cop.c.

JOURNAL

OF THE

SENATE, STATE of TEXAS

First Called Session
Thirty-Sixth Legislature

Convened in the City of Austin
May 5, 1919
AND
Adjourned Without Day
May 9, 1919

Published by Authority of the Senate

T. H. YARBROUGH, Journal Clerk

A. C. BALDWIN & SONS
STATE PRINTERS
AUSTIN

On motion of Senator McNealus the bill was read and considered section by section.

Senator Gibson offered the following which was read and adopted:

(5) Amend Senate Bill No. 1 by inserting the word "not" after the word "should" and before the word "and" in the third line from bottom of Section 1.

Senator Carlock offered the following amendment which was read and adopted:

(6) Amend Section 4, at the end thereof, by adding the following clause:

Provided that the terms and provisions of this Act shall apply only to such discharged sailors, soldiers and marines as may have received honorable discharges from their respective branches of the military service.

The following amendment by Senator Suiter was read and adopted:

(7) Amend Senate Bill 1, line 15 Section 4 by inserting before the comma the words "except" having paid his poll tax.

Senator Page offered the following:

Amend Senate Bill No. 1, Section 5, line 9, by striking out all after the period following the word him".

The amendment was withdrawn.

The following by Senator Williford was read and adopted:

(8) Amend Senate Bill No. 1, Section 6, line 3 by inserting after the word "conflict" the words: "this Act".

Senator Hall offered the following:

(9) Amend Senate Bill No. 1 by striking out all of Section 9 after the word "years" in line 9 and amend the caption to correspond with the amendment.

Pending.

House Concurrent Resolution No. 2.

Granting Hon. J. H. Milam, judge of the Fiftieth Judicial District of Texas, leave of absence from the State during vacation of his court.

Be It Resolved by the House of Representatives of the State of Texas, the Senate concurring, That the Hon. J. H. Milam, Judge of the Fiftieth Judicial District of Texas, be and is herby granted a leave of absence from the State for 60 days during the vacation periods of his court in the months of July and August 1919 and 1920.

KING, of Thockmorton.

The resolution was read and adopted.

House Concurrent Resolution No. 3.

Whereas, many employes of the various State Departments waived exemption and enlisted in the army, and

Whereas, many of these men are returning after having gallantly and faithfully served their country, be it

Resolved by the House of Representatives, the Senate concurring that all soldiers who gave up their positions in State Departments to join the army and showing an honorable discharge be given their old positions or one of equal compensation, and be it further

Resolved that the Governor, as chief executive, be asked to see that the purpose of this Resolution is fully carried out by the heads of all the departments.

Smith of Bastrop, Miller of Dallas, Tidwell, Fly, Thomason, Teer, Murrell, Bledsoe, Bertram.

The resolution was read and adopted.

Messages From the Governor.

Governor's Office,
Austin, Texas, May 5, 1919.

To the Thirty-sixth Legislature in First Called Session Assembled:

The Legislature at the last regular session, conscious that the discharged soldiers should have the right to vote, passed an Act, the purpose of which was to confer such right. There was some necessity then for the enactment of such a law. There is far greater necessity now. If hundreds of discharged soldiers had returned to Texas then, thousands have since returned. At the time of the passage of the Act at the Regular Session, comparatively few Texas soldiers had been discharged; but since that time the demobilization has been very rapid, and I am informed that there are fully 75,000 Texas soldiers who have been discharged since the adjournment of the regular session. Entertaining with you the same view with respect

to this subject and believing that it is in accord with the true genius of democratic government not to suffer a needless restriction on the right of suffrage I was favorable to this measure. The bill, however, on being submitted to the Attorney General for his opinion, was declared unconstitutional; and for this reason was vetoed. The Act, even if it had been constitutional, and if it had received executive sanction, could not have enabled the returning soldiers to vote on the important constitutional amendments to be submitted to the people on May 24th of this year. Lacking the necessary two-thirds vote to put it into immediate effect, it would not have become effective until June 18th, a day subsequent to the holding of such election.

Therefore no Act of the Legislature and no act of mine heretofore could or would have accomplished the object of this call. In justice to those who fought our country's battles, action is needed now. In justice to the people of Texas, prompt action is called for in order that the fullest and freest expression of our citizenship may be obtained. Much discussion has been indulged in as to the constitutional right of the discharged soldiers to vote in the absence of legislative action. Several district judges in the State have held that discharged soldiers have such right. It is not unlikely that there may be a contrariety of holdings among the district courts; and there is not sufficient time remaining until the election for a determination of the question prior to that time by a higher court. This condition tends to confusion, may result in preventing many of the discharged soldiers from voting, even if they have such right, and if not remedied, will bring about dissatisfaction and disorder.

Another question is presented equal in importance to that of permitting the discharged soldiers to vote without the payment of a poll tax. It is that of preventing the person who was not a soldier, and who has not paid his poll-tax from taking advantage of this situation and voting unlawfully. The friends of good government and honest elections in Texas want the discharged soldiers to vote. The enemies of good government and honest elections in Texas want the gap open so those who pose as soldiers can vote and repeat their vote when the occasion requires or when the orders from headquarters direct. Those who are sincere in their desire to settle the great questions to be voted on May 24th according to the will of the people of Texas want an election whose legality cannot be questioned. Those who are against a settlement of these questions by the people and who thrive upon a continued agitation thereof are in favor of an election open to attack in the courts. In order therefore that the end desired by a majority of the people of Texas over a long period of years may be reached because of your wise and almost unanimous submission of these measures at the Regular Session and in order that the work you accomplished then may not be fruitless, it is of supreme importance now to provide for an election in which these absent citizens who were deprived by the highest call of duty of the opportunity to pay poll taxes may vote, and at the same time provide for an election of uniform methods and unquestioned legality.

I recommend, therefore, that a law be passed embodying the following purposes:

1. To permit the discharged soldiers to vote without payment of the poll tax.

2. To prevent the slacker or imposter who has not paid a poll tax from representing himself as a soldier and voting.

3. To bring about a uniform system in each and every county in Texas under which discharged soldiers may vote.

I have been gravely concerned over the question, deeming it the duty of the State to exert every effort to enable those who so gloriously responded to the cause of freedom to participate in a determination of the important constitutional amendments to be submitted; and I feel sure that you will agree that the condition justifies my calling you in Special Session.

I have taken counsel of able lawyers and am gratified that in their opinion an Act can be prepared not in conflict with the Constitution of our State, which will permit the discharged soldiers to vote at the coming election.

I will not attempt to set out a specific plan for accomplishing the

desired result or recommend one plan as more to be preferred than another. In fact the enactment of a law which exercises every power given the Legislature under the Constitution is more to be desired than an Act which exercises but one of these powers. I therefore submit the whole subject of amending the election laws for your consideration believing that out of the combined wisdom of your body, and in that true patrotic fashion which has marked your every course, a measure will be evolved to meet the necessities of the public emergency which has arisen since your adjournment.

Respectfully submitted,
W. P. HOBBY,
Governor.

Governor's Office,
Austin, Texas, May 5, 1919.

To the Thirty-sixth Legislature in First Called Session Assembled:

I submit for your consideration the subject of exercising the Prison System's option to purchase what is known as the Blue Ridge Farm. I submit this because of the developments since the adjournment of the Regular Session and because legislation will be needed or an expression of the sense of the Legislature will be needed before such option can be effectively exercised. The law passed at the last Regular Session prohibiting the Governor and the Prison Commission from purchasing more land without approval of the Legislature will be in full force and effect before negotiations can be completed to exercise the option. A repeal of or an amendment to this law may become desirable.

I direct your particular attention to my message to the Legislature under date of February 25th, and printed in the Journals of both the Senate and the House. I accompany this message with an opinion from the Attorney General under date of April 28th, which includes a history of the transactions calling for your attention. In my judgment this matter deserves the utmost consideration, because it must be determined whether the possibilities of an oil field on the Blue Ridge Farm make it less desirable as a farming proposition and therefore unwise to purchase, or whether the value of the property which the State may acquire as an oil proposition makes it more desirable to purchase this property. To the time of the bringing in of the oil well, the view I had expressed in my message to your body on February 25th was unchanged—that is, the land was not needed as a permanent farming proposition for the Prison System, and it was the better policy not to purchase the same, but to work out an arrangement by which the Penitentiary operations would be limited to farms already acquired. The bringing in of the oil well, however, causes me to feel that the option should be exercised, provided the mineral rights thereof are of sufficient value to make it profitable to the State. On July 17, 1916, the Prison Commission authorized Bassett Blakely to lease all mineral rights in said Blue Ridge Farm not theretofore reserved by him, with the understanding that if the State of Texas should exercise its option to purchase said property the State should acquire the right reserved by said Blakely as royalties in such lease as said Blakely should thereafter make. I am not accurately advised as to what leases Mr. Blakely made under this authorization of the Prison Commission, but am informed that before bringing in of the well, practically all of the lands covered by the State's contract were leased.

The entire subject, to my mind, deserves consideration, and full and complete investigation at your hands, and therefore I suggest that a joint committee be at once appointed from the House and Senate with full power to completely investigate all the facts surrounding the matter including the facts surrounding the alleged execution of the purported release referred to in the Attorney General's opinion, and make a full report of their findings, together with the recommendations of the committee as to what action should be taken in the premises and what legislation is needed to fully protect the State's rights.

Because of their volume, I have not transmitted to you copies of the various contracts of the minutes of the Prison Commission with this message, but they are available when you desire them, and will be furnished your committee.

The opinion of the Attorney General is tendered herewith and marked "Exhibit A".

Respectfully submitted,
W. P. HOBBY, Governor.

"Exhibit A."

Austin, Texas, April 28, 1919.

To His Excellency, Hon. W. P. Hobby, Governor of Texas, Capitol.

Sir: The facts upon which this opinion is to be based are stated in your communication of April 19th, as follows:

"After presenting a statement of facts, I desire to be informed as to the legality of a certain instrument purporting to be a contract between the Board of Prison Commissioners and Mr. Bassett Blakely. The statement of facts follows:

Under date of February 1, 1916, the Board of Prison Commissioners of Texas, acting through its chairman, and Mr. Bassett Blakely entered into a contract, which was approved by the Governor, whereby Mr. Blakely leased to the State of Texas certain lands in Fort Bend county, Texas, comprising 3857 acres, known as Blue Ridge Farm No. 1. The lease was for a term of ten years, beginning January 1, 1916, and terminating 10 years from that date.

"Under the terms of the lease, the lessor agreed to furnish a sufficient number of mules for the cultivation of the land, and agreed to furnish proper equipment and machinery and housing facilities for the convicts who were to work the land for the State. For the rent and use of said premises, buildings, improvements, machinery, horses, mules, implements etc., the Commission agreed and promised to pay to the lessor twenty-five percent of the cotton, cotton seed, corn and other crops annually grown on said premises.

"In consideration of the promises and of the contract, agreements and undertakings therein contained, on the part of the Prison Commission, a provision occurs in Section A of Article 3 of the contract whereby the lessor 'hereby contracts and agrees to, and does hereby, grant, sell and convey, unto the Commission, the right and option, at any time prior to the first day of January, A. D., 1926, to buy said lands and premises, together with improvements of every kind upon said lands hereby leased to the Commission, and which may be added to from time to time, for the following prices; if said option to purchase is exercised within five years from the first day of January, 1916, the lessor agrees to convey said property to the said Commission at the rate of Fifty ($50.00) dollars per acre for said land; and if the said Commission exercises its option to buy after the expiration of five years of this lease, the lessor agrees to sell and convey said premises at the rate of Fifty-five Dollars ($55.00) per acre for said premises, upon such terms as may hereafter be agreed upon by the lessor and the Commission; provided that the lessor shall receive his twenty-five per cent of the crops grown on said premises during the year in which option is exercised.'

"Section B of Article 3 contains the following stipulation: 'It is expressly agreed and stipulated that until the expiration of this lease, by time or purchase under the option herein given, the lessor reserves the right to prospect for oil, gas and minerals, and to drill or sink, or cause to be drilled or sunk, for oil, gas or other minerals, wells and shafts upon the following described tracts of land:' (here is described two certain tracts of land contained in the lease, containing 600 acres of land, more or less out of the Heirs of Edward Drew Survey and 500 acres out of the same survey.

"In another part of Section B of said article 3, the following covenant is contained: 'In the event that no oil, gas or other minerals, in paying quantities, shall be discovered upon said land before the expiration of this lease, the right so reserved shall terminate; but in the event that before said date oil, gas and minerals, or any, shall be discovered upon said 1100 acres of land, in paying quantities, then in the deed of conveyance to be executed to said Prison Commission, should it exercise its right to purchase as hereinbefore provided, there shall be reserved, and is hereby reserved, to the lessor, his successors in trust and lessees and assigns, the right and title to all oil, gas and other minerals, in, and upon and under said 1100 acres of land, or any part thereof, with full right, privilege and authority to enter upon said 1100 acres of land for the purpose of prospecting for and taking from and out of it any and all such oil, gas and other minerals; provided that the work of prospecting for or taking from said 1100 acres of land such oil, gas, or other minerals, shall be so carried on as to not interfere with the use by the said Prison Commission of the premises herein de-

scribed, and the lessor, and his assigns shall also be responsible to said Prison Commission for and agree to indemnify and save it harmless against any and all losses and damage of whatsoever kind resulting to it from the carrying on of the business or operation of prospecting for or taking from such land such oil, gas or minerals.'

"Under date of February 24, 1919, I submitted a message to the Thirty-sixth Legislature with reference to the condition of the Prison System. In that message, after announcing the policy of this administration, that the operations of the System should be confined largely to farming interests, I made a comparison of the proceeds received by the System from the operation of State-owned farms with the proceeds derived from the operation of farms owned by individuals and operated under lease. The comparison justified the declaration of an intention on the part of the Board of Prison Commissioners and the Governor to terminate at a date as early as practicable all contracts whereby the State had leased lands, and after that date hence forth to confine the opertions of the System entirely on lands owned by the State. One paragraph of that message is as follows: 'Under my direction, the Prison Commissioners have negotiated with the lessors to bring about an agreement to shorten the life of these contracts so that the State may at the earliest possible date go out of partnership with individuals in the cultivation of land by convicts, the consideration given the lessors by the Penitentiary Commissioners for shortening the contracts being to exclude from the contracts the option of the Prison Commission to pay money rent, as well as the option to buy.' I then outlined an arrangement by which leases on most of the farms could be terminated within the next two years. In this connection, I made the following suggestion with referrence to Blue Ridge Farm No. 1 which is the subject of this communication:

" 'It can be arranged to terminate the lease on these prison farms as follows: . . . (3) By cultivating the Basett Blakely lease of Rosenberg, 300 acres, and the Blue Ridge No. 1, 5932 acres, for three years, with the understanding that at the end of the year 1921, the lease contract is abrogated.'

"After disposing of the particular subject of terminating leases, on the theory that the State should operate exclusively on its own lands, in the same message I informed the Legislature that the Prison Commission had recommended that the State exercise the option to purchase the Blue Ridge Farm No. 1, but that the purchase had not been approved by me as Governor. In this connection, I made the following specific recommendation to the Legislature: 'I will not approve the purchase of additional land by the State unless it be authorized by the enactment of a law or by resolution adopted by the Legislature. In my judgment the better plan to adopt is that of gradually getting the State out of partnership with individuals. I, therefore, will approve an arrangement to accomplish this as I have outlined above, rather than the buying of more land, but if the purchase of the Blue Ridge Farm is recommended by your body I will approve the same.' The Legislature did not adopt any resolution authorizing or approving the purchase of this land, but on the contrary passed a law taking the power of purchase from the Prison Commission and the Governor. Accordingly I did not approve the recommendation to buy this farm.

"Under date of Thursday, April 5, 1919, a representative of Mr. Bassett Blakely presented to me an instrument in blank constituting a proposed contract between the State and Mr. Bassett Blakely, lessor, which instrument set forth a description of all the lands constituting Blue Ridge Farm No. 1 and Blue Ridge Farm No. 2, reciting the existence of the contract first mentioned in this letter, and the contract under which other land had been procured under similar conditions, and thereafter the following provisions is contained in said instrument: 'The provisions of said contracts and of each and all of them **giving to the State the option to buy said lands** and the option to pay money rental shall be and the same are hereby eliminated therefrom; and said lease conditions and all of them shall in other respects remain the same, save and except as to the date of termination thereof, which shall be in the respective dates herein above specified, or which dates peaceble possession of said land, together with the improvements thereon and all personal

property belonging to the owner thereof, shall be delivered to the owner and all contractual relations existing between the parties hereto shall terminate.' The proposed contract recited a consideration moving to the State in the fact that the State thereby would be relieved of the lease which would have to run for six years longer on and after the year 1921.

"Under these circumstances I indicated my approval of said contract, on or about April 5, 1919.

"A representative of Mr. Bassett Blakely sent the instrument to the Prison Board in the city of Huntsville, Texas, on or about Friday, April 11, 1919, and on that date Mr. W. G. Pryor, a member of the Board of Prison Commissioners, signed the said contract.

"On Saturday, April 12th, a representative of Mr. Blakely went to the Eastham Farm in Madison county, and there saw Mr. E. L. Winfrey, at which time and place Mr. R. L. Winfrey, a member of the Board of Prison Commissioners, signed said instrument.

"Mr. Bassett Blakely, at another time and place signed said instrument as party of the second part. For your consideration I am attaching hereto a copy of the instrument last referred to.

"At the time the representative of Mr. Blakely, the lessor, presented the proposed contract to me, no mention was made of the fact that any oil well had been brought in or it was expected would be brought in on said Blue Ridge Farm No. 1, and after investigation I am informed this fact was not mentioned to Mr. W. G. Prior nor to Mr. R. L. Winfrey, members of the Board of Prison Commissioners. If such information had been brought to my attention, or their attention, the instrument would not have been signed.

"As a part of this statement of facts, I call your attention to the fact that Mr. R. L. Winfrey, at the time he signed said instrument did so with the reservation expressed that he did not believe his action in signing would be binding on the Board of Prison Commissioners, or legal in any sense, because the board was not convened at that time in a Board meeting; and that said action had not therefore been authorized by the Board. Such action has not since been ratified by the Board of Prison Commissioners authorizing or ratifying the action of the two members of the Board in the premises.

"At a time about 8 o'clock p. m., on Monday, April 14, it became known that a large producing oil well had been brought in on said Blue Ridge Farm No. 1.

"On Tuesday, April 15, Mr. Bassett Blakely's representative presented to the Board of Prison Commissioners the minutes proposed to be entered on the records of the Board of Commissioners, ratifying execution of the instrument last mentioned above. The Board of Prison Commissioners did not approve said minutes, but on the contrary refused to approve the document presented to be recorded, and expressed the opinion that the minutes for a transaction of such a magnitude should be prepared by the Attorney General of the State of Texas.

"I desire to be advised as to whether the State of Texas has parted with its option to buy Blue Ridge Farm No. 1, under the terms of the contract entered into between the Board of Prison Commissioners and Mr. Bassett Blakely under date of September 1, 1916, and I desire to be informed as to the rights of the State of Texas in said land at this time. I would be pleased to have you advise me whether, in your opinion, any steps can be taken by the Board of Prison Commissioners or the Governor to the end of conserving the interests of the State in this land."

From the foregoing statement of facts, it is apparent that the Prison Commission as part of its lease contract with Mr. Blakely held an option to purchase certain of the property above described, and that this option might be exercised on the terms named at any time during the life of the original contract, which was ten years. It is apparent also that this option has not been exercised, for the reason that the consent of the Governor to its exercise was never given.

The only question, therefore, for determination under the statement of facts made by Your Excellency is whether or not the subsequent instrument approved by Your Excellency and signed by two of the Prison Commissioners is sufficient to create a new contract, in which the option agreement of the original contract was abrogated or waved. Your

statement shows also that the Prison Commission prior to the attempted execution of the subsequent agreement never held a meeting as a prison commission and accepted the terms of the subsequent agreement or authorized its execution by the Prison Commission or by any of its members; and that since the instrument was signed by two of the Commissioners and approved by the Governor, their action has never been ratified by the Prison Commission as a commission. Under the facts thus stated by you and the inquiry made, it becomes our duty to determine whether or not this last named instrument became a valid and binding contract on the Prison Commission of the State. This question we answer in the negative, for the reasons which follow.

Title 104, Chapters 1 and 2 of the Revised Civil Statutes of this State is the basic law governing the present prison system of the State. These Chapters of this Title were passed by the Legislature in 1910. They have since been amended and particularly by Chapter 32 General Laws passed at the First Called Session of the Thirty-fifth Legislature. However, at the present time the existence of the Board of Prison Commissioners has its fundamental basis in a Constitutional amendment adopted November 5, 1912, and which is now Section 58 of Article 16 of the Constitution. This section reads as follows:

"The Board of Prison Commissioners charged by law with the control and management of the State prisons, shall be composed of three members, appointed by the Governor, by and with the consent of the Senate, and whose term of office shall be six years, or until their successors are appointed and qualified; providing that the terms of office of the Board of Prison Commissioners first appointed after the adoption of this amendment shall begin on January 20th of the year following the adoption of this amendment, and shall hold office as follows: One shall serve two years, one four years, and one six years. Their terms to be decided by lot after they shall have qualified and one Prison Commissioner shall be appointed every two years thereafter. In case of a vacancy in said office the Governor of this State shall fill said vacancy by appointment for the unexpired term thereof. (Added and adopted at election November 5th, 1912.)"

The Genesis of this Constitutional amendment is found in Article 6175 Revised Statutes, which was Section 4 of the original Prison Commission Act. This Article reads:

"To better carry out such policy, the management and control of the prison system of the State of Texas shall be vested in a board to be known as the Board of Prison Commissioners, and for the purposes of this title shall be referred to as the Prison Commission. Said Board of Prison Commissioners shall be composed of three men, to be appointed by the Governor, with the advice and consent of the Senate, whose term of office shall be two years from date of appointment, except those first appointed under this Act, who shall hold their offices respectively for eight, sixteen and twenty-four months from the date of their appointment and qualification. In the appointment of said Commissioners first to be appointed under this chapter, the Governor shall designate the term each one shall hold under such appointment; provided, however, that in the event of a change in the constitution, extending the term of office of the prison commissioners, then the members of said Board of Prison Commissioners then in office shall adjust their terms of office by lot or in conformance with the provisions of such Constitutional amendment without the necessity of further legislative enactment. (Id. Sec. 4.)"

Article 6177 Revised Civil Statutes requires each member of the Board of Prison Commissioners to reside at Huntsville in Walker county, Texas, and that place is designated as the headquarters of the prison system. The Prison Commissioners, in addition to the other compensation fixed by statute, are permitted to occupy free of rent the residence houses belonging to the State at Huntsville.

By Article 6178, each member of the Prison Commission is required to devote his entire time to the discharge of the duties of office, and is prohibited from engaging in any other business during his term of office. By the terms of Article 6179, the exclusive management and con-

trol of the prison system is vested in "said Prison Commission."

Article 6180 authorizes "the said Prison Commission" to appoint all necessary officers and other employees for the prison system.

Article 6181, as amended by Chapter 32 General Laws of the First Called Session of the Thirty-second Legislature, declares: "The Prison Commission shall select one of its members as chairman, and a majority of said Commission shall constitute a quorum for the transaction of business. The Commission shall keep or cause to be kept in a well-bound book a minute of all proceedings."

Article 6182 gives "the Prison Commission" authority to discharge officers and employees of the system.

Article 6183 gives "the Commission" authority to purchase lands, etc.

Article 6184 gives "the Commission" power with the approval of the the Governor to purchase lands, etc.

Article 6185 confers other and additional authority on "the Prison Commission" with reference to the purchase of lands.

Article 6186, as amended by the Act of the Legislature above named, authorizes "the Prison Commission" to construct the necessary buildings, etc., for the prison system.

Article 6187 gives "the Prison Commission" power to sell and dispose of the products of the system.

Article 6188, as amended by the legislative act above mentioned, requires "the Prison Commission" to remit moneys received by it to the State Treasurer, with certain other rules and limitations as to their action but refers to the Commission always as "the Prison Commission."

Article 6188 gives authority to the Prison Commission to issue such orders and prescribe such rules and regulations for the government of the system as may be necessary.

Article 6190 declares: "it shall be the duty of some member or members of the Prison Commission to spend at least one whole day each month without notice at each prison camp, etc." It is to be noted with reference to this Article that it does not make it the duty of "the Prison Commission" to spend a day visiting the camps, but makes it the duty of some member or members of the Commission to perform this duty. We may remark at this point that this evidences a clear intention on the part of the Legislature to make a distinction between those duties which the law requires of "the Prison Commission" and those which may be performed by "some member" or "members of the Prison Commission."

Article 6191 requires "the Prison Commission" to make a complete inventory of the Commission's property and cause to be instituted an accounting system, etc.

Article 6194 confers authority upon "each member of the Board of Prison Commissioners" in the discharge of his duties to administer oaths.

Article 6195 declares: "if any member of the Board of Prison Commissioners" shall be guilty of certain conduct, he shall be removed, etc.

Article 6196, as amended by the Acts of the Legislature, which we have heretofore mentioned, gives authority within certain limitations to "the Prison Commission" to fix salaries.

Article 6200 requires the Prison Commission to have seal, and declares: "the Prison Commission shall provide a seal whereon shall be engraved in the center a star of five points and the words 'Board of Prison Commissioners of Texas,' around the margin, which seal shall be used to attest all official acts."

Article 6201, as amended, makes it the duty of "the Prison Commission" to make provisions for the transportation of prisoners to Huntsville.

Article 6203 requires "the Prison Commission" to provide school of instruction for the prisoners and make certain other regulations with reference to this subject.

Article 6204 makes it the duty of "the Prison Commission" to provide for religious services in the prison system.

Article 6205 says that "the Prison Commission" shall see that all State prisoners are fed good and wholesome food, and makes certain other provisions with reference to this subject.

Article 6206 makes it the duty of "the Prison Commission" to require monthly reports, showing the condition and treatment of prisoners.

Article 6207 makes it the duty of "the Prison Commission" to keep a register of all prisoners, giving

certain information with reference to them.

Article 6208 declares that persons confined in the State prisons may have every opportunity and encouragement for moral reform, and, in addition to the requirements, declares it shall be the duty of "the Prison Commission" to provide reasonable and practicable means for encouraging such reforms. This Article of the statute refers in various instances to the Board of Prison Commissioners and in all cases refers to them as "the Prison Commission."

Article 6210 makes it the duty of "the Prison Commission" to provide for labor for female prisoners.

Article 6211 requires "the Prison Commission" to keep the white female prisoners separate and apart from the negro female prisoners.

Article 6215, as amended, declares that prisoners shall not be worked on Sunday, except in cases of extreme emergency or necessity, but contains a provision that "the Prison Commission" shall be authorized to work prisoners on Sunday at certain necessary labor.

Article 6220, as amended, declares that prisoners shall be kept at work under such rules and regulations as may be required by "the Prison Commission." This Article, as amended, makes various references to the Board of Prison Commissioners, and at all times refers to them as "the Prison Commission" or "the Commission."

Article 6223, as amended, makes it the duty of "the Prison Commission" to make rules and regulations in regard to reports of death of prisoners.

Article 6225 makes it the duty of "the Prison Commission" to provide medical treatment for prisoners.

Article 6226 requires "the Prison Commission" to provide a competent dentist for prisoners.

Article 6227 provides that when a prisoner is discharged that he shall be furnished a written or printed discharge from "the Prison Commission" signed by the chairman of the Board of Prison Commissioners with the seal of the Commission, etc.

Article 6229 gives authority to "the Prison Commission" with the Governor's approval to offer rewards for escaped prisoners.

Article 6231 gives authority to "the Prison Commission," with the consent of the Governor to work convicts on public works upon certain conditions.

Article 6231a contained in the amendment enacted by the Legislature, to which we have referred, provides that "the Prison Commission" shall be authorized, subject to the approval of the Governor, to bring suits and be sued.

We are not attempting to refer to each article of the statute, in which some duty is prescribed for the Board of Prison Commissioners, but we have selected numerous instances where the duties devolving upon them are prescribed for "the Prison Commission," and this general purpose of conferring of duty upon "the Prison Commission" is to be found throughout the original and amended prison laws of this State.

We have thus seen from an examination of the Constitution and the statutes relative to the duties of the Board of Prison Commissioners, that it is declared these duties shall be performed by "the Prison Commission." We have observed that the Prison Commission is required to select a chairman and to keep minutes of its proceedings—a majority of the Commission is declared to be its quorum and it is required to have a seal by which it authenticates all its acts. These several provisions of law, in our opinion, clearly show that the Commission can only act as a Commission when sitting as a body for such purpose. If any other construction should be given the law the various references which we have collated would be meaningless.

It is to be noted that Article 6181, Revised Statutes, as amended, provides that a majority of the Commission shall constitute " a **quorum** for the transaction of business."

The definition of the word "quorum," as stated in the American and English Encyclopedia of Law, volume 23, 589, is: "A quorum is the number of members of a deliberative or judicial body whose presence is necessary for the transaction of business."

Further defining a quorum, the same author, on page 591, says:

> "A quorum is, for all legal purposes, as much the body to which it appertains as if every member were present and when a quorum has been met, an act of a majority of such quorum is an act of the body itself. But the will of the majority must be ex-

pressed at a regular meeting at which all of the members might have been present."

The use of the word "quorum" under the definitions quoted above clearly implies that there must be a meeting of the Commission itself, or otherwise this word in the statute would be without purpose.

The statute having provided that the various acts authorized to be done by "the Prison Commission," it would seem to follow that these acts may not be done and performed by the individual members of the Commission, but that they must be done by the Commission acting as a body.

It is a familiar rule with statutes of this character that the expression of one thing excludes another. Where authority is given to do a particluar thing and the mode of doing it is prescribed, it is limited to be done in that mode, and all other modes are excluded.

Sutherland on Statutory Construction, Sections 491 and 492.

This rule is adhered to and followed by the Texas courts.

Mercein v. Burton, 17 Texas 210;
Seibert v. Richardson, 86, Texas 295;
Etter v. Railway Company, 2 Wilson, Civil Cases, Court of Appeals, Section 58.

In no part of the statutes are the Prison Commissioners as individuals or as independent commissioners authorized to act with reference to the purchase or lease of land or the making of contracts. In every case where provision is made relative to these matters of judgment and discretion, the statute requires that the act shall be by "the Prison Commission," which, as we believe from a construction of the statute itself, means the Prison Commission acting as a Prison Commission, being presided over by its chairman and having a record made of its proceedings on its minute book, in accordance with the statute. Our opinion is that in no other way may it make a valid contract, and that whatever may be done by the Prison Commissioners themselves must be done wholly and solely upon authority of the Prison Commission, directed while in session as a Commission.

This conclusion which we have reached from a consideration of the statute itself is one supported by all American authorities on the subject.

We will first notice the general rule as laid down by the various text-writers writing with reference to governmental boards and commissions.

Concerning the power of boards, the Cyclopedia of Law, Volume 29, page 1433, says:

"Where official authority is conferred upon a board or commission composed of three or more persons, such authority may be exercised by a majority of the members of such board; but it may not be exercised by a single member of such body, or by a minority, unless ratified by a majority, except that under some statutes a minority present at the regular time of meeting, after waiting a reasonable time, may lawfully adjourn the meeting. This rule is applied in many cases, only where all the members of such board are present when the action is taken, and is frequently applied also when all have been notified in a legal manner of the meeting. But in no case is the action of a majority regarded as valid where all are not present or have not been notified."

With reference to the powers of county boards, Cyc., Volume 11, page 391, says:

"The powers of county boards must be exercised by them as boards and not as individuals. An individual member, unless ex-expressly authorized, cannot bind the county by his acts, and notice to or knowledge by an individual member not shown to have been imparted to the board is not binding upon the latter."

Concerning the matter of a quorum the same authority, on pages 392-393, says:

"The number of members of a county board or court necessary to constitute a quorum for the transaction of official business is usually fixed by statute, and varies in the different jurisdictions. The usual rule would seem to be that a majority constitutes a quorum, unless a greater number is expressly required by law. In some states two-thirds of all the members elected constitute a quorum. Again there may be a provision to the effect that certain business shall not be transacted unless the full board be present and acting. Such statutory requirements as to

a quorum must be complied with in order that the acts of the board may be valid, and the record should show such fact."

Mechem, on Public Officers, states the universal rule as to the action of boards or commissions composed of more than one person. The rule laid down by him is the same as that we have already adverted to. In Section 572, Mr. Mechem says:

"Where, however, a trust or agency is created by law or is public in its nature and requires the exercise of deliberation, discreation or judgment, whether it be judicial or quasi-judicial in its character, the rule is otherwise, and while all of the trustees, agents or officers, except where the law makes a less number a quorum, must be present to deliberate, or what is the same thing, must be duly notified and have an opportunity to be present, yet, except where the law clearly requires the joint action of them all, it is well settled that a majority of them, where the number is such as to admit of a majority, is present, may act and that their act will be deemed the act of the body. Where the law prescribes what shall constitute a quorum, a majority of that quorum may act. The rule which applies in these cases has been comprehensively stated by Chief Justice Shaw as follows: 'Where a body or board of officers is constituted by law to perform a trust for the public, or to execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act done. The act of the majority is the act of the body. And where all have due notice of the time and place of meeting, in the manner prescribed by law if so prescribed, or by the rules and regulations of the body itself if there be any, otherwise if reasonable notice is given, and no practice or unfair means are used to prevent all from attending and participating in the proceedings, it is no objection that all the members do not attend if there be a quorum.'

"But if the statute clearly requires the joint action of all, a majority can not act.

"The act of the majority can only be upheld, however, when the conditions named exist. For if the minority took no part in the transaction, were ignorant of what was done, gave no implied consent to the action and were neither consulted not had any opportunity to exert their legitimate influence in determining the course to be pursued, the action of the majority will be unavailing."

The same authority, in discussing the necessity of the meeting of boards or commissions as such and holding that their previous individual agreements as to how they might decide in such a meeting would be void, in Section 577 says:

"Inasmuch as the law thus contemplates that all will meet together and that the public will have the benefit of their combined judgment and discussion, it follows that their previous individual agreement as to how they will act when they meet as a body is opposed to public policy and void.

"Thus when the individual members of a school board had in writing agreed to a contract to purchase supplies for the district, and had in the same writing requested a special meeting of the board to be called, 'at which meeting we agree with each other that we will ratify this contract,' the court held the contract so agreed upon was void.

" 'The board is constituted,' said the court, 'by statute, a body politic and coprorate in law, and as such is invested with certain corporate powers and charged with the performance of certain public duties. These powers are to be exercised, and these duties discharged, in the mode prescribed by law. The members composing the board have no power to act as a board except when together in session. They then act as a body or unit. The statute requires the clerk to record, in a book to be provided for that purpose, all their official proceedings. They have, in their corporate capacity, the title, care and custody of all school property whatever within their jurisdiction, and are invested with full power to control the same in such manner as they may think will best subserve the interest of the common schools and the cause of education. They are required to prescribe rules and regulations for the government of all the common schools within the

township. Clothed with such powers, and charged with such duties and such responsibilities, it will not be permitted to them to make any agreement among themselves or with others by which their public action is to be or may be restrained or embarrassed, or its freedom in anything affected or impaired. The public, for whom they act, have the right to their best judgment after free and full discussion and consultation among themselves of and upon the public matters entrusted to them in the session provided for by the state. This cannot be when the members by pre-engagement are under contract to pursue a certain line of argument or action, whether the same will be conducive. to the public good or not. It is one of the oldest rules of the common law that contracts contrary to sound morals or against public policy will not be enforced by courts of justice,—ex facio illicito non oritur actio; and the court will not enter on the inquiry, whether such contract would or would not in a given case be injurous in its consequences if enforced. It being against the public interest to enforce it, the law refuses to recognize its claim to validity.' "

Concerning this exercise of official authority by boards or official bodies composed of more than one person, the American and English Encyclopedia of Law, Volume 23, pages 366-368, inclusive, among other things, says:

"When authority to do an act of a public nature is conferred by law upon a body or board of officers, one of such body or board cannot independently of the others, and without the consent of them, or some of them, exercise such authority.

"When it is not otherwise provided by law, it is not, however, necessary that all the members of such body or board should concur in the exercise of such authority. If all meet and consult and a majority agree to an act, such act is valid, even although the minority expressly dissent. Or if all have due notice of the time and place of meeting, it is no objection to the validity of the action taken that all the members do not attend, if there is a quorum. It seems that the action of a majority of a quorum, assembled after due notice, will bind the whole body. When action has been taken by such board or body, the presumption is that all the members thereof were present and participated in the deliberation, unless the contrary expressly appears.

"When the performance of a power or duty is confined to only two persons, nothing can be done without the consent of both.

"When authority is conferred on two or more bodies, they must all come together for consultation and deliberation; but when they do, the vote of the majority of the persons present controls, even though one of the bodies should leave before the vote is taken.

"If the act is merely ministerial in its character, a majority at least must concur and unite in the performance of it; but they must act separately and need not be convened in a body, or notified so as to convene for that purpose. But if the act is one that requires the exercise of discretion and judgment, in which case it is usually termed a judicial act, unless special provision is otherwise made, the persons to whom the authority is given must meet and confer together, and be present when the act is performed."

That county boards can only act when convened as a board or commission, is shown by the text of Corpus Juris, Volume 15, page 460, Section 107, wherein the writer says:

"The powers of county boards must be exercised by them as boards and not as individuals. An individual member, unless expressly authorized, cannot bind the county by his acts, and notice to or knowledge by, an individual member not shown to have been imparted to the board is not binding on the latter."

Continuing further, in Section 108, the same authority says:

"As a natural consequence of the rule that a county board can act only as a body, it follows that a board of county commissioners can act officially only when convened as a board in legal session."

Dillon on Municipal Corporations, Vol. 2, Sec. 501

Judge Dillon, writing with refer-

ence to the New England towns and ordinary city councils, said:

"Whether the corporation be the one class or the other, its affairs must be transacted at a corporate meeting, in the one case of the qualified inhabitants; and in the other of the members of the council or governing body, duly convened at the proper time and place and upon due notice in cases where notice is requisite. It is a well-settled rule that when municipal councils or boards of any kind are called upon to perform legislative acts or acts involving discretion and judgement in administering the public affairs, they can only act at authorized meetings duly held. The council or board must meet and act as a board or council. The members cannot make a valid determination binding upon the corporation by their assent separately and individually expressed."

Discussing the same subject with reference to contracts, the same authority in Section 788 says:

"But the action or contract of the officers of a public corporation in their individual capacity is not binding upon the corporate body. . . . . contracts made by a majority of the board of aldermen, without any official action of the city council, are not binding upon the city."

McMillin on Municipal Corporations, Section 91, speaking with reference to the manner of acting on the part of municipal councils, declares the existence of the council or governing body is as a board or entity, and the members thereof can do no valid act except as a board.

The proposition which we are discussing and which is supported by the various text-books, which we have cited and quoted from, is well supported by the courts of this State in discussing the method of acting by city councils and commissioners' courts which are boards performing duties for cities and counties similar to those performed by the Prison Commission in the management of the Prison System. Some of the Texas cases are now to be cited and discussed.

Fayette County v. Krause, 73, S. W. 51, 53.

The facts of this case, so far as is necessary to notice them in this discussion, were that Fayette county constructed a sewer from the courthouse and jail to the Colorado River. The appellees were owners of business property in the city adjacent to the county sewer, and claimed the right to connect their sewer system with the sewer owned by the county. The suit was brought to enjoin the connection. It appears that in the course of proceedings preliminary to the construction of the county sewer that the commissioners' court appointed a committee to investigate the advisability of such construction. The committee recommended the construction and their report was approved by the commissioners' court. The court of Civil Appeals held that no valid agreement had been entered into to permit the connection with the county sewer. Concerning the matter, the court in part said:

"Under appropriate assignments, the appellant contends that, upon the facts found by the court, judgment should have been rendered for the plaintiff. We think the contention is sound. The sewer in controversy was constructed and paid for by the appellant and is the property of the county, in its corporate capacity, just as is the county jail or courthouse. No understanding or agreement entered into between the members of the committee appointed by the county to contract for or superintend the construction of said sewer would be binding upon the county unless said committee was authorized by the county to make same, or the county, with knowledge of the terms of said agreement, ratified it after it was made. The court finds that one of the members of this committee was a member of the commissioners' court, and three of the committee were members of the city council, and that by the concurrent agreement of the commissioners' court and the city council, acting through said committee, it was mutually agreed that the city of La Grange, or the residents of said city, could connect their private sewers with said county sewer. There is no finding that this committee was authorized by the commissioners' court or the city council to make such an agreement, or that the agreement was

ever ratified by either the court or the council. On the contrary, it affirmatively appears that the committee was only authorized to contract for and purchase, in the name of the county and necessary material and labor for the construction of a sewer from the county jail to the river, and upon completion of same to make their report, accompanied by an account of the material and labor expended, and that no order authorizing the understanding and agreement of the committee as to the use of the sewer by the citizens of La Grange was ever made by the commissioners' court or the city council, and no vote was ever taken by either of said bodies upon the subject of such agreement. The finding that the commissioners' court approved the work of the committee, accepted the sewer, and paid for it, upon the report of the committee, is not a finding that the court ratified the alleged agreement made by the committee, with the city of La Grange, because it is not found that said agreement was contained in the report of the committee, nor was it in any way brought to the knowledge of the court. The fact that citizens of La Grange who had heretofore connected their private sewers with the county sewer had been granted permission by the commissioners' court to make such connection shows that the county has never acquiesced in any claim of right on the part of such citizens to use its sewer without its consent. The verbal permission given appellees by the members of the commissioners' court to connect their sewer with the county sewer was not the act of the commissioners' court, in any legal or binding sense. Had the court, by a proper order regularly entered, granted such permission, such grant, being without contradiction, would have been a mere license, which might have been revoked at any time. It may be stated as a general rule that a contract or agreement made by a municipal corporation — either county or city—is only valid or binding when made by or under the authority of a resolution or order duly passed at a meeting of the legislative body of such municipality, and entered upon the minutes of such meeting.
Bryan v. Page, 51 Tex. 534;
32 Am. Rep. 637;
Brown v. Reese, 67, Tex., 318;
3 S. W., 292;
Wagner v. Porter (Tex. Civ. App.) 56 S. W. 560."

Wagner v. Porter, 56 S. W., 561.

Concerning the appointment of an attorney by the city, the court of Civil Appeals in this case, among other things, said:

"The acts of the common council of a municipal corporation can only be shown by the minutes of the meetings of such council; and, if the city council of the City of Greenville had been authorized by law to make the contract with appellee alleged in his petition, the delegation by the council to the mayor of the authority to make such contract could only be by affirmative action of the council as a body, and not by the acquiescence or consent of the individual members of the board; and such action by the council, in the absence of proof of the loss or destruction of its records, could only be shown by the authenticated minutes of the meeting at which such action was had. The same rule applies to proof of the ratification by the council of a contract made by the mayor. Articles 401, 404, Rev. St.; City of Bryan v. Page, 51 Tex. 534; City of San Antonio v. French, 80 Tex. 578; 16 S. W., 440; City of Denison v. Foster (Tex. Civ. App.); 28 S. W. 1053; Penn v. City of Laredo (Tex. Civ. App.); 26 S. W., 626; Brand v. City of San Antonio, (Tex. Civ. App.); 37 S. W., 340."

City of Bryan v. Page, 51 Tex. 532, 535.

This suit was instituted to recover of the City of Bryan the reasonable value of professional services rendered by the appellees in preparing a legal opinion for the city. The claim of the plaintiffs did not rest upon any ordinance, but upon the action of the mayor in employing them and subsequently, the action of the council in awaiting themselves of the opinion. The Supreme Court of the State, speaking through Associate Justice Gould, held:

that the contract was void and that no recovery could be had, for the reason that the employment had not been made by the city council to which body the law confided the exercise of the authority necessary to the making of valid contracts. Concerning the matter, the court in part said:

"We are of opinion that neither the mayor not the common council were authorized to bind the city by contract for legal counsel for their assistance, no ordinance having been passed in relation to such employment.

"The charter gave the power to employ legal counsel, but prescribed that the power be exercised by, or at all events in accordance with, an ordinance of the common council. The charter—the source of all the power of the mayor—having limited the mode of its exercise, they could not in a different mode make a valid contract; nor could they by any subsequent approval or conduct impart validity to such contract. And without power to bind the city by an express contract to pay for legal services, the law would not imply any such contract against the city. 'The law never implies an obligation to do that which it forbids the party to agree to do.' (Brady vs. Mayor of New York.16 How. Pr. 432, as cited in Zattman vs. San Francisco, 20 Cal., 105.)"

Polly vs. Hopkins, 74 Tex., 145, 147.

The question presented in this case was whether or not a contract for the erection of a courthouse had been legally executed or entered into. In discussing the validity of the contract, the Supreme Court of the State, through Chief Justice Stayton, among other things, said:

"County commissioners' courts alone have power to authorize contracts to be made for the building of courthouses, jails, and other buildings such as a county may need, and in the absence of such authorization a contract made by a county judge would impose no obligation, expressed or implied, Rev. Stats., arts. 1514, 1521; Russell vs. Cage 66 Texas, 428. . . . . One dealing with a county for the erection of a public building could not rely upon the act or declaration of a county judge as to his power to make a contract for that purpose nor to his power to issue bonds to pay for the building, but would have to look to the minutes of the county commissioners' court to ascertain whether that body had directed the building to be erected, determined its plan, and authorized a given contract to be made. Rev. Stats., art. 1527; Brown vs. Reese, 67 Texas, 318."

Ball, Hutchings & Co., vs. Presidio County, 88 Tex., 60.

This was a suit by Ball, Hutchings & Co., against Presidio county on certain coupons for interest upon county bonds. The Supreme Court of the State, in discussing those conditions which are necessary to give validity to the acts of the county commissioners, with particular respect to bonds, held that the powers conferred upon the commissioners' court can not be exercised by the court except by order made and entered upon the minutes; that no obligation arises from the action of the county judge and commissioners themselves, but the action taken must be that of the county commissioners' court. The Supreme Court of the State in an opinion by Associate Justice Denman, in part said:

"It is well settled in this State, (1) that a county cannot issue its bonds without an Act of the Legislature conferring the power to do so (Nolan County vs. The State, 83 Texas, 193); and (2) that where the power to issue the bonds of a county has been by the Legislature conferred upon the commissioners' court, as in case of courthouse and jail bonds, such power cannot be exercised by such court except by an order of court duly made and evidenced by the minutes of the court. Brown vs. Reese, 67 Texas, 318; Polly vs. Hopkins, 74 Texas, 145. The bond is not the obligation of the court but of the county. The Legislature has not seen fit to authorize the county judge and commissioners to impose such obligation upon the county, but has authorized the 'county commissioners' court', **under certain conditions,** to issue bonds of the county to erect a courthouse and jail, and under the law such court can act only by an order."

Rankin vs. Noel, 185 S. W., P. 883-885.

This action was an application for

writ of mandamus by appellant against Noel, one of the county commissioners, to compel him to open a certain second class road. It was contended that the commissioners' court of Frio county had passed an order directing Noel, who was one of the commissioners, to open the road and that the court had authority to make such an order under the special road law of the county. The court of Civil Appeals took a different view of the effect of this road law and held among other things, that it takes an order of the commissioners' court, formerly entered, for the valid performance of any duty devolving on that governmental agency. Concerning the matter the Court of Civil Appeals, through Chief Justice Fly, in part said:

"The commissioners' court is the governing body of each county, and the powers and duties conferred upon that court could not be taken away and conferred upon some member of the court. No attempt was made to curtail the powers of the commissioners' court by increasing those of a single commissioner, but all his duties are to be performed 'under such rules and regulations as the commissioners' courts shall prescribe,' and 'as the commissioners' court may require.' He is an arm of the court, moved as the court may order and prescribe. No authority has the power to lay out a public road except the commissioners' court, and when it is laid out, it cannot be opened except by an order of that court. . . . "

"The rule formerly prevailed that contracts or agreements made by municipal corporations, county or city, are only valid and binding when entered upon the minutes. This rule has been modified. Fayette county vs. Krause, 31 Tex., Civ. App., 569; 73 S. W. 51. The modification is that where an order has been passed, the omission of the clerk to record it will not render it void. If an order is in fact passed by a commissioners' court, the failure to record it would not affect its validity under our decisions. But it would be necessary to prove the passage of the order before it could have any effect. Ewing vs. Duncan, 81 Tex. 230, 16 S. W. 1000. A mere conference by the commissioners and a verbal agreement to do a certain thing without a vote being taken would not constitute an order and would not be valid. There must be an order voted by the commissioners. Fayette county vs. Krause, herein cited. In speaking of the modification of the rule as set out in Ewing vs. Duncan, the Court of Civil Appeals said:

" 'Whatever may be the extent to which those decisions modify the rule as to the necessity for the entry in the minutes of orders made by a commissioners' court, they in no way modify the rule that all contracts made by a county, to be valid and binding must be made by or under authority of an order of the commissioners' court.'

"The testimony of the clerk tends to show a mere discussion of opening the road, but no vote. Dixon, an interested party, would not swear positively to a vote, and neither would Gore. All other orders were entered on the minutes, and it was singular, if the very important order to open the road was ever passed, that no record of it was ever made. The court was justified in finding that it was not made."

Germo Manufacturing Co. vs. Coleman County, 184 S. W., 1063.

It appears in this case that the sheriff of the county had bought certain disinfectants for the county but his action was neither authorized nor approved by the comissioners' court. The Court of Civil Appeals, held that it created no application against the county and in disposing of the matter, the court, among other things said:

"The court did not err in peremptorily instructing the jury to return a verdict for appellee. The commissioners' court have charge of the business affairs of the county, and they alone have authority to make contracts binding upon the county. Ferrier vs. Van Zandt County, 77 S. W., 960; Fears vs. Nacogdoches County, 71 Tex. 337; 9 S. W., 265; Brown vs. Reese, 67 Tex., 318; 38 Tex. Civ. App., 320; 85 S. W., 475; Fayette County vs. Krause, 31 Tex. Civ. App., 569; 73 S. W., 51.

"In Ferrier vs. Knox County, supra, the court said:

" 'In dealing with a county, it is

necessary to have an express contract with the comissioners' court, and that court can speak only by and through its minutes and records. No action can be maintained upon any implied promise upon its part to pay for anything.'

"In Presidio county vs. Clarke, supra, speaking in reference to the contract there involved, the court said:

" 'To be binding upon the county, it must, on its part, be made through the proper agency, the commissioners' court.' 38 Tex. Civ. App. 320, page 476, col. 2 of 85 S. W.

"The commissioners' court may act through an agent appointed by them. Futch was not appointed by the commissioners' court to purchase disinfectants. He was not such agent by virtue of his office.

"A county, as an individual, may ratify the act of one who assumes, without authority, to be its agent. Brazoria County vs. Padgitt, 160 S. W., 1170; Brazoria County vs. Rothe, 168, S. W., 70; Harris County vs. Campbell, 68 Tex., 22, 3 S. W., 243; 2 Am. St. Rep., 467; Gallup vs. Liberty County, 57 Tex. Civ. App., 175; 122 S. W., 291; Boydston vs. Rockwall County, 86 Tex., 234; 24 S. W. 272. But such ratification must be through the only agency by which the county can act, viz.: its commissioners' court"

American Disinfecting Co. vs. Freestone County, 193 S. W., 441.

This suit was brought by the appellant against Freestone County to recover the price of certain disinfectants alleged to have been sold the County. The goods were sold upon an order given by the sheriff of the county, whose duty it was to keep the courthouse and jail in proper healthful and sanitary condition. The disinfectant, when received, was used by the sheriff for this purpose. These facts were set forth fully in the petition but the trial court sustained a general demurrer to the petition. The Court of Civil Appeals affirmed the decree of the court below, holding that the petition failed to show any liability, because it did not allege that the commissioners' court, acting as such, passed any order authorizing the purchase of the disinfectant. In its opinion the court, in part, said:

"The petition in this respect fails to show any liability of Freestone County. It is not alleged that the commissioners' court, acting as such, passed any order authorizing the purchase of the said Obugo by the sheriff, or any one else. The sheriff of said county is not endowed by law, by virtue of his office, to bind the county in making such purchase. That authority is vested alone in the comissioners' court and in creating debts against the county said court must act as such in creating such an indebtedness. Mfg. Co. vs. Coleman Co., 184 S. W., 1063."

Other jurisdictions with reference to various kinds of boards and commissions adhere to the same doctrine.

Pike County vs. Spencer, 192 Federal, 11.

In this case, the United States Circuit Court of Appeals held that two of the three members of the board of county commissioners could not bind the county by written contract signed by themselves individually, which varies materially in its terms from the contract relating to the same subject matter authorized by a resolution passed by the board while in session. From the facts of the case, it appears that a proposition had been made to the county commissioners while in session, and that the commissioners, by resolution, had accepted such contract, but not in the terms offered. Thereafter two of the commissioners signed the contract. The Circuit Court of Appeals held, however, the signed instrument insufficient as a contract, saying:

"But it is apparent that this modified proposition of the plaintiff was never accepted by the defendant. The commissioners never acted upon it as a board and it is clear, as we have said, that the signature and acknowledgments of the paper by the two commissioners did not and could not bind the defendant county. It follows then in as much as the plaintiff never accepted the contract offered by the resolution of the board of commissioners, the minds of the parties never met and the new board after their election in Jan-

uary properly repudiated the claim made by plaintiff in that regard."

Newcombe vs. Chesebrough, 33 Mich., 322.

In this case, the Supreme Court of Michigan, speaking with reference to the actions of state boards, among other things, said:

"It is well settled that the action of a board of several members must be determined by their votes, and the votes must be looked for in their record. Their action separately can amount to nothing, and their joint action, whether meeting or not meeting (supposing they can act by consent expressed in writing, upon which no opinion need be given), must be evidenced in some way as the action of a lawful majority."

Petrie vs. Doe, 30 Miss., 698.

In this case, the Supreme Court of Mississippi held that less than a majority of the whole board of commissioners appointed by an act of the Legislature, for the purpose of supplying the making titles to land belonging to the county, cannot execute a deed so as to vest the legal title in the grantee.

Railroad Company vs. Commissioners, 16 Kansas 302.

This action was brought by the Board of County Commissioners, to cancel a subscription of $160,000 purported to have been made by said county to the stock of the Paola and Fall River Ry. Co., and for the return and cancellation of $160,000 of county bonds issued and deposited with the State Treasurer to pay subscription. The opinion in the case was delivered by Judge Brewer, at that time on the Supreme Court of Kansas and who afterwards was on the Supreme Court of the United States. The court in passing on the validity of these bonds held that the powers of a county vested in the board of commissioners must be exercised by the commissioners as corporate entity and not by them separately or as individual members; that before they can act they must be in legal session and that a casual meeting of the commissioners does not constitute a legal session. In discussing the matter the court, in part, said:

"This was an action by the defendant in error to cancel a subscription for stock, and for the return and cancellation of the bonds of the county issued in payment of the stock. A demurrer to the petition was over-ruled by the district court, and this ruling is the matter here presented for review. We shall content ourselves with the examination of a single question, for upon that we think the ruling must be sustained. The subscription was ordered at a special session of county board, and it is insisted that such session was not legally called, nor validly held. The facts respecting it are, as stated in the petition, and for the purposes of the demurrer admitted to be true, as follows:

"And said paintiffs aver, that two members of said board did not request that such special session of said board should be held, nor that the same should be called by the chairman of said board; that no call for such special session was ever made by the chairman of said board; that all the members of said board were not present at such so-called special session; that B. M. Lingo, at that time an acting and legally-elected and qualified member of said board, was absent from said so-called special session, and no notice of such special session, or of any call therefor, was given to or served upon the said B. M. Lingo, or at his residence, although, as said Railway Company and its agents then and there well knew, the said B. M. Lingo was then in said county, and resided therein with his family, and had no knowledge of notice of such intended special session, or of any call therefor; but that knowledge and notice of such intended special session was intentionally and fradululently concealed and kept from the said B. M. Lingo by the said Railway Company and its agents; and said session was not a regular session of said board, nor was it an adjourned session from any regular session thereof, nor from any duly-called special session of said board."

"Was such session a legal one, and the acts of the two commissioners thereat binding on the county? and if not, is it estopped from asserting its illegality in this action? The statute providing for session of

the county board is found in Sec. 13, p. 256 of the Gen. Stat. That section, after providing for the meeting of the board in regular session, adds, 'and in special session of the call of the chairman, at the request of two members of the board, as often as the interests of the county may demand.' This is the only statutory provision on the subject. It does not specify whether the call shall be made, nor require a record to be preserved of it. And the same is true as to the request. But still it requires a 'call' and a call for a meeting, in the legal sense of the term, is a summons to the parties entitled to meet, directing them to meet. It involves something more than a mere purpose in the mind of the caller, or an expression of that purpose unheard, unseen, and unknown. It implies a communication of that purpose to the parties to be affected by it. How it should be communicated, is sometimes prescribed by statute, or by by-law. It is sometimes provided that it shall be by publication in the newspaper, sometimes by printed notice served personally or at the residence, and sometimes by mere oral personal notice. But in some way or other notice must be given; and if there be no regulation as to the manner of notice, it must be personal, at least where personal notice is practicable. This is no new question. It has arisen in respect to the sessions of common councils of cities, boards of directors or trustees of private corporations, the town meetings of New England, the meetings of members of corporations, boards of electors, etc. And there is but one uniform rule running through the authorites. In the case of Rex. vs. Mayor, etc., of Shrewsbury, Rep. Temp. Hard, 151, it was said by the court, that 'When the acts are to be done by a select number, notice must be given of the time of meeting . . . and in such case the acts of a majority would bind the whole body; or if all were present through accident, without notice, their acts would be good; but the acts of a majority, present by accident, would not be binding.' It was a saying of Lord Kenyon's, that 'special notice must be given to every member who has a right to vote.' Ch. J. Tilgham, in the case of the Baltimore Turnpike, 5 Binney, 481, said, 'that when several persons are authorized to do an act of a public nature which requires deliberation, they all should be convened, because the advice and opinions of all may be useful, though all do not unite in opinion.' In Wilcox on Munic. Corp., Sec. 58, we find it laid down, that 'all corporation affairs must be transacted at an assembly convened upon due notice at a proper time and place, consisting of a majority of the persons of each class to which the prescription or character has confided the power. And Selden, Jr., in People vs. Bachelor, 22 N. Y., 128, uses this language: "It is not only a plain dictate of reason, but a general rule of law, that no power or function intrusted to a body consisting of a number of persons can be legally exercised without notice to all the members composing such body.' Dillon in his work on Munic. Corp., Sec. 244, lays down the law thus: 'If the meeting be a special one, the general rule is, unless modified by the charter or statute, that notice is necessary, and must be personally served if practicable upon every member entitled to be present, so that each one may be afforded an opportunity to participate and vote.' See also further, King vs. Theodorick, 8 East, 543; King vs. Gavorian, 11 East, 77; ex parte Rogers, 7 Cowen, 526, and note; Downing vs. Rugar, 21 Wend, 178; Stow vs. Wise, 7 Conn. 214; Harding vs. Vandwater, 40 Cal., 77; Wiggin vs. Freewill Baptist, 8 Met. (Miss.) 301. Nor is this merely an arbitrary rule, but one founded upon the clearest dictates of reason. Wherever a matter calls for the exercise of deliberation and judgment, it is right that all parties and interests to be affected by the result should have the benefit of the counsel and judgment of all persons to whom has been intrusted the decision. It may be that all will not concur in the conclusion; but the information and counsel of each may well affect and modify the final judgment of the body. Were the rule otherwise, it might often happen that the very one whose judgment should and would carry the most weight, either by reason of his greater knowledge and experience concerning the special matter, by his riper wisdom and better judgment or by his greater familiarity with the wishes and necessities of those specially to be affected, or

from any other reason, and who was both able and willing to attend, is through lack of notice an absentee. All the benefit in short, which can flow from the mutual consultation, the experience and knowledge, the wisdom and judgment of each and all the members, is endangered by any other rule. Again, any other rule would be fraught with danger to the rights of even a majority, as, when legally convened the ordinary rule in the absence of special restriction being that a quorum can act and a majority of the quorum bind the body, it would, but for this rule, often be in the power of an unscrupulous minority to bind both the body and the corporation for which it acts to measure which neither approve of. Thus, were the body composed of twelve members, a quorum of seven could act, and a majority of that quorum, four could bind the body. An unscruplous minority of four by withholding notice to five, might thus bind both the body and the corporation. Reason therefore and authority unite in saying that notice to all the members to whom notice is practicable, is essential to a legal special session

"But we are referred by counsel to that clause in the act concerning the construction of statutes, (Gen. Stat., p. 999) which reads, 'Words giving a joint authority to three or more public officers or other persons, shall be construed as giving authority to a majority of them, unless it be otherwise expressed in the act of giving the majority.' We do not see that this effects the question. Whenever there is a legal session, unquestionably a majority of the commissioners can act and bind the county. But this casts no light upon the question as to the manner of convening a legal session. It must be remembered that the powers of the county are not vested in three or more commissioners as such, but in a single board. (Gen. Stat., p. 254, Sec. 3) Two commissioners casually meeting have no power to act for the county. There must be a session of the 'Board.' This single entity, the 'board,' alone can by its action bind the county. And it exists only when legally convened."

Eigeman vs. Board of Commissioners, 82 Ind., 413.

In this case, the Supreme Court of Indiana held that the authority of the Board of County Commissioners or doing of extra work in construction of a county jail can not be shown by proving the separate individual assent of the individual members of the Board. Concerning the matter in controversy, the court said:

"The stronger and more satisfactory ground for upholding the decision of the circuit court, however, is, that, without the direction and order of the board, the architect had no authority to make or permit any alterations or additions in the plans of the work, and that it was incompetent to show that the changes, which were made, were made with the knowledge and acquiescence of the individual members of the board. The individual action or acquiescence of the commissioners was, as the appellant had agreed and was bound to know, as meaningless and ineffective as the action of any other citizens would have been. It was not offered to show that the extra work was done with the joint approval of the individual members of the board acting together. So that the question, what would have been the effect of such action, is not presented. The averment of individual acquiescence of the members, if it does not import the separate act of the members, certainly cannot be construed to mean their joint official action."

County Commissioners v. Seawell, 3 Oklahoma 381.

In this case the supreme court of the territory of Oklahoma held that a Board of County Commissioners can only contract to bind the county while they are sitting as a board and that an agreement with one of the commissioners in the absence of the other does not bind the county. Concerning the matter, the court, in part, said:

"It is claimed that one of the individual members at a time subsequent to the date upon which the contract was entered into had a conversation with Seawell, in which such members consented to begin occupation of the building on February 9. Article 6, ch. 24, Laws of 1890, which provides for a board of county commissioners, also makes provision for the time and place of the meeting of such board, how they shall transact

business and the record they shall keep of all transactions had on behalf of the county. Under such laws the only way by which the county could be bound upon a contract was by action taken by the board while it was in session. And the evidence of what was done were the records kept by the board. Under this law a board of county commissioners could only act to bind the county while they were sitting as a board, and an agreement of one of the members, in the absence of the others could not bind such county."

Pike County v. Rowland,
94 Penn. State 238.

In this case the Supreme Court of Pennsylvania held that where a a board such as the commissioners of the county proposed to do any deliberate act that would be binding on the absent members it should be done at a regular stated meeting or a regular adjourned meeting and if at a special meeting, then that notice is necessary and must be served, if practicable, upon every member entitled to be present. Concerning this question, the court, in part, said:

"The Act of 1834 provides that the coroprate powers of a county shall be exercised by the commissioners; that two of them shall form a board for the transaction of business, and when convened in pursuance of notice or according to adjournment shall be competent to perform all duties appertaining to the office. To these officers are intrusted the care and management of county business and property. The voice of the inhabitants is not directly heard in the levying of taxes, making of contracts or expenditure of money—their power is only felt at the election of commissioners. The question presented in the fourth and fifth assignments is, may two of the commissioners convene and lawfully transact business requiring deliberation, not according to adjournment, and without notice to or knowledge of the other? This concerns every citizen of the county, as well as each member of the board.

"By law the affairs of the county are administered by three representatives. Absent members, equally with those who are present, are bound by whatever is lawfully done at a regular or stated meeting or any regular adjourned meeting. If the meeting be a special one, the general rule is that notice is necessary, and must be personally served, if practicable, upon every member entitled to be present, so that each one may be afforded an opportunity to participate and vote. Such notice is essential to the power of the board to do any deliberative act which shall bind the corporation. If all have notice, two shall form the board, and their acts bind the absent as if it were a stated or adjourned meeting. Notice may be dispensed with by the presence and consent of all; and if one has quit the municipality, and has no family or house within its limits, notice to him is unnecssary. Dillon on Mun. Corp., sects. 200, 201, 223, 224. All authorities seem to agree as to the general rule, unless there is a modification in the charter or statute. It applies alike to public and private corporations. Our statute, which declares that a majority shall form a board when duly convened, in pursuance of notice or adjournment, is an enactment of the well-settled rule without adding to or taking from . ."

"If two of the commissioners, without notice to or knowledge of the other, can form a board for transaction of business, the statutory direction for notice is futile. To say they have convened in pursuance of notice is nonsense, unless we speak of notice to the two by a person who desires business of interest to himself to be done in the other's absence. Such meeting savors of conspiracy. A designing man could observe the superiority of an able and upright commissioner over his weaker fellows for consummation of his purpose, if notice to all is not essential. Superior numbers often yield to superior weight, and sometimes the corrupt quail in presence of an honest man. Just in proportion as a clandestine meeting of two commissioners for transaction of business would be dangerous, is it to the interest of the inhabitants of the county that all three should have notice and opportunity to be present at every special meeting of the board. The opinions, reasoning, perhaps protest, of the one may advantage the county. He may prevent hasty and inconsiderable

action. Had Geyer been present on the evening the bonds were signed, he might have discussed the matter with Rosecrans till Drake's pendulous mind had swung the other way, and thereby saved the county from the Rowland contract. Be this as it may, Geyer ought to have had opportunity to consult, advise, and, if need be, protest."

Buell v. Cook
4 Conn. 238

In this case, the action was on a contract by which Buell undertook to lease the county court house to Cook. The county court at the time was composed of five persons, and the plaintiff offered to prove that three of these persons had separately assented to the contract. The Supreme Court held that the sanction of the court could only be given when acting as a body, and among other things, said:

"The sanction of the court could alone be given, when acting in a body; and the only evidence of their act, on this, as on all other subjects, is the record of their transactions. It has been said, that by the expression, 'a majority of the county court,' was meant, the personal approbation of the greater number of the judges. Much may be said on this question, on either side, as stress is laid on the word majority, on the one hand, and on the words the county court, on the other; that is, if the words are tenaciously adhered to, and the spirit and intent of the contract, is abandoned. Waiving a particular discusion, founded merely on the meaning of the words above mentioned, and declaring it as my opinion, that it is no unusual phraselogy, when the determination of the court acting judicially is spoken of, for persons to say, 'the majority of the court,' thereby intending to express the thought, that the question was decided in a particular manner, I will place my opinion on a surer ground. The agreement was suspended on the approbation of those, who had right to approve the leasing of the county property, and not of those, who had no such right. Now, who had this right; and in what manner must their approbation be evinced? I answer, the county court; and their record is the only mouth, through which they can speak. To me it seems little less than infatuation to assert, that the property of the county, of every description, is confided literally to the county court; and yet that this is not a united body, deliberating and acting together, each one of the judges aiding the reflections of the other, and the thought of each being filtered through the minds of all, and thus producing a wise result, but, that this county court, is, the judges acting separately, without deliberation, without inter-communication, in haste, or at the corners of the street, and when their separate opinions are thus obtained, that there is no permanent memorial of them, but that they are to be proved ore ternus; and by the aid of arithmetic, that the result is to be ascertained. I cannot yield my assent to a pretension entirely unnecessary, and which jeopardizes the county property; is pregnant with manifold abuses: and is recommended, by no possible benefit, to countervail its numerous disadvantages. On the contrary, it is manifestly clear, when there is any act, not ministerial, confided to the discretion of several persons, that they must jointly act and deliberate. This is the case with auditors, referees, committees and arbitrators. And emphatically, when the county court is to transact business, not judicial, but which requires the exercise of discretion, as in the ascertainment of the property belonging to a person who intends making application for a pension, they must act unitedly, and their doings be made a matter of record."

Perry v. Tynen
22 Barbour (N. Y.) 137

It is unnecessary to cite the facts of the case, but we direct attention to the adherence of the New York courts to the principle of law enunciated, to-wit: that where authority is conferred upon the board, and where the matter involved requires the exercise of judgment and discretion, that the board must act as such.

Concerning the matter, the court, in part, said:

"In cases of the delegation of a public authority to three or more persons, the authority conferred may be exercised and performed by a majority of the whole number.

If the act to be done by virtue of such public authority requires the exercise of discretion and judgment—in other words, if it is a judicial act—the persons to whom the authority is delegated must meet and confer together, and at least a majority must meet, confer, and be present, after all have been notified to attend."

Martin vs. Lemon, 26 Conn., 192.

Under the laws of Connecticut, it was provided that should any person take any part of a highway or erect any fence thereon in such manner as to obstruct the same, then that the selectmen of the town in which the offence was committed, or a committee appointed by them for such purpose, should take the necessary action to remove the obstruction. In this particular case, the plaintiff was one of a committee of three persons appointed under this act, and he, acting without the concurrence or advice of the other members of the committee undertook to enforce the law. The Supreme Court held that his action was invalid and could not be sustained. Concerning the matter, the court in part said:

"His right to recover depends on the question whether he legally possessed the power which he thus exercised; and hence the inquiry is presented, whether, by the true construction of that section, the power of removing encroachments is given to each of the members of such a committee consisting of several persons, acting separately and without the concurrence of the other members or any of them. We are clearly of the opinion that that statute does not empower each of the members of the committee appointed under it so to act. There is no general legal principle that where, as in this case, an authority to do an act of a public nature is given by law to more persons that one, each of them independently of the others, and without the concurrence of them, or of some of them, may exercise that authority. On the contrary, the rule on this subject is, that in such a case, if the act is merely ministerial in its character, a majority at least must concur and unite in the performance of it, but they may act, separately, and need not be convened in a body or notified so to convene for that purpose; but if the act is one which requires the exercise of discretion and judgment, in which case it is usually termed a judicial act, unless special provision is otherwise made, the persons to whom the authority is given, must meet and confer together, and be present when the act is performed, in which case a majority of them may perform the act; or, after all of them have been notified to meet, a majority of them having met will constitute a quorum or sufficient number to perform the act, and according to some modern authorities, the act may be legally done by the direction or with the concurrence of a majority of the quorum so assembled, Damon vs. Granby, 2 Pick., 345, 354.

"These appear to be the principle of the common law on this subject. Grindley vs. Baker, 1 Bos. & Pul., 229. Keeler vs. Frost, 22 Barb., S. C., 400. Perry vs. Tynen, id., 137.

"The courts in this State, however, have gone further, and held in a particular class of cases where the act requires the exercise of judgment and discretion, that a majority of the persons on whom the authority is conferred may perform it, and that they may act separately for that purpose, and need not act in a board or collective body. Gallup vs. Tracy, 25 Conn., 10. There is no occasion in the present case for pursuing this particular subject further. There is nothing in the act now in question which takes it out of the operation of these principles, or provides that the authority conferred by it may be exercised by one only of the members of the committee mentioned in it. Its terms contain no express delegation to the individual members of the committee of the power given to the commitee. nor so those terms apply that they may separately exercise that power. On the other hand, they import that one of them can not so act where the committee consists of more than one person. They prescribe that the acts therin authorized shall be done by a 'committee', and there is nothing to indicate that they may be done by a particular portion of the per-

sons composing it. This term, when it is applicable, as it is in the present case, to more persons than one, is a collective word, or, as grammarians would say, a noun of multitude, and indicates a plurality of persons. The expression which is thus used in the act is therefore not appreciate to express the idea that the power conferred on a committee may be exercised by each individual member of it separately. And accordingly, as a reference, to our statutes will abundantly show, wherever an authority is conferred by a statute on several persons, by whatever term they are designated, and it is intended that a particular portion of them may exercise that power, it is usual to insert some phrase which expresses such intention. We also infer from the magnitude of the power which is given by the acts in question to the committee of encroachments and the seriousconsequences which might ensue to the persons on whom it is brought to bear, that it was the intention of the legislature that it should not be exercised by one only of the members of the committee on his sole judgment and opinion, but that it was designed that its exercise should be the result of deliberation and consultation between them."

Honaker vs. Board of Education, 32 L. R. A., 413.

In this case the Supreme Court of West Virginia held that the members of a school board acting individually and separately and not as a board could not accept a proposal or make any contract whatever binding on the school district. Concerning the matter the court said:

"And the members of the board acting individually and separately and not as a board convened for the transaction of business, can not make a contract that will bind them, as a corporation."

Conger vs. Board of Commissioners, 48 Pac., 1064.

In this case the Supreme Court of Idaho held that in the employment of counsel by county commissioners in order to bind the county, they must act as a board and their action therein must be made a matter of record. Concerning this matter the Supreme Court in part said:

"The real contention is that the board of county commissioners did not employ William H. Claggett, Esq., to assist in the prosecution of said criminal cases. The record shows that the members of said board individually requested him to assist in said prosecution, and that as a board they did not act in said employment. In Rankin vs. Jauman, 39 Pac., 1111, this court held that a board of county commissioners are an entity and can only act to bind the county when sitting as a board. See also Hampton v. Board (Idaho) 43 Pac., 324; Meller v. Board (Idaho) 35 Pac. 712. In the case at bar, the employment was made by the members of the board individually. The members of the board, acting individually and separately, are not authorized to employ counsel. It is the county commissioners acting as a board that are given that authority. If such employment could be made by the members of the board, acting separately and individually, no record thereof would be made, and no order entered on the record from which an appeal could be taken. The commissioners, in order to bind the county in the employment of counsel, must act as a board. The above cited authorities are authoritative in this case."

Butler v. School District, 24 Atlantic, 308.

In this case the plaintiff sold the school board certain fixtures and in the contract provision was made that these fixtures were to be tried out for a certain period of time and the school board in order to relieve itself of liability must show that it gave notice of disapproval within the fixed time. The Supreme Court of Pennsylvania held that the school board under the contract, in order to give a legal notice of dissatisfaction with the utilties furnished, must exercise its power by joint action; that mere loose discussion without any motion or united action was not sufficient to authorize the notice of disapproval. Concerning the matter the Court in part said:

"A body of this kind must exercise its powers by joint action as a board, loose discussion without any motion or united action is not sufficient."

Independent School District v. Wirtner, 52 N. W. 243.

In this case the law provided that the president of a school board should appear in behalf of the school district in all suits brought against the district, and also provided that counsel could be employed by the board of directors. It was contended that this language authorized the president of the school board to file suit and to maintain an action on behalf of the board. The Supreme Court of Iowa held to the contrary and took occasion to say:

"It is the generla rule that corporations act through their board of directors and no corporate act can be done by the individual members of the board, unless authorized by law or by the charter of the corporation."

Reed vs. Lancaster. 25 N. E., 974.

This is a Massachusetts case. By the failure of the town to choose directors of the Almshouse, their duties were imposed upon the overseers of the poor. The board of overseers consisted of three members elected for three years, one member being elected at the town meeting in March of each year; one of the members having resigned, leaving a vacancy to be filled, the two remaining members contracted in writing for the services of a superintendent and matron of the almshouse. The Supreme Judicial Court of Massachusetts held that this contract was ineffectual and did not bind the town and that the contract could not be ratified by the overseers when a full board was elected by individual action. Concerning the matter, the court took occasion to say:

"If ratified, it must have been so by them as a body, and not individually. While they may act by a majority, the members are still to act together, and not by the agreement of members separately obtained. Id. C. 3, Sec. 3; Worcester vs. Railroad Co., 113 Mass. 161; Shea vs. Milford, 145 Mass., 528; 14 N. E. Rep. 764. The fact that plaintiff continued to render service at the almshouse, after the new board was organized, would not tend to show that the new board had ratified an invalid executory contract, so that he would be entitled to claim damages against the town for a breach thereof."

We have thus gone into this matter at great length. The authorities in all jurisdictions hold that where a duty is conferred upon a board or commission composed of more than one member, and where this duty involves judgment and discretion, that it may not be performed by the members of the board or commission separately and individually, but that it must be performed by them meeting together and taking official action as a board or commission.

The Prison Commission of this State is clearly within this rule. It can only act as a board or commission and for such purpose its members must meet together and hold a session as a board or commission before it can legally transact business involving judgement and discretion. The acts of its individual members, however solemnly entered into, are not binding on the State or on the Commission itself.

In the instance of the present inquiry, the subsequent instrument signed by two members of the Prison Commission and approved by the Governor, waiving the State's option to purchase lands involved, was never authorized by the Board of Prison Commissioners meeting in session as is contemplated by the laws of the State and is required before the Commission can create a legal obligation or relinquish one previously created. Nor was the attempted execution of this instrument ever ratified by the Prison Commission. These facts, we deduce from the statement made by Your Excellency.

In other words, the Prison Commission of Texas has never authorized, executed, or approved, any instrument releasing or waiving the State's option to purchase the lands known as the Blue Ridge Plantation Number One. It follows from what we have said that the State of Texas has not parted with its option to buy Blue Ridge Farm Number One under the terms of the contract entered into between the Board of Prison Commissioners and Mr. Bassett Blakely under date of September 1, 1916.

You are further advised that steps can be taken to the end of conserving the interest of the State in this land.

In concluding this opinion, I de-

sire to make proper acknowledgement to my assistants, W. J. Townsend, John Maxwell and E. F. Smith, who exhausted the American authorities on the legal question here involved and prepared the office briefs from which I have been able to prepare this opinion.

Respectfully,
C. M. CURETON,
Attorney General.

This opinion has been considered in conference and is approved.
C. M. CURETON,
Attorney General.

Governor's Office,
Austin, Texas, May 6, 1919.

To the Thirty-Sixth Legislature in First Called Session:

I submit for your consideration the subject of the Board of Control. I recommend that the act passed at the regular session creating this board be amended so as to become affective January 1, 1920. At a session to be convened in the meantime I will again submit this subject so the law may be amended to conform to the best judgment of your body.

After conferring with the chairman of the Senate Finance Committee and the House Appropriation Committee, I am advised that it is not reasonable to expect that any of the appropriations bill will be ready for consideration in less than two weeks time. For this reason, it is my judgment that the public interests will be best served by disposing of the three subjects I have submitted and deferring action on other measures until I convene the Legislature again in June. Therefore unless it be upon the request of a majority of the members of your body I will not submit additional subjects at the present called session.

Respectfully submitted,
W. P. HOBBY, Governor.

Recess.

At 12:35 o'clock p. m. the Senate on motion of Senator Clark, recessed until 2:30 o'clock p. m. today.

After Recess.

(Afternoon Session.)

The Senate was called to order by Lieutenant Governor Johnson.

Senate Bill No. 1.

Action recurred upon the pending business Senate Bill No. 1, the question being upon the pending amendment by Senator Hall. (See page 9.)

Senator McNealus moved to table the amendment and this motion was lost by the following vote:

Yeas—10.

Alderdice.	Hopkins.
Cousins.	McNealus.
Dean.	Smith.
Dorough.	Suiter.
Floyd.	Westbrook.

Nays—14.

Bailey.	Gibson.
Bell.	Hall.
Caldwell.	Hertzberg.
Carlock.	Johnston.
Clark.	Page.
Dudley.	Rector.
Faust.	Williford.

Present—Not Voting.

Buchanan of Bell.

Absent.

Buchanan of Scurry.	Strickland.
Dayton.	Witt.

Absent—Excused.

Parr.	Woods.

The amendment was then adopted.

Senator Hall offered the following amendment:

Amend Senate Bill No. 1 by striking out all of Section 10.

Senator Bailey offered the following substitute for the above amendment:

Amend section of the bill by striking out all of the words, "The Supreme Court of this State" and insert in lieu thereof the words "The District Court of the County of his residence" and further amend the bill by striking out all of the said section after the word "Act" in line 9 and make the caption conform to this amendment.

Senator McNealus moved to table the substitute and this motion was lost by the following vote.

Yeas—10.

Alderdice.	Dorough.
Caldwell.	Floyd.
Dean.	McNealus.