such space for the use of the State Board for Vocational Education in providing and maintaining a stand for cigars, cigarets and magazines which will be devoted to the purpose of training the blind to operate and manage such an enterprise. Arts. 668, R. C. S. Opinion 0-800 distinguished.

0-1120 To: H. A. Hodges, County Auditor, Williamson County
Date: August 3, 1939

When an agent, inspector or employee of the Department of Public Safety weighs and finds an overloaded truck or other character of vehicle, it is his duty to file the complaint and he may make the arrest; if such agent, inspector or employee allows the constable to file the complaint, the constable will be entitled to fees only for the services he actually performs. If the agent, inspector or employee arranges with the constable to convey him and the weighing equipment, the constable will not be entitled to mileage fees. Art. 827a, P. C.; Art. 1065a, C. C. P. See also Opinion 0-693.

0-1123 To: T. M. Trimble, First Assistant State Superintendent of Public Instruction
Date: August 12, 1939

Art. 2831, R. C. S. (providing for reapportionment of any balance exceeding \$5.00 per capita to the school districts of the county) applies to independent school districts of less than one hundred and fifty scholastics and such districts must be considered in apportioning these funds.

The performance of the duties specified in Art. 2831, R. C. S., is a ministerial act of the county superintendent, and as under Art. 2692, R. C. S., he may perform these duties without the necessity of an order thereon by the county board of school trustees.

0-1125 To: Alton T. Freeman, County Attorney, Gaines
County
Date: August 31, 1939

After the establishment by survey in 1900 of a common boundary line between counties which was surveyed, marked and established as the boundary line and "recognized as the true line" until 1935 by all counties concerned, the commissioners' court of one of such counties cannot (nor call all together by joint agreement) ratify the result of another and subsequent survey in an attempt to "establish a line which had never been established," and thereby change the boundary lines. Such action of the commissioners' court is null and void. Arts. 1582-1590, 1606, R. C. S.; Sec. 1, Art. IX, Constitution of Texas; *Pecos County v. Brewster County*, 250 S. W. 310. Nor by such action of the commissioners' court is a county estopped to deny the validity of the last attempted survey. *Blackburn v. Delta County*, 107 S. W. 80.

0-1128 To: Parks E. McMichael, County Attorney, Cass
County
Date: August 26, 1939

The exhibition by a citizen to the public of a calf not connected with a circus, menagerie, show or other exhibition of any nature, where a fee for admission is demanded and received by the owner of such animal will be subject either to the tax imposed by Sec. 25 or 26 of Art. 7047, V. A. C. S. If the exhibition is of a permanent nature, the Fifty Dollar occupation tax imposed by Section 25 is applicable; if the exhibition is only temporary in nature, the occupation tax of \$2.00 per day provided by Section 26 will apply.

Under Art. 7048 the commissioners' court of a county has the power to levy an occupation tax upon the exhibition by a citizen to the public of a calf not connected with a circus, menagerie, show or other exhibition of any nature, where a fee for admission is demanded, not exceeding one-half of the amount of the state occupation tax.

Under Arts. 1015 and 7048, R. C. S., the governing body of an incorporated city or town has the power to levy a tax upon the occupation of exhibiting a calf for paid admissions under the circumstances set forth.

0-1132 To: Geo. H. Sheppard, Comptroller of Public Ac-
counts
Date: August 15, 1939

Since the cities of Port Lavaca (Ch. 24, Acts, 36th Leg., 3rd C. S., p. 37), Port Arthur (Ch. 292, Acts 41st Leg., R. S., p. 656), Corpus Christi (Ch. 138, General Laws, 37th Leg., p. 270),

the City of Aransas Pass (to the extent of 8/9ths. See Ch. 22, Acts 36th Leg., 3rd C. S., p. 32) and the Nevada Independent School District in Collin County (Ch. 56, Acts 40th Leg., 1st C. S., p. 159) were receiving tax remissions of state ad valorem taxes at the time of the adoption of Sec. 1a, Art. VIII, Texas Constitution, the homestead exemption must be denied within their respective limits during the terms of their respective tax remission grants. However, the other areas in Calhoun County, San Patricio County, and Commissioners' Precinct No. 2, Jefferson County should receive the exemption. *Aransas Pass v. Keeling*, 247 S. W. 818. See also 0-380.

0-1133 To: T. D. Brooks, Dean, Graduate School, A. and M. College
Date: August 7, 1939

In administering the fund for scholarship aid for Negro students provided in item 102 of the appropriation for the Prairie View State Normal and Industrial College, H. B. No. 255, 46th Leg., the committee may charge to such fund such incidental expenses as are reasonably necessary to accomplish the purpose for which the appropriation was made such as travel costs in attending necessary meetings, printing of forms, postage, etc.

Under the appropriation for Negro scholarship aid, awards may be made to students prior to any expenditures by the students. H. B. 255, 46th Leg., p. 4241.

Under the appropriation for Negro scholarship aid, the committee may make awards to students in any manner it may deem desirable so as to attain the purposes of the appropriation and supplemental awards may be made in the discretion of the committee. H. B. 255, 46th Leg., p. 4241.

0-1134 To: Chas. E. Reagan, Criminal District Attorney, Marlin
Date: August 26, 1939

The Criminal District Attorney of Falls County cannot incur reasonable and necessary expense in investigating crime and accumulating evidence in criminal cases. Arts. 3912e, 3899(b), 199, 326q, 3899(c), V. A. C. S.

0-1136 To: James E. Kilday, Director, Motor Transportation Division, Railroad Commission of Texas
Date: August 4, 1939

Railroad Commission Form No. 76, being the motor bus endorsement for insurance policies on motor buses, may not be expanded so as to cover liability arising from the breach of contract of the operators of said buses for the reason that the legislature has not delegated to the Railroad Commission the authority to require that type of insurance. Art. 911a, V. A. C. S.; 39 Tex. Jur. 68.

0-1138 To: Geo. W. Cox, State Health Officer
Date: August 11, 1939

Sec. 2 of H. B. 142, 46th Leg., requires a health certificate for each member of a family or household engaged in the resale of candy or other manufactured sweets. However, the only offense outlined by this section is the act of the manufacturer of the product in knowingly consigning, selling or furnishing candies or manufactured sweets to a person who has not met the requirements therein set out.

H. B. 142, 46th Leg., requiring a health certificate for certain persons and a prominent display of the same, insofar as its bare provisions are concerned and in the absence of an application to specific fact situations, is constitutional.

In determining whether or not an applicant for a health certificate under the provisions of H. B. 142, 46th Leg., is free from "infectious and communicable diseases," a physician should make whatever tests are generally required to show freedom from such diseases; if blood tests are acceptable methods, they should be employed; if a Wasserman Test is necessary, it should be administered. The physician is left to use much discretion in resorting to the latest and most scientific methods for the detection of disease. However, it is not within the province of this department to dictate to the medical profession the tests it should employ.

0-1139 To: Geo. H. Sheppard, Comptroller of Public Accounts
Date: July 31, 1939

Under the departmental appropriation bill, S. B. 427, Acts 46th Leg., the Comptroller of Public Accounts will not be authorized to issue a warrant in payment of a salary for an employee as a day librarian upon an appropriation for a night librarian. Persons listed on the payroll must actually perform the duties for which they are paid. This, however, would not prevent the *bona fide* transfer of an employee within the department, the employee after the transfer being paid under the item of appropriation corresponding to his new employment.

The term "assigned duties" as used in the departmental appropriation bill (S. B. 427, Acts 46th Leg.) refers to those duties ordinarily and properly discharged by persons employed in the capacities authorized under the title assigned to the employment in the itemized appropriation.

Since there is no itemized appropriation in the departmental appropriation bill (S. B. 427, Acts 46th Leg.) to pay traveling expenses for the Text Book Division of the Department of Education employees of such division may not be reimbursed for traveling expenses.

0-1145 To: Bert Ford, Administrator, Texas Liquor Control Board
Date: August 26, 1939

Under the facts forming the basis of this opinion both the Houston Country Club and the River Oaks Country Club of Houston, Texas, and the members thereof, are operating in violation of the Texas Liquor Control Act in that the operation of same comes within the definition of an open saloon, which is prohibited by statute. *Adkins v. State*, 95 S. W.; *Sutton v. State*, 40 S. W. 501; *Krnavek v. State*, 41 S. W. 612; *Feige v. State*, 95 S. W. 506; *Adams v. State*, 145 S. W. 940; *State v. Country Club*, 173 S. W. 570; *Williams v. State*, 103 S. W. (2d) 380.

0-1146 To: Bert Ford, Administrator, Texas Liquor Control Board
Date: August 4, 1939

The power has not been granted by the legislature to the Texas Liquor Control Board to promulgate rule and regulation No. 29 restricting credit terms on sales or purchases of alcoholic beverages. *Commercial Ltd. Insurance Co. v. Board of Insurance Commissioners*, 34 S. W. (2d) 343; *McDonald v. American Fruit Growers, Inc.*, 126 S. W. (2d) 83.

0-1148 To: Tom A. Craven, County Auditor, McLennan County
Date: August 26, 1939

The commissioners' court does not have legal authority to contract for the collection of delinquent costs due the various county officers. Section 5 of Art. 3912e, 2051, 2052, 2053, 2054, 2055, 2077, 2446, 3770, 3911, 2067, 2068, V. A. C. S.; Art. 1018, V. A. P. C.

0-1150 To: Arthur Stehling, County Attorney, Gillespie County
Date: August 24, 1939

County and district school trustees have the power and authority to grant right-of-way easements for the construction of rural electrification lines, and as to those districts coming under the jurisdiction of the county trustees, the easement should be approved by such trustees. Arts. 2683, 2753, 2754, R. C. S.; *Royce I. S. D. v. Rinehart*, 159 S. W. 1010.

0-1153 To: Richard S. Morris, County Attorney, Armstrong County
Date: August 10, 1939

The sheriff who is also assessor and collector of taxes for Armstrong County and tax collector for the Claude Independent School District is required to report as fees of office the compensation he receives as tax collector for the Claude Independent School District. Arts. 3896, 3897, 3891, R. C. S.; *Nichols v. Galveston County*, 228 S. W. 547. Fees or compensation received in past years as tax collector of the Claude Independent School District should be properly accounted for, and all such fees in excess of the maximum compensation allowed by law should be paid to the county.

0-1154 To: Tom L. Beauchamp, Secretary of State
Date: August 7, 1939

The Secretary of State is not authorized to collect a supplemental franchise tax under H. B. 934, 46th Leg., where a consolidation of corporations increases the taxable capital of the proposed corporation over the combined taxable capital of the corporations consolidating since Sec. 3 of H. B. 934 is void. Sec. 36, Art. III, Texas Constitution.

The ineffective provisions of Sec. 3 of H. B. 934, 46th Leg. (relating to consolidation of corporations) do not render such bill void in its entirety. *San Antonio I. S. D. v. State*, 173 S. W. 525.

0-1157 To: Burton G. Hackney, County Attorney, Terry
County
Date: August 11, 1939

In the event school districts are grouped for rural high school purposes either by order of the county school trustees (Art. 2922a, V. A. C. S.) or by an election as set out in Art. 2922c, V. A. C. S., if the district created should contain an area of more than one hundred square miles, an election could be held under Art. 2922(1), V. A. C. S., to levy a uniform tax over the rural high school district as a whole; the fact that one of the component districts had previously held an election attempting to raise the tax rate would not affect the right of the new aggregate district to hold an election.

0-1160 To: Quincy Hawkins, County Auditor, Henderson
County
Date: August 3, 1939

When a constable arrests a man and charges him with three misdemeanors as follows: (1) operating a motor vehicle without lights (Art. 798, P. C.); (2) operating an unregistered vehicle (Art. 807b, P. C.); and (3) drunkenness (Art. 477, P. C.), such constable is entitled to fees in each case for services actually performed. That is, for each legal arrest made or arrest warrant actually served, \$2.00; a commitment fee for

each commitment actually executed, and a release fee in each case for each release actually made. However, the constable would only be entitled to his actual mileage costs in all three cases. Arts. 1011, 1065, C. C. P. Under Art. 1055, C. C. P., the county would be liable to the constable for one-half of all the legal fees of the constable, as above indicated, when the defendant lays out his fines and costs in jail.

0-1161 To: R. S. Wyche, County Auditor, Gregg County
Date: August 28, 1939

The Commissioners' Court of Gregg County does not have the authority to transfer moneys received from automobile registrations to the officers' salary fund, regardless of the status of the general fund. Arts. 6675a-10, 3912e, V. A. C. S.

0-1163 To: J. H. Rasco, Executive Head, Livestock Sanitary Commission
Date: August 10, 1939

The Livestock Sanitary Commission has no authority to sell or otherwise dispose of surplus dip and credit the proceeds therefrom to the dip material and paint appropriation for the fiscal year ending August 31, 1940. The Commission may, however, turn the surplus dip over to the Board of Control in order that the same may be disposed of at public auction with the proceeds placed in the general fund.

0-1169 To: Tom C. King, State Auditor and Efficiency Expert
Date: August 26, 1939

A county tax assessor-collector compensated on an annual fee basis, and who resigns during any fiscal year, is required, by the provisions of Art. 3898, R. C. S., 1925, as amended, to file his annual report and make final settlement with the county. The combined annual reports of such tax assessor-collector and his successor are to be taken in determining the total annual maximum and excess fees allowed said officers, not to exceed the amount authorized by law. As determined by such final settlements, each officer may be paid or retain only that proportional part of the combined net earnings as his time of service as tax assessor-collector bears to the entire fiscal year. Arts. 3897, 3898, R. C. S.

0-1170 To: B. F. McKee, County Auditor, Hidalgo County
Date: August 18, 1939

School land sold by the State in 1919 and subsequently forfeited and repossessed by the State is not *at this point* subject to a lien for any taxes that accrued against it during the time it was privately owned by an individual. *State v. Stovall*, 76 S. W. (2d) 206; *Childress County v. State*, 127 Tex. 343, 92 S. W. (2d) 1011.

0-1171 To: Tom L. Beauchamp, Secretary of State
Date: August 19, 1939

The purpose clause of the proposed corporation, "Ancient Order of Ladies and Knights of Liberty," does not fall within the meaning of an educational purpose under Art. 1302, R. C. S.

0-1173 To: R. S. Wyche, County Auditor, Gregg County
Date: August 18, 1939

Article 2368a, V. A. C. S., governs the issuance, extension and refunding of time warrants by the commissioners' court, and any money in a sinking fund set up to the credit of any issue must be used to retire so much of said debt as said sum will permit, and only such debt as remains unpaid may be extended or refunded. *City of Waco v. Mann*, 127 S. W. (2d) 879.

0-1174 To: Robert F. Cherry, County Attorney, Bosque County
Date: August 10, 1939

It is a violation of the law for the merchants of a given town or community to give their customers tickets with each purchase of merchandise from them, which tickets are good for chances upon merchandise or money given away at drawings held periodically in the said town or community. Sec. 47, Art. III, Constitution of Texas; Arts. 654, 655, P. C.; *Wink v. Griffith Amusement Co.*, 100 S. W. (2d) 695; *Featherstone v. Independent Service Station Association of Texas*, 10 S. W. (2d) 124.

0-1175 To: C. J. Wilde, County Auditor, Nueces County
Date: August 12, 1939

There are no such offices as "representatives of the commissioners' court." The commissioners' court has no authority to employ same either as "representatives of the commissioners' court" or as "deputies of the tax assessor-collector," regardless of whether such "representatives" do or do not take an oath of office.

The Tax Assessor-Collector of Nueces County may apply to the commissioners' court for authority to appoint deputies, under the procedure outlined in Art. 3902, R. C. S. However, the salaries of deputies other than the chief deputy may not exceed \$1,800.00 per annum and the statutes make no provision for "overtime pay or salary."

0-1176 To: Walter C. Woodward, Chairman, Board of Insurance Commissioners
Date: August 23, 1939

By complying with the terms of the rider to the appropriation for the Examining Division of the Insurance Department (which was not vetoed by the Governor), S. B. 427, R. S., 46th Leg., the Life Insurance Commissioner may employ additional necessary employees including examiners and pay them from the special fund created by Arts. 4690a and 4690b, R. C. S., notwithstanding the fact that the Governor eliminated by veto five senior examiners and seven assistant examiners whose positions were specifically listed in the bill.

The language in S. B. 404, 46th Leg., does not constitute an appropriation of the fees set out in Art. 3920, R. C. S., to the Insurance Department for the purposes therein stated or for any other purposes; nor does the rider to the appropriation for the Agents' License Division of the Insurance Department in the departmental appropriation bill (S. B. 427, R. S., 46th Leg.) authorize the use of the fees mentioned (agents' license fees under Art. 5068a, R. C. S.) in the payment of the salaries and other expenses listed under the Agents' License Division. Such fees should be deposited in the State General Fund. However, the various items listed in the Agents' License Division may be paid from the General Revenue Fund.

The Life Insurance Division of the Board of Insurance Commissioners may use the fees paid to the Board of Insurance Commissioners by all associations regulated by S. B. 135, 46th Leg., R. S., (Mutual Assessment Insurance Companies and Associations) to pay the salaries of mutual assessment supervisors and a secretary. Section 35, S. B. 135, 46th Leg.

0-1177 To: Marion McGee, County Auditor, Hays County
Date: August 4, 1939

The commissioners' court may allow compensation for ex officio services to a county attorney on a fee basis when, in their judgment, such compensation is necessary, provided such extra compensation shall not increase compensation of the county attorney beyond the maximum of compensation and excess fees allowed to be retained by him by law. Such ex officio compensation may be allowed only after an opportunity for a public hearing and only upon the affirmative vote of at least three members of the commissioners' court. Art. 3895, V. A. C. S.

0-1182 To: Geo. H. Sheppard, Comptroller of Public Accounts
Date: August 12, 1939

The Commissioner of Labor is not required to use the \$5,000.00 balance now in the State Boiler Inspection Fund as a payment against the \$20,000.00 general revenue appropriation (Sec. 18, H. B. 352, Acts 45th Leg.) for the reason that the \$5,000.00 balance is from fees collected during the fiscal year ending Au-

gust 31, 1938 (the second year of operation) and under the terms of the act only fees collected during the first year of operation are to be replaced and refunded to the general revenue fund.

0-1183 To: Geo. H. Sheppard, Comptroller of Public Accounts
Date: August 19, 1939

The Comptroller of Public Accounts may lawfully issue warrants against the Texas Old Age Assistance Fund or the Texas Old Age Administrative Fund (a non-statutory fund) in accordance with the departmental appropriation bill for the biennium ending August 31, 1939, for current salaries and other administrative expenses incurred by the Texas Old Age Assistance Commission in the administration of the Old Age Assistance Act; and certain outstanding interest-bearing warrants in the amount of \$2,230,779.00, drawn against the Texas Old Age Assistance Fund in the payment of grants and assistance to eligible recipients cannot be considered as present and subsisting charges against the Texas Old Age Assistance Fund so as to create a deficit therein at this time.

0-1184 To: H. E. Wassell, Director, Agents' License and Transportation, Board of Insurance Commissioners
Date: August 11, 1939

Sec. 3 of Art. 5068b, R. C. S., is not mandatory in requiring insurance companies to make appointments of agents before accepting such agent's business and the statutes have provided no penalty for an agent doing business without appointment or a company accepting such agent's business without previously complying with Sec. 3 of Art. 5068b.

0-1185 To: Bascom Giles, Commissioner, General Land Office
Date: August 22, 1939

A surface owner, as agent for the State of Texas under the provisions of the Relinquishment Acts (Arts. 5367, 5368, R. C. S.) has the power to execute an amendment (changing the drilling depth) to an oil and gas lease that would be binding on the State of Texas, the owner of the minerals, so long as he shows prudence, diligence and good faith. *Winterman v. McDonald*, 129 Tex. 275, 102 S. W. (2d) 167.

0-1186 To: Walter Petsch, County Attorney, Kerr County
Date: August 11, 1939

Bonds issued by an independent school district and other municipal corporations are subject to the personal property tax.

0-1188 To: W. S. Bussey, Chief, Weights and Measures
Division, Department of Agriculture
Date: August 11, 1939

Since S. B. 39, 46th Leg., has been held unconstitutional by this department by Opinion 0-868, the Department of Agriculture may lawfully issue a certificate of authority as a public weigher to a person residing in Bexar County qualifying under Art. 5704, R. C. S., provided that his bond filed and approved by the Commissioners' Court of Bexar County meets with the approval of the Commissioner of Agriculture.

0-1189 To: H. F. Hellmuth, Assistant County Auditor, Mc-
Lennan County
Date: August 3, 1939

Only where the facts show that the defendant is in the actual and legal custody of a constable at the time he pleads guilty and pays his fine is the constable entitled to a release fee. When the defendant mails his fine, voluntarily appears or appears in the custody of another officer, the constable is entitled to no release fee. Art. 1065, C. C. P.

0-1191 To: Esco Walter, County Attorney, Taylor County
Date: August 7, 1939

Under the officers' salary law, Art. 3912e, V. A. C. S., the salary of the County Attorney of Taylor County should be computed as follows: from the gross *earnings* for the office for the year 1935 (fees collected and uncollected) should be deducted salaries of assistants and expenses of office, thus leaving the total fees of the county attorney and not the office. From the total earnings of the county attorney would be deducted the maximum salary allowed by Art. 3883, R. C. S., leaving a balance as excess fees of office. One-third of these fees may be added to the maximum under Art. 3883 R. C. S., for the total minimum salary. Arts. 3883, 3891, R. C. S.

0-1192 To: Geo. W. Cox, State Health Officer
Date: August 10, 1939

Bedding manufacturers and renovators of bedding and mattresses must comply with S. B. 200, 46th Leg., with respect to tagging and stamping the same after the effective date of the act; however, all other bedding or materials covered by the terms of the act and manufactured prior to its effective date may be sold by an auctioneer or an individual without violating the terms of this law.

0-1193 To: I. Predecki, County Auditor, Galveston County
Date: August 11, 1939

The Commissioners' Court of Galveston County may not legally pay the premium on the official bond of its county treasurer. Arts. 3899(a) and 3899(b), R. C. S., are not applicable. See also Opinions 0-204 and 0-902.

0-1196 To: Violet S. Greenhill, Chief, Division of Child Welfare, State Board of Control
Date: August 11, 1939

The Division of Child Welfare of the State Board of Control has no authority to promulgate rules and regulations under Art. 4442a, R. C. S., and S. B. 36, 46th Leg., requiring persons, associations or corporations operating a day nursery, children's boarding home, child placing agency (or other agencies specified in Art. 4442a, R. C. S.) to have a "board of managers" before obtaining a license for such institutions. The other rules and regulations seem reasonable and valid.

0-1198 To: Geo. H. Sheppard, Comptroller of Public Accounts
Date: August 16, 1939

Under Sec. 8 of Art. 2, H. B. 8, 3rd C. S., 44th Leg., 5% of the total amount expended for old age assistance (including both state and federal funds expended) is the total amount that may be applied to administrative expenses incurred in payment of old age assistance; and in addition to this administrative expense allowed out of state funds, any moneys allocated by the federal government for administrative expense may also be expended for such purpose.

0-1199 To: O. J. S. Ellingson, General Manager, Texas Prison System, Huntsville
Date: August 26, 1939

The question submitted as to whether or not a convict's sentences (thirty years in Texas penitentiary; and subsequently convicted by a federal court to serve twenty-five years in federal prison) run concurrently is pre-mature.

0-1200 To: Robert F. Peden, Jr., County Attorney, Matagorda County
Date: August 12, 1939

The "Aces Quiz Night" scheme or plan (under the facts stated to this office) is a "lottery" and in violation of Art. 654, P. C., Sec. 47, Art. III, Texas Constitution; *Robb and Rowley, et al., v. State*, 127 S. W. (2d) 221; *Smith v. State*, 127 S. W. (2d) 297; *Featherstone v. Independent Service Station Association*, 10 S. W. (2d) 124. See also 0-428, 0-967.

0-1201 To: Leo C. Buckley, County Attorney, Zapata
County
Date: August 11, 1939

The phrase "not previously registered" as used in Sec. 2 of H. B. 614, Acts of the 46th Leg., applies to all records and certificates of birth or death not registered in strict compliance with Secs. 9 and 12 of Art. 4477, R. C. S.

Arts. 3295 and 3301 are directory and not exclusive as to the items to be entered upon the probate court docket and in the court's minutes.

All applications for registration of birth and death certificates "not previously registered" in accordance with the terms of H. B. 614, 46th Leg., should be numbered and entered on the docket of the probate court and all proceedings in correction therewith should be entered in the minutes of the probate court. Arts. 3295 and 3301, R. C. S.

0-1202 To: R. C. Wilson, County Auditor, Gray County
Date: August 15, 1939

In counties in which the district clerk is compensated on a salary basis under the officers' salary law, the pro tempore district clerk appointed under the provisions of Art. 1896, R. C. S., should be compensated on the following basis: the annual salary of the district clerk should be divided by 365 and the quotient multiplied by the number of days actually served by such pro tempore district clerk. This compensation should be paid to the pro tempore district clerk from the officers' salary fund. All fees and moneys collected by the pro tempore district clerk by virtue of his appointment and duties should be paid into the officers' salary fund of the county. Art. 3912e, V. A. C. S.

0-1203 To: John R. Shook, Criminal District Attorney, San
Antonio
Date: August 11, 1939

It was the intention of the legislature in H. B. 614, 46th Leg., that proceedings for delayed registration of births and deaths should be accorded the status and dignity of probate proceedings and a record of the proceedings should be kept in the docket and minutes of the court. Arts. 3295 and 3301, R. C. S. See also Opinion 0-1201.

The county judge and county clerk are entitled to fees for rendering the services provided for under Sec. 2 of H. B. 614, 46th Leg., amending Sec. 18 of Art. 4477, V. A. C. S. (dealing with delayed registrations of births and deaths) and Arts. 3925 and 3930, R. C. S., are governing. Each is entitled to 50c for entering the order and certifying the same to the Bureau of Vital Statistics. See also Opinion 0-1065.

0-1204 To: V. C. Marshall, Chairman, State Soil Conservation Board
Date: August 9, 1939

The term "equitable title" as referred to in Sec. 3, par. 12 of H. B. 20, 46th Leg. (Texas Soil Conservation Act) means a title based on the right in the possessor thereof to have the legal title transferred to him.

0-1212 (Conference Opinion 3080)
To: Brady Gentry, Chairman, State Highway Commission
Date: August 16, 1939

Although the Governor's action in vetoing 328 items in the appropriation for the State Highway Department in S. B. 427, 46th Leg., effectively removed such items from the bill, under the terms of special provisions and riders in the bill, not vetoed, such employees as are necessary to the economical and efficient administration of the business of the department in the construction and maintenance of highways may be employed, in addition to those itemized in the bill. Arts. 6674e, 6674s, R. C. S.

0-1213 To: S. B. Buchanan, Jr., County Attorney, Val Verde County
Date: August 26, 1939

If a person who desires to fish has the permission of the private owners of the land within the exterior boundaries of a game preserve to enter upon the land and fish, and such person has the permission of the State Game Commissioner or the deputy in charge of the reservation to enter upon such reservation and fish, and none of the pools or portions of the streams from which the fish are taken are set aside as fish hatcheries or sanctuaries, and further provided that none of the general laws of the State and none of the special laws applicable to such county are violated in the catching or taking of the fish, then such person would not violate the law and may legally fish under such circumstances. Arts. 978a, 917, 978b, 925, 1377, P. C.

0-1214 To: O. Kennedy, County Attorney, Bee County
Date: August 10, 1939

In determining the value of shares of stock in national banks for the purpose of taxation by an independent school district the value of all real estate belonging to the bank wherever situated should be deducted from the value of the shares. Sec. 548, Ch. 4, Title 12, V. A. C. S.; Art. 7166, R. C. S., *Rosenburg v. Weeks*, 4 S. W. 899.

0-1215 To: Parks E. McMichael, County Attorney, Cass County
Date: August 9, 1939

Judges and clerks in an election involving the question of the issuance of bonds in a common school district are not entitled to receive any fees for their services for holding such election, Art. 2793, R. C. S., applying. Arts. 2784, 2785, R. C. S.

0-1216 To: Joe Kunschik, Commissioner, Bureau of Labor
Statistics
Date: August 22, 1939

The repainting of a bridge is "maintenance" and not "construction" work within the meaning of Art. 5159a, R. C. S., the "Prevailing Wage Rate Law," and as such is expressly excepted from the provisions of that act.

0-1217 To: E. P. Jennings, County Auditor, Hardin County
Date: August 11, 1939

When a grantor sells and conveys a tract of land reserving or excepting the minerals or a fractional part of the minerals therein, such grantor should be assessed for taxes on the mineral interest owned or reserved by him. Art. 7151, R. C. S.; *Lemar v. Garner*, 50 S. W. (2d) 769; *Humble Oil and Refining Co. v. State*, 3 S. W. (2d) 559; *Hager v. Stakes*, 294 S. W. 835.

0-1218 To: F. B. Caudle, County Attorney, Franklin County
Date: August 24, 1939

When a suit has been "instituted" for the collection of delinquent taxes the county tax collector is not authorized or required to issue a redemption certificate upon tender of the proper amount of taxes, penalty, interest and tax collector's fees without charging against such taxpayer the lawfully accrued court costs in said suit or until he is presented with satisfactory evidence showing said costs have been satisfied or proper disposition has been made of the suit. Arts. 7324, 7332, 7339, R. C. S.

0-1219 To: Olin Culberson, Director, Gas Utilities Division, Railroad Commission of Texas
Date: August 19 1939

Under the provisions of H. B. 792, Acts 1939, 46th Leg., (regulating the liquefied petroleum industry) persons, firms or corporations operating one main office and branch offices need post only one bond and pay only one license fee. The intention of the legislature was that the person, firm or corporation operating the business and responsible for the management thereof is the only one required to post the bond and secure the license. The test to be applied in each instance is: "Is the person, firm or corporation operating his own business or representing himself to be in business with a right to control the property or business?" If this question is answered in the affirmative, such person, firm or corporation should pay the license fee and post the bond.

Under the provisions of H. B. 792, Acts 1939, 46th Leg., persons, firms or corporations selling and distributing butane gas using I. C. S. containers are subject to file a bond and pay the license fee.

The provisions of H. B. 792, Acts 1939, 46th Leg., apply to all manufacturers, assemblers, sellers and transporters of butane or liquefied petroleum gases (whether or not wholesale), limited to the person, firm or corporation engaged in the business and not to all employees of the firm, person or corporation.

0-1220 To: J. E. McDonald, Commissioner, Department of
Agriculture
Date: August 31, 1939

The effect of the Governor's veto as pertaining to the appropriation to the Department of Agriculture is to eliminate the specific items 64-a (bookkeeper) and 64-d (travel expense) under the special Jack and Stallion Fund from the General Departmental Appropriation Bill; i. e., S. B. 427 of the 46th Leg.; but the lump sum appropriation in the special rider of "any fees and/or balances" of the Jack and Stallion Special Fund, which was not vetoed by the Governor, would be available to the Jack-Stallion Division of the Department of Agriculture for the employment of necessary personnel and the payment of such salaries and other expenses as are incurred in the enforcement of the provisions of the Jack-Stallion Act, H. B. 12, 45th Leg., with the express exception of traveling expenses and the supplementing of funds for specific items.

0-1221 To: Walton D. Hood, Law Enforcement Officer and
Chief of Inspectors, Railroad Commission of
Texas
Date: August 11, 1939

Whether or not the proposed lease contract submitted to this office is an attempt to evade the Motor Carrier Law, Acts 42nd Leg., Ch. 277, H. B. 335, presents a question of fact for a trial court or jury to determine. *Anderson-Clayton Co. v. The State*, 62 S. W. (2d) 107, 82 S. W. (2d) 941.

0-1223 To: Wayne Lefevre, County Auditor, Clay County
Date: August 26, 1939

The commissioners' court has no authority now to refund a portion of trial fees for cases tried in the justice court when Art. 1074, C. C. P. (prior to its amendment) allowed a \$7.00 trial fee; however, for cases tried after the amendment (providing for a \$4.00 trial fee in justice courts) the defendant could have any error corrected and the costs properly taxed upon filing a written motion for that purpose in the court in which the case is then or was last pending, provided such mo-

tion was made at any time within one year after the final disposition of the case in which the costs were taxed and not afterward. Art. 1016, C. C. P.

0-1225 To: J. H. Kidd, Jr., County Attorney, Kleberg
County
Date: August 21, 1939

Under the provisions of S. B. 224, Acts 46th Leg., R. S., 1939 (remitting to certain counties one-half of the state ad valorem taxes collected during the next five years), the full amount of the state ad valorem taxes should continue to be collected in Kleberg County and remitted to the City of Corpus Christi, the homestead exemption (Section 1-a, Art. VIII, Texas Constitution) being allowed, as provided by S. B. 330, Ch. 138, p. 270, General Laws of the 37th Leg.

Although the homestead exemption should have been allowed in Kleberg County since the adoption of Sec. 1-a of Art. VIII, Texas Constitution, Kleberg County cannot now withhold from the City of Corpus Christi the amount of state ad valorem taxes which have been erroneously collected upon homesteads in Kleberg County since the adoption of such constitutional amendment.

0-1226 To: Geo. H. Sheppard, Comptroller of Public Ac-
counts
Date: August 15, 1939

Under Arts. 7145, 7147 and 7149, R. C. S., a taxpayer owning a \$15,000.00 vendor's lien note secured by realty in Texas is permitted to subtract therefrom a \$7,000.00 note secured by a chattel mortgage on property in Louisiana owed by him in arriving at his taxable credits. The purpose of the statutes set out is to arrive at the balance of the total debts due such person over and above his total indebtedness. *Griffin v. Heard*, 14 S. W. 892.

0-1228 To: J. C. Gowdy, County Auditor, Wichita County
Date: August 18, 1939

In counties in which the sheriff is on a salary basis, such officer has authority to feed and purchase food necessary for the maintenance of prisoners in the county jail. Art. 5116, R. C. S.; Art. 1040, C. C. P. Moreover, the commissioners' court has authority to purchase or authorize the purchase of other supplies necessary for the maintenance of prisoners under Art. 1659, R. C. S.

In counties in which the sheriff is on a salary basis, the commissioners' court has no authority to contract with the sheriff as outlined by Art. 1040, C. C. P., and allow him a specified

sum for the safekeeping, feeding and maintenance of prisoners. The sheriff may only be allowed his actual expenses incurred in the feeding of prisoners, and if there is any profit, the sheriff should deposit the same in the officers' salary fund. Art. 3912e, V. A. C. S.

Sheriffs compensated on a salary basis are not entitled to any fees from the county for their services or that of their deputies in waiting on the district and county courts, acting as "bailiffs" under Art. 3933, R. C. S., because of the prohibition in Sec. 3, Art. 3912e, V. A. C. S.

0-1229 To: Louis T. Holland, County Attorney, Montague County
Date: August 11, 1939

The consolidation of a common and independent school district becomes effective immediately upon the canvass of the election returns by the commissioners' court with the findings required by Art. 2806, R. C. S., and in the absence of an order to the contrary, and election contest subsequently filed alleging irregularities in said election would not suspend such order of consolidation *pendente lite*. *Blond v. Orangefield I. S. D.*, 24 S. W. (2d) 73.

0-1232 To: Victor Ippolito, Assistant County Attorney,
Jefferson County
Date: August 10, 1939

In determining the requisite number of names on a petition to order a local option election the phrase "as many as ten per cent of the qualified voters of said county or of any justice precinct, city or town" as used in Art. 666-32, V. A. P. C. (Texas Liquor Control Act) means ten per cent of the number of votes cast in the preceding general election for Governor.

0-1233 To: Tom L. Beauchamp, Secretary of State
Date: August 15, 1939

An attorney at law filing applications with the Secretary of State of foreign corporations for permits to do business in Texas for and on behalf of the C. T. Corporation System, or the Corporation Trust Company, or any other corporation attempting to practice law in violation of the Penal Code of this State is violating the Unauthorized Practice Act, Art. 430a, V. A. P. C., and the Secretary of State may deny such attorneys the right to file such applications. See also Opinion 0-977.

0-1234 To: Dwight Whitwell, Assistant County Attorney,
Collin County
Date: August 12, 1939

This opinion holds directly in accord with Opinion 0-722, reported in Vol. I, No. 4, *Monthly Report of the Attorney General* at p. 144, with respect to the salary of a special county judge.

0-1236 To: Geo. H. Sheppard, Comptroller of Public Accounts
Date: August 11, 1939

Prizes given for skilled shooting in connection with the operation of a shooting gallery are taxable under Art. 7047f, R. C. S.

0-1237 To: Geo. H. Sheppard, Comptroller of Public Accounts
Date: August 11, 1939

The prize tax levied by Art. 7047f, R. C. S., is not due when both patrons and non-patrons of the business establishment may participate in the contest or drawing, and no practices are engaged in such as would hamper or embarrass the non-customer who is participating in the enterprise in an effort to receive the gift. See this opinion for specific fact situations to which the rule applies.

0-1238 To: Geo. H. Sheppard, Comptroller of Public Accounts
Date: August 22, 1939

The Comptroller of Public Accounts has no legal authority to issue a warrant to the Sheriff of Childress County as payment for conveying his prisoner to El Paso County to serve as a witness there at an examining trial, no attachment having been issued for the witness and the sheriff being under no duty to convey the prisoner to the examining trial and return. Art. 1020, C. C. P.

0-1239 To: W. Lee O'Daniel, Governor of Texas
Date: August 16, 1939

Or due proof made in conformity with the refunding provisions of H. B. 779, Acts 44th Leg., that the breeding did not produce a foal, the Commissioner of Agriculture, so far as breedings reported prior to September 24, 1937, are concerned, may, prior to September 1, 1939, allow refunds out of the special Jack and Stallion Fund for service charges for services rendered by State-owned Jacks and Stallions. H. B. 12, 1st C. S., 45th Leg. However, no appropriation has been made available for the use of the Commissioner of Agriculture for making refunds on breedings reported after September 24, 1937 (effective date of H. B. 12); and although as to breedings had by virtue of a contract entered into between the Commissioner

of Agriculture and citizens of Texas prior to January 1, 1938, such citizens, where the breeding has failed to produce a foal, have lawful claims against the State of Texas for such refunds, no money has been appropriated by the legislature for the purpose of making such refunds.

0-1240 To: H. A. Hodges, County Auditor, Williamson
County
Date: August 19, 1939

A constable has authority to execute a warrant of arrest in every precinct in his county and in any county in the State, and he is entitled to the fees and mileage provided by law therefor. Art. 36, 223, C. C. P. Cf. *Henson v. State*, 49 S. W. (2d) 463.

0-1241 To: A. M. Pribble, County Attorney, Mills County
Date: August 31, 1939

When an election has been held under the terms of Art. 2742f, R. C. S., to determine whether a portion of the territory of a school district shall be detached and attached to another school district and such election has failed, one year should elapse before another election on the same proposition can be held, but the order for the second election may be made within a year after the first election without rendering the second election void. Art. 2785, R. C. S., as amended. *Martin v. Grandview Independent School District*, 267 S. W. 461.

0-1242 To: Lotus Hamrick, County Auditor, Hopkins
County
Date: August 11, 1939

The Commissioners' Court of Hopkins County has no legal authority to pay a bounty for the destruction of wolves, coyotes or pocket gophers. However, it may purchase poison with county funds for the destruction of predatory animals under Art. 190, R. C. S.

The commissioners' court has no legal authority to allow a sheriff on a salary basis a specific sum per day for boarding each prisoner in his custody; only expenses actually incurred by the sheriff in feeding prisoners may be allowed. Art. 3812e, R. C. S.

0-1244 To: W. B. Baker, County Attorney, Coleman County
Date: August 31, 1939

After an elementary school has been discontinued or consolidated with another elementary school within a rural high school district by the board of trustees of the rural high school district, there is no *obligation* on such board of trustees to

reestablish the elementary school dependent on the possibility of how many elementary pupils there will be in the school district for the current year Art. 2922f, R. C. S. Cf. *Chastain v. Mauldian*, 32 S. W. (2d) 235. Moreover, the county board of school trustees is not authorized to reestablish an elementary school within a rural high school district, when the board of trustees of such rural high school district has discontinued such elementary school as provided by law.

0-1247 To: Mrs. Faye Stewart, Member, State Board of
Hairdressers & Cosmetologists
Date: August 31, 1939

The requirements of Art. 734b, V. A. C. S., having been met, a person may hold both a beauty operator's and instructor's license and must do so if such person intends to occupy the fields covered by both licenses, but it is unnecessary for a person who desires to act as an instructor only to continue to renew the operator's license upon qualifying as an instructor and paying the \$10.00 annual registration fee. Moreover, a person who has held only an instructor's license and who desires to return to the status of operator may do so simply by exchanging the instructor's license for an operator's license at the time fixed for renewal and pay only the \$3.00 annual registration fee.

0-1250 To: Woodrow Curtis, County Attorney, Frio County
Date: August 19, 1939

If a Member of the House of Representatives removes his residence from one county, which is within the district for which he was elected, to another county, which is also within the same representative district for which he was elected, he will not thereby vacate his office under the provisions of Sec. 23, Art. III, Texas Constitution.

0-1251 To: Olin Culberson, Director, Gas Utilities Division,
Railroad Commission of Texas
Date: August 18, 1939

A new order of the Railroad Commission or a substantially revised order requiring annual reports from gas utilities within the commission's jurisdiction and calling for additional information not heretofore demanded concerning investments, expenses, operations, and policies of said companies, is required by Sec. 4, Art. 6053a, V. A. C. S., to be based on notice, hearing and findings of fact.

0-1257 To: E. B. Lewis, County Attorney, Cherokee
County
Date: August 19, 1939

A widow of a deceased sheriff now serving as sheriff by appointment may appoint the brother of her deceased husband as a deputy sheriff. Since there were no issue from the union of the deceased sheriff and his widow, the widow is no longer related by affinity to the brother of her deceased husband. Art. 432, P. C. *Lewis v. O'Hair*, 130 S. W. (2d) 379.

0-1258 To: Walton D. Hood, Law Enforcement Officer and Chief of Inspectors, Motor Transportation Division, Railroad Commission of Texas.
Date: August 19, 1939

All fines and penalties collected for violations of the provisions of the Texas Motor Carrier Act, Art. 911 (b), V. A. C. S., should be paid to the State Treasurer at Austin, Texas, and credited to the Motor Carrier Fund as provided in paragraph c of Section 17 of the Act.

0-1259 To: Paul T. Holt, County Attorney, Travis County
Date: August 18, 1939

The facts submitted to this office are not sufficient to show that the Austin Knights of Columbus Home Association is operated purely for public charity as contemplated by Section 2, Art. VIII, Texas Constitution, and Section 7, Art. 7150, R. C. S., and consequently, these facts do not show that the property owned by such association is exempted from taxation. *B. P. O. E. Lodge No. 151 v. City of Houston*, 44 S. W. (2d) 488; *City of Houston v. Scottish Rite Benevolent Association*, 230 S. W. 978; *Masonic Temple Association v. Amarillo Independent School District*, 14, S. W. (2d) 128.

0-1260 To: Edgar Pfeil, County Attorney, Guadalupe County
Date: August 24, 1939

A commissioners' court of a county is not authorized to make a donation of county funds for the joint purchase (with a city in such county) of a tract of land to be used for the purposes of a National Guard Unit, county fairs, and other public celebrations, when the balance of the purchase price and all subsequent expenses will be paid by the city. Arts. 6078, 6080, 6081e, 5885, V. A. C. S.

0-1261 To: Tom Seay, County Attorney, Potter County
Date: August 24, 1939

Art. 1583, P. C., has no application to and does not undertake to regulate the hours of employment of firemen and policemen in any cities or towns except those having a population of more than seventy-five thousand (75,000) inhabitants.

0-1264 To: James E. Kilday, Director, Motor Transportation Division, Railroad Commission of Texas
Date: August 19, 1939

The Railroad Commission of Texas has authority to hold a hearing upon an application for rerouting under a certificate of convenience and necessity, excluding from evidence adduced at such hearing questions of public necessity and convenience and the inadequacy of existing transportation facilities between Houston and Corpus Christi. If it develops at such hearing (as will be claimed by the licensee) that the new route will be 26 miles longer than the old one, the mere fact that he will be able to make the new distance about an hour and a half quicker than the old one on account of not stopping to serve intermediate points will not be substantial enough a change as to constitute a new service and, under Art. 911b, R. C. S., the commission will have authority to grant the application for rerouting. *Railroad Commission v. Red Arrow Freight Lines*, 96 S. W. (2d) 735.

0-1267 To: W. B. Baker, County Attorney, Coleman County
Date: August 18, 1939

When a plaintiff enters a discontinuance or dismissal on the docket in vacation, in a suit wherein the defendant has not answered, and when the plaintiff has paid all costs that have accrued thereon, the district clerk is not entitled to charge a fee of One Dollar for a final judgment nor is the clerk entitled to charge anything for the dismissal. Arts. 3927, 2089, R. C. S.

0-1268 To: J. W. Calhoun, Comptroller, The University of Texas
Date: August 25, 1939

The University of Texas under its contract with certain contractors for the construction of a men's dormitory should withhold final payment from the contractor until he furnishes satisfactory evidence and affidavits that all just bills for labor and material under the contract have been paid in full by the contractor. When a claim is filed under Art. 5472a, R. C. S., the University should retain enough moneys due the contractor to pay said claim. When a portion of the retainage fund or balance of the contract price withheld is charged by statutory notice with the claim by a subcontractor, the general contractors have a right to furnish a release bond under the provisions of Art. 5472b-1, R. C. S., and be paid said claimed portion along with the balance of the retainage fund, provided the evidence is satisfactory that there are no other claimants to the retainage fund. Arts. 5160, 5472a, 5472b, 5472b-1, R. C. S.

0-1269 To: Joe Kunschik, Commissioner, Bureau of Labor Statistics
Date: August 22, 1939

An agent or entertainment entrepreneur who secures entertainers for persons, associations, conventions, etc., contracts directly with the persons, associations, or conventions desiring the entertainment program, personally directs the program, is paid a lump sum by those desiring the entertainment and in turn pays the entertainers himself according to his own contracts with them, does not come within the purview of Art. 5208, R. C. S., and is not required by law to obtain an employment agency license, Arts. 5208 through 5221, R. C. S., and Arts. 1584 through 1593, P. C., not applying to his business. No relationship of master and servant or employer-employee has been brought about between the entertainers on the one hand and the persons, clubs, associations and conventions desiring their services.

0-1273 To: J. A. Hill, President, West Texas State Teachers College, Canyon
Date: August 26, 1939

Under S. B. 28 and S. B. 393, 46th Leg., R. S., the Board of Regents of the Texas State Teachers Colleges has the authority expressly and by implication to issue bonds for the erection of buildings and facilities usually found on college campuses, subject to the restriction found in S. B. 28 that such buildings therein provided for must be revenue producing and self-liquidating.

The authorization to the Board of Regents of the Texas State Teachers Colleges to use "25% of the local funds" for the purpose of supplementing funds pledged to the payment of bonds authorized under S. B. 28, 46th Leg., for the erection of college buildings, applies only to buildings which are mentioned in section 1 of S. B. 28.

The subject matter of Section 2 of S. B. 28 (authorizing the Board of Regents of the Texas State Teachers Colleges to provide for the erection of certain college buildings) is nowhere mentioned in the caption or title to such bill and such section is therefore invalid. However, its omission is not fatal to the bill as a whole. *Commonwealth Insurance Company v. Finegold*, 183 S. W. 833.

0-1274 To: John C. Marburger, County Attorney, Fayette County
Date: August 18, 1939

Under Art. 968, C. C. P., the justice of the peace is not required to hold an inquest over the body of a dead person when there are one or more living witnesses to the death, and in such a situation the justice of the peace is not entitled to an inquest fee.

0-1278 To: Geo. W. Cox, State Health Officer
Date: August 24, 1939

Under Section 8 of Art. 46a, R. C. S., no white child can be adopted by a Negro person, and a decree of a district court approving such an adoption is void and subject to collateral attack. *Freeman on Judgments* (5th Ed.) Section 354; *Cline v. Niblo*, 117 Tex. 474, 8 S. W. (2d) 633, 66 A. L. R. 916. Consequently, the State Health Officer should refuse to register the same.

0-1279 To: Thomas A. Wheat, County Attorney, Liberty
County
Date: August 31, 1939

A commissioners' court does not have the authority to reimburse the county attorney (compensated on an annual salary basis) for expenses incurred while investigating criminal felony cases. Art. 3899 (b) R. C. S.; Art. 26, C. C. P.; Section 21 of Art. V, Constitution of Texas; *Voges v. Sheppard*, 67 S. W. (2d) 856.

0-1284 To: D. Richard Voges, County Attorney, Wilson
County
Date: August 26, 1939

The Commissioners' Court of Wilson County, a county operating upon a fee basis, may not pay the sheriff, monthly, the necessary and actual expenses for telephone service out of the general fund of the county. Such sheriff, however, may pay such expenses out of his current fees of office. Arts. 3899(a), 3891, V. A. C. S.

The Commissioners' Court of Wilson County, a county operating upon a fee basis, may not pay the sheriff, monthly, a certain sum for the maintenance and upkeep of a county automobile, furnished the sheriff by the county for his official duties, out of the general fund of the county. Under Art. 3899(a), R. C. S., such expense is to be paid by the sheriff and reported by him as provided by such article.

0-1286 To: Beeman Strong, Member, State Welfare Board
Date: August 31, 1939

The State Welfare Board has the authority under S. B. 36, 46th Leg., to require the Executive Director to give bond conditioned upon the faithful performance of the duties imposed upon him by law; likewise, the Executive Director, being the managing officer, could, with the approval of the Board, require such bond of such employees as in his judgment good business practice would demand. Such bonds should be made payable to the members of the State Board of Public Welfare, jointly and severally.

Premiums on the bonds of the Executive Director and employees of the State Welfare Board cannot be legally paid out of funds appropriated for operating expenses of the department, the Act not expressly requiring bonds of such persons and no express appropriation having been made therefor.

0-1300 To: L. A. Woods, State Superintendent of Public Instruction
Date: August 25, 1939

The provisions of Section 2 of H. B. 133, Chapter 60, Acts 1937, 45th Leg., p. 1972, do not disqualify the Ranger Independent School District from receiving transportation aid.

0-1309 To: Charley Lockhart, State Treasurer
Date: August 26, 1939

Under Art. 4371, R. C. S., unless the original warrant or duplicate warrant issued in lieu thereof is presented to the State Treasurer for payment within two years from the close of the fiscal year in which the original warrant was issued, he is not authorized to pay the same.

0-1313 To: Baker, Botts, Andrews & Wharton, Attorneys at Law, Esperson Building, Houston
Date: August 31, 1939

The proposed recycling agreement between Earl Callaway et al. and Davis & Company, Incorporated, providing for the cooperative development and operation of certain gas producing properties in the Alice Area in Jim Wells County and the construction and operation by Davis & Company, Incorporated, of a recycling plant and other equipment to be used in obtaining condensate from the gas and in injecting the gas back into the formation from which it will be produced, does not violate any of the conservation statutes of the State of Texas or any orders of the Railroad Commission of Texas, and the proposed agreement is authorized under the provisions of Section 21 of Art. 6008, R. C. S.

0-1319 To: Sam T. Holt, County Attorney, Panola County
Lon E. Alsup, Chairman, Contingent Expense Committee, House of Representatives
Date: August 26, 1939

An election held within a common school district to abrogate or diminish a maintenance tax of 50c imposed by such district upon itself at an election within two years next preceding the date of the election held to abrogate or diminish the rate is void. Art. 2794, R. C. S.; *Beeman v. Mays*, 163 S. W. 358; *McCall v. Lewis*, 263 S. W. 325.

0-1321 (Conference Opinion 3082)

To: W. Lee O'Daniel, Governor of Texas

Date: August 31, 1939

The provision in the General Departmental Appropriation Bill creating the "Limitation of Payments" Board, composed of the Governor, the Treasurer and the Attorney General, is a valid exercise of the legislative authority under the Constitution of Texas. This clause is in effect an appropriation, with the board a fact finding agency whose duty it is to determine whether or not the conditions which give rise to the appropriation are present. *Terrell v. Sparks*, 135 S. W. 519; *State ex rel Normal Schools v. Zimmerman*, 183 Wis. 132.

The authority of the "Limitation of Payments" Board created by the General Departmental Appropriation Bill relates only to those surpluses existing in the funds dedicated or devoted to the uses of a particular department, where an appropriation of such surplus in such dedicated funds to the particular department is not to be found elsewhere than in the Limitation of Payments clause.

When the authority of a state department to hire additional employees other than those enumerated and itemized in the appropriation bill has been denied by that bill, the Limitation of Payments Board does not have the power to authorize such employment.

The Limitation of Payments Board is without authority to allow any additional amount whatsoever for traveling expenses to any department out of any funds over which it has jurisdiction.

The Limitation of Payments Board is authorized to deal only with "actual surpluses" in the special funds subject to the jurisdiction of the board and the board has no jurisdiction over prospectively available or estimated surpluses.

0-1330 To: E. R. Wright, Superintendent, Texas School
for the Deaf

Date: August 31, 1939

Under the terms of the Eleemosynary Appropriation Bill, H. B. 256, 46th Leg., the Superintendent of the Texas School for the Deaf is authorized to employ students on part time jobs without compensating them any more than to give them their room, board and laundry, provided he obtains the written consent and approval of the Board of Control both in respect to the employment and the compensation.

0-1332 To: Geo. H. Sheppard, Comptroller of Public Accounts

Date: August 31, 1939

The Limitation of Payments Board, created by the General Departmental Appropriation Bill, S. B. 427, 46th Leg., does not have jurisdiction or authority to re-allocate or transfer moneys specifically appropriated by the legislature for one purpose to another and different purpose. See Opinion 0-1321.

The intention of the legislature in the "salary payment paragraph" of the General Departmental Appropriation Bill, S. B. 427, 46th Leg., is to require the numbering and listing of all employees of the particular departments who may be employed upon a salary basis out of any appropriation available for such purpose to that department, whether it be specifically itemized as to purpose and amounts or whether it be a lump sum appropriation; and the salary payments clause applies to all salaried positions with the exception of "seasonal help."

The term "seasonal help" as used in the General Departmental Appropriation Bill, S. B. 427, 46th Leg., is commonly used to refer to employees engaged in work exclusively performed at specific seasons or periods of the year, which, from its nature, cannot be continuous or carried on throughout the year. *Froehly v. T. M. Hardon Co.*, 291 Penn. 197, 139 Atl. 727.

Unless under the Departmental Appropriation Bill, S. B. 427, 46th Leg., a particular state department is specifically prohibited from engaging any salaried employees in addition to those provided specifically by the appropriation for that department, a department head may use his "contingent" appropriation for the employment of additional salaried help. The department head is not required to obtain the approval of the Limitation of Payments Board before making such employment (see Opinion 0-1321), but he will be required to number such salaried positions created and paid out of this contingent fund, as provided in the paragraph on "salary payments" in the general rider to the General Departmental Appropriation Bill.

The "head of the department" is the proper person to make the payroll affidavits required by S. B. 427, 46th Leg., the General Departmental Appropriation Bill, and that phrase is used in contradistinction to "State employees." In those instances where a department is headed by one individual, he is the proper person; where a particular branch or division of the government is headed by a Board or Commission, it is contemplated that the affidavit shall be made by the Chairman of that Board or Commission.

0-1333 To: E. O. Siecke, Director, Texas Forest Service,
College Station
Date: August 31, 1939

H. R. 4728, 75th Congress, empowers or gives the Secretary of Agriculture the right to cooperate with the State Forester with reference to matters of farm forestry, but does not obligate or require him to do these things. Arts. 2613, 2613a, R. C. S.; *Cox, Inc. v. Humble Oil & Refining Co.*, 16 S. W. (2d) 285.

0-1341 To: Olin Culberson, Director, Gas Utilities Division,
Railroad Commission of Texas

Date: August 26, 1939

This opinion passes upon a proposed form of license for those engaged in manufacturing, assembling, and selling apparatus used for the transportation or dispensation of liquefied petroleum gas in compliance with the provisions of H. B. 792, Acts, 46th Leg., R. S.

0-1344 To: L. P. Heard, County Auditor, Bell County
Date: August 31, 1939

Under Art. 3329, R. C. S., after a will is filed for probate it cannot be removed from the office of the county clerk except by order of either the county or the district court.

0-1350 To: Beeman Strong, M. E. Sadler, Marvin Leonard,
Members, State Board of Public Welfare
Date: August 31, 1939

The several agencies of the State whose duties are transferred to the State Department of Public Welfare cannot continue to operate under the present status quo; i. e., under the Board of Control after August 31, 1939, for the reason that the Legislature has made no provision for the payment of the expenses of such operation. S. B. 36, Acts, 46th Leg., R. S.; S. B. 437, Acts 46th Leg., R. S.

The State Department of Public Welfare cannot operate temporarily without the appointment of an executive director. S. B. 36, Acts 46th Leg., R. S.

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