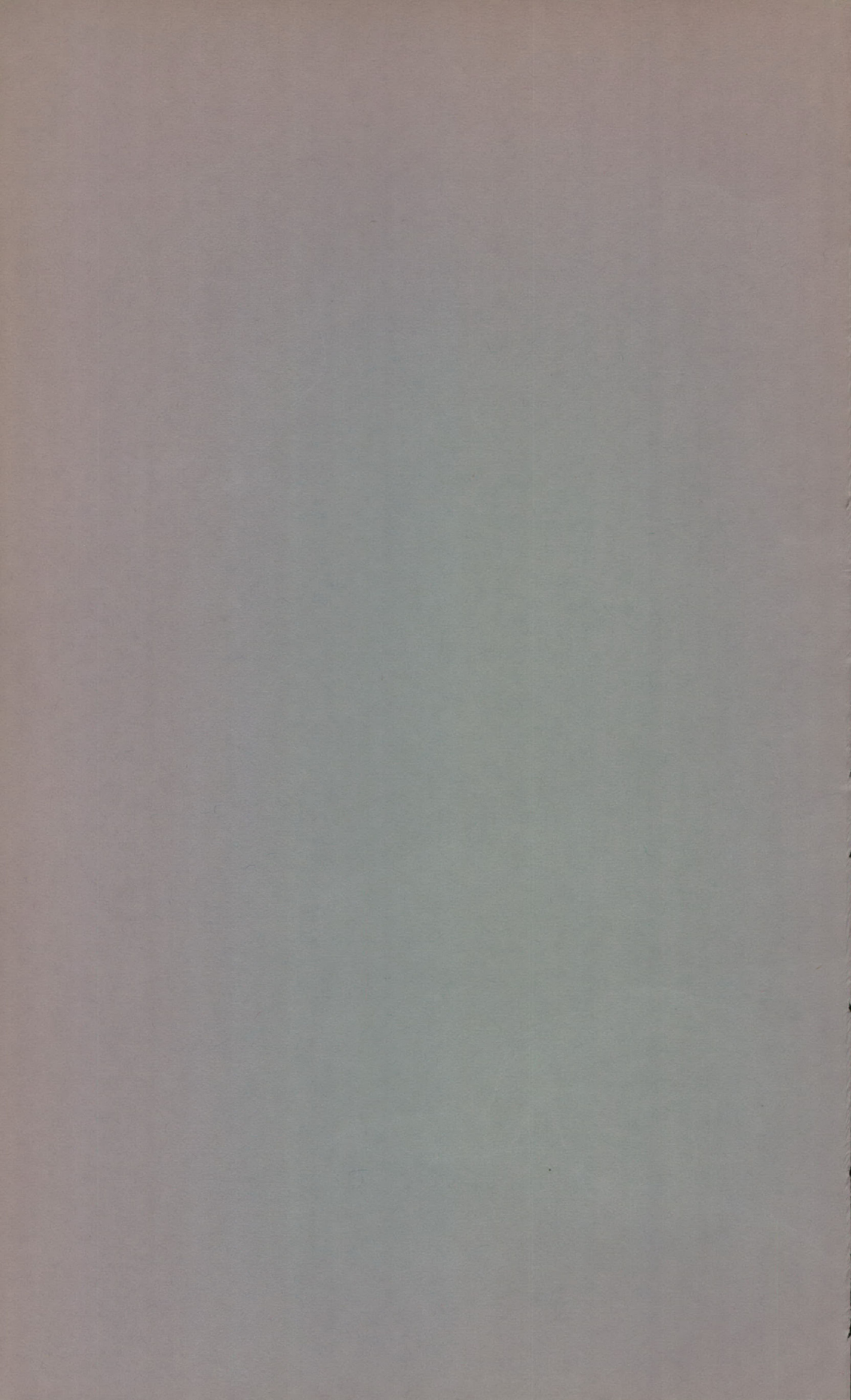


MONTHLY REPORT
OF THE
ATTORNEY GENERAL
OF THE
STATE OF TEXAS



GERALD C. MANN
ATTORNEY GENERAL

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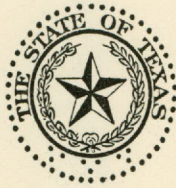
MONTHLY REPORT
OF THE
ATTORNEY GENERAL
OF THE
STATE OF TEXAS

OPINIONS RENDERED

June 1, 1941

To

June 30, 1941



GERALD C. MANN
ATTORNEY GENERAL

VOLUME 3, NUMBER 6

JUNE, 1941

0-2947 To: Wm. J. Lawson, Secretary of State
Date: June 10, 1941

The Special Events Corporation of Galveston, which has for its purpose the "staging of pageants and similar events to educate the public as to the history and natural advantages of the City of Galveston," is essentially an educational undertaking within the meaning of Sec. 2 of Art. 1302, R. C. S. *Conley v. Daughters of the Republic*, 156 S. W. 197; Opinion 0-2902.

0-2983-A To: C. R. McNamee, Director, Rate Division,
Railroad Commission of Texas
Date: June 17, 1941

Since the legislative history clearly shows that the Legislature has always allowed transportation companies to carry goods to charitable institutions free of charge, and since Art. 4009, R. C. S., is clearly susceptible to such construction, all transportation companies as enumerated in Title 66 of the Revised Civil Statutes, as well as motor carriers, may transport goods free of charge to any orphan home or other charitable institution.

Opinion 0-2983 is overruled only insofar as it conflicts with this opinion.

Arts. 4005-4015, inc., R. C. S.; Acts 1921, 37th Leg., R. S., H. B. 196, Ch. 99, p. 191. Opinions 0-445, 0-2983. (See opinion for citation of additional authorities.)

0-3281 To: John R. Shook, Criminal District Attorney, San
Antonio
Date: June 20, 1941

Under the described circumstances, where, in effect, an alien, subsequent to Feb. 1, 1941, and after paying his poll tax, becomes a naturalized citizen of the United States, such naturalized citizen is not entitled to vote at an election during said year. The county tax assessor-collector does not have the power or duty of transferring the name of a naturalized citizen appearing on the alien poll tax roll to the regular qualified elector poll list, and election judges could not legally permit such naturalized citizen to vote in an election. Art. VI, Secs. 1, 2, and 4, Constitution of Texas; Arts. 2954, 2955, 2959, 2963, 2965, 2970, 2975, and 3005, R. C. S.; *Campbell, Mayor, et al., v. Wright, County Attorney, et al.*, 95 S. W. (2d) 149; *Yett v. Cook*, 281 S. W. 837. (See opinion for citation of additional authorities.)

0-3305 To: J. C. Gowdy, County Auditor, Wichita County
Date: June 6, 1941

Arts. 2681 and 2766, R. C. S., permit the county board of school trustees to change the boundary lines of an independent school district, incorporated for free school purposes only, on its own initiative when it is for the public good. Sec. 2 of Art. 2742e, V. A. C. S., authorizes the county board of school trustees to change the boundary lines of common school districts. *Hill County School Trustees v. Melton, et al.*, 119 S. W. 1142.

0-3359-A To: P. W. Minter, County Attorney, Jim Hogg
County
Date: June 5, 1941

This opinion supplements Opinion 0-3359 and holds that the operator of a meat market who purchases animals on foot which are subsequently slaughtered by his employee or agent must file the reports and bond required by Arts. 6904 and 6908, R. C. S., and Arts. 1447-1454, P. C., inc.

0-3393 To: Charles S. McMillan, County Attorney, San
Augustine County
Date: June 6, 1941

Art. 2808, R. C. S., has, by implication, been repealed by Acts 1929, 41st Leg., 5th C. S., S. B. 30, p. 212.

In a school trustee election in which two trustees are to be elected, if more than two names are unscratched or written in, the entire ballot is void, but such does not render the entire election void as a matter of law. Arts. 2746, 3018, R. C. S.; Arts. 2746a, 2774a, V. A. C. S.; *Plains Common Consolidated School District No. 1 of Yoakum County v. Hayhurst*, 122 S. W. (2d) 322; 16 Tex. Jur. 111; Opinion 0-1432.

0-3397 To: C. S. Clark, Chairman, Board of Water Engi-
neers
Date: June 24, 1941

This opinion concerns the rights and limitations imposed on those who appropriate water for irrigation purposes, and the authority of the Board of Water Engineers to grant amendments to existing permits under the facts presented to this department. Arts. 7495, 7589, 7590, 7591, R. C. S.; Arts. 7493, 7508, 7515, and 7532, V. A. C. S.; *Lincoln Land Co. v. Davis*,

27 F. Supp. 1006; *Biggs v. Miller*, 147 S. W. 632; 39 Tex. Jur. 149, Sec. 126; 55 Conference Opinions 149. (See opinion for citation of additional authorities.)

0-3419 To: Railroad Commission of Texas
Date: June 14, 1941

An order of the Railroad Commission amending a special commodity permit, where no notice or opportunity to be heard is given the holder, is erroneous and may be set aside upon an appeal conducted in accordance with Sec. 20, Art. 911b, V. A. C. S. 34 C. J. 246; 25 Tex. Jur. 538-539.

0-3424 To: T. M. Trimble, First Assistant State Superintendent of Public Instruction
Date: June 11, 1941

Under Arts. 2742j and 2757, V. A. C. S., a rural high school district may be incorporated into an independent school district. Art. 2922b, V. A. C. S.

0-3433 To: Wm. J. Lawson, Secretary of State
Date: June 15, 1941

The type of corporation contemplated under the provisions of Art. 1434a, V. A. C. S., is in the nature of a quasi-public corporation with the power of eminent domain and operating on a non-profit basis. The only powers which such a corporation can exercise are those conferred by the provisions of the act authorizing its creation; therefore, under the facts submitted to this department, a corporation formed under Art. 1434a for the purpose of supplying water on a non-profit basis is not authorized to amend its charter so as to include within its purpose clause the furnishing of sewerage on a non-profit basis. Art. 1302, Sec. 93, V. A. C. S.; Acts 1933, 43rd Leg., 1st C. S., p. 202, ch. 76.

0-3442 To: Eli Willis, County Attorney, Moore County
Date: June 6, 1941

Under the facts submitted to this department, the trucks in question, which are coming from other states to purchase Texas gasoline for resale, are operated for compensation or hire within the meaning of Sec. 2, Art. 827b, V. A. P. C., which concerns the registration of non-resident vehicles. *New Way Lumber Company, et al., v. Smith, et al.*, 96 S. W. (2d) 282.

0-3477 To: Henry C. Kyle, County Attorney, Hays County
Date: June 7, 1941

A county attorney is not entitled to a 10% commission upon amounts collected to reimburse the Texas Unemployment Compensation Fund for benefits erroneously paid because of misrepresentation, inasmuch as such money does not belong to the State but is handled as a trust fund with the State Treasurer acting as trustee. Art. 335, R. C. S.; Arts. 5221b-1—5221b-22, V. A. C. S., inc.; *Friedman v. American Surety Company of America*, 9 Tex. S. Ct. Rep. 300.

0-3481 To: Ernest Guinn, County Attorney, El Paso County
Date: June 14, 1941

Where A and B are standing close together on the edge of a highway and D in his automobile runs into them, if he be acquitted on a charge of aggravated assault with a motor vehicle as to A, he may, in a subsequent trial for negligent homicide of B, successfully raise the plea of former acquittal. Art. I, Sec. 14, Constitution of Texas; Arts. 8, 508, et seq., C. C. P.; Arts. 1149, 1233, V. A. P. C.; *Spannell v. State*, 203 S. W. 357; *People v. Barr*, 181 N. E. 64; Bishop's Work on Criminal Law (9th Ed., 1923), Sec. 1061. (See opinion for citation of additional authorities.)

0-3485 To: Railroad Commission of Texas
Date: June 6, 1941

Under the facts submitted to this department, the contract carriers who transport goods for the wholesale company in question are bound by law to observe a rate structure involving, as a minimum, the rates and ratings of the common carriers, and may be required to keep records such as bills of lading and waybills on which the articles transported are described and rated in accordance with the general order promulgated by the Railroad Commission on April 19, 1933. Art. 911b, Secs. 4a, 4c, 6aa, 13b, 21, V. A. C. S.

0-3492 To: Railroad Commission of Texas
Date: June 5, 1941

If an application for a carrier's permit shows on its face that the route over which it is sought to operate is not even a designated public road or highway, the Railroad Commission would be acting within its authority in refusing to accept such application for filing. However, this Department advises that such applications be accepted, filed, and permitted to rest on

the docket until the Supreme Court passes on application for writ of error in the case of *Southwestern Greyhound Lines, Inc., v. Railroad Commission, et al.*, 147 S.W. (2d) 318. Art. 911a, V. A. C. S.

0-3517 To: Wm. J. Lawson, Secretary of State
Date: June 7, 1941

The depository corporation in question which was granted a charter in 1923 "to do a general fiduciary and depository business" as authorized under Subsec. 37, Art. 1121, R. C. S., 1911, and which has a paid-up capital stock of only \$10,000, has no authority to amend its charter increasing its capital stock and still have less than \$100,000.00 capital stock. Art. 4969, R. C. S., was passed in 1897 and amended in 1903 and 1913, and was in force and effect at the time the above mentioned company was granted a charter. 39 Tex. Jur. 145.

0-3523 To: Z. D. Allen, District Attorney, Wichita Falls
Date: June 5, 1941

Before a sheriff or deputy is entitled to the five per cent commission on fines collected as provided by Art. 951, C. C. P., he must have actually collected the fine on which he is claiming the commission, and it is not a sufficient basis for payment that he was present when the defendant paid his fine to the justice of the peace. *McLennan County v. Boggess, et al.*, 137 S.W. 346; 19 Tex. Jur. 655.

0-3525 To: W. A. Davis, State Registrar, Texas State
Board of Health
Date: June 11, 1941

An illegitimate child born to a divorced mother takes the name of its mother at the time of birth. The mother retains the name of her divorced husband until a subsequent marriage or the rendering of a decree by a competent court. *Barkley v. Dunke*, 87 S. W. 1147; Speer's Law of Marital Rights (3rd Ed.), Sec. 25, et seq.

0-3526 To: George H. Sheppard, Comptroller of Public
Accounts
Date: June 6, 1941

The term "book value" as used in Art. 881a-53, V. A. C. S., which prescribes the manner for the rendition of the property of building and loan associations, means the value of the

shares outstanding shown by the assets and liabilities as carried on the books of the building and loan association. Art. 881a-1, V. A. C. S.; *People v. Coleman*, 14 N. E. 431. (See opinion for citation of additional authorities.)

0-3531 To: Thomas A. Wheat, County Attorney, Liberty County

Date: June 10, 1941

Since Art. 951, P. C., is not one of the articles expressly repealed by Art. 934a, P. C., and is not in conflict with said article, a person violating the provisions of Art. 951, supra, which prohibits the catching of fish by seine and the use of artificial bait during the months of March and April, is subject to having his license automatically cancelled.

0-3532 To: C. G. Mendenhall, County Auditor, Chambers County

Date: June 6, 1941

There are no statutes requiring the tax collector to make his reports on forms provided by and in accordance with tax rates as set by the commissioners' court, but the county auditor has the authority under Art. 1656, R. C. S., to demand such a report, although no specific method of enforcing such demand is provided.

0-3536 To: Buford D. Battle, State Auditor and Efficiency Expert

Date: June 30, 1941

The State Auditor and Efficiency Expert does not have authority to make an audit of the Tyler Field Office of the Governing Committee for Salt Water Control. Arts. 697, 698, 698a, V. A. P. C.; Arts. 4444, 5351-5366, R. C. S.; Art. 4413a, V. A. C. S.; 34 Tex. Jur. 440; *Sherrick v. State*, 79 N. E. 193.

0-3537 To: L. L. Roberts, County Auditor, Hutchinson County

Date: June 6, 1941

A county may legally expend moneys in its lateral road fund for removing old bridges, buying materials, acquiring right of ways, and building new bridges. Art. III, Sec. 52, Constitution of Texas, as amended; *Aransas County v. Coleman-Fulton Pasture Company*, 191 S. W. 553.

0-3538 To: H. A. Hodges, County Auditor, Williamson
County
Date: June 7, 1941

When a defendant is tried in a justice court, found guilty, and allowed to go on his promise to appear and pay the fine and costs assessed on the date fixed by the court, and he fails to appear and pay on that date, the sheriff may have a *capias* issued and serve same on the defendant and charge the \$2.00 fee, although his previous arresting fee of \$2.00 has been included in the amount of the fine and costs. If the defendant gives a deferred judgment bond and fails to appear, the sheriff may have a *capias* issued and charge the \$2.00 fee for serving same.

Capiases are to be issued when a pecuniary fine has been adjudged against a defendant not present in court. Arts. 319, 698, 787-789, 792, 1065, C. C. P.; Arts. 1617, 1619, V. A. C. S.

0-3544 To: Texas State Board of Pharmacy
Date: June 6, 1941

In order for the State Board of Pharmacy to revoke a pharmacist's license because of conviction of a felony, the conviction must be "final." It is not sufficient that a statement of conviction has been furnished by the Liquor Control Board or the U. S. Bureau of Narcotics, but a certified copy of the judgment or sentence should be had. Art. 4542-a, Sec. 12, V. A. C. S.; *Texas State Board of Dental Examiners, et al., v. Dr. Winn O. Francisco*, 149 S. W. (2d) 619; Opinions 0-1824, 0-1894, 0-2359.

0-3546 To: George H. Sheppard, Comptroller of Public
Accounts
Date: June 6, 1941

The intangible tax levied by Art. XIII, H. B. 8, Acts 47th Leg., insofar as it affects motor bus companies and motor carriers, applies only to those holding certificates of convenience and necessity authorizing permanent operations; while the holders of temporary certificates, contract carrier permits, and special commodity permits are subject to the tax levied by Art. XIV, H. B. 8, *supra*. Such tax on motor bus companies may be levied by the Intangible Tax Board for the year 1941.

Art. XIV, *supra*, makes no attempt to levy the tax on receipts from interstate business even though done in this State.

Cadena v. State, 185 S. W. 367; *Masterson v. Hedley*, 265 S. W. 406; 61 C. J. 564. (See opinion for citation of additional authorities.)

0-3547-A To: Buford D. Battle, State Auditor and Efficiency Expert
Date: June 13, 1941

Facts presented to this department since the release of Opinion 0-3547 show that the Jeanes Supervising Teacher mentioned has definite teaching assignments in the rural school in question. Upon these facts, said school may be allowed reimbursement from the Rural Aid Fund in the same manner as would be allowed on a regular teacher.

0-3548-A To: Buford D. Battle, State Auditor and Efficiency Expert
Date: June 13, 1941

Facts presented to this department since the release of Opinion 0-3548 show that the Jeanes Supervising Teacher mentioned has definite teaching assignments in the rural school in question. Upon these facts, said school may be allowed reimbursement from the Rural Aid Fund in the same manner as would be allowed on a regular teacher.

0-3549 To: Buford D. Battle, State Auditor and Efficiency Expert
Date: June 14, 1941

Under the facts submitted to this department, rural aid may be drawn by Eureka School District No. 16 for a "ghost teacher's" salary based upon the amount the rural district would have been entitled to receive had it not made the contract of transfer from the Whitehouse Independent School District of Smith County. Acts 1939, 46th Leg., H. B. 933, Secs. 4 and 15.

0-3558 To: Railroad Commission of Texas
Date: June 5, 1941

The Railroad Commission has a certain amount of discretion in revoking, suspending, or amending a certificate of convenience and necessity because of the failure of the holder thereof to operate over a particular portion of its route in accordance with the terms of the certificate.

The Railroad Commission has the authority to amend a certificate of convenience and necessity authorizing irregular service and schedules over no fixed routes, either intrastate or interstate, in order to remove such certificate from the invalidity referred to in Opinions 0-2608 and 0-3147, condi-

tioned upon a proper application of the holder, findings of public necessity, and the sufficiency of the highways to be traversed.

Art. 911b, Sec. 12(b), V. A. C. S.

0-3565 To: Charles E. Baughman, Chief Clerk, Department of Agriculture

Date: June 10, 1941

The Department of Agriculture has no authority to continue employment of quarantine inspectors under H. B. 345, Acts 47th Leg., for a period of five months from and after May 12, 1941, the effective date of said act, since specific notice is given that the appropriation provided therein is to be made for the remaining portion of the fiscal year ending August 31, 1941. Art. III, Sec. 35, Constitution of Texas.

0-3566 To: H. D. Stringer, County Attorney, Hall County

Date: June 9, 1941

When an out-of-county arrest is made by a sheriff for a felony, the offender is not entitled to make bail in the county of his arrest, but should be brought before a magistrate in the county where the felony was committed. Where such out-of-county arrest is made for a misdemeanor, the offender is entitled to make bail in the county of his arrest; or, if he cannot make bail, he should be brought before a magistrate in the county where the offense was committed. In either event, the sheriff is entitled to seven and one-half cents per mile both going and returning. Arts. 36, 223, 224, 234, 235, 1065, C. C. P.; *Henson v. State*, 49 S. W. (2d) 463. (See opinion for citation of additional authorities.)

0-3567 To: Stanley Kulawik, County Attorney, De Witt County

Date: June 26, 1941

The granting of an easement by a county commissioner to the county for state highway purposes violates Art. 373, V. A. P. C., and the transaction is void. The money paid to said commissioner was illegally received by him, and it is his duty under Art. 2340, V. A. C. S., to pay the same over to the county. *Rigby v. State*, 10 S. W. 760; *City of Edinburg v. Ellis*, 59 S. W. (2d) 99; *Bland v. State*, 38 S. W. 252.

0-3571 To: Roland Boyd, County Attorney, Collin County
Date: June 23, 1941

Under the facts presented to this department, the Sheriff of Collin County may pay, as expenses of office, for radio service rendered by the City of McKinney short wave radio station, provided the procedure prescribed in Art. 3899, Sec. b, V. A. C. S., is followed and the expenditure is approved by the commissioners' court.

0-3577 To: R. L. Wilson, Member, Texas Board of Pharmacy
Date: June 9, 1941

The Texas Board of Pharmacy may refuse to issue a reciprocity license to an applicant licensed in another state on grounds of moral character, and it is within the authority and discretion of said board to call an applicant who seeks such license before it for examination as to character, ethics, and past experience. Art. 4542a, Sec. 9, V. A. C. S.; *Hanzal v. City of San Antonio*, 221 S. W. 237; *In re Mosher*, 102 P. 705; 48 C. J. 1090. (See opinion for citation of additional authorities.)

0-3578 To: P. W. Minter, County Attorney, Jim Hogg County
Date: June 5, 1941

A magistrate has no authority to postpone a hearing on a peace bond charge because in his judgment it "tends to lessen hardship on the defendant," nor may he postpone such hearing upon the application of either the State or the defendant; therefore, the defendant is not entitled to make appearance bond pending postponement of such hearing. Art. I, Sec. 2, Constitution of Texas; Arts. 5, 79, et seq., 267, 274, C. C. P.; *Ex parte Garner*, 246 S. W. 371; *Ex parte Ezell*, 40 Tex. 451. (See opinion for citation of additional authorities.)

0-3579 To: Sam H. Davidson, County Attorney, Hockley County
Date: June 4, 1941

This opinion is concerned with the effect of H. B. 76, Acts 47th Leg., which releases penalties and interest, upon the payment of a commission to a delinquent tax attorney under a contract providing that the "cost of collecting shall not exceed the amount of penalty and interest," and holds that said attorney is entitled to the full 7½% commission stipulated in the contract, so long as such commission, plus any costs of collection, do not exceed an amount equal to the penalties and interest collected under the contract from its beginning.

0-3585 To: T. M. Trimble, First Assistant Superintendent
of Public Instruction
Date: June 7, 1941

A school depository bank cannot be required to release rural aid warrants as long as it remains the legal depository for the district, and, as the school board does not have authority to discount said warrants, neither the depository bank nor any other bank or person has authority to purchase such warrants at a discount. Said depository bank and its successor only have authority to keep such warrants in their custody until the State pays them the amount of money represented by the warrants, and then the depository must account for an amount of money equivalent to the face value of the warrants. Arts. 2832, 3912e, Sec. 6a, V. A. C. S.; Opinion 0-1054. (See opinion for citation of additional authorities.)

0-3586 To: T. M. Trimble, First Assistant Superintendent
of Public Instruction
Date: June 10, 1941

The offices of county treasurer and trustee of an independent school district which has more than 150 scholastics are not incompatible and may, therefore, be held by the same person. Art. XVI, Sec. 40, Constitution of Texas; Art. 2828, R. C. S.; Arts. 2832, 2833, V. A. C. S.; *State v. Martin*, 51 S. W. (2d) 815; *Horton v. Rockwall County*, 149 S.W. 297; Opinions 0-2184, 0-3308, 0-3522.

0-3589 To: George H. Sheppard, Comptroller of Public
Accounts
Date: June 5, 1941

Art. 1833, R. C. S., has been superseded in part by S. B. 431, Ch. 2, Vol. 1, p. 619, Acts 47th Leg., R. S., and since the current biennial appropriation for the Courts of Civil Appeals makes no appropriation for the deputy clerk mentioned, there is no authority for the appointment and compensation of any deputy beyond the two deputies specially mentioned in the appropriation bill and for whom specific salaries have been appropriated. Acts 1939, 46th Leg., R. S., H. B. 257.

0-3592 To: J. R. (Bill) Hall, County Attorney, Lamb
County
Date: June 6, 1941

The commissioners' court has no authority to withdraw funds from the duly selected county depository and place them in

another bank, even though the second bank is prepared to make bond for its safe return. Arts. 2544, et seq., V. A. C. S.; Acts 1941, 47th Leg., R. S., S. B. 212.

0-3593 To: Edgar H. Maddox, County Attorney, Palo Pinto County

Date: June 10, 1941

A military policeman of the United States Army is not an officer within the purview of Art. 41, C. C. P., or Arts. 339 and 346, P. C., the latter of which imposes a fine upon any person opposing or resisting an officer who is lawfully arresting a third person; therefore, a private citizen would not be subject to punishment under said statute for resisting such a policeman who is attempting to arrest a third person. Arts. 3, 7, P. C.; 10 U. S. C. A. 1546; *Harless v. State*, 109 S.W. 934; *Bennett v. State*, 124 S.W. (2d) 359. (See opinion for citation of additional authorities.)

0-3595 To: Stansell Bryan, District Attorney, Waco

Date: June 6, 1941

The county clerk has authority to accept an instrument for record even though the notary public has failed to stamp or print his name under his signature in the acknowledgment of such instrument as required by H. B. 389, Acts 1941, 47th Leg. Art. V, Sec. 20, Constitution of Texas; Arts. 1941, 5954, 6591, R. C. S.; Art. 6592, V. A. C. S.; *First National Bank v. McElroy*, 112 S.W. 801; *Hollis v. Pikland Corporation*, 40 S. W. (2d) 53.

0-3597 To: Homer Garrison, Jr., Director, Department of Public Safety

Date: June 10, 1941

There are no statutes which forbid the use of the seal of the State of Texas for any purpose, and the use of the seal on a business card or automobile does not of itself constitute a violation of law. If, however, by use of such emblem, a person should falsely personate himself to be a particular officer of the State and should undertake to act as such, he would be violating Arts. 150 and 429, P. C. *Walker v. State*, 229 S.W. 853; *Brown v. State*, 170 S. W. 714; *Reid v. State*, 80 S. W. (2d) 961. (See opinion for citation of additional authorities.)

0-3598 To: J. D. Looney, County Auditor, Bowie County
Date: June 14, 1941

H. B. 397, Acts 1941, 47th Leg., which validates the act of the Commissioners' Court of Bowie County in ordering the tax assessor-collector to accept in full payment of all county taxes delinquent in 1932 and 1933, and due in 1934, the sum of fifty cents on the dollar, is authorized under Sec. 10, Art. VIII, Constitution of Texas.

0-3602 To: Charles H. Slaughter, County Attorney, Martin County
Date: June 6, 1941

A notary public is engaged in the unlawful practice of law when he draws for and on behalf of others contracts, deeds, leases, affidavits, and mechanics' liens, and gives opinions as to title to real estate, when he has no direct or primary interest in such matters and renders said service for a pecuniary benefit. Art. 430a, P. C.; Art. 5954, R. C. S.; Opinions 0-831, 0-1233, 0-1560.

0-3603 To: Ramey A. Smith, District Attorney, Sulphur Springs
Date: June 7, 1941

The contract submitted to this department does not on its face violate the anti-trust laws of this State in that it appears to be clearly a contract of consignment. But if it can be shown that the transactions between the so-called consignors and consignee are in fact sales of goods, then such contract would be a violation of said laws. *Stein Double Cushion Tire Co. v. Wm. T. Fulton Co.*, 159 S. W. 1013; *La Fon v. Falls Rubber Co.*, 242 S. W. 346, 256 S. W. 577; *Henderson Tire & Rubber Co. v. Roberts*, 12 S. W. (2d) 154.

0-3605 To: C. S. Clark, Chairman, Board of Water Engineers
Date: June 26, 1941

The Board of Water Engineers may legally approve for payment, and the accounting officials of this State may pay, vouchers covering repairs to automobiles purchased with Federal funds allotted to the Texas Division of the U. S. Geological Survey for stream measurement when such automobiles are assigned to and used exclusively in such work. Acts 1939, 46th Leg., Sp. L., Ch. 6, p. 64; *Terrell v. Sparks*, 135 S. W. 519; 59 C. J. 263.

0-3606 To: S. B. Buchanan, Jr., County Attorney, Val Verde County
Date: June 6, 1941

The lateral roads to which Art. 6675a, Secs. 1 to 14, V. A. C. S., refer can be nothing more than such roads as constitute a part of the county road system as contradistinguished from the State Highway System; therefore, the funds allocated to the counties for use on lateral roads under the provisions of said article would be restricted to use on roads constituting a part of the county system and over which the commissioners' court has jurisdiction. Art. 6674q-2, V. A. C. S.

0-3613 To: Dallas Blankenship, Chairman, Criminal Jurisprudence Committee, House of Representatives
Date: June 19, 1941

H. B. 193, Acts 1941, 47th Leg., R. S., which deals with the publication of official notices, would remain valid even in the event that the provision relating to charges made against individuals for political advertising should be declared unconstitutional. It is the opinion of this department that such provision is constitutional. Art. 29, R. C. S.; *Marrs v. Munne*, 25 S. W. (2d) 215; *Logan v. State*, 111 S. W. 1028; 39 Tex. Jur. 84-85; Conference Opinion 3081.

0-3614 To: Tom A. Craven, County Auditor, McLennan County
Date: June 6, 1941

H. B. 518, Acts 47th Leg., R. S., which concerns the fixing of salaries of certain county and district officers by the commissioners' court, is unconstitutional under Art. III, Sec. 35, Constitution of Texas, in that the caption "*authorizes* the commissioners' court *to determine* the salary" while the body directs that the officers' salaries "*shall be set at the maximum* prescribed in this Bill" in mandatory language, thereby effecting a fatal divergence. (Emphasis ours.) *Ex parte Heartsill*, 38 S. W. (2d) 803; *Newnom v. Williamson*, 103 S. W. 656. (See opinion for citation of additional authorities.)

0-3615 To: Miss Hazel H. Beckham, Executive Secretary-Director, State Commission for the Blind
Date: June 10, 1941

Under S. B. 427, Acts 46th Leg., the State Commission for the Blind has the authority to pay an employee less than the salary

designated by the Legislature for a specific position, but the saving thereby effected is neither transferable nor usable to pay a part-time employee for similar work. Opinions 0-1006, 0-3068.

0-3616 To: H. B. Virgil Crawford, County Attorney, Terry
County
Date: June 7, 1941

The salary of the members of the commissioners' court for 1941, under Art. 2350, V. A. C. S., should be computed on the assessed valuation of the county for the year 1940; and if the assessed valuation moves into a higher bracket in 1941, as provided in said statute, the commissioners would not be entitled to the higher salary until after their first regular meeting in January, 1942.

0-3617 To: George H. Sheppard, Comptroller of Public
Accounts
Date: June 10, 1941

The Comptroller of Public Accounts has no authority to issue a duplicate for an original warrant issued in favor of the Treasury of the United States when the original has been lost without the execution and filing of bond as required by Art. 4365, R. C. S.; Opinion 0-3205.

0-3621 To: D. C. Greer, State Highway Engineer
Date: June 4, 1941

Fees collected by the State Highway Department and appropriated by the Legislature for the payment of salaries and other expenses necessarily incident to a proper administration of the Certificate of Title Act became available to the Highway Department immediately upon the effective date of H. B. 205, Acts 47th Leg., R. S. Such appropriation is constitutional and is operative until May 2, 1943, two years after the effective date of the act. Art. VIII, Sec. 6, Constitution of Texas; Acts 1939, 46th Leg., R. S., H. B. 407, Sec. 57; *Pickle v. Finley*, 44 S. W. 480; *Dallas County v. McCombs*, 140 S. W. (2d) 1109. (See opinion for citation of additional authorities.)

0-3622 To: James W. Strawn, County Attorney, Willacy
County
Date: June 7, 1941

The recent tax penalty and interest remission bill (H. B. 76, Acts 47th Leg.) does not apply to or have the effect of remitting

any part of the penalty and interest on taxes that have been reduced to final judgment. Art. III, Sec. 55, Constitution of Texas; Arts. 7264a, 7335, 7335a, 7344, V. A. C. S.; *Jones v. Williams*, 45 S. W. (2d) 130.

0-3626 To: George H. Sheppard, Comptroller of Public Accounts
Date: June 11, 1941

The effective date of Art. XV, H. B. 8, Acts 47th Leg., R. S., which provides for the stock transfer tax, is May 1. Acts 1941, 47th Leg., R. S., H. B. 8, Art. XV, Sec. 7.

0-3627 To: George H. Sheppard, Comptroller of Public Accounts
Date: June 27, 1941

Art. XIV of H. B. 8, Acts 1941, 47th Leg., R. S., which provides for a tax of 2.2% on oil and gas well servicing in connection with certain types of operations, is construed in this opinion, and it is held that this is a tax, not on materials furnished, but on services rendered; and where a contract contains both items, the price of the materials furnished by the contractor should be deducted before arriving at the amount to be taxed. *Standard Oil Company of Texas v. State*, 142 S. W. (2d) 519; *Wiseman v. Gilliotz*, 96 S. W. (2d) 459. (See opinion for citation of additional authorities.)

0-3628 To: Roy Loventhal, Chairman, Livestock Sanitary Commission of Texas
Date: June 20, 1941

The so-called "Tick Eradication Law," Acts 41st Leg., 1st C. S., H. B. 77, Ch. 53, p. 128, which is now carried as Art. 1525-c, V. A. P. C., does not confer upon the Chairman of the Livestock Sanitary Commission, acting individually without the consent and concurrence of a majority of said Commission, the purported powers attempted to be given, inasmuch as the purpose of conferring such powers is not expressed in the caption of the act. 39 Tex. Jur. 84.

0-3630 To: Walter Carson, County Attorney, Hudspeth County
Date: June 14, 1941

An unincorporated town may constitute a subdivision of a county to authorize the holding of a stock law election therein as provided in Art. 6954, V. A. C. S. Art. XVI, Sec. 23, Consti-

tution of Texas; *Ex parte Thompkins*, 83 S. W. 379; *Johnson v. State*, 244 S. W. 609. (See opinion for citation of additional authorities.)

0-3633 To: H. D. Stringer, County Attorney, Hall County
Date: June 14, 1941

Neither the State nor the defendant has the right to subpoena and attach out-of-county witnesses in a misdemeanor case. Art. 567b, Sec. 5, V. A. P. C.; Acts 1939, 46th Leg., R. S., Gen. L., p. 246; *Cothren v. State*, 141 S. W. (2d) 594.

0-3634 To: R. B. Ritchey, Jr., County Attorney, Jasper
County
Date: June 7, 1941

The tax assessor-collector, by virtue of H. B. 76, Acts 47th Leg., Sec. 2, is not entitled to the \$1.00 fee provided in Art. 7331, V. A. C. S., upon taxes delinquent since 1930. However, he is entitled to such fee upon taxes delinquent from 1923 to 1930.

0-3637 To: George H. Sheppard, Comptroller of Public
Accounts
Date: June 14, 1941

The Comptroller has no authority to permit a transfer of a chain store license issued to a utility store operating in a town of less than three thousand inhabitants to a store in a city of more than three thousand inhabitants, in view of the amendment to Art. 7060, R. C. S. Art. 1111d, Sec. 5a, V. A. P. C.; Acts 1941, 47th Leg., H. B. 8, Art. V.

0-3639 To: George H. Sheppard, Comptroller of Public
Accounts
Date: June 15, 1941

The special fund for enforcement and administration created under Sec. 25, Art. XVII, H. B. 8, Acts 47th Leg., R. S., concerning the motor fuel tax, is available for the use and benefit of the Comptroller from and after the effective date of H. B. 8. This appropriation will not be available in any event beyond two years from the effective date of the Act, and, by virtue of the provisions of Sec. 6, Art. XXI, H. B. 8, supra, it will cease to be effective for any purpose after the effective date of any act by the Legislature, either in the departmental appropriation bill or any other appropriation bill enacted subsequent to H. B. 8, wherein the Legislature makes appropriations from the special fund created by Sec. 25, Art. XVII, H. B. 8. Acts 1941, 47th Leg., H. B. 8, Art. XXI, Sec. 21; Opinions 0-3621, 0-3651.

0-3643 To: C. J. Wilde, County Auditor, Nueces County
Date: June 14, 1941

Where a deputy court reporter is appointed by the court under Art. 2323, V. A. C. S., it is mandatory for the deputy court reporter to be paid for the time served the same salary on a per diem basis as that received by the official court reporter. Art. 2326c, V. A. C. S.

0-3645 To: C. W. Talbot, County Attorney, Bastrop County
Date: June 14, 1941

Additional weight fees for raising the load limit of a commercial vehicle should be paid in the county of the owner's residence. Art. 6675a-2, R. C. S.; Opinions 0-1023, 0-1950.

0-3650 To: H. D. Stringer, County Attorney, Hall County
Date: June 20, 1941

A county judge who signs an application for a driver's license of a minor between the age of 16 and 18 years, as is provided by H. B. 20, Secs. 7 and 8, Acts 1941, 47th Leg., is not liable for the negligence of such minor.

0-3651 To: Bert Ford, Administrator, Texas Liquor Control Board
Date: June 14, 1941

The appropriation in Sec. 3 of Art. IX, H. B. 8, Acts 47th Leg., R. S., dealing with the levy of a tax upon prescriptions for liquor filled by pharmacies, is sufficiently specific under the Constitution of Texas, and the appropriation made therein is effective for a period of two years from the effective date of the act. Art. VIII, Sec. 6, Constitution of Texas; *Atkins v. State Highway Department*, 201 S. W. 226; *National Biscuit Company v. State*, 135 S. W. (2d) 687; *Cherokee County v. Odom*, 297 S. W. 1055, 15 S. W. (2d) 538; 38 Tex. Jur. 844; Opinion 0-3621. (See opinion for citation of additional authorities.)

0-3653 To: E. R. Wright, Superintendent, Texas School for the Deaf
Date: June 14, 1941

The advance written consent of the Attorney General to a proposed out-of-state trip of a superintendent of an eleemosynary institution is not required before traveling expenses incurred may be paid. Consent should be obtained, however, from the Board of Control. Acts 1939, 46th Leg., R. S., H. B. 256; Opinion 0-2220.

0-3654 To: C. H. Gilmer, Chairman, Committee on Judiciary and Uniform State Laws, House of Representatives
Date: June 20, 1941

S. B. 346, Acts 1941, 47th Leg., R. S., providing for the establishment of county hospitals in counties having a population of not less than three hundred twenty-five thousand inhabitants and not more than three hundred fifty thousand inhabitants, is unconstitutional and void under Art. III, Sec. 56, and Art. VIII, Sec. 3, Constitution of Texas, Title 71, Ch. 5, V. A. C. S.; *J. R. Miller v. County of El Paso*, 150 S. W. (2d) 1000.

0-3655 To: W. A. Davis, State Registrar, Texas State Board of Health
Date: June 23, 1941

Fees collected by the justice of the peace acting as local Registrar of Vital Statistics are fees of office and should be accounted for as such. Opinion 0-419.

0-3656 To: D. Richard Voges, County Attorney, Wilson County
Date: June 15, 1941

The commissioners' court can legally contract with the county attorney and pay him a reasonable compensation for services rendered in all civil cases where the duty is not imposed upon the county attorney by statute to represent the county. If such services are performed in the absence of a contract, but upon the request of the commissioners' court, the county attorney is entitled to a reasonable compensation on a quantum meruit basis.

There is no statute imposing the duty upon the county attorney to file a suit upon the instructions of the commissioners' court to remove a tenant from the county poor farm.

Arts. 334, 339, 6716, V. A. C. S.; *City National Bank v. Presidio County*, 26 S. W. 777; *Jones v. Veltman*, 171 S. W. 291; Conference Opinion 2673. (See opinion for citation of additional authorities.)

0-3657 To: George H. Sheppard, Comptroller of Public Accounts
Date: June 26, 1941

Under H. B. 76, Acts 47th Leg., R. S., no penalty on delinquent taxes will be chargeable by the State and county or any other political subdivision thereof which adopts such act, where a

person pays all the delinquent ad valorem and poll taxes owed by him. If he pays all delinquent taxes due on a part of his property only and leaves the remainder unpaid, he must pay a 6% penalty upon that portion which he pays.

0-3658 To: Thomas A. Wheat, County Attorney, Liberty County

Date: June 15, 1941

A plan whereby, in effect, a merchant gives to his customers a booklet with a concealed number which number is to be disclosed when the booklet is filled with "sales" stamps and which number represents a prize ranging in value from two quarts of oil to twenty dollars in cash or merchandise, is a violation of the lottery laws of the State of Texas. Art. III, Sec. 47, Constitution of Texas; Art. 654, P. C.; *City of Wink v. Griffith Amusement Company*, 100 S. W. (2d) 695; *Griffith Amusement Company v. Morgan*, 98 S. W. (2d) 844; Opinions 0-1174, 0-1819, 0-2063.

0-3659 To: W. M. Tucker, County Attorney, Collingsworth County

Date: June 24, 1941

H. B. 76, Acts 1941, 47th Leg., does not halt the filing of delinquent tax suits; however, judgments in such suits should contain provisions safeguarding the right of the property owner to the remissions given by said act in case such taxpayer makes payment before November 2. All costs are released in case of payment of the delinquent taxes on or before November 1, 1941, except those due and payable to officers or officials at the effective date of the Act.

0-3661 To: C. H. Gilmer, Chairman, Committee on Judiciary and Uniform State Laws, House of Representatives

Date: June 20, 1941

S. B. 288, Acts 1941, 47th Leg., R. S., providing for the employment and discharge of courthouse employees by the commissioners' court in counties of more than three hundred twenty-five thousand and less than three hundred seventy-five thousand inhabitants is unconstitutional and void under Art. III, Sec. 56, Constitution of Texas. *J. R. Miller v. County of El Paso*, 150 S. W. (2d) 1000.

0-3662 To: C. H. Gilmer, Chairman, Committee on Judiciary and Uniform State Laws, House of Representatives
Date: June 19, 1941

S. B. 345, Acts 1941, 47th Leg., R. S., providing for fees for constables of precincts which lie in counties having a certain population and which lie in whole or in part in an incorporated city or town containing territorial limits of twenty-five square miles, is a local or special law and is therefore unconstitutional. Art. III, Sec. 56, Constitution of Texas; Art. 1055, C. C. P.; *J. R. Miller v. County of El Paso*, 150 S. W. (2d) 1000.

0-3666 To: Marvin H. Brown, Jr., Criminal District Attorney, Fort Worth
Date: June 19, 1941

Judgments in delinquent tax cases entered before November 1, 1941, should contain provisions safeguarding the taxpayer in the remission of certain penalties, interest, and costs, provided by H. B. 76, Acts 1941, 47th Leg., in case he should make payment in such manner and within such time as to entitle him to the benefits of the act.

0-3668 To: R. B. Ritchey, County Attorney, Jasper County
Date: June 15, 1941

A delinquent tax judgment rendered in favor of the State of Texas never becomes dormant. Art. 3773, R. C. S., as amended; *Christian v. Hill Company*, 113 S. W. (2d) 616; Opinion 0-418.

0-3669 To: Frank Wright, County Auditor, Fannin County
Date: June 15, 1941

The commissioners' court does not have the authority to donate to a fund for the purpose of purchasing a pulmotor, as it may exercise only such authority as is conferred, expressly or by implication, by the Constitution and statutes of this State. Opinions 0-591, 0-1001.

0-3671 To: A. J. Lockett, County Attorney, Comal County
Date: June 18, 1941

A sheriff who conveys a temporarily committed patient to a state hospital is entitled to receive actual expenses of transportation from the county. Arts. 3193-3196, R. C. S., inc.; Arts. 147-150, Vernon's Sayles' Texas Civil Statutes of 1914; Opinion 0-3284. (See opinion for citation of additional authorities.)

0-3676 To: Guy Turner, County Attorney, Denton County
Date: June 23, 1941

The County School Superintendent of Denton County should not be drawing salary under S. B. 499, Acts 1937, 45th Leg., because said county, according to the last Federal census, no longer comes within the population bracket fixed by said Act. However, since the salary of said school superintendent is paid out of school funds, the matter of passing on the amount of salary to which the superintendent is entitled is not part of the duties required of the auditor of said county. Arts. 2700d-17, 2827a, V. A. C. S.; *Houston National Exchange Bank v. School District No. 25, Harris County*, 185 S. W. 589; Opinions 0-1063, 0-2734, 0-2734-A.

0-3679 To: D. Richard Voges, County Attorney, Wilson County
Date: June 18, 1941

An independent school district has no authority to pay to a delinquent tax collector attorney a compensation exceeding fifteen per cent of the amount collected. Arts. 7335, 7343, R. C. S.; Art. 7335a, V. A. C. S.; *Bell v. Mansfield Independent School District*, 129 S. W. (2d) 629.

0-3681 To: George H. Sheppard, Comptroller of Public Accounts
Date: June 17, 1941

A radio dealer who sells a \$100.00 radio to a customer and gives him a \$50.00 trade-in allowance on his old radio and finances the remaining \$50.00 by adding \$5.00 as carrying charges and \$5.00 for installation charges is taxed 2% of \$100.00 under the gross receipt tax as levied by Sec. 1, Art. X, H. B. 8, Acts 1941, 47th Leg., *R. S. Elleton's Estate*, 136 N. Y. Supp. 455.

0-3682 To: R. E. Beasley, County Auditor, Collin County
Date: June 18, 1941

The provisions of Art. 2938, R. C. S., control the number of election officials required in each precinct to conduct a special senatorial election, but Art. 2943, V. A. C. S., controls the compensation of such officials, since it is in conflict with Art. 2938, supra, and is the latest expression of the Legislature. 39 Tex. Jur. 139; Opinion 0-3438.

0-3683 To: Thomas L. Blanton, Jr., County Attorney,
Shackelford County
Date: June 19, 1941

Justices of the peace and county judges in fee counties are entitled to their full fees from the county under Art. 1052, C. C. P., for each criminal action tried and finally disposed of by them, regardless of the method of satisfaction of the fine and costs. Opinion 0-616.

In counties operating under the general road law, the commissioners' court has no authority to allow each commissioner a monthly allowance for automobile expenses incurred in supervising county roads. Opinions 0-752, 0-3119.

There is no express or implied authority for the Commissioners' Court of Shackelford County to employ a stenographer.

0-3685 To: Omar Burkett, Chairman, Committee on Federal Relations, House of Representatives
Date: June 18, 1941

An appropriation appearing in a "rider" to an appropriation bill, such as submitted to this department, constitutes an item of appropriation within the purview of Sec. 14, Art. IV, Constitution of Texas, and is subject to the veto power of the Governor. *Fulmore v. Lane*, 140 S. W. 405; *National Biscuit Company v. State*, 135 S. W. (2d) 687.

0-3686 To: A. A. Miller, County Attorney, Newton County
Date: June 23, 1941

The commissioners' court has no authority under the described facts to pay the board bill of a prisoner to the sheriff when he only arrests such prisoner and does not place him in jail. Art. 1040, C. C. P.; *Dallas County v. Reynolds*, 199 S. W. 703. (See opinion for citation of additional authorities.)

0-3687 To: Aubrey Robison, County Attorney, Morris County
Date: June 23, 1941

Neither the county judge nor the county clerk is entitled to fees for securing the admission of tuberculars to state hospitals. Arts. 3239-3252, 3926, V. A. C. S.; *Crosby County Cattle Co. v. McDermott*, 281 S. W. 293; *McCalla v. City of Rockdale*, 246 S. W. 654; 334 Letter Opinions 799. (See opinion for citation of additional authorities.)

0-3691 To: William A. Griffis, Jr., County Attorney, Gaines County
Date: June 24, 1941

Neither the County Attorney nor the Sheriff of Gaines County has, under the described facts, the legal authority to demand and receive an examination and opinion from the medical staff of the Big Spring State Hospital as to the sanity of the prisoner in question charged with a felony, nor would the physician, if he had examined such prisoner, be authorized by law to charge and receive a \$100 fee in the event he is called upon to testify upon the trial of the accused. The party charged with the criminal offense cannot now be tried in the county court to determine whether or not he is of unsound mind under Art. 5561a, V. A. C. S. Art. 23, V. A. P. C.; Arts. 259, 932a, 1079, C. C. P.; *Ex parte Guynn*, 32 S. W. (2d) 187. (See opinion for citation of additional authorities.)

0-3692 To: Homer Garrison, Jr., Director, Department of Public Safety
Date: June 30, 1941

Any semi-trailer which by actual measurement exceeds thirty-five feet in length cannot be lawfully operated upon the public highways of this State. In determining the length of a semi-trailer, the measurement would be the over-all length of such semi-trailer and not from the back wheels of a truck-tractor to which it might be attached or from the king pin of the semi-trailer. Acts 1941, 47th Leg., H. B. 19; Art. 827a, Sec. 3c, V. A. P. C.

0-3693 To: Homer Thornberry, District Attorney, Austin
Date: June 23, 1941

A district attorney inducted into the United States Army has no authority to receive his salary from the State as district attorney. Art. XVI, Sec. 33, Constitution of Texas; *Carpenter v. Sheppard*, 145 S. W. (2d) 562; Opinion 0-3335.

0-3721 To: Jack Wiech, County Attorney, Cameron County
Date: June 26, 1941

There is no authority for the Brownsville Navigation District, the Brownsville Independent School District, and the City of Brownsville to appoint three persons to serve as a joint board of equalization for such three taxing units. Art. XVI, Sec. 40, Constitution of Texas; Opinion 0-3175.

0-3731 To: Bert Ford, Administrator, Texas Liquor Control Board

Date: June 26, 1941

Under the facts submitted to this department, no member of the Liquor Control Board has been designated as chairman of said board. The right and power of the Governor to make such designation is not lost by his failure, up to this time, to make such designation. Art. 666-5, P. C.

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