



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GROVER SELLERS
ATTORNEY GENERAL

Honorable C. H. Cavness
State Auditor
Austin, Texas

Dear Sir:

Opinion No. 0-5709

Re: Is title to the property formerly owned by the State Staff Corps and Detachment Club property vested in the Texas National Guard Armory Board, and related questions.

In your recent letter you gave us certain facts, which may be summarized as follows:

You are making an audit of the books of account and records of the Adjutant General's Department. Attached to your letter are the following documents:

1. Sales agreement between M. L. Wiginton, Vendor, and Col. H. H. Carmichael, Major Q. C. Taylor and Capt. Ralph A. Lewis, Trustees for the State Staff Corps and Detachment Club, Purchaser, dated May 15, 1935, whereby the vendor agreed to sell and convey, and the Purchaser agreed to purchase "a strip of land on the west side of vendor's 9.73 acre tract adjoining a 3.02 acre tract this day sold to the Adjutant General's Department of Texas, being unimproved land lying immediately east of said 3.02 acres and containing 1.35 acres", situated in Travis County, Texas, for the sum of \$1,800.00, payable in 10 monthly payments, with 5% interest, to Clyde Hailey, Trustee.

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2. Warranty Deed, dated May 15, 1935, executed by Mark L. Wiginton and wife, Gorham Wiginton, conveying to the State Staff Corps and Detachment Club a 1.35 acre tract situated in Travis County, Texas, and described by metes and bounds therein, for a recited consideration of \$1,800.00. The acknowledgments on this deed were dated September 9, 1935, and it was filed for record in the office of the County Clerk of Travis County, Texas, on September 10, 1935.
3. Photostatic copy of the charter of the State Staff Corps and Detachment Club, which was approved September 9, 1935, by the Secretary of State, and which shows Lieutenant Colonel Horace H. Carmichael, Major Q. C. Taylor and Captain Ralph A. Lewis as the corporation's directors.
4. Minutes of a called meeting of the State Staff Corps and Detachment Club members (carbon copy), dated May 26, 1941. Such minutes recite, among other things, that Colonel Carmichael died September 24, 1938; that the only other two members, namely, Major Taylor and Captain Lewis, were present at the meeting, and that the following resolution was duly adopted:

"WHEREAS, on August 27, 1935, H. H. Carmichael and Q. C. Taylor and Ralph H. Lewis did, on or about August 27, 1935, determine to organize themselves into a Club, and to that end they did, on September 9, 1935, file with the Secretary of State of Texas an application for a charter of such Club to be known as State Staff Corps and Detachment Club, which application was approved by the Secretary of State of Texas on the date upon which it was filed; and

"WHEREAS, the three individuals above named were and are the only persons who have ever been members of said Club and Colonel H. H. Carmichael, one of said members, died in the year 1938, and the other two above named are now all

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of the and the only members of this Club; and

"WHEREAS, by an instrument dated May 16, 1935 but showing on its face that it was not executed until September 9, 1935, Mark L. Wiginton and his wife conveyed to said Club a tract of land being 1.35 acres out of the George W. Spears League, Travis County, more particularly described in said deed; and

"WHEREAS, said deed was not delivered until September 10, 1936, on which date it was placed of record with the County Clerk of Travis County, Texas, and is to be found of record on pages 361-362 of Vol. 526 of the Deed Records of said County; and

"WHEREAS, the consideration of \$1800.00 recited in said deed was actually paid by the Adjutant General's Department of Texas by warrants drawn against the funds in the State Treasury appropriated for the procurement of armories for the military forces of Texas and neither this Club nor any member thereof paid any part of such consideration; and

"WHEREAS, at the time of the formation of this Club and of said conveyance and said payment the Adjutant General's Department intended to, by the use of funds so appropriated, acquire said land and, thereafter, construct thereon a building or buildings for the use of such military forces and, in order that a legal entity take title to said property, this Club was organized and chartered; and

"WHEREAS, shortly after the acquisition of said property, the procurement of such armories was, by Statute, taken from such Adjutant General's Department and placed in the Texas National Guard Armory Board, where such procurement authority now reposes; and

"WHEREAS, it has thereby become impossible to carry out, in the manner and form intended, the original purpose for which this Club was organized and said purchase made, but

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it is possible to accomplish practically the same purpose in the manner provided in this resolution:

"Therefore, be it and it is hereby resolved by the State Staff Corps and Detachment Club and by all the members of said Club, as follows:

"1. That the President of this Club be and he is hereby authorized and directed to execute and properly acknowledge a deed, in behalf of this Club, and its entire membership, conveying, for a nominal consideration, the said tract of land to the Texas National Guard Armory Board, a body politic and corporate under the Statutes of Texas, on the following conditions, to wit: that if the said Board shall not on or before the expiration of the ten year period immediately following the execution of such deed begin or procure to be begun on said land the construction of a building or buildings intended to be leased by said Board to the State of Texas as contemplated in the Statutes governing said Board and laws amendatory thereof and, thereafter complete such construction with reasonable dispatch, the title so conveyed will revert to the State of Texas for the use and benefit of the Adjutant General of the said State and his successors in office, otherwise to become absolute in said Board.

"2. That the Secretary of this Club be and he is hereby authorized and directed to affix the seal of this Club to said deed and attest the same and properly acknowledge said deed.

"3. That each of the two present members of this Club join in said deed in their individual capacities and in their capacities as members and Directors of this Club.

"4. That after the execution of such deed as aforesaid, the same be delivered to the Texas National Guard Armory Board through its Chairman.

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"5. That Mrs. Edna Fay Carmichael be and she is hereby requested and authorized to execute an appropriate instrument in her individual capacity and as Independent Executrix of the Estate of H. H. Carmichael, deceased, transferring and conveying to said Armory Board, under the same conditions as above set out, all of her right, title and interest and all of the right, title and interest held and possessed by H. H. Carmichael at the time of his death in and to said land, and that the Secretary of this Club transmit to her a copy of this resolution with the request that she execute such an instrument.

"6. That certified copies of the Minutes of this meeting and of this Resolution be delivered to said Armory Board at the time said deed is delivered."

5. Warranty deed, dated May 26, 1941, executed by State Staff Corps and Detachment Club, conveying to the Texas National Guard Armory Board the 1.35 acres described in the deed referred to in paragraph (2) above, upon the following condition, however:

"If the said Armory Board, its successors or assigns, shall, for any reason, fail or refuse, on or before the expiration of the period of ten years immediately following the date of this instrument, to actually begin to construct on said land, and thereafter prosecute the same to completion with reasonable diligence, a building or buildings intended for lease to the State of Texas under the laws now prevailing, or any amendments thereof, the title hereby conveyed shall pass from said Board unto the State of Texas for the use and benefit of the Adjutant General's Department of said State of Texas; but if such construction be so begun and prosecuted to completion, this deed to said Board shall become absolute."

6. Quitclaim deed, dated May 26, 1941, executed by Edna Fay Carmichael, individually and as Independent Executrix of the Estate of H. H. Carmichael, deceased, conveying to Texas

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National Guard Armory Board all of the right, title and interest of grantor in either capacity in and to the 1.35 acres above described.

7. List of warrants, aggregating \$2,000.00, paid out of funds of the Adjutant General's Department as rentals, towit:

<u>Warrant No.</u>	<u>Amount</u>	<u>Date</u>	<u>To Whom Issued</u>
151736	\$200.00	May, 1935	Clyde Hailey, Trustee
156833	600.00	June, 1935	Clyde Hailey, Trustee
171709	600.00	July, 1935	Ralph A. Lewis, Trustee
182131	600.00	Aug., 1935	Ralph A. Lewis, Trustee

8. Miscellaneous correspondence.
9. Working Sketch of Camp Mabry.

You request our opinion upon the following questions:

"1. Was this transaction properly handled as to the manner in which this property was acquired, that is by payment of State funds charged on the books as rental which was actually paying for 1.35 acres of land where the title rested with three individuals, one of whom we know was a State employee, organized as the State Staff Corps and Detachment Club, especially in view of the fact that the property was acquired by the Club in 1935, and was conveyed to a State Agency in 1941 after a lapse of some six years?

"2. Is Document Number 5 a binding document in view of the fact that the State Staff Corps and Detachment Club is conveying the 1.35 acres to the Texas National Guard Armory Board for a consideration of '\$10.00' whereas the Club did not pay for this property in the beginning as it was paid for by disbursements from the funds of the Adjutant

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General's Department, and further restrictive clauses condition the deed?

"3. What State Agency does hold title to this property under the existing document? If any fault be found in these instruments, what should be done to correct same? We feel there should be a clear title to the State of Texas."

The State of Texas has the same rights and powers in respect of property as an individual. It may acquire real or personal property by conveyance, will or otherwise, and hold or dispose of the property or apply it to any purpose as the State sees fit. Power in respect of State property rights is vested in the Legislature, and the Legislature alone may exercise the power necessary to the enjoyment and protection of those rights by the enactment of statutes for that purpose. 38 Tex. Jur. 836.

S. B. No. 526, Acts of the Regular Session of the 44th Legislature, 1935, transferred certain property owned by the State of Texas and theretofore acquired for the use of the Adjutant General's Department to the State Highway Department, and authorized the State Highway Department to pay over to the Adjutant General's Department the sum of \$3,200.00, which sum was placed in a special fund in the State Treasury to the credit of the Adjutant General's Department. Such Act authorized the Adjutant General's Department to purchase and acquire suitable right of way and entrance to Camp Mabry, as in its judgment may be deemed necessary and proper, such property to be paid for out of the special fund thereby created. Such Act further provided that should the \$3,200.00 special fund not be sufficient, an amount sufficient, not to exceed \$3,200.00, was appropriated to the Adjutant General's Department to pay the difference between the special fund and the purchase price paid for such right of way.

Pursuant to such Act, the Adjutant General's Department acquired title to a .55 acre tract from Frank Roll and wife for \$1,345.00; a .6669 acre tract from Mrs. Alice Aiken for \$1,800.00; and a 3.2 acre tract from M. L. Wiginton and wife for \$3,200.00. Such property is now used as an entrance to Camp Mabry. The 1.35 acre tract purchased by the State Staff Corps and Detachment Club, simultaneously with the above purchases by the Adjutant General's Department, is located just east of this entrance.

During the months of May, June, July and August,

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1935, the warrants described in paragraph 7 above were issued upon vouchers signed by Colonel Carmichael, as Assistant Adjutant General. Such vouchers stated that the sums were for "armory rentals" for State Staff Corps and Detachment Headquarters 36th Division Trains; Company D, 14th Infantry. We have been unable to locate any written rental agreement between the Adjutant General's Department and Colonel Carmichael, Major Taylor and Captain Lewis, Trustees for the State Staff Corps and Detachment Club. The corporation, State Staff Corps and Detachment Club, did not come into legal existence until September 9, 1935. On such date, Mark L. Wiginton and wife conveyed to such corporation the above described 1.35 acre tract of land. We are at a loss to understand the reason for the "armory rental" vouchers, except the statement in the Resolution, on page 3 hereof, to the effect the consideration of \$1,800.00 recited in the deed from Mark L. Wiginton and wife to the State Staff Corps and Detachment Club was actually paid by the Adjutant General's Department, and neither such Club nor any member thereof paid any part of such consideration.

Since Colonel Carmichael was Assistant Adjutant General and Trustee for the State Staff Corps and Detachment Club, any rental agreement he might attempt to make between the State of Texas and such Club would be void and against public policy. 43 Am. Jur. pp. 105, 107; Meyers v. Walker, 276 S. W. 305; City of Edinburg v. Ellis, 59 S. W. (2) 99. If the "armory rental" agreement was void, and State funds were used to pay the consideration for the deed to the Club, we are of the opinion that the State of Texas, at its election, will have a constructive trust upon such property, with the same rights to follow its funds into such property as an individual would have under the same circumstances.

In view of the fact that the Texas National Guard Armory Board paid no value to the State Staff Corps and Detachment Club for the deed to it, and is a State Agency with notice of the official position of Colonel Carmichael, we believe that such Board holds this property upon a constructive trust for the State of Texas.

We answer your questions as follows:

First question: This transaction was not properly handled, since State funds were used under the guise of "armory rentals" to pay the purchase price for property where the title

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thereto was taken in the name of another. However, it should be noted that the Adjutant General's Department had no express legislative authority to purchase this property, and could not have purchased same for the State of Texas without such legislative authority.

Second question: We believe that document No. 5, above, is a "binding document", but that the Texas National Guard Armory Board holds this property upon a constructive trust for the State of Texas, because (1) such Board paid no value for this property, and (2) is a State Agency with notice of the official position of Colonel Carmichael.

Third question: The Texas National Guard Armory Board holds title to this property, subject to and upon a constructive trust for the State of Texas, at the election of the Legislature. If the Legislature elects to enforce a constructive trust upon this property, a conveyance to the State or suit by the Attorney General to enforce such trust will be necessary to vest title in the State. The remedy of enforcing a constructive trust upon this property is not exclusive, but it appears to us more feasible.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Thos. B. Duggan, Jr.*
Thos. B. Duggan, Jr.
Assistant



TED:BT

APPROVED MAY 12, 1944
[Signature]
ATTORNEY GENERAL OF TEXAS

(Acting)