

MONTHLY REPORT
OF THE
ATTORNEY GENERAL
OF THE
STATE OF TEXAS

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GERALD C. MANN
ATTORNEY GENERAL

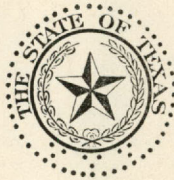
MONTHLY REPORT
OF THE
ATTORNEY GENERAL
OF THE
STATE OF TEXAS

OPINIONS RENDERED

April 1, 1940

To

April 30, 1940



GERALD C. MANN
ATTORNEY GENERAL

VOLUME 2, NUMBER 4

APRIL, 1940

PRESS OF VON BOECKMANN-JONES CO., AUSTIN, TEXAS

0- 683-A To: Albert J. Hutson, Jr., County Attorney, Trinity County

Date: April 15, 1940

Neither the county tax assessor-collector nor anyone else has the power or authority to levy on and sell real estate for delinquent taxes except after foreclosure of the tax lien by a court as provided by Art. 7328a, V. A. C. S. Art. VIII, Secs. 13, 15, 35, Constitution of Texas; Arts. 7272, 7273, 7274, 7275, 7276, 7277, 7278, 7280, 7281, 7282, R. C. S.; Acts 1931, 42nd Leg., R. S., H. B. 440, Ch. 141, p. 237, *Dunn v. Harris*, 86 S. E. 556, 144 Ga. 157; *Davis, et al., v. Santa Rosa Infirmary*, 220 S. W. 125; *Mexia Independent School District v. City of Mexia*, 133 S. W. (2d) 118; *Brown v. Bonough*, 111 Tex. 275, 232 S. W. 490; 39 Tex. Jur. 92. (See opinion for citation of additional authorities.)

0-1077-A To: Julian Montgomery, State Highway Engineer

Date: April 17, 1940

The State Highway Commission is without authority, after bids are received, opened, and read on a highway project, to permit the low bidder on such project to withdraw his bid, and return to such low bidder the deposit made as a guaranty on such bid. *State v. Scholz Brothers*, 4 S. W. (2d) 661; *Edwards, et al., v. Trinity & B. V. Railway Company*, 118 S. W. 572; Opinion 0-1077 re-affirmed. (See opinion for citation of additional authorities.)

0-1251 To: L. L. Geren, County Attorney, Limestone County

Date: April 1, 1940

Where the defendant in a criminal case files a deferred judgment bond, the justice is not entitled to his trial fee until the deferred judgment is entered and thereafter the statutory time elapses to make it final insofar as his jurisdiction is concerned. Arts. 698, 1052, C. C. P.; Opinion 0-1759.

0-1363 To: George W. Cox, State Health Officer

Date: April 4, 1940

This opinion deals with the proposed merit system for the State Board of Health.

0-1582 To: A. J. Bryan, Jr., Criminal District Attorney,
Hillsboro
Date: April 4, 1940

In a felony case where the punishment of the defendant is assessed at a fine and a term in jail and the sentence is suspended, the period of suspension is co-existent with the said jail term, and the defendant may have such sentence dismissed upon the expiration of such term. In such a case, the suspension applies also to the costs in the case. Arts. 776, 779, 780, C. C. P.; *Brittian v. State*, 214 S. W. 351; *Clare v. State*, 54 S. W. (2d) 127; *McFadden v. State*, 300 S. W. 54; *Bowers v. State*, 13 S. W. (2d) 702; 12 Tex. Jur. 717, 718.

0-1635 To: M. O. Flowers, Secretary of State
Date: April 13, 1940

The taxable capital of the Matador Land and Cattle Company, Ltd., for the purpose of calculating the corporation's permit filing fee should be accepted on \$1,461,000.00, being the full amount of the shares subscribed and in the hands of stockholders. Art. XII, Sec. 6, Constitution of Texas; Arts. 1353, 1354, 3914, as amended, 7084, R. C. S.; *Palmer's Company Law*, 15th Ed., pp. 96, 110, 146; *Lock and Trotman v. Queensland Investment Land Mortgage Co., Ltd.*, L. R. C. A., p. 461.

0-1680 To: Ben J. Dean, District Attorney, Breckenridge
Date: April 1, 1940

A contract by the commissioners' court for the lease of road machinery payable in monthly installments with an option to purchase is void. Art. III, Sec. 52; Art. XI, Sec. 2, Constitution of Texas; Arts. 1659, 2351, V. A. C. S.; 11 Tex. Jur. 632; Opinions 0-1317, 0-1685, 0-1839.

0-1715 To: Clinton Owsley, Director, Gas Utilities Division,
Railroad Commission of Texas
Date: April 4, 1940

The Railroad Commission in exercising its express power to fix rates for gas to be charged by a distributing utility must also exercise the express duty conferred upon it to make an equitable division between the "mere producer" on the one hand and the distributor or seller on the other hand. Collateral to this latter express jurisdictional power is the necessarily implied power to require annual reports from the mere producers of gas. Arts. 6051, 6053, 6054, R. C. S.; *Humble Oil & Refining Company, et al., v. Railroad Commission of Texas, et al.*, 128 S. W. (2d) 9.

0-1847 To: Stirling T. Phelps, County Attorney, Webb
County
Date: April 11, 1940

It is not within the proper scope of the functions of this department to serve as a quasi-appellate tribunal for the correction of what are conceived to be errors committed by the courts of this State. The method for reviewing and correcting such errors does not lie in an appeal to this department for an opinion upon a disputed question, but in an action by the proper reviewing tribunal. H. B. 614, Acts 46th Leg.

0-1869 To: George H. Sheppard, Comptroller of Public
Accounts
Date: April 13, 1940

The Comptroller's Department is authorized to issue warrants in payment of the expenses incurred by the Assistant District Attorney for the 72nd Judicial District of Texas appointed under Art. 326 (L), V. A. C. S., against the funds appropriated by the Judiciary Appropriation Bill when such expenses are properly incurred under the direction of the District Attorney and in discharge of the duties of the District Attorney. Acts 1939, 46th Leg., R. S., H. B. 257.

0-1891 To: J. B. Allred, County Auditor, Baylor County
Date: April 20, 1940

Expenses of the County Clerk of Baylor County for postage and extra help must be paid out of the fees earned by said officer, and the commissioners' court is without authority to allow payment of same by the county. Arts. 3897, 3899, V. A. C. S.; *Mills County v. Lampasas County*, 40 S. W. 403; 11 Tex. Jur. 563. (See opinion for citation of additional authorities.)

0-1897 To: Bascom Giles, Commissioner, General Land
Office
Date: April 13, 1940

The right of reinstatement existing in favor of a second purchaser is an enforceable, vested right which, so long as it is outstanding, is an "intervening right" within the meaning of Art. 5326, R. C. S., which operates to bar a reinstatement of the first forfeited sale. *Gulf Production Company v. State*, 231 S. W. 124; *Magnolia Petroleum Co. v. Walker*, 83 S. W. (2d) 929; *Cruzan v. Walker*, 26 S. W. (2d) 908; *Freels v. Walker*, 26 S. W. (2d) 627; Opinions of the Attorney General, 1930-32, p. 230; Opinions 0-760, 0-760 Sup. overruled and withdrawn.

0-1901 (Conference Opinion 3101)

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

Date: April 24, 1940

A person who is not a registered professional engineer and who describes himself in advertisements as a "graduate electrical and mechanical engineer" or as an "engineer" is not, as a matter of law, guilty of violating the Engineer Registration Act. Art. 3271a, Sec. 1, V. A. C. S.

Whether the use of the terms "graduate electrical and mechanical engineer" and "engineer" tend to convey the impression that the user is a "professional engineer" as defined in Sec. 2, Art. 3271a, V. A. C. S., is a question of fact.

0-1929 To: Homer Garrison, Jr., Director, Department of
Public Safety

Date: April 26, 1940

It is not permissible for the State to present evidence of the amount of alcohol in the system of a defendant charged with driving a motor vehicle while under the influence of intoxicating liquor as determined by breath tests, blood tests, and urine tests made by or at the instance of an officer or officers where there is an invasion of the body or person of the defendant for the purpose of obtaining such evidence, unless the defendant waives his privilege against self-incrimination which is incident to the use of such evidence. Art. I, Secs. 9, 10, Constitution of Texas; 4th Amendment, 5th Amendment, Constitution of the United States; Art. 802, P. C., as amended; Arts. 726, 727, C. C. P.; *Innes v. State*, 106 Tex. Cr. R. 524, 293 S. W. 821; *Cordes v. State*, 54 Tex. Cr. R. 204, 112 S. W. 943; *A. & N. W. Ry. Co. v. Cluck*, 97 Tex. 172, 77 S. W. 403, 64 L. R. A. 494; *Kennison v. State*, 97 Tex. Cr. R. 154, 260 S. W. 174; *Wragg v. Griffin*, 185 Iowa 243, 170 N. W. 400, 2 A. L. R. 1327. (See opinion for citation of additional authorities.)

0-1934 To: George H. Sheppard, Comptroller of Public
Accounts

Date: April 6, 1940

As a meeting of the Parent-Teachers Association is an "educational gathering" within the meaning of Art. 2658, R. C. S., and as said gathering is not a "convention" within the rider to the departmental appropriation bill, traveling expenses of the Deputy State Superintendent of Public Instruction incurred in speaking at said meeting are legal charges against the appropriation for traveling expenses of the Department of Education. Acts 1939, 46th Leg., R. S., S. B. 427.

The district meeting of Delta Kappa Gamma (a national private organization of women teachers) is a "convention" within the meaning of the rider to the departmental appropriation bill, S. B. 427, supra.

Traveling expenses of the Deputy State Superintendent of Public Instruction incurred in attending or directing music for a Chamber of Commerce banquet and singing for a Rotary Club banquet and the First Methodist Church are not legal charges against the appropriation for traveling expenses of the Department of Education. Art. 2658, R. C. S.; Acts 1939, 46th Leg., R. S., S. B. 427.

0-1937 To: Walter C. Woodward, Chairman, Board of
Insurance Commissioners
Date: April 19, 1940

The Board of Insurance Commissioners has the power and authority to issue a license to do business in this State to a foreign company or association engaged in the business of life or casualty insurance on the assessment or natural premium plan although such company or association has certain additional rights within its home state, provided that such license is limited to the business of writing life or casualty insurance upon the assessment or natural premium plan. Arts. 4781, 4860a-18, V. A. C. S.; *State ex rel. National Life Association of Hartford, Conn., v. Matthews, State Superintendent of Insurance*, 49 N. E. 1034; *American Automobile Insurance Company v. Palmer, Insurance Commissioner*, 140 N. W. 557; 32 C. J. pp. 99C, 991. (See opinion for citation of additional authorities.)

0-1947 To: Homer Garrison, Jr., Director, Department of
Public Safety
Date: April 25, 1940

The Department of Public Safety is authorized to seize under a search warrant punch boards, tip sheets, and/or slot machines from the warehouse or distributing point of a person or persons engaged in the business of distributing said devices. However, members of said department are authorized to seize slot machines or any other device which is a gambling device per se at any place where the same may be found when such members are at said place by lawful means. Art. I, Sec. 9, Constitution of Texas; Arts. 619, 630, 632, 636, 637, P. C.; Arts. 4, 4a, C. C. P.; *Scott v. State*, 95 S. W. (2d) 140; *Starnes v. State*, 21 Tex. 693; *Estes v. State*, 10 Tex. 300; *Moore v. Adams*, 91 S. W. (2d) 447.

0-1973 To: Clifford B. Jones, President, Texas Technological College
Date: April 5, 1940

The reasonable and proper expenses involved in the proposed trip of the Director of the Division of Extension of Texas Technological College to the meeting of the Association of Texas Colleges, April 25-27, 1940, within the limitations set out in H. B. 255, Acts 46th Leg., may be paid out of the available funds of the Division of Extension of said college.

0-2000 To: Bert Ford, Administrator, Texas Liquor Control Board
Date: April 1, 1940

No refund can legally be made for taxes paid where intoxicating liquors upon which stamps had been placed were subsequently destroyed by fire, explosion, tornado, and other catastrophes. Art. 666-21, P. C.

0-2007 To: Orville S. Carpenter, Chairman and Executive Director, Texas Unemployment Compensation Commission
Date: April 27, 1940

This opinion deals with the application of the Texas Unemployment Compensation Act to various situations concerning husband and wife. Art. XVI, Sec. 15, Constitution of Texas; Arts. 1306, 4714, 5221-b-17 (f) (4), V. A. C. S. (See opinion for citation of additional authorities.)

0-2012 To: John C. Marburger, County Attorney, Fayette County
Date: April 17, 1940

It is not a violation of the Stock Law to stake out livestock on public property or upon private property without the consent of the owner. Art. 1370, V. A. P. C.; 1 R. C. L. 1149, 39 Tex. Jur. 369.

0-2018 To: Joe Kunschik, Commissioner, Bureau of Labor Statistics
Date: April 19, 1940

Under the facts stated to this department, the booking agent (who secures information on wrestlers, contacts promoters,

etc.) is not an employment agent and is therefore not required under Arts. 5208-5221, R. C. S., and Arts. 1584-1593, P. C., to obtain an employment agency license before engaging in such business.

0-2021 To: Harry Knox, Chairman, State Board of Control
Date: April 19, 1940

The Board of Control has the authority to enter into a contract with an undertaker for the preparation and burial of indigent inmates of certain state eleemosynary institutions. Arts. 634a, 635, 642, 643, and 644, R. C. S., which govern the purchase of supplies by the State, are not applicable in the letting of such burial contract. Art. 660, R. C. S.

0-2029 To: Ralph Logan, County Attorney, Tom Green County
Date: April 11, 1940

When a trustee is appointed to the board of trustees of an independent school district governed by Art. 2783 (a), V. A. C. S., to fill a vacancy created by the resignation of a member, such appointment is by Art. 2783 (b), V. A. C. S., for the unexpired term of the resigned member. Art. IV, Sec. 12, Constitution of Texas; Arts. 2740 (b), Sec. 4; 2745, 2774, Secs. 3, 4; 2777; 2777 (a); 2777 (b), V. A. C. S.; Letter Opinion March 9, 1933.

In larger independent school districts candidates for the office of school trustee may file their names with the secretary of the school board requesting that they be placed on the ballot, and the board under the general powers vested in it may enter an appropriate order fixing the date within which the filings may be made. Arts. 2746 (a), 2776, 2783 (b), V. A. C. S.

0-2031 To: George H. Sheppard, Comptroller of Public Accounts
Date: April 4, 1940

The Comptroller of Public Accounts has no authority under Art. 7065a-13 (b), V. A. C. S., to honor the motor fuel tax refund claim of individuals purchasing motor fuel from a distributor without the license required for such purpose by the statute referred to.

0-2035 To: L. R. Thompson, County Auditor, Taylor
County
Date: April 8, 1940

The Iberis Common School District was not validly annexed to the Wylie School District or the two districts consolidated so as to form a de jure Wylie Common Consolidated School District including the territory of the Iberis District; nor is the Wylie Common Consolidated School District, including the territory of the Iberis District, a rural high school district. Art. III, Sec. 53; Art. VII, Sec. 3, Constitution of Texas; Arts. 2742-F, 2806, 2922a, 2922a-1, V. A. C. S.; Acts 1937, 45th Leg., 2nd C. S., H. B. 59, Ch. 23, p. 1898; *Fritter v. West*, 65 S. W. (2d) 414; *Brownfield v. Tongate*, 109 S. W. (2d) 352; Letter Opinion, January 24, 1938.

0-2044 To: Homer Garrison, Jr., Director, Department of
Public Safety
Date: April 25, 1940

Private persons or their duly appointed representatives who show that they have an interest in the accident reports filed with the Department of Public Safety are entitled to inspect such reports, subject to reasonable regulations adopted by said department. Art. 6687a, Secs. 8, 12, V. A. C. S. (See opinion for citation of additional authorities.)

Assuming that there is no pending litigation which would involve any of these reports, the Department of Public Safety, in the exercise of its sound discretion, could by complying with Arts. 4413 (4), 4413 (6), V. A. C. S., adopt such rules and regulations that would forbid either the issuance of certified copies of these reports or the furnishing of information contained in such reports.

See opinion for discussion of whether certified copies of these reports are subject to subpoena duces tecum by the courts of this State. Art. 462, C. C. P. (See opinion for citation of additional authorities.)

0-2048 To: Mortimer Brown, Executive Secretary, Teacher
Retirement System
Date: April 1, 1940

Where the accumulated contributions are designated in the Teacher Retirement System to be paid to a third party, the same should be so paid regardless of the fact that in a subsequent will the deceased left all her property, both real and personal, to someone else. *White, et al., v. White*, 32 S. W. 48; *Interna-*

tional Travelers' Assn. v. Bettis, 35 S. W. (2d) 1040; Opinions 0-129, 0-2009; Letter Opinion, May 24, 1938, expressly overruled.

The money here should be paid to the minor designated as beneficiary if her disabilities have been removed, or to the county clerk if her disabilities have not been removed, and if there has been no legal guardian appointed for her. Opinion 0-1439.

0-2051 To: George H. Sheppard, Comptroller of Public
Accounts
Date: April 1, 1940

The Comptroller of Public Accounts does not have authority to authorize and permit the county tax assessor-collector to refund state ad valorem taxes mistakenly but voluntarily paid. Letter Opinion, March 25, 1937; Opinions 0-1044, 0-1749.

0-2055 To: E. P. Jennings, County Auditor, Hardin County
Date: April 1, 1940

A person who holds the office of justice of the peace may also legally qualify and serve as the recorder, or judge, of a corporation court. Art. XVI, Sec. 40, Constitution of Texas; Art. 1195, R. C. S.; *Gaal v. Townsend*, 14 S. W. 355; *Luera v. State*, 63 S. W. (2d) 699; Letter Opinions, March 14, 1913, and October 3, 1913, expressly overruled.

0-2056 To: Dan W. Jackson, Criminal District Attorney,
Houston
Date: April 2, 1940

School trustees and drainage commissioners are public officers of this State and are disqualified under Art. 2940, R. C. S., from acting as judges, clerks, or supervisors of any election in this State. School teachers and other employees of the various school systems and employees of the various drainage districts who are not holders of an office of profit or trust under the United States or this State, or in any city or town of this State, and who are not otherwise disqualified by law, may legally act as judges, clerks, or supervisors in said elections. *Mootz v. Belyea*, 60 N. D. 741, 236 N. W. 358, 75 A. L. R. 1347; *Rowan v. King*, 94 Tex. 650, 55 S. W. 123; 34 Tex. Jur. pp. 324, 325-326, 332-334; 15 Tex. Jur. Sec. 13, p. 732. (See opinion for additional citations.) Art. 2940, R. C. S., as amended, is directory insofar as said article affects the validity of elections in the holding of which disqualified officers participated, in the absence of some imputa-

tion of attempted exercise of influence upon electors, or unfairness or fraud. *Cayle v. Alexander*, 75 S. W. (2d) 706; *Savage v. Umphries*, 118 S. W. 902; *Miller, et al., v. Tucker, et al.*, 119 S. W. (2d) 92.

0-2058 To: B. Carl Holder, Secretary, Texas State Board of Dental Examiners

Date: April 18, 1940

The maintenance of chain dental offices is not prohibited by the laws of this State. Title 12, Ch. 7, Arts. 752, 752c, 754, P. C.; Acts 1937, 45th Leg., H. B. 36, Secs. 1, 4, 6; *Sherman v. State Board of Dental Examiners*, 116 S. W. (2d) 843; *Pistole v. State*, 69 Tex. Cr. R. 127, 150 S. W. 618; *Semlar v. Oregon State Board*, 294 U. S. 608.

Under the facts submitted it is for the judge or jury to determine whether the doctor in question is acting in violation of the laws of Texas regulating the practice of dentistry. Arts. 752a, 752b, 754a, V. A. P. C.

0-2065 To: R. C. Slagle, Jr., Criminal District Attorney, Sherman

Date: April 1, 1940

Under the facts submitted to this department, where a motor company in Texas makes a trade for an Oklahoma car and then removes the car out of this State for re-sale in Oklahoma, said car need not be registered in Texas. Art. 827b, 1434, 1435, 1436-1, Sec. 60, V. A. P. C.; Art. 6675a-2, V. A. C. S.; Opinion 0-1491.

0-2073 To: Homer Garrison, Jr., Director, Department of Public Safety

Date: April 1, 1940

The Department of Public Safety is under a duty to issue a certificate of title showing a lien for a specific sum of money and for "future debts" if the application states that such lien is for a specific sum of money and for "future debts." Art. 1436-1, V. A. P. C.; H. B. 407, Acts 46th Leg.; *H. W. Williams & Co. v. Bell*, 8 S. W. (2d) 743; *Poole v. Cage*, 214 S. W. 500; *Freilberg v. Magale*, 7 S. W. 634.

0-2075 To: A. J. Bryan, Jr., District Attorney, Hillsboro
Date: April 4, 1940

The County Board of Trustees of Hill County exceeded their authority in ordering the annexation of the Pleasant View Common School District to the Blum Rural High School District without the approval of the Board of Trustees of the Pleasant View District. Arts. 2922a, 2922b, 2922c, R. C. S.; *County Board of School Trustees of Limestone County v. Wilson*, 15 S. W. (2d) 144; *County v. Mitchell*, 38 S. W. (2d) 770, 48 S. W. (2d) 803; Opinion 0-1639.

0-2077 To: M. O. Flowers, Secretary of State
Date: April 8, 1940

The application and certificate of the United Fraternal Benefit Association considered together constitute a security within the meaning of the Securities Act. Art. 600a, V. A. C. S.

0-2084 To: Homer P. Rainey, President, The University of
Texas
Date: April 5, 1940

The heads of State educational institutions are not exempt under Acts 1939, 46th Leg., R. S., H. B. 255, Subsec. 6, from the provision there imposed limiting payment of traveling expenses to those incurred in the discharge of State business. Art. XVI, Sec. 6, Constitution of Texas; Letter Opinion, October 1, 1933; Opinion 0-1195.

As attendance at the meetings of the Southern Association of Colleges and Secondary Schools and the American Association of Teachers' Colleges of the president of a State teachers' college is for a State or public purpose, the authorized traveling expenses incurred in attending such meetings may be approved and paid by the Comptroller. H. B. 255, supra; Letter Opinion, October 1, 1933; Opinion 0-1973.

0-2092 To: Charles E. Baughman, Chief Clerk, Department of Agriculture
Date: April 1, 1940

The premium on the official bond of the Chief Clerk of the Department of Agriculture may not legally be paid by said department out of its contingent expense fund. Arts. 49, 50, R. C. S.; *McCalla v. City of Rockdale*, 246 S. W. 654.

0-2094 To: V. B. Goar, County Attorney, Blanco County
Date: April 5, 1940

The Blanco County Special Road Fund may be expended by the commissioners' court to build and maintain public roads in Road Precinct No. 3 as such court may determine. Art. VIII, Sec. 9, Constitution of Texas; Art. 6790, V. A. C. S. *Dallas County v. Plowman*, 91 S. W. 222; Opinion 0-1844.

0-2095 To: Woodrow Curtis, County Attorney, Frio County
Date: April 27, 1940

A district clerk has no legal authority to charge and collect a recording fee for an officer's return on process where such return is shown in "brief form"—that is, by a mere notation on the clerk's file docket. Arts. 1973, 1899, 3927, V. A. C. S.; *Terrell v. King*, 14 S. W. (2d) 786; *Texas M. R. Ry. v. Parker*, 66 S. W. 583; 34 Tex. Jur. 508. (See opinion for citation of additional authorities.)

0-2098 To: Charley Lockhart, State Treasurer
Date: April 8, 1940

A consignment contract is not subject to the stamp tax levied by Art. 7047e, V. A. C. S. *Stieff v. City of San Antonio*, 111 S. W. (2d) 1086; *Whitehouse Bros v. S. H. Abbott and Son*, 228 S. W. 599.

0-2100 To: Ralph L. Buell, Chief, Certificate of Title Section, Department of Public Safety
Date: April 1, 1940

Under the facts submitted to this department, the Department of Public Safety should refuse issuance of a certificate of title to the motor company in question on the ground that necessary information has not been furnished. Art. 1436-1, Secs. 35, 38, V. A. P. C.

0-2102 To: J. D. Looney, County Auditor, Bowie County
Date: April 1, 1940

The commissioners' court is not authorized to create the office of county veterinarian and pay him a salary out of county funds. 11 Tex. Jur. 563-4-5.

0-2103 To: Wardlow Lane, District Attorney, Center
Date: April 20, 1940

School funds of a consolidated common school district may not legally be used to pay attorney's fees incurred by certain members of a previous board of trustees in the defense of a quo warranto suit brought against them. Arts. 2748, 2749, 2827, V. A. C. S. (See opinion for citation of additional authorities.)

0-2106 To: J. R. Parten, Board of Regents, The University
of Texas
Date: April 16, 1940

The catalog and bulletins of The University of Texas mailed to students and prospective students of that institution constitute an offer to contract on the part of the State through the Board of Regents, and the acts of registration constitute acceptance of such offer by the student. (See opinion for citation of authorities.)

Under the facts submitted to this department, the parties have not altered the original contract (by mailing notices of new rules and regulations, notice to parent that the student had been placed on scholastic probation, etc.).

0-2108 To: Holvey Williams, Criminal District Attorney,
Waco
Date: April 1, 1940

The authorization of the commissioners' court in addition to the approval of the City Planning Commission, or of the governing body where no such commission exists, must be given before the county clerk is authorized to file or record a plat of a subdivision lying outside of, but within five miles of, a city of 25,000 or more population. Arts. 974a, 6626, V. A. C. S.; Arts. 427b, 1137b, P. C.; Acts 1931, 42nd Leg., Ch. 217, p. 371; *Hollis v. Parkland Corporation*, 40 S. W. (2d) 53; *Bishop v. Houston Independent School District*, 119 Tex. 403, 29 S. W. (2d) 312; 39 Tex. Jur., p. 253, Sec. 135, and cases cited. (See opinion for additional citations.)

0-2109 To: M. O. Flowers, Secretary of State
Date: April 18, 1940

Based upon the facts submitted to this department, the Distribuidora de Petroleos Mexicanos, a corporation of Mexico, the entire capital stock of which is owned by the Mexican Gov-

ernment, contemplates doing business in Texas within the meaning of Art. 1529, R. C. S., and, therefore, is required to obtain a permit to transact business in this State.

A foreign corporation doing business in this State under a lawful permit is subject to suit in our courts; even without a permit it is subject to the jurisdiction of our courts to the extent of property owned by the corporation within the jurisdiction of the State, whether jurisdiction for personal judgment could be obtained or not.

0-2110 To: John C. Marburger, County Attorney, Fayette
County
Date: April 16, 1940

The compensation of a court interpreter in a civil case is determined by the judge of the court, but in no instance is such compensation to exceed \$5.00 per day. The compensation is payable by the day rather than by the case, and is to be from the time in which he is required to be in attendance upon the court until the time of his discharge. The court or clerk is authorized to issue warrants in payment of such compensation, which warrants are payable from the general fund of the county. Arts. 1661, 2076, 2372, 3712, R. C. S.; Sutherland on Statutory Construction, Sec. 145 at p. 195.

0-2111 To: Fred Norris, County Auditor, Polk County
Date: April 20, 1940

The Commissioners' Court of Polk County cannot build a house or make other improvements upon county-owned school land with funds derived from the rental or lease of said lands. Art. VII, Sec. 6, Constitution of Texas; Arts. 2825, 2826, R. C. S.; *Falls County v. De Laney*, 73 Tex. 463; *Taber v. Dallas County*, 101 Tex. 241; 3 Bogert's Trust and Trustees, Sec. 481, et seq.

The commissioners' court may charge off as uncollectible an account due and owing the available school fund after said court has exhausted all reasonable means to collect said account.

0-2112 To: B. M. Whiteacre, County Auditor, Grayson
County
Date: April 1, 1940

If a city marshal files a case in a justice court and performs services, he is entitled to the same fees as the sheriff or constable would be entitled to for performing similar services; therefore,

the county is liable under Acts 46th Leg., H. B. 205, for one-half of the fees of such marshal where the defendant fails to pay the fine and costs. Arts. 999, 1147, R. C. S.; Arts. 36, 1067, C. C. P.

0-2114 To: Thomas L. Blanton, Jr., County Attorney,
Shackelford County
Date: April 8, 1940

In a county-wide local option election where the county as a whole is wet regarding all alcoholic beverages, the proper issues to be presented to be voted upon would be "For prohibiting the sale of all alcoholic beverages," and "Against prohibiting the sale of all alcoholic beverages." If the county as a whole should vote for prohibiting the sale of all alcoholic beverages, the county would be dry regarding all alcoholic beverages, and the various precincts would have no authority to call and hold any local option election; if the county should vote against prohibiting the sale of all alcoholic beverages, the status of the precincts would remain the same, and such precincts could legally hold a local option election submitting to the voters of the different precincts the separate and distinct statutory issues upon the question of legalizing the sale of malt and vinous beverages or liquor at any time after the county-wide election in compliance with the Liquor Control Act. Art. 666-40, V. A. P. C.; *Houchins v. Plainos, et al.*, 110 S. W. (2d) 549; Letter Opinion, Feb. 4, 1936; Opinion 0-682.

0-2115 To: Game, Fish and Oyster Commission
Date: April 16, 1940

The Game, Fish and Oyster Commission in the employment of skilled laborers such as carpenters, is authorized to hire and pay the prevailing wage scale in the locality where the work is to be performed. Acts 1939, 46th Leg., R. S., S. B. 427, and rider thereto.

0-2116 To: C. Woodrow Laughlin, County Attorney, Jim
Wells County
Date: April 17, 1940

Under certain facts the board of trustees of an independent school district may employ and provide compensation for a board secretary who is not himself a trustee. Arts. 2779, 2827, R. C. S.; *Board of Trustees of Independent School District of Houston v. Dow*, 63 S. W. 1027.

The tax assessor of an independent school district may not legally be paid a fee in excess of two per cent of the whole amount of taxes assessed by him. Art. 2791, R. C. S.

0-2117 To: A. M. Turney, County Attorney, Brewster
County
Date: April 27, 1940

The payment of expenses of various members of the commissioners' court in attending a meeting of the State Highway Commission is not authorized by law and is, therefore, illegal. 11 Tex. Jur. pp. 563, 564, 565.

A taxpaying citizen has no right or authority to bring suit to recover funds illegally expended by the commissioners' court. Where the majority of the court are charged with dereliction of duty, the county treasurer has the statutory authority to protect the county's rights and direct the institution of suits in his name for the use of the county upon the bonds of the county judge and the county commissioners. Arts. 339, 1578, 1579, 1710, 1928, 2340, V. A. C. S.; *Hoffman, et al., v. Davis, et al.*, 100 S. W. (2d) 94.

0-2119 To: George H. Sheppard, Comptroller of Public
Accounts
Date: April 27, 1940

The Comptroller, in the enforcement of the motor fuel refund law, is authorized to incur expenses when they are reasonably necessary in the enforcement of said law, including the preparation and prosecution of cases arising thereunder; such expenses are properly chargeable against the \$1.00 refunding filing fee appropriation contained in Sec. 1, S. B. 179, Acts 46th Leg., Art. 7065a, V. A. C. S.; Opinion 0-1256; Conference Opinions, Book 56, p. 6.

0-2120 To: George H. Sheppard, Comptroller of Public
Accounts
Date: April 23, 1940

Any person, firm, corporation, or association of persons engaged in Texas in the dual business of "emigrant agent" and "employment agent," as defined by statute is required to pay the occupation tax levied by Subdiv. 40, Art. 7047, V. A. C. S., upon the business of "emigrant agent" and also the license fees levied by Arts. 5221a-1 and 5210, V. A. C. S., respectively upon the business of "emigrant agent" and "employment agent."

0-2121 To: A. E. Wood, Chairman, Game, Fish, and Oyster
Commission
Date: April 11, 1940

Art. 941, Sec. 1e, V. A. P. C., controls and supersedes Art. 929, V. A. P. C., insofar as the prohibition against taking or having in possession fish of certain size. *Texas Pacific Railway Company v. Wimberly, et al.*, 19 S. W. (2d) 604; *Southern Construction Co. v. Halliburton*, 255 S. W. 409; 39 Tex. Jur., Sec. 73; 59 C. J. 910.

0-2122 To: George H. Sheppard, Comptroller of Public
Accounts
Date: April 20, 1940

Sec. 31 of H. B. 36, Acts 46th Leg., which relates to the confidential nature of records concerning applicants and recipients of old age assistance, is applicable to the records kept by the Department of Public Welfare, the Comptroller's Department, and the Treasurer's Department. The warrant register kept by the Comptroller's Department is a record within the contemplation of the above mentioned provision, and said department would not be authorized upon application of an individual to make certified copies of the register. Acts 1939, 46th Leg., R. S., H. B. 36, Sec. 37, Subsec. b; Art. 3722, V. A. C. S.; *Coopersberg v. Taylor*, 266 N. Y. Sup. 359. (See opinion for citation of additional authorities.)

0-2123 To: George H. Sheppard, Comptroller of Public
Accounts
Date: April 4, 1940

The Comptroller of Public Accounts has authority to issue warrants for the payment of a purchase of real property by the Highway Department where it affirmatively appears that title to such realty is good limitation title.

0-2127 To: Richard S. Morris, County Attorney, Arm-
strong County
Date: April 15, 1940

S. B. 367, Acts 46th Leg., which relates to traveling expenses of county commissioners in certain counties, is a local or special law in violation of Art. III, Sec. 56, Constitution of Texas, and is, therefore, unconstitutional and void. *Altgelt v. Gutzeit*, 201 S. W. 400; *Smith v. State*, 49 S. W. (2d) 739; *Wood v. Marfa Independent School District*, 123 S. W. (2d) 429; Opinions 0-18, 0-364, 0-462, 0-899, 0-1986.

0-2128 To: C. J. Wilde, County Auditor, Nueces County
Date: April 16, 1940

Under the facts submitted to this department, the Commissioners' Court of Nueces County may not legally enter into a contract with an expert for the performance of certain services in connection with property valuation. *Marquart v. Harris County*, 117 S. W. (2d) 494; *Roper v. Hall*, 280 S. W. 289.

0-2129 To: Robert J. Allen, County Attorney, Lubbock County
Date: April 1, 1940

If a justice of the peace rendered a valid judgment of conviction which became final in 1937 insofar as his jurisdiction was concerned, and he did not collect his trial fee for same in 1937 from the county, and reported same as a delinquent fee for that year, then he would clearly be entitled to collect same from the county in order to bring his 1937 allowance up to the maximum, regardless of whether or not the fine and costs were ever paid or the judgment satisfied by jail service by the defendant or by the defendant's working same out on the county farm or other public works. Art. 1052, C. C. P.; Opinion 0-616, 0-1759, 0-1868.

If the "judgment of conviction" was deferred under Art. 698, C. C. P., the justice would not be entitled to his trial fee until the "deferred judgment" was rendered, entered, and became final insofar as the jurisdiction of the justice of the peace was concerned.

0-2130 To: Board of Insurance Commissioners
Date: April 13, 1940

The Board of Insurance Commissioners is not authorized to contract and pay for insurance on state-owned property under said board's control when the payment would have to be made from an appropriation for traveling expenses. Opinions 0-184, 0-842, 0-1762.

0-2131 To: Department of Agriculture
Date: April 18, 1940

The traveling expense appropriation to the Department of Agriculture may not be used for the purchase of automobiles; only the specific appropriation of \$4,000 may be used for such purpose. S. B. 427, Acts 46th Leg.; 4 C. J. 1640; 6 C. J. S. 123; 34 Tex. Jur. 314; 25 R. C. L. 396.

0-2132 To: M. O. Flowers, Secretary of State
Date: April 4, 1940

A charter may not legally be issued to a proposed corporation the admitted purpose of which is to acquire and own land within incorporated cities and towns in Texas. Arts. 1302, Subdiv. 47, 1362, 1363, R. C. S.

0-2133 To: L. A. Woods, State Superintendent of Public
Instruction
Date: April 4, 1940

The Board of Trustees of the Reagan Independent School District may call an executive session from which visitors are excluded and legally conduct the regular business of the school district.

0-2134 To: L. A. Woods, State Superintendent of Public
Instruction
Date: April 15, 1940

As the property in question of the Westminster Presbyterian Encampment and the Methodist Kerrville Assembly is not used exclusively by these associations within the provisions of Art. 7150, Sec. 2a, V. A. C. S., said property is subject to all ad valorem taxation, including taxes levied by the Kerrville Independent School District. Art. VIII, Sec. 2, Constitution of Texas; *Morris v. Lone Star Chapter*, 68 Tex. 698, 5 S. W. 519; *Red v. Johnson*, 53 Tex. 284; *Little Theatre v. City of Dallas*, 124 S. W. (2d) 863; *City of Houston v. Scottish Rite Benev. Assn.*, 111 Tex. 191, 230 S. W. 978; 40 Tex. Jur. 108, 109.

Under the facts submitted to this department the abstract books and the abstract plant are subject to taxation. Opinion 0-803.

0-2136 To: S. B. Buchanan, Jr., County Attorney, Val
Verde County
Date: April 4, 1940

The commissioners' court may not legally pay a claim for damages resulting from the death of an employee of the county in a collision while on his way to work. Arts. 1928, 2340, 2351, Subdiv. 10, R. C. S.; *Bryan v. Liberty County*, 229 S. W. 303, 304; *Howard v. Henderson County*, 116 S. W. (2d) 479, 482; *Hardy v. Lubbock County*, 89 S. W. (2d) 240.

0-2137 To: M. O. Flowers, Secretary of State
Date: April 1, 1940

One-tenth of one per cent of the aggregate par value of the securities to be sold in this State plus a \$5.00 filing fee is the proper fee to be charged a foreign corporation under the Texas Securities Act for a permit to sell said securities. Acts 1935, 44th Leg., R. S., H. B. 521, Sec. 35(g).

0-2138 To: G. A. Neal, County Auditor, Ellis County
Date: April 23, 1940

If a person has been actually sworn in as a juror for a given case, week, or term, and is thereafter dismissed the same day by the court, he is entitled to his pay for one day irrespective of whether he actually served in a given case or not; but if he is excused prior to being sworn in as a member of the panel, he is not entitled to collect the jury fee. Art. 2122, R. C. S.; Arts. 1056, 1057, C. C. P.

0-2139 To: Homer Garrison, Jr., Director, Department of
Public Safety
Date: April 8, 1940

A scheme whereby, in substance, a bingo game is operated under a plan in which a player throws either a dart at a board or a ball into slots for the purpose of determining the winning numbers and merchandise certificates as prizes are awarded to the winners, is in violation of the lottery laws of this state. Art. III, Sec. 47, Constitution of Texas; Arts. 619, 620, 621, 654, P. C.; *Wink v. Griffith Amusement Company*, 100 S. W. (2d) 695; *Griffith Amusement Co. v. Morgan*, 98 S. W. (2d) 844; *Stearnes v. State*, 21 Tex. 692; Opinion 0-366. (See opinion for citation of additional authorities.)

0-2140 To: Marion McGee, County Auditor, Hays County
Date: April 27, 1940

The commissioners' court has no authority to issue warrants drawn on the permanent improvement fund for the purpose of improving county parks in the absence of compliance with one of the statutory methods providing for the levy and collection of a tax for such purpose. Art. VIII, Sec. 9, Constitution of Texas; Arts. 6078, 6081e, Secs. 1, 2, R. C. S.; *Ault v. Hill County*, 116 S. W. 359; *Foster v. City of Waco*, 255 S. W. 1104; 11 Tex. Jur. 609. (See opinion for citation of additional authorities.)

0-2141 To: L. A. Woods, State Superintendent of Public Instruction
Date: April 8, 1940

S. B. 297, Acts 46th Leg., leaves no doubt either as to the right of a teacher to assign his salary upon compliance with the requirements therein stipulated or as to the right and duty of the employing district to honor such assignment when regularly executed and duly presented to the assignee for payment.

0-2142 To: D. Richard Voges, County Attorney, Wilson County
Date: April 11, 1940

It was the intention of the Legislature in amending Sec. 1, Art. 952, P. C., and declaring an emergency by Sec. 2, H. B. 432, Acts 46th Leg., that said act would amend all the sections of the original Art. 952, supra. Therefore, Art. 952 as a whole applies to Wilson County. Art. III, Sec. 35, Constitution of Texas; 39 Tex. Jur. pp. 123, 124, 127; *City of Laredo v. Frishmuth*, 196 S. W. 190; *Sutherland on Statutory Construction*, p. 169.

0-2143 To: G. A. Walters, County Attorney, San Saba County
Date: April 19, 1940

There is no express or implied provision in the present laws of this State whereby a county official or any person or persons charged with the administration and enforcement of the Liquor Control Act can prosecute criminally those persons guilty of giving intoxicating liquors to children under age. Art. 666-26, P. C.; Acts 1935, 44th Leg., 2nd C. S., H. B. 77, Art. I, Sec. 49; Art. 534, P. C.

0-2144 To: E. L. Shelton, County Auditor, Johnson County
Date: April 8, 1940

It is the duty of the county clerk to record an instrument properly acknowledged or proven for record and tendered to him regardless of the fact that said instrument has become mutilated. Art. 6626, 6631, 6652, R. C. S.; *Hughes v. Wright and Vaughan*, 97 S. W. 525, 101 S. W. 789; 36 Tex. Jur. 426. (See opinion for citation of additional authorities.)

0-2145 To: H. A. Hodges, County Auditor, Williamson
County
Date: April 8, 1940

The county judge or any other member of the commissioners' court may vote or refrain from voting upon all matters before the court at his discretion regardless of whether or not there is a tie vote. Art. V, Sec. 18, Constitution of Texas; Art. 2342, V. A. C. S.; 2 Tex. Jur. 559, 560; Opinion 0-1716.

0-2145-A To: H. A. Hodges, County Auditor, Williamson
County
Date: April 17, 1940

The county judge or any other member of the commissioners' court may vote or refrain from voting upon all matters before the court at his discretion regardless of whether there is a tie vote, with the exception that all members of the court including the county judge are required to vote when selecting a bank or banker as a depository of the county funds. A failure to vote in such selection is a violation of Art. 425, P. C. Opinion 0-2145.

0-2146 To: George H. Sheppard, Comptroller of Public
Accounts
Date: April 19, 1940

As a horse show conducted for the purpose of raising money for the Finnish relief fund is not a "business enterprise," prizes given at such show are not subject to the tax levied by Art. 7047f, V. A. C. S. Opinions 0-81, 0-1689.

The admission tax is not applicable to the admissions collected at such show. Art. 7047a-19, V. A. C. S.; Opinion 0-820.

0-2148 To: R. L. Crosier, County Attorney, Johnson County
Date: April 11, 1940

A person is a "property taxpayer" within the purview of Art. 2745, R. C. S. (setting forth the qualifications of common school district trustees), if he owns personal property within the district which has been assessed for taxes, notwithstanding that such person is delinquent in the payment thereof. Letter Opinion, April 14, 1936. (See opinion for citation of additional authorities.)

0-2149 To: State Board of Barber Examiners
Date: April 8, 1940

The five year retirement period, (with reference to the renewals of barber licenses) as set out in the Texas Barber Law, begins upon the date of the particular barber's actual retirement from the practice of barbering, and bears no relation to issuance or termination of his annual license. Art. 734a, Sec. 20, P. C.

0-2150 To: Department of Agriculture
Date: April 8, 1940

Trees, plants, and shrubs taken from a forest and sold or offered for sale are subject to the provisions of the General Nursery Stock Law of this State, and any individual, partnership, or corporation failing to comply with the provisions of said law is subject to prosecution thereunder. Arts. 1691-1700, P. C., inc.

0-2151 To: Homer Garrison, Jr., Director, Department of
Public Safety
Date: April 27, 1940

Where a mortgage on a motor vehicle by its terms allows the mortgagee to become a purchaser at a private foreclosure sale, he may so purchase the repossessed property, and the Department of Public Safety would be authorized to issue a certificate of title in such mortgagee's name. However, if the mortgage merely provides that the mortgagee can sell the property at a private sale, a sale by the mortgagee to himself would be void. Opinion 0-1984. (See opinion for citation of additional authorities.)

0-2153 To: Artie Stephens, County Attorney, Hopkins
County
Date: April 11, 1940

A teacher's contract with an individual who does not have a valid teacher's certificate is void, and compensation may not be paid thereunder to the person holding such void contract. The county school superintendent is not authorized to approve vouchers issued to such individual for teaching in a common school district for a period during which such teacher did not hold a valid teacher's certificate. Art. 2882, R. C. S., Art. 291, P. C.; *Richards v. Richardson*, 168 S. W. 50; *Hill v. Smithville Ind. School Dist.*, 239 S. W. 987.

0-2154 To: Gilbert Smith, County Attorney, Jones County
Date: April 11, 1940

A motor vehicle owned by a resident of Texas but which is used exclusively in New Mexico except that the same makes an occasional trip into this State must be registered in Texas. Art. 6675a-2, V. A. C. S.; Arts 802, 827b, P. C.

0-2156 To: Z. D. Allen, District Attorney, Wichita Falls
Date: April 25, 1940

Where a permit has been granted to a person to handle liquor and the permit holder's place of business is within 300 feet of a church, public school, or public hospital, the proper procedure would be to make application for cancellation of said permit. Arts. 666-12, 666-25a, V. A. P. C.

Under the facts submitted, the east door of the Salvation Army Building is a "front door" within the provisions of said act. Opinion 0-2062.

A liquor dealer may rearrange the front door of his building, placing said door where he desires; and in determining whether the liquor store comes within the prohibited distance under said act, the measurements should be from front door to front door as they are actually situated.

0-2157 To: Ernest Guinn, County Attorney, El Paso County
Date: April 18, 1940

Under Sec. 12, Art. 7345b, V. A. C. S., where there has been a judicial foreclosure and sale of property, the owner of such property, or anyone having an interest therein, may within two years from the date of sale redeem the property upon the terms set out in said Sec. 12, Art. 7345b, supra. 61 C. J. 1276; Opinion 0-950.

0-2158 To: Jack Wiech, County Attorney, Cameron County
Date: April 18, 1940

The right of redemption exists in a land owner where his property is foreclosed upon and sold out under court judgment. Sec. 12, Art. 7345b, V. A. C. S., governs the amount the owner is required to pay to the purchaser upon redemption. *Mexia Independent School District v. City of Mexia*, 133 S. W. (2d) 118. Opinion 0-643.

Where the owner finds that it is necessary, under the provisions of Art. 7284, V. A. C. S., to make redemption by payment to the tax collector, the collector, in respect to the terms of the redemption, is governed by Sec. 12, Art. 7345b, V. A. C. S.

0-2162 To: L. A. Woods, State Superintendent of Public
Instruction
Date: April 15, 1940

Assuming that under all the facts and circumstances a valid and enforceable contract had been entered into between the board of trustees of a school district and a teacher, the board may not relieve itself of such valid contractual obligation by subsequently refusing to approve that part of the minutes recording the action of the board when the offer or contract was made. *Brown v. City of Webster City*, 88 N. W. 1070; *Roland v. Reading School District*, 28 A. 995; 30 Tex. Jur. p. 200.

0-2163 To: E. H. Griffin, County Attorney, Young County
Date: April 15, 1940

The lot owned by the Junior Altruistic Club of Olney, Texas, is not exempt from taxation. Art. VIII, Sec. 2, Constitution of Texas; *Santa Rosa Infirmary v. City of San Antonio*, 259 S. W. 926. (See opinion for citation of additional authorities.)

0-2170 To: J. A. Guest, County Attorney, Camp County
Date: April 20, 1940

The Commissioners' Court and the County Treasurer of Camp County must comply with the judgment of the District Court for the Eastern District of Texas, Jefferson Division, and pay the \$3,000 on such judgment, or take proper steps to set the same aside.

0-2172 To: George H. Sheppard, Comptroller of Public
Accounts
Date: April 29, 1940

The distributor's permit held by the Bell Oil and Gas Company covers and authorizes only sales of motor fuel from the bulk plant in Wichita County, and does not, under any conception of the statute governing its issuance and purpose, cover and protect sales of motor fuel wholly consummated within the State of Oklahoma. Art. 7065a, V. A. C. S.

The Comptroller's Department has authority to issue to Bell Oil and Gas Company a motor fuel distributor's permit despite the fact that it has been brought to said department's knowledge that said company is selling motor fuel beyond the limits of the State of Texas. Art. 7065a, V. A. C. S., supra.

A regulation refusing no longer to recognize the practice of the Bell Oil and Gas Company, or other distributors holding a permit in Texas to collect, report, and remit to the Comptroller's Department taxes on sales of motor fuel at points beyond the limits of Texas, and requiring persons and dealers making such purchases and importing the motor fuel into Texas for a "first sale" as defined, to qualify in all respects as "distributors," would not be inconsistent with but rather in strict conformity to the plain terms and requirements of the Motor Fuel Tax Law. Art. 7065a, V. A. C. S., supra.

0-2173 To: G. A. Walters, County Attorney, San Saba
County
Date: April 16, 1940

The authority of the county judge with respect to the ordering and holding of the election of trustees is limited to common school districts and independent school districts having fewer than 500 scholastics as shown by the last preceding scholastic census roll. Arts. 2746, 2746a, V. A. C. S.; Opinion 0-568.

0-2176 To: George H. Sheppard, Comptroller of Public
Accounts
Date: April 16, 1940

A person soliciting orders and delivering patent medicine from house to house in his home town is subject to the occupation tax levied by Art. 7047, Subdiv. 2, R. C. S., on traveling persons selling patent or other medicines, even though he does not go outside the city limits of such town. *Andrews v. White*, 32 Me. 388; *L. B. Price Co. v. City of Atlanta*, 31 S. E. 619; *Martin v. Town of Rosedale*, 29 N. E. 410; *Pegues, Tax Collector, v. Ray*, 23 So. 904.

0-2177 To: Wardlow Lane, District Attorney, Center
Date: April 20, 1940

Under the facts submitted to this Department, the Cameron Independent School District may charge a reasonable amount as tuition to a non-resident scholastic transferred to said district from a common school district; in determining the amount of said tuition no element entering into the cost or expense of

said school system or its maintenance should be excluded. Arts. 2695, 2696, 2697, 2698, 2699, R. C. S.; Art. 2760, Revised Statutes, 1911; Acts 1935, 44th Leg., R. S., Ch. 201, Sec. 1, p. 488; *Slocomb v. Cameron Independent School District*, 116 Tex. 288, 283 S. W. 1064; *Love v. City of Dallas*, 40 S. W. (2d) 20. (See opinion for citation of additional authorities.

0-2178 To: E. L. Shelton, County Auditor, Johnson County
Date: April 15, 1940

A lien instrument dated prior to the effective date of the Stamp Tax Act is subject to said tax upon recordation (assuming that the vendor's lien reserved in said instrument has not been paid and released of record). Art. 7047e, Sec. (a), V. A. C. S.; Letter Opinion, June 17, 1930; Opinion 0-1328.

0-2179 To: A. J. Bryan, Jr., Criminal District Attorney,
Hillsboro
Date: April 15, 1940

A county is not liable for the hospitalization of a transient pauper where the county has no public hospital. Arts. 2351, Secs. 11, 12; 4438, V. A. C. S.; *Willacy County v. Valley Baptist Hospital, et al.*, 29 S. W. (2d) 456.

0-2180 To: Charley Lockhart, State Treasurer
Date: April 16, 1940

A national bank, although in the process of liquidation, is exempt from the stamp tax imposed by Acts 1939, 46th Leg., R. S., S. B. 24. Art. 7047e, V. A. C. S.; *Ross Amigos Oil Co. v. State of Texas* (not yet reported).

0-2181 To: Stephen P. Hebert, County Attorney, De Witt
County
Date: April 20, 1940

Under Art. 2961, R. C. S., relating to poll tax payment by an agent, it is necessary that the taxpayer not only sign an agency authorization but also a statement containing information necessary to enable the tax collector to prepare the poll tax receipt.

Art. 2693, R. C. S., places the mandatory duty upon the tax collector to stamp on the face of any poll tax receipt issued after January 31 of any year, the words, "Holder not entitled to vote." Art. 199, P. C.

0-2182 To: Jesse James, Acting State Treasurer
Date: April 25, 1940

Refunding bonds of the Brazos River Conservation and Reclamation District are not eligible as securities for public depositories. Art. 2529, R. C. S.; Acts 1929, 41st Leg., 2nd C. S., Spec. Laws, Ch. 13, p. 22; Acts 1935, 44th Leg., 1st C. S., Ch. 368, p. 1527; Acts 1939, 46th Leg., R. S., H. B. 564; *Dillon on Municipal Corporations*, Vol. 1, Secs. 18, 34; Opinion 0-152. (See opinion for citation of additional authorities.)

0-2184 To: Cecil H. Tate, County Attorney, Bailey County
Date: April 16, 1940

A person who has been elected justice of the peace and who has taken the oath of office as such may also serve as city secretary. Art. XVI, Sec. 40, Constitution of Texas; *Gaal v. Townsend*, 14 S. W. 355; *Luera v. State*, 63 S. W. (2d) 699; Opinions 0-582, 0-2055. (See opinion for citation of additional authorities.)

0-2185 To: R. G. Waters, Commissioner, Board of Insurance Commissioners
Date: April 20, 1940

Opinion 0-2049 does not invalidate or condemn the Retrospective Rating Plan as such, but goes solely to the question of discrimination by permitting risks of a certain size to adopt the plan and denying such privilege to those risks which call for a lesser premium.

0-2187 To: John Atchison, County Attorney, Cooke County
Date: April 15, 1940

In an election for two trustees of an independent school district where one candidate received 74 votes, two others received 70 votes each, and a fourth 41, the candidate who received 74 votes was duly elected. As to the other office, there was a tie, and as to such office the election was void, and another election should be ordered in accordance with Art. 2953, V. A. C. S. If applications are seasonably filed, names of new applicants may be placed on the ballot for such election. Arts. 2746a, 2953, V. A. C. S.; *Scherz v. Telfer*, 74 S. W. (2d) 327.

0-2190 To: Gilbert Smith, County Attorney, Jones County
Date: April 16, 1940

A person who is a traveling vendor of patent medicines is liable for the occupation tax imposed by Art. 7047, Subdiv. 2, R. C. S., notwithstanding he may also sell other products in connection therewith. *Collins v. State*, 182 S. W. 327; *Needham v. State*, 103 S. W. 857; *Shed v. State*, 155 S. W. 524; *Peoples v. State*, 152 S. W. 168.

0-2192 To: Stephen P. Hebert, County Attorney, De Witt County
Date: April 17, 1940

Prosecution will lie against a person for committing any of the acts or offenses set out in Art. 1546, Subdiv. 4, P. C., prior to the effective date of the new hot check law even though said Subdiv. 4 was expressly repealed by the new law. H. B. 190, Acts 46th Leg.; *Padlock v. The State of Texas* (not yet reported); Opinion 0-1564 expressly overruled.

0-2196 To: J. M. Allen, County Auditor, Hunt County
Date: April 29, 1940

If a person who is elected to the board of trustees of a common school district or to the county board of trustees is disqualified, the person receiving the next highest vote in the election is not deemed to be elected, but the county board of education should appoint a suitable person to fill such office. Arts. 2676, as amended, 2745, as amended, 2747, R. C. S.; *State ex rel. Nevills v. Sanderson*, 88 S. W. (2d) 1069; 20 C. J. 207.

0-2197 To: O. J. S. Ellingson, General Manager, Texas Prison System
Date: April 25, 1940

The Texas Prison System has no authority to employ convicts as prison guards. Art. 6166a, 6166j, V. A. C. S.

0-2198 To: Homer Garrison, Jr., Director, Department of Public Safety
Date: April 23, 1940

The Department of Public Safety has no authority to pay a physician's bill for medical services rendered to a wounded bank robber who was shot by a Texas Highway Patrolman in

the discharge of the latter's official duties. Art. 4413 (1), et seq., V. A. C. S.; *Willacy County v. Valley Baptist Hospital*, 29 S. W. (2d) 456.

0-2199 To: John E. Taylor, Chief Supervisor, Oil and Gas
Division, Railroad Commission of Texas
Date: April 25, 1940

Gas from a well producing a gas/oil ratio of less than 100,000 cubic feet of gas to one barrel of oil may be burned in the manufacture of carbon black without first being processed for its gasoline content. Art. 6008, Sec. 3, Subsecs (h), (i), and (m); Sec. 7, Subsec. (3), R. C. S.

Under the stated circumstances, the Railroad Commission does not have authority to permit a gasoline plant to vent dry gas. Art. 6008, Sec. 3, Subsec. (k); Sec. 7, R. C. S.

0-2201 To: Mrs. Willie O'Neal, County Auditor, Carson
County
Date: April 17, 1940

The commissioners' court may legally construct and maintain jails at places in the county other than the county seat. Art. 5115, R. C. S.; Letter Opinion, January 28, 1928; Opinion 0-14.

The commissioners' court is not authorized to expend county funds for construction or equipment of a city jail or to enter into a contract and partnership with a city and expend county funds for the construction and equipment of a city-county jail. Arts. 2356, 4434, 4492, R. C. S.; *Edwards County v. Jennings*, 33 S. W. 585; 11 Tex. Jur. 563, 632; Opinion 0-1000.

0-2202 To: Homer Garrison, Jr., Director, Department of
Public Safety
Date: April 16, 1940

The four employees of the Department of Public Safety under the facts related to this department are entitled to a twelve days' vacation without reduction in salary. Acts 1939, 46th Leg., R. S., S. B. 427.

0-2203 To: L. A. Woods, State Superintendent of Public
Instruction
Date: April 20, 1940

In changing or adding territory to county line school districts, it is not essential that such districts maintain the shape of a square; however, the provisions in Sec. 1, Art. 2743, R. C. S., that “. . . in no event shall the length of such district be greater than the width plus one-half of the width of such district” is mandatory and a limitation on the authority of the board of trustees. 39 Tex. Jur. 32.

0-2209 To: Game, Fish, and Oyster Commission
Date: April 25, 1940

The Game, Fish, and Oyster Commission is not prohibited by virtue of a previous contract it entered into in 1934 for the sale of mudshell in Nueces Bay from now granting the right to another company or individual to take mudshell from a portion of the same bay. Arts. 4053, 4053d, R. C. S., Acts 1911, 32nd Leg., Ch. 68; Acts 1919, 36th Leg., 2nd C. S., S. B. 114; Acts 1925, 39th Leg., Ch. 193, p. 452; 39 Tex. Jur. 253.

0-2210 To: J. P. Bryan, County Attorney, Brazoria County
Date: April 29, 1940

The “escape” of a person under arrest is not in itself a violation of positive law for which he can be successfully prosecuted; however, if a prisoner in making an escape commits an assault upon the arresting officer, a prosecution for aggravated assault would lie under Art. 1147, P. C. Arts. 314, 330, 339, P. C.; *Lee v. State*, 74 S. W. 28; *Branner v. State*, 72 S. W. 184; *Veal v. State*, 120 S. W. 173. (See opinion for citation of additional authorities.)

0-2211 To: George H. Sheppard, Comptroller of Public
Accounts
Date: April 23, 1940

Dues for membership of the Adjutant General's Department in the National Guard Association of the United States may be paid out of the appropriation to said department.

0-2214 To: J. Piner Powell, County Attorney, Brown County

Date: April 23, 1940

In counties where the county officials are compensated on a salary basis and the precinct officers on a fee basis, the constable is entitled to the statutory fees for all services actually performed by him in felony cases, which fees are to be paid by the county out of the Officers' Salary Fund when said fees would otherwise be paid by the State for such services. Arts. 1030, 1065, C. C. P.; Art. 3912e, V. A. C. S.

Where a defendant is indicted for a felony and upon conviction his punishment is by fine or confinement in the county jail, or by both, or where he was convicted of a misdemeanor, no fees can be paid a constable for services rendered in such cases by the county out of the Officers' Salary Fund or any other fund; such fees shall be taxed, assessed, and collected as in misdemeanor cases. Art. 1019, C. C. P.

0-2215 To: Homer Garrison, Jr., Director, Department of Public Safety

Date: April 19, 1940

The sum of money held by the Narcotic Drug Division of the Department of Public Safety at the time of the abolition of said division should be returned to the general revenue fund by delivering to the Comptroller of Public Accounts a check made payable to the State Treasury. Acts 1937, 45th Leg., R. S., General and Special Laws, Ch. 169, p. 333.

0-2218 To: Fred Erisman, Criminal District Attorney, Longview

Date: April 29, 1940

A scheme whereby in substance, a theatre gives a prize to a person or persons who ascertain the correct five numbers indicated by dial and revolving disc on the stage of said theatre is a violation of the lottery laws of this State. Art. III, Sec. 47, Constitution of Texas; Art. 654, P. C.; *City of Wink v. Griffith Amusement Co.*, 100 S. W. (2d) 695; *Boatwright v. State*, 38 S. W. (2d) 87; *McRae v. State*, 81 S. W. 741; *Waite v. Press Publishing Assn.*, 155 Fed. 58, 61, 11 L. R. A. (N. S.) 609, 12 Ann. Cases 319. (See opinion for citation of additional authorities.)

0-2220 To: Chas. W. Castner, Chief, Eleemosynary Division,
State Board of Control
Date: April 20, 1940

The advance written consent of the Board of Control to a proposed out-of-state trip of a superintendent of an eleemosynary institution must be obtained before traveling expenses incurred in making said trip may be paid. Acts 1939, 46th Leg., R. S., H. B. 256.

If doubt should arise as to the purpose of the trip being for the transaction of State's business, the Comptroller of Public Accounts may secure an opinion thereon from this department.

0-2224 To: Mrs. Willie O'Neal, County Auditor, Carson
County
Date: April 23, 1940

H. B. 193, Acts 46th Leg. (which authorizes the payment of traveling expenses of county commissioners in certain counties), and H. B. 438, Acts 46th Leg. (which authorizes the county judge to employ a stenographer or clerk in certain counties), are special or local laws in contravention of Art. III, Sec. 56, Constitution of Texas, and are unconstitutional and void; therefore, the county auditors of such counties have no authority to and should not approve the payment of claims arising under said bills. *Altgelt v. Gutzeit*, 201 S. W. 400; *Smith v. State*, 49 S. W. (2d) 739; *Wood v. Marfa Independent School District*, 123 S. W. (2d) 429; *Southern Surety Company, et al., v. Hidalgo County*, 83 S. W. (2d) 313; Arts. 1649, 1651, 1653, 1660, 1661, R. C. S.; Opinions 0-18, 0-364, 0-462, 0-899, 0-1955.

0-2228 To: Joe C. Gladney, Criminal District Attorney,
Henderson
Date: April 27, 1940

Contracts of the board of trustees of an independent school district for the employment of teachers are valid and binding where a majority of said board have met and signed the contracts even though the minutes of the meeting in which such teachers were elected are not approved by said board, and it is not necessary that the president or chairman of the board join in the execution of the contracts as a prerequisite to their validity. Arts. 2779, 2780, 2781, R. C. S.; 46 C. J. 138; 56 C. J. 90; Opinions 0-237, 0-2162.

0-2229 To: R. J. Noonan, District Attorney, Hondo
Date: April 29, 1940

A person who registers his automobile in a county other than that of his residence is guilty of violating Art. 804, P. C., when he operates the same upon the public highways of this State under such registration. Arts. 6675a-2, 6675a-2a, V. A. C. S.; *Opp v. State*, 94 S. W. (2d) 180. Opinions 0-2050, 0-2105.

0-2230 To: P. G. Stanford, County Attorney, Yoakum
County
Date: April 20, 1940

When a vacancy occurs in the board of trustees of a rural high school district, such vacancy should be filled by the remaining members of the board and not by the county board of school trustees. Arts. 2745, 2774a, 2922e, R. C. S.; *Clark v. Worrell*, 65 S. W. (2d) 350; *Whittenberg v. Craven*, 258 S. W. 152; 39 Tex. Jur. 137, et seq.

0-2232 To: Ernest Guinn, County Attorney, El Paso County
Date: April 20, 1940

The supplemental indenture of trust submitted to this department is subject to the stamp tax levied by Art. 7047e, V. A. C. S. Conference Opinion 3061.

0-2234 To: Swain Burkett, County Attorney, Castro County
Date: April 23, 1940

The County Treasurer of Castro County is limited to a maximum compensation of \$600.00 per annum under the order of the commissioners' court allowing him three-fourths of 1% of all moneys collected, expended, or paid out, with the limitation contained therein. Arts. 3941, 3943, R. C. S.

0-2235 To: I. Predecki, County Auditor, Galveston County
Date: April 25, 1940

The county auditor is without authority to sign a warrant in payment of the Revised Civil and Criminal Statutes of Texas for the justices of the peace. Arts. 1649, 1651, 1653, 1660, 1661, 3899b, 4335, 4336, 4338, 4339, 4341, R. C. S.; *Sutherland on Statutory Construction*, Sec. 326.

0-2242 To: Frank R. Murray, County Attorney, Carson
County
Date: April 27, 1940

When the County Judge of Carson County complies with Art. 3902, V. A. C. S., a clerk may be appointed and when said judge complies with Sec. (a), Art. 3899, V. A. C. S., he may pay said clerk out of his fees of office as an authorized expense of office. The county would not be authorized to expend any county funds whatsoever for the payment of such clerk.

Neither the County Judge nor the Commissioners' Court of Carson County is authorized to employ a stenographer for said judge.

Arts. 3883, 3891, 3892, 3895, V. A. C. S. Opinions 0-1620, 0-1874, 0-1930, 0-2224.

0-2244 To: E. G. Pharr, County Attorney, Delta County
Date: April 27, 1940

Under the facts submitted to this department, the drug store in question is not entitled to a medical permit for the sale of liquor as it was not a "pharmacy" as that term is defined by law during the entire two year period prior to the filing of the application for said permit. Art. 666-15, Sec. 18, V. A. P. C.; Art. 4542a, Secs. 15, 16, 19, 20, V. A. C. S.; Art. 4542, Sec. 17, R. C. S.; Opinion 0-537.

0-2251 To: Fannie M. Wilcox, State Librarian
Date: April 27, 1940

If an applicant of the favored class mentioned in the preference of employment statute, Art. 4413 (30), V. A. C. S., is not qualified under Art. 5445, R. C. S. (governing Library and Historical Commission), he is not entitled to appointment at all.

INDEX

CONSTITUTION AND STATUTES CITED AND CONSTRUED

CONSTITUTION OF TEXAS

Article	Section	Opinion No.	Page
Article I	Section 9	0-1947	95
		0-1929	94
	Section 10	0-1929	94
Article III	Section 35	0-2142	111
	Section 47	0-2139	110
		0-2218	122
	Section 52	0-1680	92
	Section 53	0-2035	98
	Section 56	0-2224	123
Article IV	Section 12	0-2029	97
Article V	Section 18	0-2145	112
Article VII	Section 3	0-2035	98
	Section 6	0-2111	104
Article VIII	Section 2	0-2134	109
		0-2163	115
	Section 9	0-2094	102
		0-2140	110
	Section 13	0- 683-A	91
	Section 15	0- 683-A	91
	Section 35	0- 683-A	91
Article XI	Section 2	0-1680	92
Article XII	Section 6	0-1635	92
Article XVI	Section 6	0-2084	101
	Section 15	0-2007	96
	Section 40	0-2055	99
		0-2184	118

CONSTITUTION OF THE UNITED STATES

Article	Section	Opinion No.	Page
4th Amendment		0-1929	94
5th Amendment		0-1929	94

REVISED CIVIL STATUTES

Article	Opinion No.	Page
49	0-2092	101
50	0-2092	101
326 (L)	0-1869	93
339	0-2117	106
600a	0-2077	101

Article	Opinion No.	Page
634a	0-2021	97
635	0-2021	97
642	0-2021	97
643	0-2021	97
644	0-2021	97
660	0-2021	97
734a, Sec. 20	0-2149	113
974a	0-2108	103
999	0-2112	104
1147	0-2112	104
1195	0-2055	99
1302, Subdiv. 47	0-2132	109
1306	0-2007	96
1353	0-1635	92
1354	0-1635	92
1362	0-2132	109
1363	0-2132	109
1529	0-2109	103
1578	0-2117	106
1579	0-2117	106
1649	0-2235	134
1651	0-2235	134
1653	0-2235	134
1659	0-1680	92
1660	0-2235	124
1661	0-2110	104
	0-2235	124
1691-1700, inc.	0-2150	113
1710	0-2117	106
1899	0-2095	102
1928	0-2117	106
	0-2136	109
1973	0-2095	102
2076	0-2110	104
2122	0-2138	110
2340	0-2117	106
	0-2136	109
2342	0-2145	112
2351	0-1680	92
	0-2136	109
Sec. 10	0-2179	117
Secs. 11 and 12	0-2201	120
2356	0-2110	104
2372	0-2182	118
2529	0-1934	94
2658	0-2196	119
2676, as amended	0-2177	116
2695-2699, inc.	0-2029	97
2740 (b), Sec. 4	0-2035	98
2742-F	0-2203	121
2743, Sec. 1		

Article	Opinion No.	Page
2745	0-2029	97
	0-2148	112
	0-2196	119
	0-2230	124
2746	0-2173	116
(a)	0-2029	97
	0-2173	116
	0-2187	118
2747	0-2196	119
2748	0-2103	103
2749	0-2103	103
2760	0-2177	116
2774, Secs. 3 and 4	0-2029	97
2774 (a)	0-2230	121
2776	0-2029	97
2777	0-2029	97
2777 (a)	0-2029	97
2777 (b)	0-2029	97
2779	0-2116	105
	0-2228	123
2780	0-2228	123
2781	0-2228	123
2783 (a)	0-2029	97
2783 (b)	0-2029	97
2791	0-2116	105
2806	0-2035	98
2825	0-2111	104
2826	0-2111	104
2827	0-2103	103
	0-2116	105
2882	0-2153	113
2922 (a)	0-2035	98
	0-2075	101
2922 (a-1)	0-2035	98
2922 (b)	0-2075	101
2922 (c)	0-2075	101
2922 (e)	0-2230	124
2940	0-2056	99
2953	0-2187	118
2953 (a)	0-2187	118
2961	0-2181	117
2963	0-2181	117
3271a, Secs. 1 and 2	0-1901	94
3712	0-2110	104
3722	0-2122	107
3883	0-2242	125
3891	0-2242	125
3892	0-2242	125
3895	0-2242	125
3897	0-1891	93

Article	Opinion No.	Page
3899	0-1891	93
Sec. (a)	0-2242	125
Sec. (b)	0-2235	124
3902	0-2242	125
3912e	0-2214	122
3914, as amended	0-1635	92
3927	0-2095	102
3941	0-2234	124
3943	0-2234	124
4053	0-2209	121
4053d	0-2209	121
4335	0-2235	124
4336	0-2235	124
4338	0-2235	124
4339	0-2235	124
4341	0-2235	124
4413 (1), et seq.	0-2198	119
4413 (4)	0-2044	98
4413 (6)	0-2044	98
4413 (30)	0-2251	125
4434	0-2201	120
4438	0-2179	115
4492	0-2201	120
4542, Sec. 17	0-2244	125
4542a, Secs. 15, 16, 19, and 20	0-2244	125
4714	0-2007	96
4781	0-1937	95
4860a-18	0-1937	95
5115	0-2201	120
5208-5221	0-2018	96
5210	0-2120	106
5221a-1	0-2120	106
5221-b-17 (f) (4)	0-2007	96
5326	0-1897	93
5445	0-2251	125
6008, Sec. 3, Subsecs. (h), (i), (k), (m)	0-2199	120
Sec. 7, Subsec. (3)	0-2199	120
6051	0-1715	92
6053	0-1715	92
6054	0-1715	92
6078	0-2140	110
6081e, Secs. 1, 2	0-2140	110
6166a	0-2197	119
6166j	0-2197	119
6626	0-2108	103
	0-2144	111
6631	0-2144	111
6652	0-2144	111
6675a-2	0-2065	100
	0-2154	114
	0-2229	124
6675a-2a	0-2229	124

Article	Opinion No.	Page
6687a, Secs. 8, 12	0-2044	98
6790	0-2094	102
7047, Subdiv. 2	0-2176	116
	0-2190	119
Subdiv. 40	0-2120	106
7047a-19	0-2146	112
7047e	0-2098	102
	0-2180	117
	0-2232	124
7047 Sec. (a)	0-2178	117
7047f	0-2146	112
7065a	0-2119	106
	0-2172	115
7065-13 (b)	0-2031	97
7084	0-1635	92
7150, Sec. 2a	0-2134	109
7272-7278, inc.	0- 683-A	91
7280-7282, inc.	0- 683-A	91
7284	0-2158	114
7328a	0- 683-A	91
7345b, Sec. 12	0-2157	114
	0-2158	114

PENAL CODE

Article	Opinion No.	Page
199	0-2181	117
291	0-2153	113
314	0-2210	121
330	0-2210	121
339	0-2210	121
425	0-2145-A	112
427	0-2108	103
534	0-2143	111
619	0-1947	95
	0-2139	110
620	0-2139	110
621	0-2139	110
630	0-1947	95
632	0-1947	95
636	0-1947	95
637	0-1947	95
654	0-2139	110
	0-2218	122
666-12	0-2156	114
666-21	0-2000	96
666-25a	0-1947	95
666-40	0-2114	105
752	0-2058	100
752a	0-2058	100

Article	Opinion No.	Page
752b	0-2058	100
752c	0-2058	100
754	0-2058	100
754a	0-2058	100
802	0-1929	94
	0-2154	114
804	0-2229	124
827b	0-2065	100
	0-2154	114
929	0-2121	107
941, Sec. 1e	0-2121	107
952	0-2142	111
1137b	0-2108	103
1147	0-2210	121
1370	0-2012	96
1434	0-2065	100
1435	0-2065	100
1436-1	0-2065	100
	0-2073	100
Secs. 35, 38	0-2100	102
1546, Subdiv. 4	0-2192	119
1584-1593	0-2018	96

CODE OF CRIMINAL PROCEDURE

Article	Opinion No.	Page
4	0-1947	95
4a	0-1947	95
36	0-2112	104
462	0-2044	98
698	0-2129	108
726	0-1929	94
727	0-1929	94
776	0-1582	92
779	0-1582	92
780	0-1582	92
1019	0-2214	122
1030	0-2214	122
1052	0-1251	91
	0-2129	108
1056	0-2138	110
1057	0-2138	110
1065	0-2214	122
1067	0-2112	104

SESSION LAWS CITED AND CONSTRUED

	Opinion No.	Page
Acts 1911, 32nd Leg., R. S., Ch. 68	0-2209	121
Acts 1919, 36th Leg., 2nd C. S., S. B. 114	0-2209	121
Acts 1925, 39th Leg., R. S., Ch. 193, p. 452	0-2209	121
Acts 1929, 41st Leg., 2nd C. S., Ch. 13, p. 22, Special Laws	0-2182	118
Acts 1931, 42nd Leg., R. S., Ch. 141, p. 237, H. B. 440	0- 683-A	91
Acts 1931, 42nd Leg., R. S., Ch. 217, p. 371	0-2108	103
Acts 1935, 44th Leg., R. S., Ch. 201, Sec. 1, p. 488	0-2177	116
Acts 1935, 44th Leg., R. S., H. B. 521, Sec. 35 (g)	0-2137	110
Acts 1935, 44th Leg., 1st C. S., Ch. 360, p. 1527	0-2182	118
Acts 1935, 44th Leg., 2nd C. S., H. B. 77, Art. 1, Sec. 49	0-2143	111
Acts 1937, 45th Leg., R. S., Ch. 169, p. 333, General and Special Laws	0-2215	122
Acts 1937, 45th Leg., 2nd C. S., Ch. 23, p. 1898, H. B. 59	0-2035	98
Acts 1939, 46th Leg., R. S., H. B. 36	0-2122	107
H. B. 190	0-2192	119
H. B. 193	0-2224	123
H. B. 205	0-2112	104
H. B. 255	0-1973	96
Subsec. 6	0-2084	101
H. B. 256	0-2220	123
H. B. 257	0-1869	93
H. B. 407	0-2073	100
H. B. 432, Sec. 2	0-2142	111
H. B. 438	0-2224	123
H. B. 564	0-2182	118
H. B. 614	0-1847	93
S. B. 179	0-2119	106
S. B. 297	0-2141	111
S. B. 367	0-2127	107
S. B. 427	0-1934	94
	0-2115	105
	0-2131	108
	0-2202	120

OPINIONS MODIFIED

	Opinion No.	Page
0- 760 expressly overruled by	0-1897	93
0- 760 Supplement expressly overruled by	0-1897	93
0-1564 expressly overruled by	0-2192	119
0-2145 supplemented by	0-2145-A	112

SUBJECT INDEX

	A	Opinion No.	Page
Abstracts			
Books and plant of abstract company as subject to taxation		0-2134	109
APPROPRIATIONS			
Adjutant General's Department, membership in National Guard Association of the United States, payment of from appropriation to		0-2211	121
Comptroller of Public Accounts, motor fuel tax report fee appropriation, expenses of preparation and prosecution of cases as chargeable against		0-2119	106
Contingent expense appropriation			
Department of Agriculture, Chief Clerk of, premium on official bond of, payment of		0-2092	101
Department of Agriculture			
Contingent expense appropriation to, bond of chief clerk, payment of premium on from		0-2092	101
Traveling expense appropriation to, automobile purchase with		0-2131	108
Department of Education, traveling expense appropriation to			
Conventions, expenses of Deputy State Superintendent of Public Instruction in attending, payment of from		0-1934	94
Department of Public Safety, Narcotic Drug Division, abolition of, disposition of balance of funds appropriated to		0-2215	122
Educational institutions appropriation bill			
Conventions, expenses in attending, payment of from		0-1973	96
		0-2084	101
Eleemosynary institutions appropriation bill			
Traveling expenses of superintendent of institution, advance consent of Board of Control as prerequisite to payment of from		0-2220	123
ARRESTS			
Fees to constable in felony cases where sheriff is on salary basis and precinct officers are on fee basis		0-2214	122
Resisting arrest, escape of prisoner, prosecution for		0-2210	121
B			
BANKS AND BANKING			
Liquidation, national bank in process of as exempt from stamp tax		0-2180	117
National bank in the process of liquidation, exemption of from stamp tax		0-2180	117

	Opinion No.	Page
Barbers		
License renewals, five year retirement period in reference to, commencement of	0-2149	113
Bills and Notes		
Hot check law, statute repealed by, prosecution under	0-2192	119
BONDS		
Deferred judgment bond, trial fees to justice of peace when defendant files as payable when	0-1251	91
Public officers' bond Department of Agriculture, Chief Clerk of, premium on official bond of, payment of	0-2092	101
Refunding bonds of conservation and reclamation district, eligibility of as securities for public de- positories	0-2182	118
Brazos River Conservation and Reclamation District, refunding bonds of, eligibility of as securities for public depositories	0-2182	118
C		
Carbon black, burning of casinghead gas in manufacture of without processing for gasoline content, legality of	0-2199	120
CITIES, TOWNS AND VILLAGES		
City officers		
City marshal		
Fees to for services performed in justice court	0-2112	104
Corporation court judge		
Justice of peace serving as, legality of	0-2055	99
Secretary		
Justice of peace serving as, legality of	0-2184	118
Jails		
City or city-county jail, construction of expenditure of county funds for as unauthorized	0-2201	120
Planning Commission, subdivision within five miles of city of 25,000 or more inhabitants, recordation of plat of, approval of as necessary for	0-2108	103
Subdivision within five miles of city of 25,000 or more inhabitants, plat of, recordation of by county clerk as allowed when	0-2108	103
Claims		
County employee, death of, claim for damages, pay- ment of by commissioners' court	0-2136	109
COLLEGES AND UNIVERSITIES		
Association of Texas Colleges expenses incurred by Director of Division of Extension of Texas Technological College incurred in attending, pay- ment of	0-1973	96

	Opinion No.	Page
Catalogues to students as offer to contract accepted by registration	0-2106	109
Southern Association of Colleges and Secondary Schools and American Association of Teachers' Colleges, traveling expenses of president of State teacher's college incurred in attending meeting of, payment of	0-2084	101
State teacher's college, president of, attendance of at educational associations' meetings as State business	0-2084	101
State universities		
Heads of, traveling expenses of incurred in discharge of State business, payment of	0-2084	101
Texas Technological College		
Convention, expenses of Director of Division of Extension incurred in attending, payment of	0-1973	96
COMMISSIONERS' COURT		
Available school fund, account owing, authority of to charge off as uncollectible	0-2111	104
County clerk on fee basis, postage and extra help expenses of, authority of court to allow payments of by county	0-1891	93
County employee, death of resulting from collision, claim for, authority of to pay	0-2136	109
County judge as member of, voting of on matters before as discretionary	0-2145-A	112
County judge, stenographer or clerk for, employment and payment of by court	0-2242	125
County parks, improvements on, warrants on permanent improvement fund for, authority of to issue	0-2140	110
County treasurer, maximum compensation of under certain order of	0-2234	124
County veterinarian, creation of office of a payment with county funds by	0-2102	102
Depository, selection of, members of as required to vote in	0-2145-A	112
Expenses of members of, payment of by	0-2117	106
Jails		
City or city-county jail, construction of, expenditure of county funds by for as unauthorized	0-2201	120
County jail in place other than county seat, construction and maintenance of by, authority of court in	0-2201	120
Judgment against county, payment of as directed by federal court	0-2170	115
Property valuation expert, contract of employment of authority of to enter into	0-2128	108
Road machinery, lease of with option to purchase, authority of court to contract for	0-1680	92

	Opinion No.	Page
Road tax of county, manner of expenditure of as determined by	0-2094	102
School land owned by the county, improvements on, authority of to make with funds from lease or sale of said land	0-2111	104
Subdivision within five miles of city of 25,000 or more inhabitants, plat of, consent of court as necessary for recordation of	0-2108	103
Suit against, institution of by whom	0-2117	106
Voting of members of as discretionary	0-2145	112
Conservation and Reclamation Districts		
Brazos River Conservation and Reclamation District, refunding bonds of, eligibility of as securities for public depositories	0-2182	118
CONSTITUTIONAL LAW		
Local or special law		
County commissioners, traveling expenses of, act authorizing payment of in certain counties as	0-2224	123
County commissioners, traveling expenses of, in certain counties, bill providing for as	0-2127	107
County judge, stenographer or clerk of, act authorizing employment of in certain counties as	0-2224	123
Office of emolument, constitutional prohibition against holding more than one, justice of peace as removed from	0-2055 0-2184	99 118
Privilege against self-incrimination, breath tests, blood tests, and urine tests as within.....	0-1929	94
Searches and seizures		
Breath tests, blood tests, and urine tests in intoxicated while driving charge as unreasonable in violation of	0-1929	94
Gambling devices, seizure of by Department of Public Safety	0-1947	95
Special law, creation of or validating attempted creations of school districts by	0-2035	98
CONTRACTS		
College and student, contractual relationship as existing between	0-2106	103
Consignment contract, stamp tax on	0-2098	102
Game, Fish and Oyster Commission, sale of mudshell in Nueces Bay by, previous contract as affecting	0-2209	121
Highway projects, bids for, withdrawal of and return of deposit, authority of Highway Commission to allow	0-1077-A	91
Teacher's contract minutes of board of trustees recording the making of, refusal to approve as discharging liability	0-2162 0-2228	115 123

	Opinion No.	Page
CONVENTIONS		
Association of Texas Colleges, expenses of Director of Division of Extension of Texas Technological College incurred in attending meeting of, payment of	0-1973	96
County commissioners, expenses incurred by in attending State Highway Meeting, payment by commissioners' court	0-2117	106
Educational institutions of higher learnings, appropriation for, expenses incurred in attending payment of from	0-1973	96
Southern Association of Colleges and Secondary Schools and American Association of Teachers' Colleges, traveling expenses of president of State teacher's college incurred in attending meetings of, payment of	0-2084	101
State Superintendent Deputy, traveling expenses of in attending certain meetings, payment of	0-1934	94
CONVEYANCES		
Deed dated prior to effective date of Stamp Tax Act as subject to tax upon recordation	0-2178	117
Deed, mutilation of as affecting county clerk's duty to record	0-2144	111
Limitations title, purchase of real property with by Highway Department, warrant in payment of, issuance of	0-2123	107
CORPORATIONS		
Foreign corporations		
Capital stock ownership as affecting requirement of permit to do business	0-2109	103
Filing fees for renewal of right to do business, calculation of	0-1635	92
Jurisdiction of courts over corporation with and without permit to do business	0-2109	103
Mutual insurance company, license to do business in Texas, issuance of	0-1937	95
Permit to do business		
Foreign mutual insurance company, issuance of to Ownership of capital stock as affecting requirement of	0-1937	95
	0-2109	103
Purpose Clause		
Real estate in incorporated cities and towns, issuance of charter with purpose to acquire and own	0-2132	109
Religious encampment corporations		
Ad valorem tax on property of, necessity that property be used exclusively by to be exempt from	0-2134	109
Securities of, sale of in Texas permit for, proper fee for	0-2137	110

	Opinion No.	Page
COUNTIES		
County of Camp		
Judgment against, payment of as directed by federal court	0-2170	115
County of Castro		
County Treasurer, maximum compensation of under certain order of commissioners' court	0-2234	124
County of Nueces		
Contract of employment with property valuation expert, authority of commissioners' court to enter	0-2128	108
County of Wilson		
Fish, taking and selling of, amendment adding Wilson County to statute on as applying to entire statute	0-2142	111
Employees, death of, claim for damages arising from, authority of commissioners' court to pay	0-2136	109
Precincts		
Road precinct, tax levied by county for road construction and improvement, authority of commissioners' court to expend for in	0-2094	102
Convicts		
Guards in Prison System, use of convicts as	0-2197	119
COURTS		
Corporation Court		
Justice of peace serving as recorder of, legality of	0-2055	99
Decisions considered to be erroneous, duty of Attorney General's Department to correct	0-1847	93
CRIMINAL LAW		
Aggravated assault, assault on officer by prisoner in escape as	0-2210	121
Dental offices, chain of, maintenance of as violation of	0-2058	100
Dentistry practice in violation of as question for judge or jury	0-2058	100
Driving while intoxicated, admissibility of breath tests, blood tests, and urine tests as evidence of "Escape" of prisoner, prosecution for	0-1929	94
Felony case, suspended sentence in, period of suspension and time for dismissal of same	0-2210	121
Fish laws, taking and selling of in certain counties, amendment adding county to statute prohibiting as applying to entire statute	0-1582	92
Fish laws, taking or having in possession fish of certain size, statutes prohibiting	0-2142	111
Gambling devices seizure of by Department of Public Safety	0-2121	107
Hot check law, prosecution under statute repealed by	0-1947	95
Intoxicating liquors, giving of to minors, prosecution for	0-2192	119
	0-2143	111

	Opinion No.	Page
Motor vehicle registration in county other than residence of registrant as violation of	0-2210	121
Nursery certificate, failure to secure for sale of trees, plants, and shrubs taken from forest as violation of Nursery Stock Law	0-2150	113
Stock Law, staking of livestock on public property without owner's consent as a violation of	0-2012	96
Suspended sentence in felony case, period of and time for dismissal of	0-1582	92
D		
Dentistry		
Chain dental offices, maintenance of as illegal	0-2058	100
Practice of in violation of laws governing as question for judge or jury	0-2058	100
Depositories		
County depositories, selection of, county commissioners as required to vote in	0-2145-A	112
Securities for public depositories, refunding bonds of Brazos River Conservation and Reclamation District, eligibility of as	0-2182	118
Drainage Districts		
Commissioners and employees of, qualification of to act as officials in election	0-2056	99
E		
ELECTIONS		
Common school district trustee election		
Disqualification of person who is elected, filling of office upon	0-2196	119
County board of school trustee election		
Disqualification of person who is elected, filling of office upon	0-2196	119
Independent school district trustee election		
Ballots in, filing of candidates' names on, time for County judge, authority of in as limited to districts with less than 500 scholastics	0-2029	97
Tie vote for two candidates and third candidate receives more, third candidate as elected and new election as necessary for the two	0-2173	116
	0-2187	118
Local option election		
County-wide election in wet county, issues to be submitted, status of precincts after, and precinct election within one year after	0-2114	105
Officials in, public officers as disqualified from acting as	0-2056	99

	Opinion No.	Page
Eleemosynary Institutions		
Burial of indigent inmates of, contract for, authority of Board of Control to enter	0-2021	97
Superintendent of, traveling expenses of incurred in out-of-state trip, advance consent of Board of Control to trip as prerequisite of payment of	0-2220	123
Emigrant agent, license fee and occupation tax on	0-2120	106
Employment Agencies		
Booking agent securing information wrestlers and contacting promoters as required to obtain license	0-2018	96
Emigrant agent and employment agent, dual business of, license fees and occupation tax on	0-2120	106
Engineers		
Advertisement as "graduate electrical and mechanical engineer" or "engineer" by one not a registered professional engineer as unlawful	0-1901	94
Evidence		
Driving while intoxicated, admissibility of blood tests, breath tests, and urine tests in case where defendant is charged with as	0-1929	94
F		
FEEES, SALARIES, AND COMMISSIONS		
Arrest fees to constable in felony cases where sheriff is on salary basis and precinct officers are on fee basis	0-2214	122
Assessment fees to independent school district tax assessor for services, maximum amount of	0-2116	105
Compensation of court interpreters in civil case, determination of, manner of payment of and warrants issued in payment of	0-2110	104
Compensation of county treasurer under certain order of commissioners' court, maximum allowed	0-2234	124
Compensation of Game, Fish and Oyster Commission skilled laborers, determination of amount of	0-2115	105
Compensation of school teacher without certificate, payment of	0-2153	113
Corporate securities, fees to Secretary of State for permit to sell, proper amount of	0-2137	110
Delinquent trial fees to justice of peace for judgment in former year, collection of to make maximum for such year	0-2129	108
Filing fee to Secretary of State for application for permit allowing sale of corporate securities, amount of	0-2137	110

	Opinion No.	Page
Filing fee to Secretary of State for renewal of right to do business, calculation of	0-1635	92
Half fees to city marshal for case in justice court where defendant fails to pay fine and costs	0-2112	104
Jury fee to juror who is dismissed before or after being sworn in, payment of	0-2138	110
License fees, emigrant agent and employment agent, dual business of as subject to	0-2120	106
Recording fee to district clerk for return of process, collection of by clerk	0-2095	102
Salary of Department of Public Safety employees, payment of during vacation of	0-2202	120
Salary of school teachers, assignability of	0-2141	111
Trial fees to justice of peace when defendant files deferred judgment bond as payable when	0-1251	91
FINES, COSTS, AND FORFEITURES		
Suspended sentence in felony case, suspension of fine and costs by	0-1582	92
G		
Gambling devices, seizure of by Department of Public Safety	0-1947	95
GAME, FISH, AND BIRDS		
Fish of certain size, taking or having in possession of, conflict in statutes regulating, later statute as controlling	0-2121	107
Fish, taking and selling of in certain counties amendment adding county as applying to entire statute	0-2142	111
General Nursery Stock Law		
Sale of forest trees, plants, and shrubs as within	0-2150	113
H		
Hospitals		
Transient pauper, hospitalization of where county has no public hospital, liability of county for	0-2179	117
Hot check law, prosecution under statute repealed by	0-2192	119
Husband and Wife		
Unemployment Compensation Act, application of to certain situations concerning	0-2007	96

INDEX

17

I

Opinion No.

Page

INSURANCE

Board of Insurance Commissioners, property under control of, authority of to insure	0-2130	108
Foreign mutual company, license to do business in Texas, issuance of to	0-1937	95
Fraternal benefit association, application and certificate of for insurance benefits as securities	0-2077	101
Retrospective rating plan, validity of	0-2185	118

INTOXICATING LIQUORS

Driving while intoxicated, admissibility of breath tests, blood tests, and urine tests in case where defendant is charged with as evidence	0-1929	94
Front door of liquor store, alteration of location as allowed	0-2156	114
Front door of liquor store, distance of within 300 feet of church, public school, or public hospital, cancellation of liquor store permit for	0-2156	114
Local option election		
County-wide election in wet county, issues to be submitted in, status of precincts after and precinct election within and one year after	0-2114	105
Medicinal permit for sale of by drug store, prerequisites to issuance of	0-2244	125
Minors, giving of to, prosecution for	0-2143	111
Taxes, refund of where liquors upon which stamps have been placed are destroyed by fire	0-2000	96

J

Judgments

Deferred judgment bond, trial fee to justice of peace when defendant files as payable when	0-1251	91
--	--------	----

K

L

Labor

Skilled laborers, employment and compensation of by Game, Fish and Oyster Commission	0-2115	105
--	--------	-----

LICENSES AND CERTIFICATES

Barber's license renewals, five year retirement in reference to, commencement of	0-2149	113
Certificate of title, divestiture of title by operation of law, information necessary to be shown	0-2100	102
Certificate of title showing lien for future debts, issuance of	0-2073	100

	Opinion No.	Page
Certificate of title to mortgagee who is purchaser at private foreclosure sale, issuance of to	0-2119	106
Corporate securities, permit for sale of, proper fee to be charged foreign corporation for	0-2137	110
Dentist's license, revocation or suspension of for illegal practice of dentistry	0-2058	100
Emigrant agent license and employment agent license, fees for	0-2120	106
Employment agency license, booking agent securing information on wrestlers and contracting promoters as required to obtain	0-2018	96
Liquor store permit, front door of liquor store within 300 feet of church, public school or public hospital, cancellation of for	0-2156	114
Medicinal permit for sale of liquor by drug store, necessity that drug store be a "pharmacy" for two years immediately preceding the filing of application for	0-2244	125
Motor fuel tax license refund to individuals purchasing from unlicensed distributor, authority of Comptroller to make	0-2031	97
Mudshell removal permit, issuance of by Game, Fish and Oyster Commission as affected by previous contract	0-2209	121
Nursery certificate, tree, plants and shrubs from forests, sale of as requiring	0-2150	113
Permit to do business to foreign mutual insurance company, issuance of	0-1937	95
Poll tax receipt issued after January 31st, stamp necessary to be placed on	0-2181	117
Liens		
Future debts, lien for as valid	0-2073	100
Tax lien, necessity of foreclosure of for valid sale of real estate	0- 683-A	91
Livestock		
Horse show to raise relief funds, prizes given at and admission charges as subject to taxes	0-2146	112
Staking of on public property or on private property without owner's consent as violation of Stock Law	0-2012	96
LOTTERIES		
Numbers determined correctly by person as indicated by dial and revolving disc and prize given as	0-2218	122
Winning number determined by player's throwing a dart at a board or a ball into a slot and merchandise certificate given as	0-2139	110

INDEX

19

M	Opinion No.	Page
Medicine		
Patent or other medicine, traveling person selling, occupation tax on		
Traveling person selling other products along with subject to	0-2190	119
Traveling person soliciting orders and delivering medicine in home town and not outside city limits as subject to	0-2176	116
Merit System		
Board of Health, proposed plan of for	0-1363	91
Minerals		
Reinstatement, "intervening right" second purchaser's right of as	0-1897	93
MINORS		
Intoxicating liquors, giving of to, prosecution for	0-2143	111
Teacher Retirement System, minor as beneficiary, payment of contributions to	0-2048	98
MORTGAGES		
Private foreclosure sale, mortgagee as purchaser at legality of	0-2151	113
MOTOR VEHICLES		
Certificate of title, See LICENSES AND CERTIFICATES		
Registration of, See RECORDATION AND REGISTRATION, Motor vehicle registration		
N		
O		
OIL AND GAS		
Casinghead gas, burning of in manufacture of carbon black without processing for gasoline, legality of	0-2199	120
Dry gas, venting of by gasoline plant, legality of	0-2199	120
Gas producers, annual reports of, authority of Railroad Commission to require	0-1715	92
Reinstatement, second purchaser's right of as "intervening right" barring reinstatement of first forfeited sale	0-1897	93
P		
Paupers		
Hospitalization of transient where county has no public hospital, liability of county for	0-2179	117

	Opinion No.	Page
PENITENTIARIES AND JAILS		
City and city-county jail, construction and equipment of, expenditure of county funds by commissioners' court as unauthorized	0-2201	120
County jail, construction and maintenance of in place other than county seat, authority of commissioners' court in	0-2201	120
Prison System		
Convicts in, use of as guards in as unauthorized	0-2197	119
PUBLIC LANDS		
County parks		
Improvements on, issuance of warrants against permanent improvement fund for	0-2140	110
Lease or sale of, funds derived from, use of for improvements on	0-2111	104
Limitation title, purchase of real property with by Highway Department, warrant in payment of, issuance of	0-2123	107
Reinstatement, second purchaser's right of as "intervening right" barring reinstatement of first forfeited sale	0-1897	93
PUBLIC MONEYS		
County commissioners		
Traveling expenses of in certain counties, bill providing for as local or special law	0-2127	107
Expenses		
Postage and extra help expenses of county clerk on fee basis, payment of	0-1891	93
Traveling expenses of county commissioners in certain counties, act authorizing payment of as local or special law	0-2127	107
	0-2224	123
Traveling expenses of Department of Agriculture, appropriation for, automobile purchase out of	0-2131	108
Traveling expenses of district attorney assistant, payment of	0-1869	93
Traveling expenses of eleemosynary institution superintendent, advance consent of Board of Control as prerequisite to payment of	0-2220	123
Traveling expenses of State educational institution heads as incurred in discharge of State business, payment of by Comptroller	0-2084	101
Traveling expenses of State Superintendent Deputy incurred in attending conventions and educational gatherings, payment of	0-1934	94
Traveling expenses of State teacher's college president in attending educational associations' meetings as State business	0-2084	101

	Opinion No.	Page
Traveling expenses of Texas Technological College, Director of Division of Extension, in attending meeting, payment of	0-1973	96
Funds		
County funds		
Available school fund		
Account owing, authority of commissioners' court to charge off as uncollectible	0-2111	104
Road fund (special), road construction and im- provement, authority of commissioners' court to extend for in certain precincts	0-2094	102
School funds, suits against trustees, attorney's fees in, payment of with	0-2103	103
PUBLIC OFFICERS		
Assistants and deputies		
District attorney assistant, traveling expenses of, payment of	0-1869	93
County auditor		
Statute books for justice of peace, warrant in pay- ment of, authority of to sign	0-2235	124
County clerk		
Postage and extra help expenses of county clerk on fee basis, payment of	0-1891	93
Recordation of mutilated instrument, duty of in	0-2144	111
County commissioners		
Expenses of incurred in attending meeting payment of by commissioners' court as illegal	0-2117	106
Traveling expenses of in certain counties, act authorizing payment of as local or special law	0-2224	123
Voting by on matters before commissioners' court as discretionary	0-2145 0-2145-A	112 112
County judge		
Commissioners' court, voting of judge on matters before as discretionary	0-2145 0-2145-A	112 112
Election of school trustees, authority of judge in as restricted to common and independent school districts of less than 500 scholastics	0-2173	116
S-enographer or clerk of, act authorizing employ- ment of in certain counties as local or special law	0-2224	123
S-enographer or clerk, employment and payment of	0-2242	125
County superintendent		
Vouchers issued to teacher without certificate, approval of by	0-2153	113
County tax assessor-collector		
Redemption payment to, terms of as governed by what articles	0-2158	114
Sale of real estate by for delinquent taxes, fore- closure of tax lien as required	0- 683-A	91

	Opinion No.	Page
State ad valorem taxes erroneously paid to, authority of Comptroller to allow refund of	0-2051	99
County treasurer		
Compensation of, maximum that may be allowed under certain order of commissioners' court	0-2234	124
Judgment against county, payment of as directed by federal court	0-2170	115
Suit against commissioners' court for recovery of funds illegally expended, institution of by	0-2117	106
County veterinarian, creation of office of, authority of commissioners' court in	0-2102	102
Court interpreters		
Compensation of, determination of and manner of payment	0-2110	104
District attorney		
Assistant, traveling expenses of, payment of	0-1869	93
District clerk		
Recording fee for return of process where return is shown in "brief form" on file docket, collection of by	0-2095	102
Incompatible offices		
City secretary and justice of the peace, offices of as Justice of peace and recorder of corporation court as	0-2184	118
as	0-2055	99
Justice of the peace		
City secretary, justice serving as, legality of	0-2184	118
Corporation court, justice of peace serving as recorder of, legality of	0-2055	99
Criminal case fees to when defendant files deferred judgment bond as payable when	0-1251	91
Delinquent trial fees to for judgment in former years, collection of to make maximum for such year	0-2129	108
Revised Civil and Criminal Statutes for, warrant in payment of, authority of county auditor to sign	0-2235	124
Petit Jurors		
Dismissal of before or after being sworn in, jury fees allowed in case of	0-2138	109
 PUBLIC RECORDS		
Accident reports of Department of Public Safety, public nature of, certified copies of, furnishing of information contained in, and subpoena issued on	0-2044	98
Old Age Assistance records, confidential nature of	0-2122	107
Public Utilities		
Gas utilities, producers for, annual reports of, authority of Railroad Commission to require	0-1715	92

Q

Opinion No.

Page

R

RECORDATION AND REGISTRATION

Motor vehicle registration

Non-resident, occasional trips into Texas, registration as necessary under certain facts	0-2065	100
Residence of registrant, county other than, registration in as violation of law	0-2210	121
Resident of Texas, vehicle owned by but used exclusively in another state except for occasional trips into Texas as required to be registered in Texas	0-2154	114
Mutilated instrument, recordation of	0-2144	111
Return of process, recording fee for, authority of district court to collect	0-2095	102
Subdivision within five miles of city of 25,000 inhabitants or more, prerequisites to recordation of	0-2108	103

ROADS, STREETS, AND BRIDGES

Highway projects, bids for, withdrawal of and return of deposit, authority of Highway Commission to allow	0-1077-A	91
Machinery, lease of with option to purchase, contract by commissioners' court for as void	0-1680	92
Tax for construction and improvement of, expenditure of, manner of as determined by commissioners' court	0-2094	102

S

SCHOOLS AND SCHOOL DISTRICTS

Common school districts

Annexation from, consent of board of trustees of as necessary	0-2075	101
Teacher's certificate, compensation of individual without, payment of	0-2153	113
Transfer of scholastic from to independent school district, tuition charges	0-2177	116
Trustees		
Disqualification of person elected as, filling of vacancy upon	0-2196	119
Qualifications of, person with personal property upon which are due delinquent taxes as "property taxpayer" within	0-2148	112
Consolidated common school district		
Trustees, quo warranto suit against, attorney's fees in, use of school funds to pay	0-2103	103
Creation of, prerequisites of	0-2035	98

	Opinion No.	Page
County board of trustees		
Election, disqualification of person elected, filling of vacancy upon	0-2196	119
Rural high school board of trustees, vacancy in, filling of, authority of in	0-2230	124
County line school districts		
Length, width, and shape of, limitations on	0-2203	121
Creation of, special act validating as unconstitutional	0-2035	98
Independent school districts		
Annexation from, consent of board of trustees of as necessary	0-2075	101
Taxes		
Abstract books and plant as subject to	0-2134	109
Assessor, maximum fee allowance of	0-2116	105
Religious encampment corporations, requirement that property of to be used exclusively by, to be exempt from	0-2134	109
Teachers' contracts, approval of minutes of meeting, signature of chairman and majority of members of board as necessary for validity of	0-2228	123
Teacher's contract, minutes of board recording the making of, refusal to approve as discharging liability under	0-2162	115
	0-2228	123
Transfer of scholastic (non-resident) to from common school district, tuition charges	0-2177	116
Trustees		
Board of, secretary of, employment and compensation of non-member as	0-2116	105
Election, authority of county judge in as limited to districts with less than 500 scholastics	0-2173	116
Election, filing of names on ballot, time for	0-2029	97
Election, tie vote for two candidates and third candidate receives more, third candidate as elected and new election as necessary for the two	0-2187	118
Meetings of, exclusion of visitors from	0-2133	109
Teachers' contracts, signatures of majority of board, approval of minutes of meeting, and signature of chairman of board as prerequisites to validity of	0-2228	123
Vacancy, appointment to fill, term of	0-2029	97
Lands of, improvements on with funds derived from lease or sale of, authority of commissioners' court to make	0-2111	104
Rural high school district		
Creation of, prerequisites of	0-2035	98
Trustees,		
Vacancy in board of, remaining trustees as authorized to fill	0-2230	124
Teachers and employes of, qualification of to act as officials in election	0-2056	99

	Opinion No.	Page
Teacher's contracts		
Minutes of board recording making of, refusal to approve as discharging liability under	0-2162	115
	0-2228	123
Signatures of trustees and approval of minutes as necessary to validity of	0-2228	123
Teacher's contract with individual who does not have certificate as void; payment of such individual	0-2153	113
Teacher Retirement System		
Minor as beneficiary, payment of contributions to	0-2048	98
Will subsequent to designation of beneficiary leaving all property to someone else, payment of money to beneficiary	0-2048	98
Teachers, salaries of, assignability of	0-2141	111
Trustees		
Election of, county judge's authority in as restricted to common and independent school districts of less than 500 scholastics	0-2173	116
Election, tie votes in, new election in which new candidates may be placed on ballot as proper procedure	0-2187	118
Election, tie vote for two candidates and third candidate receives more, third candidate as elected and new election as necessary for the two	0-2187	118
Suits against, attorney's fees in payment of with school funds	0-2103	103
SECURITIES		
Brazos River Conservation and Reclamation District refunding bonds, eligibility of as for public depositories	0-2182	118
Corporate securities, sale of in Texas, permit for, proper fees for	0-2137	110
Insurance benefits, application and certificate of fraternal benefit association as constituting	0-2077	101
SHERIFFS AND CONSTABLES		
City marshal, fees to for services in justice court, similarity of to fees of	0-2112	104
Felony case fees to constable where sheriff is on salary basis and precinct officers are on fee basis	0-2214	122
STATE DEPARTMENTS AND BOARDS		
Adjutant General's Department		
National Guard Association of the United States, membership dues in of, payment of	0-2211	121
Attorney General		
Court, errors of, duty of department to correct	0-1847	93
Board of Control		
Eleemosynary Division		
Inmates of institutions, preparation and burial of, contract for, authority to enter	0-2021	97

	Opinion No.	Page
Superintendents, traveling expenses of, incurred in out-of-state trip, advance consent of Board as prerequisite to payment of	0-2220	123
Board of Health		
Merit System for, validity of proposed plan	0-1363	91
Board of Insurance Commissioners		
Assessment or natural premium plan, license to do business in Texas, issuance of to foreign company on	0-1937	93
Insurance on State-owned property under control of authority of to contract and pay for	0-2130	108
Board of Registration for Professional Engineers		
"Graduate electrical and mechanical engineer" or "engineer," advertisement of by one not a registered professional engineer as unlawful	0-1901	94
Comptroller of Public Accounts		
Eleemosynary institution superintendent, traveling expenses of incurred in out-of-state trip, prerequisites to payment of by	0-2220	123
Old Age Assistance Warrant Register, inspection and certified copies of	0-2122	107
Motor Fuel Tax Division		
Distributor's permit, issuance of upon knowledge of sales outside Texas	0-2172	115
Sales outside Texas, distributor's permit as covering	0-2172	115
Motor Fuel Tax Refund Division		
Expenses of preparation and prosecution of cases as chargeable against the motor fuel tax refund fee appropriation	0-2119	106
Real property with limitation title purchased by Highway Department, warrant in payment of, authority of Comptroller to issue	0-2123	107
State ad valorem taxes, refund of, authority to authorize tax assessor-collector to make where erroneously paid	0-2051	99
Department of Agriculture		
Automobile of, purchase of with what funds	0-2131	108
Chief clerk of, premiums on bond of, payment of from contingent expense appropriation	0-2092	101
Department of Education		
Superintendent of Public Instruction		
Deputy superintendent, traveling expenses of in attending conventions and educational gatherings, payment of	0-1934	94
Department of Public Safety		
Accident reports of, inspection of, certified copies of, furnishing information contained in, and subpoena duces tecum issued on	0-2044	98
Bank robber, wounded by shot of highway patrolman, bill for medical services rendered to, authority of Department to pay	0-2198	119

	Opinion No.	Page
Certificate of title, divestiture of title by operation of law, information necessary to be shown	0-2100	102
Certificate of title showing lien for future debts, issuance of by	0-2073	100
Certificate of title to mortgagee who is purchaser at private foreclosure sale, issuance of to	0-2151	113
Employees of, vacation of without deduction in salary as allowed when	0-2202	121
Gambling devices per se, seizure of by	0-1947	95
Narcotic Drug Division, abolition of, disposition of money held by at time of	0-2215	122
Punch boards, tip sheets, and/or slot machines in warehouse, seizure of by under search warrant	0-1947	95
Department of Public Welfare		
Old Age Assistance Division		
Records concerning applicants and recipients, confidential nature of	0-2122	107
Employees of, preference of, construction of statute providing for	0-2251	125
Game, Fish, and Oyster Commission		
Mudshell in Nueces Bay, sale of, authority of Commission to make as affected by previous contract	0-2209	121
Skilled laborers, employment of by and compensation of	0-2115	105
General Land Office		
Reinstatement, second purchaser's right of as "intervening right" barring reinstatement of first forfeited sale	0-1897	93
Highway Department		
Bids for highway projects, withdrawal of and return of deposit, authority of commission to allow	0-1077-A	91
Real property with limitation title purchased by, warrant in payment of, authority of Comptroller to issue	0-2123	107
Liquor Control Board		
Taxes, refund of where liquor is destroyed by fire	0-2000	96
Motor fuel tax refund, purchase from licensed dealer as necessary to authorize Comptroller to make	0-2031	97
Officers and employees of, qualification of to act as officials in election	0-2056	99
Railroad Commission		
Gas Utilities Division		
Producers, annual reports of, authority of commission to require	0-1715	92
Oil and Gas Division		
Casinghead gas, burning of in manufacture of carbon black without processing for gasoline content, legality of	0-2199	120
Dry gas, venting of by gasoline plant, authority of commission to allow	0-2199	120

	Opinion No.	Page
Secretary of State		
Corporate securities, sale of, permit for, proper fee to be charged for	0-2137	110
Filing fees to for renewal of right to do business of foreign corporation, calculation of	0-1635	92
Permit to do business to foreign corporation, capital stock ownership as affecting requirement of	0-2109	103
State Library		
Employees, preference statute, application of when applicant is not qualified	0-2251	125
Teacher Retirement Board		
Minor as beneficiary, payment of contributions to	0-2048	98
Will subsequent to designation of beneficiary leaving all property to someone else, payment of money to beneficiary	0-2048	98
Texas Prison System		
Guards, employment of convicts as	0-2197	119
Treasurer's Department		
Old Age Assistance records, confidential nature of	0-2122	107
Unemployment Compensation Commission		
Husband and wife, application of Act to certain situations concerning	0-2007	96

T

TAXES AND TAXATION

Abstract books and plant of as subject to	0-2134	109
Ad valorem tax		
Abstract plant as subject to	0-2134	109
Mistake of law or fact, refund of by tax assessor-collector of taxes paid under	0-2051	99
Public charity, exclusive use of property for charitable purposes as necessary for exemption as	0-2163	115
Refund of by tax assessor-collector where erroneously paid, authority of Comptroller to allow	0-2051	99
Religious encampment corporation, requirement that property of be used exclusively by to be exempt from	0-2134	109
Admission tax		
Horse show to raise money for Finnish relief, admissions charged as subject to	0-2146	112
Delinquent taxes		
Personal property taxes, person owning property upon which are due as "property taxpayer"	0-2148	112
Redemption, amount of payment and terms of as governed by what articles	0-2157	114
	0-2158	114
Redemption, state and city as purchasers at judicial foreclosure sale, terms of redemption	0-2157	114
Sale of real estate for, foreclosure of tax lien as required for	0- 683-A	91

	Opinion No.	Page
Exemptions		
National bank in process of liquidation as exempt from stamp tax	0-2180	117
Public charity exemption, exclusive use of property for charitable purposes as necessary for	0-2163	115
Religious encampment corporation requirement that property of be used exclusively by to be exempt	0-2134	109
Liquor stamp tax		
Refund of when liquor stored is destroyed by fire	0-2000	96
Motor fuel tax, refund of individual purchasing from unlicensed distributor, authority of Comptroller to make	0-2031	97
Occupation taxes		
Emigrant agent, taxes on occupation of	0-2120	106
Traveling person selling patent medicine along with other products as subject to	0-2190	119
Traveling person selling patent medicine in home town and not outside city limits as subject to	0-2176	116
Personal property taxes		
"Property taxpayer," common school district trustee owning property upon which are due delinquent taxes as	0-2148	112
Poll tax		
Agency authorization of taxpayer who does not reside in town of 10,000 inhabitants or more, requirements of	0-2181	117
Receipt issued after January 31st, stamp necessary to be placed on	0-2181	117
Prize tax		
Horse show to raise money for Finnish relief, prizes given at as subject to	0-2146	112
Road tax		
Expenditure of, manner of as determined by commissioners' court	0-2094	102
School taxes		
Independent school district tax assessor, maximum fees to	0-2116	105
Religious encampment corporation, necessity that property of be used exclusively by to be exempt from	0-2134	109
Stamp tax		
Consignment contract as subject to	0-2098	102
Date of instrument prior to effective date of act, instrument as subject to	0-2178	117
National bank in process of liquidation, exemption of from	0-2180	117
Supplemental indenture of trust as subject to	0-2232	124
Valuation		
Expert, contract of employment of, authority of commissioners' court to enter	0-2128	108

	Opinion No.	Page
TRIAL		
Subpoena duces tecum, accident reports of Department of Public Safety as subject to	0-2044	98
TRUSTEES		
Common school district trustee		
Election, disqualification of person elected, filling of vacancy upon	0-2196	119
Property taxpayer, trustee with personal property upon which delinquent taxes are due as	0-2148	112
County board of school trustees		
Annexation ordered by, consent of trustees of district as necessary	0-2075	101
Election, disqualification of person elected, filling of vacancy upon	0-2196	119
Rural high school district board of trustees, vacancy in, filling of by	0-2230	124
Independent school district trustees		
Appointment of to fill vacancy, time for	0-2029	97
Board of, secretary of, employment and compensation of non-member as	0-2116	105
Elections, county judge, authority of in as restricted to districts of less than 500 scholastics	0-2173	116
Election, names on ballots, time for candidates to file	0-2029	97
Election, tie vote for two candidates and third candidate receives more, third candidate as elected and new election as necessary for the two	0-2187	118
Meetings of, exclusion of visitors from	0-2133	109
Teachers' contracts, signatures of majority of members of and approval of minutes as affecting validity of	0-2228	123
Rural high school district board of, vacancy in, filling of	0-2230	124
School trustees		
Elections, disqualification of to act as official in	0-2056	99
Elections, county judge's authority in as restricted to common and independent school districts of less than 500 scholastics	0-2173	116
Elections, tie vote in new election in which new candidates may be placed on ballot as proper procedure	0-2187	118
Minutes of meeting, teacher's contract recorded by refusal to approve minutes as discharging liability	0-2162	115
	0-2228	123
Suits against, attorney's fees in, payment of with school funds	0-2103	103

INDEX

31

U

Opinion No.

Page

UNEMPLOYMENT COMPENSATION

Husband and wife, application of Act to certain situations concerning 0-2007 96

United Fraternal Benefit Association, application and certificate of as constituting securities 0-2077 101

UNITED STATES AND FEDERAL AGENCIES

National Guard Association of the United States, membership dues in of Adjutant General's Department, payment of 0-2211 121

Office of profit or trust, holder of as disqualified to act as election official 0-2056 99

University of Texas

Contractual relationship between student and university, existence of 0-2106 103

V

W

WARRANTS, VOUCHERS, AND SCRIP

County parks, improvements on, authority of commissioners' court to issue against permanent improvement fund 0-2140 110

State warrants

Real property with limitation title purchased by Highway Department, issuance 0-2123 107

WORDS AND PHRASES

"Bingo" 0-2139 110

"Front door" 0-2156 114

"Pharmacy" 0-2244 125

"Property taxpayer" 0-2148 112

Wrestlers

Booking agent securing information on and contacting promoters as required to secure employment agency license 0-2018 96

X

Y

Z

