

TEXAS STATE DOCUMENT COLLECTION

MONTHLY REPORT

OF THE

ATTORNEY GENERAL

OF THE

STATE OF TEXAS



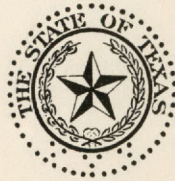
GERALD C. MANN
ATTORNEY GENERAL

VOLUME 1, NUMBER 8

SEPTEMBER, 1939

MONTHLY REPORT
OF THE
ATTORNEY GENERAL
OF THE
STATE OF TEXAS

OPINIONS RENDERED
September 1, 1939
To
September 30, 1939



GERALD C. MANN
ATTORNEY GENERAL

VOLUME 1, NUMBER 8

SEPTEMBER, 1939

0- 241 To: Truett Smith, District Attorney, Tahoka
Date: September 20, 1939

The commissioners' court has no authority to pay out of county funds money for the employment of a special officer working in four counties to apprehend cattle thieves. Article 7155a, R. C. S.; 11 Tex. Jur. pp. 562-566, inclusive. Such office does not exist at law, and the commissioners' court is without authority to create such office.

0- 445 To: James E. Kilday, Director, Motor Transportation Division, Railroad Commission of Texas
Date: September 2, 1939

The caption to S. B. 427, Acts 46th Leg., R. S., 1939, makes no reference to the fact that the bill contains any prohibition against the receipt or use of any passes or franking privileges by any state employee. Therefore, this portion of the bill is clearly in violation of the provisions of Art. III, Sec. 35, Constitution of Texas. *De Silvia v. State*, 88 Tex. Cr. R. 634, 229 S. W. 542; *Arnold v. Leonard*, 114 Tex. 535, 273 S. W. 799. If construed as an implied amendment of the general statutes, such provisions would be invalid since a general law may not be amended by provisions of a general appropriation bill. See *State v. Steele*, 57 Tex. 200; *Linden v. Findley*, 92 Tex. 451.

Art. 4005, R. C. S., prohibiting the giving of any free pass, applies to motor bus lines as well as railways and any transportation agency operating under permit or certificate of authority from the State of Texas or any governmental department or commission.

Unless there is a special statutory authorization allowing a person to ride on a free pass, the granting of a free pass to a person or the use of such a pass by him would be a violation of the law. Arts. 4005, 4006, R. C. S.; Art. 1651, P. C.

The Railroad Commission may by its order designate employees to perform the duties usually performable by an inspector, and such persons, while in the actual exercise of their official duties as such, would be entitled to passes under the exception stated in Art. 4006, R. C. S.

All persons not coming under the exceptions provided for in Art. 4006, R. C. S., and who use free passes shall be guilty of a criminal offense and shall be fined. Art. 1655, P. C.

0- 578 To: Allen C. Wilson, County Attorney, Kendall
County
Date: September 22, 1939

Fines collected under the game laws relating to fur-bearing animals should be remitted after deducting the commissions set out in Art. 923 qq, P. C. As to other violations of the game laws, Art. 912, P. C., would apply after the deduction of the commissions allowed in Articles 950 and 951, C. C. P.

0- 585 To: Allen C. Wilson, County Attorney, Kendall
County
Date: September 16, 1939

As the board of trustees of an independent school district annually levies and causes to be assessed and collected the school tax (Art. 2790, R. C. S.), when the county tax assessor-collector who is also assessor-collector of said district is notified of an increase in the amount of levy voted by said district, he should include the increase on his tax roll, and it is not necessary for him to have been notified of such increase by the commissioners' court. Arts. 2791, 2792, R. C. S.

0- 596 To: Marvin Hall, Commissioner, Board of Insurance
Commissioners
Date: September 6, 1939.

The authority of the Limitation of Payments Board relates only to surpluses in funds dedicated or devoted to a department's use and benefit, but not appropriated to that department elsewhere than in the "limitation of payments" clause. Therefore, the Limitation of Payments Board would have no authority over the appropriation for the reprinting of the general basis schedules of fire and windstorm insurance rates and other matters incident thereto. Arts. 4882, 4902, R. C. S.; S. B. 427, 46th Leg.

It was the intention of the legislature in making this appropriation to appropriate so much of such fund as would be necessary to pay all expenses of labor and material deemed reasonably necessary in the discretion and judgment of the commissioners to do the job effectively. This appropriation covers not only reprinting of the Texas General Basis Schedules in their existing form and content but also reprinting of such schedules with the alterations, changes, and supplements which may from time to time be required. Art. 4882, R. C. S.

0- 602 To: Roger Thurmond, District Attorney, Del Rio
Date: September 16, 1939

A county agricultural agent may not accept appointment as a livestock sanitary inspector, even though he will receive no

additional compensation, because the two offices are incompatible. Opinion 0-1263; 34 Tex. Jur. p. 349; *Thomas v Abernathy County Line Independent School District*, 290 S. W. 152; *State v. Anderson*, 155 Iowa 271; *State ex rel. Banker v. Bobst*, 218 N. W. 253; Art. XVI, Secs. 33 and 40, Constitution of Texas.

0- 823 To: Alfred N. Steinle, County Attorney, Atascosa County
Date: September 29, 1939

Expenses incurred in connection with the recovery of the land lying in La Salle County but belonging to the public free schools of Atascosa County must be paid from the General Fund of Atascosa County; and taxes duly and lawfully levied against such land by La Salle County may be paid out of the revenue derived from the land; but if there is no such revenue, then such taxes must be paid from the General Fund. Art. VII, Secs. 6 and 6a, Constitution of Texas; Arts. 2824, 2827, 2351, 7150a, R. C. S.; *Oge et al. v. Froeboese et al.*; 66 S. W. 688; *Childress County v. State et al.*, 92 S. W. (2d) 1011.

Profit derived from purchase, sale and reinvestment of the cash in the Permanent School Fund of the county should become a part of the Available Fund. Art. VII, Sec. 6a, Constitution of Texas.

0- 924 (Conference Opinion 3088)
To: E. G. Mosely, Civil District Attorney, Dallas
Date: September 20, 1939

Counties and other political subdivisions may not legally insure property in mutual fire insurance companies because of the prohibitions contained in Sec. 52 of Art. III, Constitution of Texas. Therefore, that part of Sec. 8, Ch. 40, p. 90, Acts 41st Leg., 1st C. S. (Art. 4860a-8, V. A. C. S.), purporting to give public corporations the right to purchase insurance in mutual companies is unconstitutional. Sec. 3, Article XI, Constitution of Texas, Articles 4860a-1 to 4860a-19 inclusive, V. A. C. S.; Cooley's Briefs on the Law of Insurance, Vol. I, pp. 51-52; Vol. VI, p. 9; 14 R. C. L. 847, par. 12; *Texas Employers' Insurance Association v. City of Tyler*, 283 S. W. 929, 288 S. W. 409; *Southern Casualty Company v. Morgan*, 299 S. W. 476, 12 S. W. (2d) 200; *McCaleb v. Continental Casualty Company*, 113 S. W. (2d) 347, 116 S. W. (2d) 679.

0- 956 To: John E. Taylor, Chief Supervisor, Railroad Commission
Date: September 20, 1939

The statewide order of the Railroad Commission fixing the allowable production of crude oil, the proration schedule of the

Commission fixing the allowables of the individual wells located on the leases therein shown, in the particular oil fields designated and described in the statewide order, and the order of the Commission putting into effect said proration schedule must be published in order to maintain a criminal prosecution for production of oil from a well or wells in excess of the amount allotted to the wells under the order and schedules above referred to. Article 1112b, Secs. 7a, 8a, 9, V. A. P. C.; Article 6066a, Sec. 5, V. A. C. S.; *Carter v. State*, 116 S. W. (2d) 371.

0- 999 To: Ned McDaniel, County Attorney, Wichita County
Date: September 14, 1939

Article 666-23(a), V. A. P. C., provides that a person may transport alcoholic beverages for his own consumption from a place where the sale is legal to a place where the possession thereof is legal. As a prima facie case can be made out against the accused for unlawfully transporting alcoholic beverages without proof of the negative of the above article such need not be alleged nor proven. Sec. 9, Texas Liquor Control Act; *Baker v. State*, 106 S. W. (2d) 308; *Sewell v. State*, 106 S. W. (2d) 321.

0-1015 To: Tom Seay, County Attorney, Potter County
Date: September 8, 1939

A person convicted of a misdemeanor in the justice court, when his total fine and costs is a sum under \$30.00 should receive credit for only one-tenth of the total amount for each day he serves in jail. Opinion 0-441; Letter Opinion of Attorney General, Vol. 366, p. 656; Arts. 920, 793, C. C. P.; *Ex parte Hill*, 15 S. W. (2d) 14; *Ex parte Fernandez*, 57 S. W. (2d) 578; *Ex parte McLaughlin*, 60 S. W. (2d) 786.

0-1025 (Conference Opinion 3084)
To: W. S. Bussey, Chief, Weights and Measures
Division, Department of Agriculture
Date: September 26, 1939

A gasoline pump, which is a mechanism or machine adapted to measure and deliver liquid by volume, graduated in units of measure other than the standard units of liquid measure provided for in Art. 5732, R. C. S., i. e., the standard gallon and its parts derived by continual division by the number two, is in violation of the civil and criminal weights and measures laws of Texas and may not legally be used in commercial transactions in this State. Arts. 5705-5736, inclusive, V. A. C. S.; Arts. 1035-1046, V. A. P. C.

0-1079 To: Geo. W. Cox, State Health Officer
Date: September 13, 1939

The order of the probate judge accompanying the certificate of birth or death "not previously registered" is binding upon the State Registrar; therefore, he cannot legally refuse to accept such a certificate. H. B. 614, Acts 46th Leg.

The fees due the county judge and county clerk for delayed registration of birth and death certificates, controlled by and included in Arts. 3925 and 3930, R. C. S., are payable by the person applying for the delayed registration. H. B. 614; Opinions 0-1065 and 0-1203.

Applications for delayed registration of birth and death certificates should be numbered and entered on the docket of the probate court, and all proceedings in connection therewith should be entered in the minutes of said court. Opinion 0-1201.

0-1103 To: George D. Morgan, Member, The Board of Regents of The University of Texas
Date: September 1, 1939

The provisions of the "common purchaser" statutes are applicable to producers in different fields as well as to producers within the same field and a common purchaser is prohibited from making any unjust or unreasonable discrimination as between fields in this state. Arts. 6018, 6019, 6023, 6040, 6041, 6043, 6045, 6048, 6049a, V. A. C. S. Moreover, a producer in a general area served by a common purchaser can force pro rata purchase of oil by tendering same to a common purchaser, assuming that the rules and regulations of the Railroad Commission are complied with.

0-1116 (Conference Opinion 3086)
To: W. Lee O'Daniel, Governor of Texas
Date: September 12, 1939

H. B. 132, 46th Leg., is unconstitutional, as a violation of the right to assemble and petition and the right of freedom of speech, insofar as it attempts to prohibit the solicitation or collection of money for the bona fide purpose of sponsoring, etc., social security legislation; but is constitutional insofar as it makes unlawful the solicitation or collection of money for any *pretended* (or fraudulent) purpose. Art. I, Sec. 27, Constitution of Texas; 12 Corpus Juris, p. 953.

Sec. 2 of H. B. 132 is sufficiently definite to enable the district attorneys of the state by criminal prosecution, as provided in Sec. 4, or the Attorney General, by civil suits for injunction

as provided in Sec. 5, effectively to deter the solicitation or collection of money for private gain upon a pretended promise that the money so collected would be used to sponsor or promote social security.

0-1127 To: C. J. Wilde, County Auditor, Nueces County
Date: September 8, 1939

The tax assessor-collector or his deputies who are duly qualified notaries public may perform such services as taking acknowledgments for transfer of ownership of automobiles by request and personally retain fees for such services. Arts. 7246a, 6685, 3891, R. C. S.

0-1149 To: J. C. Gowdy, County Auditor, Wichita County
Date: September 8, 1939

When a county is operating on a cash basis, such county cannot legally pay interest on overdrafts. The commissioners' court is without authority to allow and pay interest on ordinary county warrants or scrip issued in payment of current expenses. Sec. 53 of Art. III, Constitution of Texas; 15 Cor. Jur. 606; 15 Ruling Case Law 17; 11 Tex. Jur. 603; 11 Tex. Jur. 564; *Commissioners' Court v. Wallace*, 15 S. W. (2d) 535; see *State of Texas v. Wilson*, 71 Tex. 291.

0-1156 To: King Fike, County Attorney, Hartley County
Date: September 18, 1939

The commissioners' court, upon written and sworn application of a sheriff compensated on a fee basis, may allow one or more automobiles to be purchased to be used in the discharge of the sheriff's official duties, which, if purchased by the county, shall be paid out of the General Fund, and shall remain the property of the county. The sheriff would be entitled to charge up as expense of office the expense of depreciation and necessary automobile expenses whether said automobile is purchased by the county or owned by the sheriff or his deputies. Art. 3899, R. C. S.

0-1165 To: Geo. H. Sheppard, Comptroller of Public Accounts
Date: September 9, 1939

Where a furniture company gives prizes to contestants receiving the largest number of votes, and there is no requirement that said contestants be customers or purchasers, such prizes are not subject to the prize tax of 20% levied by Art. 7047f, R. C. S.

0-1172 To: Bascom Giles, Commissioner, General Land Office
Date: September 15, 1939

The Board for Lease of Texas Prison Lands has no power or authority to grant a permit to any person or corporation to prospect and explore Texas prison lands by seismographic or other methods independently of an oil and gas lease thereon. Art. 6203a, V. A. C. S.; 34 Tex. Jur. 440; *Harlingen Independent School District v. C. H. Page & Bro.*, 48 S. W. (2d) 983.

0-1194 To: A. M. McMahan, Business Manager, John Tarleton Agricultural College, Stephenville.
Date: September 1, 1939

The four year statute of limitations will not apply as against John Tarleton Agricultural College in actions which may be brought on notes payable to said college or the board of directors thereof. Arts. 2616, 2619, R. C. S.; *Brown v. Sneed*, 77 Tex. 471, 14 S. W. 248, 28 Tex. Jur. 98.

0-1197 To: Geo. W. Cox, State Health Officer
Date: September 30, 1939

The initial bedding permits run for twelve months from the date of issuance. Sec. 6b, S. B. 200, Acts 46th Leg. A permit should under no circumstances be issued until the fee has been received, and the permit fee may be paid by cash, money order, cashier's check, or personal check. Sec. 6c, S. B. 200, supra.

Sec. 6(b) which provides for numbering of the germ process permits applies also to the bedding permits. Sec. 2(a), S. B. 200, supra.

Payment for a permit may be made separately from payment for stamps. S. B. 200, supra.

0-1205 To: Adam R. Johnson, Executive Director, Department of Public Welfare
Date: September 16, 1939

Opinion No. 0-702 held that all outstanding orders issued by the Texas Relief Commission to merchants for merchandise deliverable to relief clients which have been filled, but not presented to the Commission for payment were valid obligations of the State of Texas; and that checks issued by the Commission to divers persons in payment of obligations of the Commission to them, but which checks had never been presented for payment, were also valid obligations; the enactment of laws impairing the obligation of contracts is prohibited by Sec. 16 of

Art. I, Constitution of Texas, and by Sec. 10 of Art. I, Constitution of the U. S. *Dartmouth College v. Woodward*, 4 Wheat 519; *Johnson v. Smith*, 246 S. W. 1013; *Danolds v. State of New York*, 42 Am. Rep. 277; 9 Tex. Jur. p. 541. However, the Legislature may enact a valid statute prescribing a reasonable time within which the owners of these obligations, all of which are past due, may present the same for payment, or forever be barred. Opinion 0-702. (See opinion for citation of cases.)

0-1207 To: James E. Kilday, Director, Motor Transportation Division, Railroad Commission of Texas
Date: September 19, 1939

The Railroad Commission has no jurisdiction over and cannot require a certificate of convenience and necessity or a permit for a motor vehicle owned and operated jointly by a group of business houses for the transportation of products and commodities of the owners on the public highways and not engaged in the transportation of property of the public for compensation or hire, such a vehicle being neither a motor carrier common carrier nor a motor carrier contract carrier. Art. 911b, R. C. S.

0-1208 To: Geo. H. Sheppard, Comptroller of Public Accounts
Date: September 27, 1939

Par. 13, Sec. 1, H. B. 89, Acts 44th Leg. (which authorizes credit for taxes erroneously paid) does not apply retrospectively; therefore, money erroneously paid as gross production oil taxes prior to the passage of said bill cannot be credited on the taxes that become due after the bill takes effect. Art. III, Sec. 44, Constitution of Texas; Art. 7057a, V. A. C. S.; *Rockwall County v. Kaufman County*, 69 Tex. 172; *M. C. R. Co. v. City of Hattiesburg*, 163 Miss. 311; *Ford Motor Co. v. State*, 59 N. Dak. 792.

0-1209 To: Will Mann Richardson, Chief Clerk, Texas State Parks Board
Date: August 21, 1939

The Texas State Parks Board does not have the power or authority to operate the Texas State Parks by hiring managers on a fixed salary plus a percentage of the net profits realized from the operation of concessions. Arts. 6069, 6070a, R. C. S.

0-1210 To: L. J. Wardlaw, Commissioner, Livestock Sanitary Commission, Fort Worth
Date: September 13, 1939

As Art. 7009, R. C. S., gives to the Governor the sole power of designating what member of the Livestock Sanitary Com-

mission shall act as chairman, senate approval is not required. Therefore, such power may be exercised by the Governor at will without the advice and consent of the senate and without regard to a previous designation made by another Governor. 34 Tex. Jur. 394, par. 42; *Keenan v. Perry*, 24 Tex. 253; *Neeper v. Steward*, 66 S. W. (2d) 812.

0-1211 To: J. E. McDonald, Commissioner, Department of
Agriculture
Date: September 14, 1939

As there are no provisions prohibiting the hiring of additional employees to those specifically provided for in the Department of Agriculture Appropriation under S. B. 427, said Department has the authority to use its various contingent appropriations out of special funds created under various acts and appropriated by S. B. 427 for the employment of additional salaried help, but a contingent fund under one act may not be used for the hiring of additional salaried help to carry out the provisions of another act. Arts. 5764, 5695, R. C. S.; Ch. 304, 45th Leg., R. S.; H. B. 12, Acts 45th Leg., 1st C. S.; Opinion 0-1332.

0-1224 To: Wayne Lefevre, County Auditor, Clay County
Date: September 1, 1939

The county tax assessor-collector is charged by law with the duty of collecting 50¢ for the issuance of each certificate of redemption as provided by Art. 7287, R. C. S., 1925, and the commissioners' court has no authority to waive the collection of this fee and the accounting for same by the tax assessor-collector. Art. 102, P. C.

0-1227 To: W. J. McConnell, President, North Texas State
Teachers College, Denton
Date: September 27, 1939

The North Texas State Teachers College may not sell or dispose of realty which was conveyed in absolute fee to the State of Texas.

0-1231 To: E. Y. Cunningham, County Auditor, Navarro
County
Date: September 7, 1939

It is permissible when preparing the county budget to anticipate some amount of delinquent taxes to be collected; however, as there is no statutory provision providing for setting forth any per cent for figuring the same, it would be wholly

within the discretion of the county judge and county auditor in determining such per cent. Arts. 689a-9, 689a-11 and 1666, R. C. S.

0-1245 To: Truett Barber, District Attorney, Colorado
Date: September 5, 1939

Article 2350, R. C. S., fixes the compensation of the county commissioners in counties having assessed valuation of less than Four Million Five Hundred Thousand Dollars (\$4,500,000.00), and the commissioners cannot legally agree as to how many days each month they shall turn in to the commissioners' court for their work.

0-1246 To: Bascom Giles, Commissioner, General Land Office
Date: September 14, 1939

The Land Commissioner has the authority to issue a lease for metallic minerals and precious stones to any applicant even though the application for lease is not filed and the first annual rental payment tendered within one year from the date of the filing of the applicant's application to prospect. Ch. 271, Secs. 8, 12, Acts 42nd Leg.; Art. 5421c, V. A. C. S.

0-1253 To: Bert Ford, Administrator, Texas Liquor Control Board
Date: September 1, 1939

An employee of the Texas Liquor Control Board is not entitled to draw expenses for room and meals incurred in 1937 during a period of confinement in the hospital inasmuch as he was not engaged at the time in active discharge of his duties. Art. 6823, R. C. S.

0-1254 To: John Stapleton, County Attorney, Floyd County
Date: September 19, 1939

The office of county superintendent of public instruction terminated in Floyd County when the scholastic population of such county fell below 3,000 in 1938, and such office has had no existence, potential or otherwise, since Jan. 1, 1939. Therefore, the persons who have served as county superintendent of said county from Jan. 1, 1939, are entitled to no emoluments of office. Art. 2688, R. C. S.; *Marfa Independent School District v. Davis*, 102 S. W. (2d) 283; *Miller v. Brown*, 216 S. W. 452.

0-1253 To: Geo. H. Sheppard, Comptroller of Public Accounts
Date: September 5, 1939

Section 1 (h) of S. B. 179, Acts 1939, 46th Leg., should control over the "limitation of payments" rider of the Departmental Appropriation Bill, S. B. 427, Acts 1939, 46th Leg., because S. B. 179 represents the last expression by the legislature on the subject, and there is no real conflict between the two. This conclusion is reinforced by the fact that S. B. 179 is, in the main, an amendment of the refund sections of H. B. 247, Ch. 44, Acts 43rd Leg., R. S., as amended by H. B. 749, Ch. 240, Acts 44th Leg., R. S., commonly known as the Motor Fuel Tax Law. Inasmuch as Sec. 1 (h) of S. B. 179 is an outright appropriation to the Comptroller's Department, the Limitation of Payments Board would have no authority over such funds. Conference Opinion 3082.

0-1262 To: J. P. Bryan, County Attorney, Brazoria County
Date: September 8, 1939

Under S. B. 402, 46th Leg., which allows discounts for the prompt payment of taxes, the county tax assessor-collector may require the payment of all taxes due on a particular piece of property that he collects before he will give a receipt and make the reduction on the state taxes. Arts. 4344, 7336e, R. C. S.

0-1263 To: Shelby H. Glover, County Attorney, Marion County
Date: September 11, 1939

Although Art. XVI, Sec. 40 of the Constitution of Texas, which provides that no person shall hold or exercise at the same time more than one civil office of emolument, is not applicable, yet, a person cannot hold the offices of deputy sheriff and "Special Ranger" at the same time since the two offices are incompatible. Arts. 6865, et seq., 4413(11), R. C. S.; *Thomas v. Abernathy County Line Independent School District*, 290 S. W. 152; *State v. Anderson*, 136 N. W. 128; *State ex rel. Banker v. Bobst*, 218 N. W. 253.

0-1266 To: T. M. Trimble, First Assistant State Superintendent
Date: September 5, 1939

A taxpayer having property adjacent to a school district who has been paying taxes for school purposes to this adjacent district, under the mistaken belief that her property was in this district, may recover the taxes so paid. 61 C. J. 985; *County of Galveston v. J. C. Gorham*, 49 Tex. 279; *Frost v. Fowlerton*

Consolidated School District No. 1, 111 S. W. (2d) 754. The trustees of this school district may refund the money so collected by issuing a warrant drawn on the local maintenance fund collected from local taxes, tuition fees, etc. Article 2827, R. C. S.; *Frost v. Fowlerton Consolidated School District No. 1*, supra; *Pfluger, et al. v. Hutto Independent School District*, 34 S. W. (2d) 632.

0-1271 To: J. D. Hall, State Board of Control
Date: September 16, 1939

The mother and sister of the Superintendent for the Alabama-Coushatti Indian Agency are not entitled to the free use of the enumerated provisions and benefits listed in the Eleemosynary Appropriation Bill for the superintendent-farm supervisor and family.

0-1272 To: Roy Loventhal, Chairman, Livestock Sanitary
Commission, Fort Worth
Date: September 7, 1939

Members of the Livestock Sanitary Commission and employees thereof may not be reimbursed out of the traveling expense appropriation either for expenses incurred in attending meetings called by the chairman in towns or cities in Texas at a point where a committee or conference of representative stockmen meet in called, regular or annual session, or for expenses incurred in attending meetings at points outside of Texas. Traveling Expenses Rider to Departmental Appropriation Bill (S. B. 427, 46th Leg.).

Savings effected in the management of the department may not be used to defray the costs of other services or expenses. (See opinion for detailed construction of "other available funds.") S. B. 427, Sec. 1, (a) of "traveling expenses," "Salary and other Provisions" heading, "Limitation of Payments" Rider.

The appropriation bill permits a department to pay less than the maximum amount set forth in an appropriation for any salaried position, but such saving will not be available for use in employing and paying other employees in addition to those itemized.

0-1280 To: Murphy Cole, County Auditor, Liberty County
Date: September 16, 1939

A special permit for the operation of an overlength vehicle does not imply the right of a carrier to haul a load which extends more than three feet beyond the front of the vehicle; however,

a permit for the transportation of overlength commodities or for the operation of oversize equipment does carry with it as an incidental privilege the right to extend the load, if necessary, more than four feet from the rear of such vehicle. Art. 827a, V. A. P. C.

0-1281 To: Homer Garrison, Jr., Director, Department of
Public Safety
Date: September 18, 1939

Liens placed on tires, radios, parts and accessories of motor vehicles should be noted on the certificate of title as "liens on the motor vehicle," under Sec. 24 (g) of H. B. 407. H. B. 407, Acts 46th Leg.

0-1287 To: Neil J. Gilligan, County Auditor, Uvalde
County
Date: September 23, 1939

The funds given to counties under H. B. 688, Acts 46th Leg., may be expended when available by the commissioners' court for the construction and maintenance of county lateral roads. Opinion 0-908.

0-1294 (Conference Opinion 3089)
To: Geo. H. Sheppard, Comptroller of Public Ac-
counts
Date: September 30, 1939

1. Under S. B. 427, 46th Leg., where a department or division of a department is provided with a specific item of appropriation for "traveling expenses," the amount thus provided represents the maximum which may be spent for that purpose by the department or division.

2. Where a department or division of a department is not provided specifically with an item for "traveling expenses," but is provided with an item for "contingent expenses," such item may be used to defray the traveling expenses of the department or division; but in such event, the sum so provided represents the maximum amount available for traveling expenses, and when such amount has been expended, whether for traveling expenses or for other expenses properly payable out of such item, no other funds from any source (except Federal funds) may be spent by the department or division for traveling expenses. Opinion 0-1321 overruled; Opinions 0-1139, 0-1220 and 0-1301 overruled in part.

3. Conclusions 1 and 2 do not apply to the "field travel expense of the State Highway Department" because the travel

expense rider especially excepts this item from its operation. Nor do they apply to appropriations of the type of the Game, Fish and Oyster Commission, where special riders permit the use of the appropriation of the appropriated surplus and excesses in particular items "to supplement the performance of any purpose for which money is herein appropriated" except salaries.

0-1295 To: Geo. H. Sheppard, Comptroller of Public Accounts
Date: September 9, 1939

Beer distributing stores are "stores" within the meaning of the Texas Chain Store Act, Art. 1111d, R. C. S., and are, therefore, subject to the chain store tax. *Hurt et al., v. Cooper, et al.*, 110 S. W. (2d) 896; Art. 667, P. C.; Opinion 0-797; *City of Beaumont v. Sam's Loan Office, Inc.*, 31 S. W. (2d) 882; *Dunlop Tire & Rubber Co., et al., v. Lee, State Comptroller*, 171 So. 331; 17 Rul. Case Law 479-480.

0-1296 To: Ross Doughty, Jr., County Attorney, Uvalde County
Date: September 30, 1939

The owner of an undivided interest in a tract of land which has been rendered and assessed as under a single ownership, which interest was acquired prior to the year in which the assessment was made, may pay the proportionate part of the taxes against his property without being required to pay any other taxes included in the assessment. Arts. 7151, 7152, 7172, R. C. S.; H. B. 440, Acts 1931, 42nd Leg.; Art. VIII, Sec. 15, Constitution of Texas; *Young et al., v. City of Marshall*, 199 S. W. 1180; *Richie v. Moore*, 249 S. W. 272; Opinion 0-928.

0-1297 To: Texas State Board of Medical Examiners, San Antonio
Date: September 26, 1939

All students who were enrolled in medical schools whose graduates were permitted to take the medical examination in this State prior to the effective date of Article 4501, R. C. S., as amended, are exempt from the requirement of 60 semester hours of non-medical college courses, and such students may take the medical examination upon completion of their medical college course.

0-1298 To: Members, Texas State Board of Medical Examiners, San Antonio
Date: September 18, 1939

The practice of osteopathy is within the meaning of the phrase "the practice of medicine." Article 4510, R. C. S.; *Ex parte*

Collins, 121 S. W. 501, 223 U. S. 288; *Newman v. State*, 124 S. W. 956; *Collins v. State*, 152 S. W. 1047; *Hayman v. City of Galveston*, 273 S. W. 414.

0-1301 To: J. C. Blair, President, State Board of Education,
Kerens
Date: September 5, 1939

Under the Travel Expense Rider of the General Appropriation Bill (S. B. 427), where no amount of money is provided for traveling expenses, no money can be expended for that purpose. Therefore, the Limitation of Payments Board cannot legally authorize the expenditure of a surplus for traveling expenses of members of the Board of Education out of the appropriation of \$6,000 for per diem of board members.

0-1302 To: F. B. Caudle, County Attorney, Franklin County
Date: September 7, 1939

In an election held in an independent school district ordered by the board of trustees of the district, where voters were handed two separate ballots—one provided for in the election order authorizing the bond election—the other a separate ballot to determine location of a building in the event that the bond election carried, the referendum ticket did not invalidate the election as a matter of law. The board of trustees has authority to erect a building on any site within the district, and this additional ballot is merely an expression of the people which may or may not aid the Board in determining the location. However, if a sufficient number of voters were in some way misled by this "straw" ballot so as to change the result of the election, then these facts if proved in a court of competent jurisdiction would invalidate the election.

0-1303 To: F. B. Caudle, County Attorney, Franklin County
Date: September 1, 1939

For the purpose of voting on the issuance of bonds or for the purpose of voting on all questions affecting the interest of the public schools within an independent school district, such territory legally constitutes a residence voting precinct within the meaning of Section 3a of Art. VI of the Constitution of Texas, the polling places to be designated by the school trustees as provided in Art. 2788, R. C. S. *Parks et al. v. West*, 108 S. W. 466. In any event, an election so held is not invalid. *Dillon Municipal Corporations*, 5th Ed., Vol. 1, p. 642; 20 C. J. 102; *Ex Parte White*, 28 S. W. 542.

0-1305 To: Wm. J. Tucker, Executive Secretary, Game,
Fish, and Oyster Commission
Date: September 30, 1939

The discharge of sewage by the disposal plant of a municipal corporation in the bayou, in which bayou there is no fish life in the immediate vicinity of the plant because of the discharge, is a pollution of a public waterway which is prohibited by Article 698, P. C.

As the superintendent of the plant is not listed among those who shall be held guilty and subject to punishment in case of violation, a representative of the Game, Fish, and Oyster Commission does not have authority to file a complaint against said superintendent for such violation. Art. 698, P. C.

0-1310 To: James E. Kilday, Director, Motor Transportation Division, Railroad Commission of Texas
Date: September 9, 1939

Whether the Railroad Commission may issue a certificate of convenience and necessity to operate as common motor carrier to a subsidiary of the Missouri Pacific Railway is not determined by proof that the traffic on certain heavily burdened highways would be lessened; inadequacy of existing lines must be alleged and shown along with the need of additional service. Arts. 911b; 911b, Secs. 3, 9, 10, R. C. S.; *Railroad Commission v. Red Arrow Freight Lines*, 96 S. W. (2d) 735.

The Railroad Commission hears no evidence upon the issue of convenience and necessity upon applications for certificates filed by carriers engaged only in interstate commerce because Congress has given to the Interstate Commerce Commission the exclusive power and authority to determine that issue as to such interstate carriers; such, however, is not true in the case of a carrier engaged in intrastate commerce. (See opinion for detailed construction of requirements for certificate of convenience and necessity.)

0-1314 To: E. B. Lewis, County Attorney, Cherokee County
Date: September 16, 1939

Under Art. 10, Sec. 1 of the charter of the City of Jacksonville, the city may issue bonds and levy a tax in payment thereof for the purpose of constructing a livestock exposition building. *Lewis, et al. v. City of Ft. Worth*, 98 S. W. 975; Jones—Bonds and Bond Securities, 4th ed., Secs. 160, 161-185. If the qualified voters vote for the city to issue said bonds at an election duly and legally called and held, and all orders and ordinances are duly entered and certified copies thereof, together with other

instruments required by Art. 709, R. C. S., are presented to the Attorney General's Department and found regular in every detail, said department will issue a certificate of approval on said bonds.

0-1317 To: T. K. Wilkinson, County Auditor, Hill County
Date: September 16, 1939

Under Art. 1659, R. C. S., the commissioners' court cannot legally lease or rent, with the option to purchase, road machinery, pickups or trucks, or warehouses for the storage of equipment.

Under Art. 1659 the commissioners' court cannot, by declaring an emergency, purchase equipment in excess of \$150.00 without advertising for competitive bids. Art. III, Sec. 52 and Art. XI, Sec. 2 of Constitution of Texas; Art. 2351, R. C. S.; 11 Tex. Jur. p. 632; *Wyatt Metal & Boiler Works v. Fannin County*, 111 S. W. (2d) 787; *Gulf Bitulithic Co. v. Nueces County*, 297 S. W. 747 (reversed on other grounds, 11 S. W. (2d) 305).

0-1322 To: P. L. Marquess, County Attorney, Wharton County
Date: September 16, 1939

Where the deputy county clerk by virtue of an agreement with firms or individuals received fees for preparing lists of chattel mortgages, deeds of trust, etc., by using county equipment and supplies, he may retain the fees so charged if such services are in truth and in fact personal services of such deputy as an individual and are not services within the scope of the county clerk's office. However, it would be improper for the county clerk to permit his deputy to use county equipment and county's time for the personal gain of the deputy. Arts. 3902; 3912, Sec. 5, R. C. S.; Opinion Nos. 0-430 and 0-921.

0-1323 To: Roy L. Hill, County Attorney, Runnels County
Date: September 9, 1939

An election held for the purpose of determining whether common school districts and independent school districts shall consolidate is a special election. *Williams v. Hammond*, 278 S. W. 304; *Clark v. Wilbrich*, 146 S. W. 947; *Wallis v. Williams*, 108 S. W. 153; *Scherz v. Pelfer*, 74 S. W. (2d) 327. Therefore, Art. 2943, R. C. S., which provides for the compensation of judges and clerks of general and special elections would apply.

0-1324 To: T. M. Trimble, First Assistant State Superintendent, Department of Education
Date: September 25, 1939

The State Auditor's office does not have discretion in the matter of determining an unusual condition under the Equaliza-

tion Law of the 45th Legislature; such discretion is vested in the State Superintendent and the State Board of Education. S. B. 349, Ch. 475, Acts 45th Leg., as amended by H. B. 133, Ch. 60, Acts 45th Leg., 2nd C. S.

0-1328 To: E. W. Easterling, County Attorney, Jefferson County
Date: September 14, 1939

When a purchaser of real estate as part of the purchase price assumes a debt or other obligation of the vendor, even without a vendor's lien clause in the deed, an equitable vendor's lien therein is created to secure the payment of the pre-existing indebtedness, and such instrument is subject to the stamp tax levied by Art. 7047e, R. C. S., as amended by S. B. 24, 46th Leg.

0-1329 To: Jack Borden, County Attorney, Parker County
Date: September 8, 1939

A scheme whereby, in substance, a theatre buys the fingerprints of a citizen of the community by selection of one fingerprint from the files of the theatre is a violation of the lottery laws of the state. Art. 654, P. C.; *Featherstone v. Independent Service Station Association of Texas*, 10 S. W. (2d) 124; *Peek v. United States*, 61 F. (2) 973; *Boatwright v. State*, 38 S. W. (2d) 87; *Griffith Amusement Co. v. Morgan*, 98 S. W. (2d) 844; *State v. Randle*, 41 Tex. 292; *City of Wink v. Griffith Amusement Co.*, 100 S. W. (2d) 695.

0-1336 To: Paul T. Holt, County Attorney, Travis County
Date: September 18, 1939

A scheme whereby in substance a "suit club" gives credits in trade to winning contestants for completing a sentence, etc., constitutes a violation of the lottery laws of the state. Art. III, Sec. 47, Constitution of Texas; Arts. 654, 655, P. C.; 38 Tex. Jur. pp. 409-410; 28 Tex. Jur. pp. 410, 412, 413, 414; *Grant v. State*, 112 S. W. 1068; *City of Wink v. Griffith Amusement Co.*, 100 S. W. (2d) 695, 701; Opinions 0-1200, 0-1329.

0-1338 To: Claud Wolf, County Auditor, Howard County
Date: September 18, 1939

Arts. 1645a and 1645a-3, V. A. C. S., apply only to auditors in counties strictly within the population brackets stated therein.

A county auditor appointed under Arts. 1646 and 1647 is not authorized to act also in the capacity of purchasing agent for

the county; the salary of such auditor is fixed by Art. 1645. Arts 1651-1676a inclusive, R. C. S.

0-1339 To: C. Burt Potter, County Attorney, San Patricio County
Date: September 30, 1939

The city commission cannot destroy or cancel any amount of bonds voted by the qualified voters of the city, and said commission has no authority to order an election for the purpose of destroying or cancelling such bonds. *Orr v. Marrs*, 47 S. W. (2d) 440; Art. III, Sec. 52, Constitution of Texas; Arts. 784a, 2786a, R. C. S.

An order by the commission after the bonds had been authorized by an election that only a certain amount of such bonds would be issued would not be binding on future administrations. *City of Houston v. McCraw*, 113 S. W. (2d) 145; *Black v. Strength*, 246 S. W. 79.

0-1342 To: E. W. Easterling, County Attorney, Jefferson County
Date: September 12, 1939

The commissioners' court is not authorized to pass an order authorizing a re-assessment of property on which delinquent taxes are due on the grounds that said property was over-assessed and over-valued originally. Opinion 0-930; *Hinkson v. Lorenzo Ind. School Dist.*, 109 S. W. (2d) 1008; *Nederland Independent School District v. Carter et al.*, 83 S. W. (2d) 487; Arts. 7346, 7347, R. C. S.

0-1347 To: David Cole, County Attorney, Stephens County
Date: September 14, 1939

Art. 720, Ch. 2, Title 22, R. C. S., which provides that bonds issued under this chapter shall run not exceeding forty years, is applicable to serial road bonds of a county when issued under Ch. 2, Title 22, and against the constitutional road tax as provided in Sec. 9, Art. VIII of the Constitution; but in the event the bonds are issued under Ch. 3, Title 22, pursuant to Sec. 52, Art. III of the Constitution, Art. 752i would be applicable to the ultimate date of such bond issue.

0-1348 To: Linton S. Savage, County Attorney, Nueces County
Date: September 7, 1939

Upon the filing and recordation in the county clerk's office of an indenture of mortgage of a duly licensed foreign corpo-

ration under which indenture of mortgage bonds will be issued and where a part of the security is property located outside the State of Texas, by Art. 7047e, as amended by S. B. 24, Acts 1939, 46th Leg., R. S., such instrument must bear stamps as provided in the amended act, and the amount is to be determined as provided therein. Conference Opinion 3061.

None of the bonds secured by this indenture is owned by national banks even though one apparently intends to buy a series of the bonds; the bank would not be paying the tax; hence, there is no exemption of the indenture of mortgage in question. Opinions 0-267 and 0-874.

0-1351 To: Julian Montgomery, State Highway Engineer
Date: September 7, 1939

The provisions of the specifications and contract of the Neches River Bridge that were submitted to this department for an opinion are legal and may properly be made a portion of said contract.

0-1353 To: V. C. Marshall, Chairman, State Soil Conservation Board, Temple
Date: September 30, 1939

Under the State Soil Conservation Law (Art. 165a-4):

1. When a man and his wife own a farm within the boundaries of the territory as determined by the State Soil Conservation Board and reside within such territory, both the husband and wife are entitled to vote in the elections held under the Act, provided they are otherwise qualified. A land owner living in an incorporated city or town who owns lands outside the corporate limits within the boundaries of the above determined territory is not entitled to vote in said elections.

2. In an election ordered by the board in a proposed district all land owners within the boundaries of territory are eligible to vote provided they are otherwise qualified.

3. Incorporated cities and towns should not be included as part of a district.

4. The board would not be permitted to post notices of an election or public hearing rather than to publish such notices where there is a newspaper or other publication of general circulation within the appropriate territory. Art. 29a, R. C. S. The act provides no other means for holding elections or posting notices when appropriations for such purposes are exhausted.

5. The board has no authority in setting up and assisting in the operation of districts when appropriations for these purposes are exhausted.

6. The manner by which the board may assemble information that will enable judges at an election to determine who is qualified to vote is within the discretion of the board.

0-1355 To: Paul T. Holt, County Attorney, Travis County
Date: September 16, 1939

The repairing, reupholstering, refinishing and performing of other work in connection with furniture, exclusive of mattresses, pillows, bolsters, feather beds and other filled bedding of any description, does not come within the provisions of S. B. 200, 46th Leg., which relates to bedding.

0-1356 To: Geo. H. Sheppard, Comptroller of Public Accounts
Date: September 13, 1939

Even though the Departmental Appropriation Bill (S. B. 427, Acts 46th Leg.) makes no provision therefor, Art. VII, Sec. 3, Constitution of Texas, authorizes and makes it the duty of the State Board of Education to set aside out of the Available School Fund such amount as will be sufficient to defray the traveling expenses necessary to be incurred in the purchase and distribution of free text books to the school children of this state. Art. 2866, R. C. S.

0-1357 To: M. F. Kieke, County Attorney, Lee County
Date: September 20, 1939

Where there are two elections for the office of trustee of a common school district, the first of which was properly held and the board of trustees canvassed the returns and issued a certificate of election thereon, and the second of which was ordered by the county judge and the commissioners' court canvassed the returns and issued a certificate of election thereon, the candidate elected in the first election is the legally elected trustee. Art. 2746 as amended, 2746a, R. C. S.; Opinion 0-655; *Stubbs v. Moursund*, 222 S. W. 632.

0-1358 To: Paul T. Holt, County Attorney, Travis County
Date: September 11, 1939

The Maternal Health Clinic of Austin, Texas, the function of which is to support a post-natal clinic for women unable to pay for the services of a physician, is exempt from ad valorem tax-

tion. Art. VIII, Sec. 2, Constitution of Texas; Art. 7150, Sec. 7, R. C. S.; *City of Houston v. Scottish Rite Benevolent Association*, 111 Tex. 191, 230 S. W. 978; *Santa Rosa Infirmary v. City of San Antonio*, 259 S. W. 926.

0-1359 To: N. J. Dartez, Secretary, State Board of Barber Examiners

Date: September 13, 1939

The balance of the Deficiency Appropriation authorized in 1937 by the Governor for traveling expenses of the members of the State Board of Barber Examiners, appropriated in 1939 by the 46th Legislature, should not be set aside by the Comptroller from the special barber fund, for the payment of the deficiency appropriation, which deficiency appropriation is to be regarded as a direction to pay out of the General Reserve Fund, there being no legislative authority for its payment out of special funds.

0-1362 To: Charley Lockhart, State Treasurer

Date: September 8, 1939

A deposit of a warrant in some bank to be transmitted by said bank and then presented to the Treasurer for payment is not a presentment for payment until same is received by the State Treasurer. Art. 4371; Secs. 72, 73, 74, 75 of Art. 5937, R. C. S.

0-1364 To: Board of Insurance Commissioners

Date: September 18, 1939

The phrase "any reinstatement of this policy shall be incontestable after the same period following reinstatement and with the same conditions and exceptions" is a valid contractual provision permissible in the uncontestable clause of a life insurance policy to be issued in Texas. Articles 4732, 4734, 5068, V. A. C. S. (See opinion for citation of cases.)

0-1365 To: F. E. Rightor, Secretary, State Board of Registration for Professional Engineers

Date: September 11, 1939

The Secretary of the Texas State Board of Registration for Professional Engineers is entitled to both a salary and per diem compensation. Secs. 3, 5, 7, and 9, Art. 3271a, R. C. S.

0-1367 To: Olan R. Van Zandt, Chairman, Joint Legislative Advisory Committee, Tioga

Date: September 12, 1939

The appropriation set up in Sec. 1 and allocated in Sec. 11 of H. B. 933, (Rural Aid), Acts 1939, 46th Leg., is not a special

fund the surplus of which is made subject to the jurisdiction of the Limitation of Payments Board. S. B. 427, Acts 46th Leg.

0-1369 To: R. A. McElrath, County Auditor, Cooke County
Date: September 8, 1939

Even though a person over nineteen and under twenty-one years of age has had his disabilities removed, yet by Secs. 14 and 20, S. B. 15, Ch. 466, Acts 1935, 44th Leg., which was intended to operate as a safety measure, it would be unlawful for him to operate a school bus.

0-1370 To: Dr. H. G. Towle, President, Texas State Board
of Examiners in Optometry, Snyder
Date: September 13, 1939

The Texas State Board of Examiners in Optometry does not have the authority to withhold a license to practice optometry from a person on the grounds that he stated his true name in his applications and later had his name legally changed; nor would the fact that three complaints were filed against him for practicing optometry without a license, two of which were dismissed and the third of which he was found not guilty, serve to deprive him of the right to a license. Arts. 4959, 5928, 5930, R. C. S.

0-1371 To: Queen Arbuckle, Secretary, State Board of
Hairdressers and Cosmetologists
Date: September 19, 1939

The State Board of Hairdressers and Cosmetologists cannot refund money collected through an error which has been deposited in the General Revenue Fund, nor issue a shop license for the fiscal year of 1939 for the additional remittance erroneously collected, after such fee has been placed in the General Revenue Fund. Art. VIII, Sec. 6, Constitution of Texas; Art. 734b, Sec. 18a, P. C.; *Manion v. Lockhart*, 114 S. W. (2d) 216.

0-1373 To: Homer Garrison, Jr., Director, Department of
Public Safety
Date: September 11, 1939

A member of the Texas Highway Patrol may properly receive a pass from a transportation agency and make use of the same while engaged in the execution of criminal process. Arts. 4005, 4006, R. C. S. (See Opinion 0-445 which rules as unconstitutional the anti-pass provisions of S. B. 427, Acts, 46th Leg.)

0-1375 To: Gean B. Turner, District Attorney, Cleburne
Date: September 11, 1939

If the board of trustees of a school district determine that said district will be unable to maintain a satisfactory school, said board is authorized to transfer its entire scholastic enrollment to a convenient school of higher rank even though the school district may have voted to increase its tax rate to fifty cents on the one hundred dollar valuation within one year of the date of such transfer, provided, however, that such transfer must be approved by the county superintendent and the state superintendent. H. B. 933, Secs. 6, 15, Acts 46th Leg.; Art. 2699, R. C. S.

0-1377 To: L. A. Woods, State Superintendent of Public
Instruction
Date: September 9, 1939

It would be a violation of the law for the State Superintendent to authorize the business manager to sell state-adopted textbooks to students of other than public schools.

Pupils or their parents may purchase only a reasonable number of books required for their pupils' own use. Art. 2876d.

0-1378 To: L. A. Woods, State Superintendent of Public
Instruction
Date: September 19, 1939

An independent school district having more than one ward school may charge tuition for permitting the transfer of children from one elementary district to another in the same school system. Article 2780, R. C. S.; *Johnson v. City of Dallas*, 291 S. W. 972; *Boydstum v. Fort Worth Independent School District*, 33 S. W. (2d) 811.

0-1380 To: T. K. Wilkinson, County Auditor, Hill County
Date: September 22, 1939

A constable is prohibited by Article XVI, Secs. 33 and 40, Constitution of Texas, from serving and accepting pay as a grand jury bailiff. Opinions 0-122, 0-880; Article 6878, R. C. S.; Arts. 367, 367a, 367b and 368, C. C. P.

0-1381 To: R. T. Burns, County Attorney, Walker County
Date: September 9, 1939

By Art. 3686, R. C. S., the county board of school trustees is authorized and it is its duty to hear and determine appeals

from the county superintendent's actions in refusing to approve a contract entered into between a teacher and the local board of school trustees. *Duncan v. Bowman*, 22 S. W. (2d) 683; *Powell v. Gibson*, 43 S. W. (2d) 1113; *Miller v. Smiley*, 65 S. W. (2d) 417; *Isbel v. Stovall*, 92 S. W. (2d) 1067.

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

Date: September 7, 1939

The operation of a club whereby the operator agrees to deliver to a club member one \$25.00 suit of clothes after such member has paid \$2.50 per week for ten consecutive weeks and whereby once a week all members who have paid the \$2.50 weekly payment are entitled to participate in a drawing of names or numbers to determine the winner of a credit equal to the unpaid balance of the name or number drawn clearly comes within Secs. A and B of Art. 7047f, R. C. S., levying a prize tax of 20%. As the manner of making the award is immaterial, the result would be the same even if the operator of the club arbitrarily selects each week the member he wishes to receive the award.

0-1383 To: Howard Traweek, County Attorney, Motley County

Date: September 25, 1939

The commissioners' court is without authority to order an election for the purpose of revoking or cancelling the county's unsold courthouse bonds. Art. 718, R. C. S.; Arts. 784a, 2788a, V. A. C. S.; *Williams v. Glover*, 259 S. W. 957; *Orr v. Marrs*, 47 S. W. (2d) 440.

0-1384 To: R. E. McLaughlin, County Attorney, Moore County

Date: September 15, 1939

Although the domicile of a minor is ordinarily that of his parents, it is well established that for purposes of attending public free schools a minor may acquire a "residence" separate and apart from that of his parents. Based upon the fact situation submitted, the two boys referred to have a substantial residence in the independent school district and would be entitled to attend the public free school of said district. Arts. 2922l(1), 2904a, 2902, 2904, R. C. S.

0-1385 To: Charles S. McMillan, County Attorney, San Augustine County

Date: September 13, 1939

Notices of delinquent tax suits, provided for in Sec. (d) of H. B. 565, Acts 1939, 46th Leg., may be posted if no newspaper

in the county will print the same for 2 $\frac{1}{2}$ ¢ a line, despite the provisions of Art. 29a, R. C. S., relating to such notices; Sec. (d) of H. B. 565, which is the later act of the two on the subject, limits the application of Art. 29a as to the specific citations set out in H. B. 565. *Baker v. Compton*, 52 Tex. 262; *Fry v. Jackson*, 264 S. W. 612.

0-1387 To: C. Woodrow Laughlin, County Attorney, Jim
Wells County
Date: September 18, 1939

An independent school district may use any surplus funds in its local maintenance fund for the purpose of erecting a school building and may issue its evidence of indebtedness in contemplation of current revenues; but whatever the form of said evidence of indebtedness the board of trustees is not authorized to create a deficiency debt against such fund for future years, and the person advancing such money must look solely to the surplus funds accumulated for the year said obligation was created. Arts. 2749, 2827, R. C. S. *Collier v. Peacock*, 54 S. W. 1027; *Templeman Common School District v. Boyd B. Head*, 101 S. W. (2d) 352; *Trustees of Crosby Independent School District v. West Disinfecting Company*, 121 S. W. (2d) 661; *Harlingen Independent School District v. C. H. Page & Bro.*, 48 S. W. (2d) 983.

0-1388 To: L. A. Woods, State Superintendent of Public
Instruction
Date: September 25, 1939

The board of trustees of a school district cannot legally refuse to accept a student who is within the scholastic age even though he has graduated from high school. Articles 2902, 2904, 2892, 2893, R. C. S.; Arts. 297, 298, P. C.; Department of Education's Bulletin on Standards and Activities, No. 397, Vol. XV, No. 4, September 1, 1939, p. 39; *Love v. City of Dallas*, 40 S. W. (2d) 20.

0-1389 To: Adam R. Johnson, Executive Director, State
Department of Public Welfare
Date: September 15, 1939

By the rider following the itemization for the Division of Old Age Assistance in the Departmental Appropriation Bill the Department of Public Welfare is authorized to hire employees in addition to those itemized for said division if a necessity therefor exists, subject to the 5% limitation upon the amount of money available for administrative expenses and that such employees shall be paid in conformity with the salaries fixed in the itemiza-

tion for similar positions. Opinion 0-1321; S. B. 36; S. B. 427, Acts, 46th Leg.

By the rider appearing at the end of the appropriation to the State Department of Public Welfare such department is authorized to create new positions or redefine and consolidate existing positions and fix salary schedules within the Old Age Assistance Division provided, however, that no additional employees used shall be paid larger salaries than are fixed in the itemization for employees rendering similar services and that no salaries for those positions itemized in the bill may be paid in excess of fixed salaries. S. B. 36, S. B. 427, Acts, 46th Leg.

0-1391 To: Fred Norris, County Auditor, Polk County
Date: September 27, 1939

The court reporter in a district containing four counties must submit an expense account of his "actual and necessary expenses" to each non-resident county in which he serves and receive pay therefor until he has received his maximum of \$400, without regard to a percentage basis. Art. 2326a, R. C. S.

0-1392 To: Board of Water Engineers
Date: September 11, 1939

A study to be made in connection with the Red Bluff Water Power Control District by a member of the State Board of Water Engineers and an assistant outside of the boundaries of Texas is "state business" which "directly concerns" said board, the traveling expenses incurred by said member and assistant in the study to be paid from the appropriation to the board. Art. 59, Sec. (a), Constitution of Texas; Arts. 7466, 7472c, 7472d, 7537a, R. C. S.; S. B. 490 and S. B. 427, Acts 46th Leg., R. S. A letter of approval by the Attorney General filed with the State Comptroller will be sufficient for an indefinite number of crossings, so long as the purposes of the crossings come within the purpose of the particular trip. S. B. 427, supra.

0-1394 To: W. A. Davis, State Registrar, State Board of Health
Date: September 14, 1939

Only in the event of an actual surplus in the Vital Statistics Fund over and above the sum necessary to pay items provided in the departmental appropriation bill for the fiscal year, and with the permission of the Limitation of Payments Board, may

such excess or surplus be used for necessary expenses of the Bureau of Vital Statistics, including the employment of additional employees, full or part time. H. B. 613, S. B. 427, 46th Leg.

0-1395 To: Homer Garrison, Jr., Director, Department of
Public Safety
Date: September 23, 1939

There is no mandatory suspension of a driver's license in the case of conviction wherein a suspended sentence is given unless and until such judgment has become final by action of the court. Art. 6687a, R. C. S.; Arts. 776, 776a, 778, 779, 780, C. C. P.

0-1396 To: Marvin Hall, Commissioner, Board of Insurance
Commissioners
Date: September 29, 1939

Only in the event that there may be in the Fire Insurance Division Fund, a special fund, an amount of more than is sufficient to pay the items appropriated for the department for the fiscal year does there exist a surplus that is subject to the jurisdiction of the Limitation of Payments Board. S. B. 427, Acts 46th Leg.; Arts. 12, 4902, 4927, R. C. S.

0-1398 To: Charles E. Reagan, District Attorney, Marlin
Date: September 14, 1939

A member of the county board of trustees may not also hold the office of trustee for an independent school district because the two offices are incompatible and inconsistent one with the other. *Thomas, et al., v. Abernathy County Line Independent School District*, 290 S. W. 152; *Kugle, et al., v. Glen Rose Independent School District No. 1*, 50 S. W. (2d) 375; Art. 2696, R. C. S.

0-1399 To: Bert Ford, Administrator, Texas Liquor Control Board
Date: September 27, 1939

If beer is given away and consumed upon the premises of the manufacturer or is dumped on the premises, so as to render such beer incapable of reaching the channels of commerce, no tax is due thereon. Secs. (a) and (d), Art. 667-23, P. C.

0-1400 To: Geo. W. Cox, State Health Officer
Date: September 29, 1939

A truck driver who lives and works for a meat packing and distributing plant in one county and who holds a health certifi-

cate by a physician licensed to practice medicine in said county is not required under the terms of H. B. 142, Acts 46th Leg., (Art. 705c, P. C.) to have additional health certificates signed by physicians who live in counties in which the driver makes deliveries of meat and meat products. Acts 1937, 45th Leg., p. 707, Ch. 356, Opinion 0-1138.

0-1403 To: Geo. H. Sheppard, Comptroller of Public Accounts
Date: September 14, 1939

Under the provisions of Art. 3912e, R. C. S., the 10¢ fee which is paid the tax collector-assessor as agent for the state on each certificate of title issued by the Department of Public Safety (Certificate of Title Act, H. B. 407, 46th Leg.) is one of the fees of office and is to be deposited in the Officers' Salary Fund.

0-1404 To: Geo. W. Cox, State Health Officer
Date: September 27, 1939

Where a state employee has traveled to a designated post of duty on official state business, he cannot be allowed traveling expenses for week-ends, holidays or daily trips from and to said point which have no connection with official state business even though the traveling expenses in individual instances will be less than the per diem expense of remaining at the designated post of duty. S. B. 427, Acts 46th Leg.; Art. 6823, V. A. C. S.

0-1405 To: T. M. Trimble, First Assistant State Superintendent, Department of Education
Date: September 16, 1939

A school district is not liable for injuries of a student received while participating in football or while traveling to and from inter-school games in a regular school bus; the fact that a portion of the student body is insured by the school board would make no difference as far as the liability of the school district is concerned. Opinion 0-443.

0-1406 To: Bert Ford, Administrator, Texas Liquor Control Board
Date: September 22, 1939

Refunds of taxes and license fees which accrue under Article 1, Secs. 15b and 45d, and Article 2, Secs. 18 and 23g, of the Texas Liquor Control Act, may not be paid if accruing after August 31, 1939, the date of the close of the biennium for

which appropriations were made for said refunds. Art. VIII, Sec. 6, Constitution of Texas; *Pickle v. Finley*, 91 Tex. 484.

0-1407 To: L. R. Thompson, County Auditor, Taylor
County
Date: September 23, 1939

The taxes of an independent school district which lies in two adjoining counties may not legally be collected in both counties by the tax assessor-collector of one of the counties. Sec. 40, Art. XVI, Constitution of Texas; Arts. 2806, 2744, 7254, R. C. S.

0-1408 To: Fred T. Porter, County Attorney, Kaufman
County
Date: September 29, 1939

Where a county hires a man by the month who, during the term of employment marries the daughter of a county commissioner and after marriage works the rest of the month and the first five days of the following month, the man is entitled to be paid for the balance of the month but not for the five days, since on the first of the following month the employment came under the purview of the nepotism statutes. Opinion 0-361; Arts. 432, 435, P. C. No notice is necessary when employment is in violation of the Penal Code. *Fairless v. The Cameron County Water Imp. Dist. No. 1*, 25 S. W. (2d) 651.

0-1409 To: Adam R. Johnson, Executive Director, State
Department of Public Welfare
Date: September 16, 1939

Federal funds turned over to the Texas Relief Commission and deposited as required by Federal rules and regulations in a national bank subject to withdrawal by said Commission, which funds have been transferred to the State Department of Public Welfare by S. B. 36, 46th Leg., should be left on deposit in the national bank subject to withdrawal by said department.

0-1411 To: Chas. W. Castner, Chief, Eleemosynary Divi-
sion, Board of Control
Date: September 14, 1939

Because of the specific exception in the travel expense rider of the Eleemosynary Appropriation Bill in the case of superintendents of eleemosynary institutions, such superintendents may, if and when such trips are permitted by the Board of Control, attend at state expense such conferences or conventions

as may relate to the administration of the particular institutions over which the superintendents have charge. S. B. 427, 46th Leg.

0-1413 To: Texas State Board of Health
Date: September 18, 1939

A manufacturer of bedding is required to place the legal label and affix the bedding revenue stamp to articles manufactured for a state institution or for the United States Government. Art. 4476a, V. A. C. S. (S. B. 200, 46th Leg.)

0-1415 To: Julian Montgomery, State Highway Engineer
Date: September 18, 1939

A non-resident chartered bus or a privately owned bus operated for hire may remain in this state four days without being registered in this state, provided the state or county of the registration of such bus grants like exceptions to motor vehicles registered in Texas; such buses are not entitled to the privileges of a non-resident permit for a fee of fifty cents. A passenger type of vehicle not operated for hire which is used to transport members of an orchestra should be registered as a passenger car. Art. 827b, P. C.

0-1417 To: Julian Montgomery, State Highway Engineer
Date: September 15, 1939

The Rio Grande Valley Citrus Exchange, an incorporated cooperative marketing exchange, the members of which are associations of citrus growers, is not entitled to have its trucks classified and registered as farm trucks and thus obtain a reduction of license fees as contemplated by Art. 6675a-6a, R. C. S. The exchange, as a legal entity, owns the trucks, but does not own the products sought to be conveyed.

0-1418 To: W. K. McClain, Criminal District Attorney,
Georgetown
Date: September 25, 1939

A school board has no authority to expend local school funds in payment of insurance premiums on a policy covering personal injuries sustained through the operation of school buses. Arts. 2687a, 2827, V. A. C. S.

0-1419 To: Leo Presnell, County Attorney, Upshur County
Date: September 15, 1939

A city lot upon which lot the Highway Department now has a supply house and which lot will continue to be so used by said Department, may not legally be purchased with county funds. Art. 6694q-4, V. A. C. S.; Opinions 0-893, 0-1159, and 0-1260.

0-1420 To: J. E. McDonald, Commissioner, Department of
Agriculture
Date: September 16, 1939

The lump sum appropriation of "all fees and/or unexpended balances" from certain named acts, provided for in the rider to the Department of Agriculture appropriation, would be available to the respective divisions of the department to which the acts apply for the employment of necessary personnel and the payment of such salaries and other expenses, with the express exception of traveling items and the supplementing of funds for specific items. S. B. 427, Acts 46th Leg.

0-1422 To: J. O. Loftin, President, Texas College of Arts
and Industries, Kingsville
Date: September 23, 1939

A person may simultaneously serve on the board of trustees of an independent school district and (1) as United States Postmaster, or (2) without compensation on the Board of Directors of the Texas College of Arts and Industries. Secs. 33 and 40 of Art. XVI, Constitution of Texas; Opinions 0-490, 0-982, and 0-1263.

0-1423 To: Edgar E. Payne, County Attorney, Hockley
County
Date: September 29, 1939

Any person may qualify as a weigher for the public for hire under Arts. 568 and 5704, R. C. S., and weigh for the public for compensation irrespective of whether or not there are regularly elected or appointed public weighers in the same precinct. Arts. 5681, 5692, R. C. S.; Art. 7834, Complete Texas Statutes, 1920; *Paschal v. Inman*, 157 S. W. 1158; *Martin v. Foy*, 234 S. W. 698; Opinion 0-1188.

0-1424 To: Joe Bailey, Business Manager, North Texas
Agricultural College, Arlington
Date: September 20, 1939

A student who moved to Texas on June 1, 1939, will be required to pay the out-of-state tuition despite the fact that he was a resident of Texas up until about two and one-half years ago. Art. 2654, R. C. S.

0-1426 To: Julian Montgomery, State Highway Engineer
Date: September 14, 1939

By Art. 6669, R. C. S., the State Highway Engineer shall be allowed all actual traveling expenses under the direction of the

Highway Commission, but by the general rider to the Departmental Appropriation Bill, S. B. 427, 46th Leg., he is limited to \$4.00 per day expenses for meals and lodgings.

0-1428 To: J. C. Hamilton, County Auditor, Ector County
Date: September 30, 1939

The sheriff-tax assessor-collector is entitled to that number of deputies the commissioners' court shall in its discretion deem proper. The salary of the chief deputy shall not exceed \$1,800 per annum, and the salaries of the other deputies shall not exceed \$1,500 per annum each. Opinion 0-91; Art. 3902, R. C. S.

The sheriff-tax assessor-collector who is compensated on a fee basis is not entitled to be paid for the county any amount for mileage.

0-1433 To: F. M. Law, Board of Directors, A. & M. College, Houston
Date: September 30, 1939

The Vice-President of A. & M. College may be paid a salary not to exceed 80% of the total salary paid the President from both the General Revenue Fund and local funds of the school. H. B. 255, Acts 46th Leg.; Art. 2613, R. C. S.

0-1434 To: Geo. W. Cox, State Health Officer
Date: September 30, 1939

The State Board of Health may use available Federal funds under Title VI of the Social Security Act for the employment of a director of public health education, provided approval of the Surgeon General of the U. S. Public Health Service is obtained. S. B. 427, Acts 46th Leg.; Art. 4483, R. C. S.

0-1435 To: Tom L. Beauchamp, Secretary of State
Date: September 14, 1939

The Secretary of State is not authorized to employ two auditors working at the same time and pay them out of the appropriation for "Auditor, Franchise Tax Reports (seasonal) \$1,000.00" of the Departmental Appropriation Bill. However, the appropriation for extra help, etc., under item 34 of said bill, may if necessary be resorted to for the employment and compensation of additional auditors in the franchise tax department, in time of seasonal distress.

As there is no requirement in the rider appearing at the end of the Departmental Appropriation Bill that any employee of

a state department work any specific number of hours per day, the department head has the discretion to determine the arranging of hours of service of particular employees. Therefore, a porter is not required to start work at eight and stop work at five in the afternoon, but may work before and after office hours. (As the above rider expressly places porters under direct supervision of the Board of Control, the discretion to determine the hours of labor is to be exercised by that body.)

0-1439 To: Mortimer Brown, Executive Secretary, Teacher Retirement System
Date: September 20, 1939

The Teacher Retirement System may pay an amount not exceeding \$250 held by it for a minor who is the beneficiary of a deceased member to the county clerk of the minor's residence, and the county clerk's receipt therefor will relieve said system from any and all further liability in connection therewith. Articles 2922, 4112a, R. C. S. If a guardian has been appointed, the money should be paid to the guardian. Art. 1994, R. C. S.

0-1440 To: V. B. Goar, County Attorney, Blanco County
Date: September 19, 1939

In a suit against the commissioners' court, in which only three members are made defendants, to set aside an order of the said court distributing automobile registration fees, the commissioners' court has authority to hire counsel to represent it. The contract of employment, however, would have to be a contract to represent the commissioners' court, and not one to represent the three precincts whose commissioners are named as defendants. Art. 6675a-10, R. C. S.; *City National Bank of Austin v. Presidio County*, 26 S. W. 775; Opinion 0-1091.

0-1442 To: O. J. S. Ellingson, General Manager, Texas Prison System, Huntsville
Date: September 23, 1939

The salary of the secretary to the warden may not legally be supplemented out of the Educational and Recreational Fund nor from any other source. S. B. 427, 46th Leg.

0-1444 To: Geo. H. Sheppard, Comptroller of Public Accounts
Date: September 20, 1939

An operator dealing in paint and wallpaper who handles such items as artists' supplies, etc., show card supplies, etc., is liable for the chain store tax. Art. 1111d, P. C.; Opinion 0-40.

0-1445 To: H. A. Hodges, County Auditor, Williamson
County
Date: September 23, 1939

A sheriff who receives a salary as compensation for his services should be paid the sum of 4¢ for each mile traveled by automobile while attempting to serve either civil or criminal process even though he fails to locate the person on whom the process is to be served, provided the automobile is owned by the sheriff. Art. 3899, Sec. (b), R. C. S.

0-1446 To: Geo. W. Cox, State Health Officer
Date: September 19, 1939

The \$5,500 collected during the months of July and August from fees, registrations and stamps may be used to measure the availability of appropriated funds to the Bedding Division of the Board of Health for expenditures. S. B. 200; Opinion 0-1311.

No warrant may be issued by the Comptroller against the appropriations to the Bedding Division unless the total receipts exceed the total expenditures by the amount of the warrant at the time its issuance is requested. S. B. 200.

0-1448 To: L. L. Roberts, County Auditor, Hutchinson
County
Date: September 27, 1939

An officer whose term of office has terminated is not authorized to collect delinquent fees earned by him while in office; his successor shall collect such fees and pay them to said retiring officer, provided such fees are collected within one year after termination of the office and such retiring officer shall be entitled to retain, when collected, only such part of such delinquent fees as is sufficient to complete the maximum compensation authorized by Arts. 3883, 3883-a, and 3886, R. C. S. Arts. 3891, 3892, 3897, R. C. S.

0-1451 To: E. H. Griffin, County Attorney, Young County
Date: September 23, 1939

The moneys collected from the registration of motor vehicles and paid into the road and bridge fund shall be expended in each commissioners' precinct in proportion to the amount collected from each precinct unless in the judgment of the commissioners' court a necessity exists to expend said fund in a proportion other than that in which they were collected because of the conditions

of the roads in the respective precincts. Articles 6740, 6675A-10, R. C. S.; *Stovall v. Shivers*, 103 S. W. (2d) 363.

0-1453 To: Mrs. C. A. Teagle, Secretary, Texas Prison Board, Houston
Date: September 23, 1939

The Texas Prison Board may employ either a man or woman as steward at Goree State Farm. S. B. 427, 46th Leg.; Art. 10, R. C. S.

0-1459 To: Clifford B. Jones, President, Texas Technological College, Lubbock
Date: September 30, 1939

The residence of a minor son of an army officer is in the state of residence of his father. Therefore, if the residence of such army officer is in a state other than Texas, the reciprocal fee law is applicable to the son upon registration in a state institution of collegiate rank. Art. 2654c, R. C. S.; Letter Opinion, Sept. 13, 1933; Conference Opinion 2977; *Trigg v. Trigg* (Mo. 1931), 41 S. W. (2d) 583; *Owens v. Stovall*, 64 S. W. (2d) 360; *Harris v. Harris*, 215 N. W. 661.

0-1463 To: Geo. W. Cox, State Health Officer
Date: September 22, 1939

Neither the Departmental Appropriation Bill (S. B. 427, Acts 46th Leg.) nor any other statutes of this state prohibit the State Board of Health from sending the proposed letter, submitted to this department, to city health officers, county health officers and other persons interested in public health, inviting them to attend the annual meeting of the Texas State Public Health Association.

0-1477 To: O. Kennedy, County Attorney, Bee County
Date: September 30, 1939

The commissioners' court cannot legally levy a county tax without all members of the court being present. Art. 2354, V. A. C. S.; *Free et al. v. Scarborough*, 8 S. W. 490; *Brooks et al. v. State*, 41 S. W. (2d) 714.

The commissioners' court cannot legally meet outside of the county. Art. I, Sec. 13, Constitution of Texas; Art. 2348, V. A. C. S.; *Tarrant County et al. v. Smith et al.*, 81 S. W. (2d) 537; *Merrick County v. Batty*, 4 N. W. 959.

0-1479 To: W. Lee O'Daniel, Governor of Texas
Date: September 30, 1939

"If at any time state funds are not available to pay all grants of assistance in full" in Sec. 44 of S. B. 36, Acts 46th Leg., means that no warrants shall be issued to pay such grants unless there are sufficient moneys in the Old Age Assistance Fund to pay such warrants in full. It would be necessary for the legislature to authorize the issuance of warrants in excess of moneys actually in the fund at date of issuance. Art. III, Sec. 51b, Constitution of Texas; H. B. 26, Ch. 472, p. 1854, 44th Leg.; H. B. 8, Ch. 495, p. 2040, 44th Leg.

S. B. 427, 46th Leg., makes a separate appropriation of the income of the fund for each of the fiscal years of the biennium.

0-1480 To: Tom C. King, State Auditor
Date: September 25, 1939

Old age assistance warrants issued against the State Department of Public Welfare Fund are valid obligations of the State, the validity of which is in no way affected by the fact that they may be transferred to investors and held by them, provided that they are presented to the State Treasurer for payment "within two years from the close of the fiscal year" in which such warrants were issued. S. B. 36, 46th Leg.; Arts. 4371, as amended, 4386, R. C. S.

0-1484 To: John R. Shook, Criminal District Attorney,
Bexar County
Date: September 29, 1939

Premium costs of bonds purchased for the County Permanent School Fund should be charged to that fund and repaid to such fund out of the first interest accruing on said bonds. Art. VII, Sec. 6, Constitution of Texas; Art. 2824, R. C. S.

Interest accrued on such bonds at date of purchase should be paid out of the "available fund." *Oge et al. v. Froeboese et al.*, 66 S. W. 688.

0-1999 To: Thos. D. Broad, Secretary - Treasurer, State
Board of Architectural Examiners
Date: September 8, 1939

Opinion 0-1101 which holds that the State Board of Dental Examiners cannot legally employ one of its members as secretary does not apply to the State Board of Architectural Examiners. Arts. 249a, 4550a, R. C. S.

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