

REPORT
AND
OFFICIAL OPINIONS

OF THE
ATTORNEY GENERAL

OF
PENNSYLVANIA

FOR THE
Two Years Ending December 31, 1904.

HAMPTON L. CARSON,
Attorney General.

WM. STANLEY RAY,
STATE PRINTER OF PENNSYLVANIA
1905.

REPORT

OF THE

Attorney General of Pennsylvania.

OFFICE OF THE ATTORNEY GENERAL,
HARRISBURG, PA., *January 1, 1905.*

To the Senate and House of Representatives of the Commonwealth of Pennsylvania:

I have the honor to submit, in obedience to law and custom, my official report of the business transacted by the Attorney General during the two years ending on the 31st day of December, 1904.

Upon assuming the duties of my office on the 21st day of January, 1903, immediately after my appointment by the Governor and confirmation by the Senate, I found the work of the office had been so efficiently conducted and closed up by my able and energetic predecessor and his capable and attentive Deputy Attorney General that nothing remained undisposed of except strictly current business.

Hon. Frederic W. Fleitz was re-appointed and commissioned as Deputy Attorney General—a position he had earned by merit—and he has continued to discharge his varied and onerous duties with a zeal, fidelity and ability which have greatly lightened my labors. I also retained the trained and experienced staff, whose familiarity with their respective duties has expedited the transaction of business, and whose work has met with my approval.

Under the act of 25th of March, 1903 (P. L. 62) the Department was reorganized, and now consists, in addition to the Attorney General and Deputy Attorney General, whose duties and salaries remain as now provided by law, of one Chief Clerk, learned in the law; one Law Clerk, learned in the law, both of whom receive salaries of twenty-two hundred dollars per annum; one Private Secretary, required to be a skilled stenographer, at a salary of sixteen hundred dollars per annum; a stenographer, at a salary of nine hun-

dred dollars per annum, and a messenger, at a salary of six hundred dollars per annum.

The work of the Department is exceedingly varied, requiring a knowledge of the principles and practice governing all other departments of the Government, and special knowledge in particular fields. The volume of work is growing rapidly, owing to the establishment of new departments, such as the Highway Department and the Mining Department, the growth of the bridge business, and the expansion of the work of all other departments, as well as a noticeable increase in the number of State Commissions and Boards, all of which are constantly requesting official opinions as to their duties and powers. Besides this, a custom has grown up throughout the State of propounding questions to the Attorney General by city and township officers and by individuals upon almost every subject matter. The law does not require the Attorney General to answer these inquiries, as he is not a general attorney, but solely the adviser of heads of departments and State officers. Nevertheless, the communications must be answered in some shape to escape the imputation of discourtesy or neglect, and it has imposed an enormous burden upon the office.

For these reasons, in my judgment, the salaries paid in my Department are inadequate. I recommend that the salary of the Deputy Attorney General be made five thousand dollars per annum, instead of four thousand dollars, as at present; that the salaries of the Chief Law Clerk and Law Clerk, both of whom are required to be lawyers and who cannot attend to private practice, be made twenty-four hundred dollars; and that the salary of the Private Secretary, whose labors steadily increase, be made eighteen hundred dollars per annum. These increases, if made, as in my judgment they should be made in justice to the incumbents, should take effect after the expiration of existing terms—say on the 21st of January, 1907.

I am also of opinion that the Attorney General should be paid a salary commensurate with the dignity, responsibility and exacting character of the position—a position which places the incumbent at the head of the Bar of the Commonwealth as its ranking officer. At present the Attorney General is paid a salary of three thousand five hundred dollars per annum, and is also paid five hundred dollars per annum as a member of the Pardon Board. He receives nothing as a member of the Board of Property, the Medical Council, the Board of Public Accounts, the College and University Council and other boards. He is permitted to retain for his own use out of the fees collected by his office the sum of seven thousand dollars per annum and is required to pay over the excess thereof into the State Treasury for the use of the Commonwealth. The system is

vicious, mongrel and uncertain. The highest law officer of the State ought not to receive the larger part of his compensation from the contingencies of litigation—the most numerous and substantial parties defendant being the corporations of the State. He should be paid a certain salary out of the State Treasury, and be required to pay over all fees into the Treasury for the use of the Commonwealth. The salary should be at least twelve thousand dollars per annum; it would not be excessive if it were fixed at fifteen thousand dollars per annum in view of the character and importance of the labor required, the exact features of which will appear in the subsequent pages of this report. This change should not go into effect until the 21st of January, 1907.

The duties of the office may be classified as follows:

- I. Advisory.
- II. Quasi-Judicial.
- III. Forensic.
- IV. As a Member of Various Boards.
- V. Miscellaneous.

I. ADVISORY DUTIES.

The Attorney General is the legal adviser of the Governor, the Heads of Departments, and of the various State Boards, heads of State institutions, and all State officials, and, when requested, he furnishes orally or in writing, formal opinions on questions arising in the administration of the State Government. This constitutes a very heavy portion of his labors, and its weight is increasing rapidly. It has more than quadrupled within the past two years. The following table shows the number of opinions requested, and to whom they were rendered in writing:

OPINIONS RENDERED BY THE ATTORNEY GENERAL FROM JANUARY 12, 1903, TO JANUARY 1, 1905.

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|---|----|
| Hon. Samuel W. Pennypacker, Governor, | 26 |
| Secretary of the Commonwealth, | 8 |
| Auditor General, | 17 |
| State Treasurer, | 3 |
| Secretary of Internal Affairs, | 4 |
| Superintendent of Public Instruction, | 4 |
| Insurance Commissioner, | 7 |
| Commissioner of Banking, | 20 |
| Secretary of Agriculture, | 4 |
| Commissioner of Forestry, | 4 |
| Factory Inspector, | 3 |

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| Chief of Department of Mines, | 5 |
| State Highway Commissioner, | 4 |
| Commissioner of Fisheries, | 4 |
| Superintendent Public Grounds and Buildings, | 6 |
| Superintendent Public Printing and Binding, | 8 |
| Dairy and Food Commissioner, | 8 |
| Secretary Board of Game Commissioners, | 2 |
| Secretary State Board of Health, | 3 |
| Pres. and Officers State Pharmaceutical Examining Board,.. | 2 |
| Henry B. McCormick, President Board of Managers, Harris- | |
| burg Hospital, | 1 |
| Samuel K. Schwenk, Chairman Vicksburg Battlefield Com.,.. | 3 |
| David B. Oliver, Pres. Board School Controllers, | 1 |
| Cadwalader Biddle, General Agent and Secretary Board of | |
| Public Charities, | 1 |
| R. A. Reid, Sec. Survivors Ass. of the 28th Reg., Penna. Vol., | 1 |
| In re Eastern Building and Loan Association, | 1 |
| Dr. H. B. Detweiler, | 1 |
| E. O. Lyte, Principal 1st Penna. State Normal School, | 1 |
| Hon. L. O. McLane, House of Representatives, | 1 |
| Geo. M. Stiles, M. D., Chairman State Hospital for Insane, | |
| S. E. District of Penna., | 1 |
| T. M. Daly, Pres. Continental Title and Trust Co., | 1 |
| Donald C. Haldeman, Esq., | 1 |
| Wm. McC. Johnston, Warden Western Penitentiary of Penna., | 1 |
| T. B. Patton, Gen. Supt. Penna. Industrial Reformatory,.... | 1 |
| In re Petition French for Writs of Quo Warranto vs. Ransley | |
| et al., | 2 |
| Hon. John E. Fox, | 1 |
| In re Quemahoning Valley Coal Co., | 1 |
| In re Information of Lee P. Snyder and Patrick W. Cashman | |
| vs. The Pittsburg, Shawmut and Northern R. R. Co., | 1 |
| The Interior Construction and Improvement Co., et al.,.... | 1 |
| E. Dallett Hemphill, Jr., Esq., | 1 |
| W. R. Andrews, Sec. State Rep. Committee, | 1 |
| Hon. W. H. Moody, Attorney General of the United States,.. | 1 |
| P. F. Rothermel, Esq., | 1 |
| Mr. F. B. Comstock, | 1 |
| James P. Herdic, Esq., | 1 |
| Nelson & Maynard, | 1 |
| Harry S. Schaeffer, Esq., | 1 |
| Horatio C. Wood, M. D., University of Pennsylvania, | 1 |
| To the Editor of "City and State," | 1 |
| Charles Pearce Hewes, Esq., | 1 |
| William Maxwell, Esq., | 1 |

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| J. D. O'Neil, Esq., | 1 |
| William R. Bricker, | 1 |
| Henry Beates, Jr., Pres. Board Medical Examiners, | 1 |
| John L. Rouse, | 1 |
| H. S. Hossler, | 1 |
| Col. Francis C. Hooten, | 1 |
| Jos. DeF. Junkin, Esq., | 1 |
| C. R. Taylor, | 1 |
| James Walker, Pres. Phila. Coal Exchange, | 1 |
| Hon. John M. Reynolds, | 1 |
| W. R. Tucker, Master Warden Port of Phila., | 1 |
| Frank Hall, Clerk to Medical Council, | 1 |
| Geo. W. Hayman, | 1 |
| Charles L. Dykes, Sec. State Board of Undertakers, | 1 |
| Wm. A. McConnell, | 1 |
| Hon. Charles A. Snyder, | 1 |
| Hon. Alvin A. Adee, Department of State, Washington, | 1 |
| Howard Lyon, Pres. Hospital for Insane, Danville, | 1 |
| Arthur H. Brockie, Sec. Germantown Battlefield Com., | 1 |
| Dr. J. S. James, Member of Board of Health, | 1 |
| Ralph Longenecker, | 1 |
| Total, | 186 |

The opinions themselves will be found under the title "Opinions of the Attorney General," immediately following this report. An examination of them will show their variety and scope. Some of them—as those relating to Judges Salaries, the Ballot Law, Incompatibility of Offices, Charters, Building Associations, Food Inspection, Factory Inspection, Return of Collateral Inheritance Tax and Water Companies—are elaborate and important. Besides formal opinions, over nine hundred letters were written upon matters touching the business of the Department and numerous oral opinions were given almost daily to the Heads of Departments, State Officers, and members of the State Boards and Commissioners. This does not include the letters to county or township officers or to individuals.

II. QUASI-JUDICIAL DUTIES.

These embrace applications for suggestions to the Courts that writs of *quo warranto* be issued; that the use of the name of the Commonwealth be allowed in equity proceedings; that writs of *Mandamus* be issued, as well as hearings before the Banking Com-

missioner; that orders to show cause, etc., be granted against insolvent financial institutions, as well as hearings before the Attorney General of a miscellaneous character. They all involve the exercise of judicial or quasi-judicial judgment, the practice being to grant no *ex parte* applications, but only upon notice to the parties to be affected adversely. The parties appear in person or by counsel, testimony is submitted, either orally or by affidavit, and arguments follow; in the majority of cases, arguments as elaborate as if made in court. During the past two years ninety applications were made for writs of *quo warranto*; of these sixty-three were granted; fifteen were refused; four were abandoned, two were withdrawn and six are pending. Permission to use the name of the Commonwealth was granted in ten cases, and two proceedings, in railroad cases, were allowed under the extraordinary Act of May 7th, 1887. Nine Mandamus proceedings were instituted in the Common Pleas of Dauphin County, and six orders to show cause were issued against insolvent companies.

PRACTICE IN EXTRAORDINARY PROCEEDINGS.

The practice of the Department upon application for writs of *quo warranto* or *mandamus* or other extraordinary legal process is as follows:

Upon receipt of petition or application, requesting the Attorney General to institute said proceedings, a certain day is fixed as a time of hearing. Notice of the application and the time of hearing, together with a copy of the petition or application, is required to be served by the petitioner upon the respondent. At the time fixed for the hearing the respective parties are heard in person or by counsel at the Attorney General's office at Harrisburg. Testimony is taken either orally or by affidavit, and if a *prima facie* case is made out by the complainant, the Attorney General allows the writ asked for by a simple order to that effect, without filing a formal opinion setting forth the reason for his action. If the writ requested is thus allowed the suggestion is prepared and filed in the court of common pleas of Dauphin county. While the general practice is to institute proceedings of this character in said court, the complainant can institute the proceedings at the relation of the Attorney General in any county. If it shall appear to the Attorney General in his discretion that the petitioner or complainant has not made out a *prima facie* case, he will refuse the application by simple notification that the writ has been refused without giving reasons. The hearing of these cases by the court presents no peculiarities, the *quo warranto* cases being heard upon suggestion and answer and the equity cases upon bill and answer.

The principle governing the allowance of applications for extraordinary relief is based upon the existence of a question in which

it is clear that the Commonwealth, as the conservator of the public welfare, is interested in the result. If it appears that the controversy is substantially between private parties, one of whom is seeking to weight the scales against an adversary by the interposition of the State, the application is refused.

The detail of this branch of the work of the Department will be found in Schedule A, Appendix III.

III. FORENSIC DUTIES.

TAX COLLECTIONS.

The Attorney General receives for collection from the Auditor General and State Treasurer all claims due the Commonwealth from any source, whereupon he proceeds to collect the same by suit or otherwise as he deems most conducive to the interests of the Commonwealth, and pays over to the State Treasurer all moneys immediately upon his receipt of the same. He reports quarterly to the State Treasurer the amount of money collected and paid over by him on account of the State, and has power to employ resident attorneys to assist in the prosecution of claims. Although most of these claims are transmitted to him for collection by the State Treasurer and Auditor General, it is his duty to collect any claims due the Commonwealth which may be certified to him by any other State official or State Board. He has the right of access at all times to the books and papers in the offices of the Auditor General and State Treasurer, and, in his discretion, may cause a settlement and collection of moneys appearing to be due thereby. In conjunction with the Auditor General and State Treasurer, forming what is commonly known as the "Board of Public Accounts," he revises and resettles for tax or any other debt due the State, whether from corporations, city or county officers or individuals. He conducts the suits arising from appeals from the settlements of tax and other accounts made by the Auditor General and State Treasurer.

The practice with regard to settlements for taxes and other claims is as follows:

These claims come into the hands of the Attorney General only by certification from the Auditor General after settlement made by that official in conjunction with the State Treasurer. If the debtor, after having received a copy of the settlement from the Auditor General, neglects to take an appeal therefrom to the court of common pleas of Dauphin county within sixty days after the approval of such settlement by the State Treasurer, the Auditor General certifies said settlement to the Attorney General for immediate collection, and without further delay an action of assumpsit is brought upon this settlement in the Dauphin county court. The

summons obtained from the prothonotary of said court is sent for service to the sheriff of the county in which the office or residence of the debtor is located, together with a copy of the settlement filed in the suit. The sheriff makes his return of service through this Department to the prothonotary, and if the claim is not paid or adjusted and no formal affidavit of defense is filed, judgment is taken upon the return day for the amount of tax or claim, together with interest thereon, at the rate of 12 per cent. from sixty days after the date of settlement, Attorney General's commissions at 5 per cent., and costs of suit. If a formal affidavit of defense is filed before the return day, the case is included in a trial list which is prepared when warranted by the accumulation of suits, and tried at a special session of common pleas fixed by the court of Dauphin county. If, however, the debtor should, within sixty days after settlement, file with the Auditor General a formal appeal from the settlement, the said appeal, together with a specification of the legal objections to said settlement, is filed in the office of the prothonotary at Harrisburg, and the proceeding is also included in the trial list above mentioned.

The trial of suits of the Commonwealth for unpaid taxes, bonus and other claims present some peculiarities. The Dauphin county court has special jurisdiction under the acts of 1870 and 1901 in all tax cases to which the Commonwealth is a party. Under the act of April 22, 1874 (P. L. 109), all tax cases may be tried without the intervention of a jury by filing in the proper office a stipulation to that effect, and nearly all of the Commonwealth's cases are thus tried. Testimony is taken either orally or by affidavit. Many cases are tried entirely upon affidavits. As in all other cases either party has the right of appeal from the opinion and finding of the court, and all such appeals are argued before the Supreme Court at its annual session in Harrisburg unless advanced by special order. Cases which involve consideration of the Federal Constitution may be further appealed to the Supreme Court of the United States, but such appeals are infrequent.

Of tax appeals in the court of common pleas of Dauphin county there have been during the past two years five hundred and fifty. The detail will be found in Schedules D and E, Appendix III.

There have been eighteen cases argued in the Supreme Court of Pennsylvania; the details will be found in Schedule C, Appendix III.

There are now pending in that court three cases, awaiting decision, and one awaiting argument.

There has been argued one case in the Superior Court, now awaiting decision; one case argued in the Circuit Court of the United States, the decision of which was in favor of the Commonwealth, one case is now before the Supreme Court of the United States,

awaiting argument; of quo warranto proceedings there were sixty-three cases instituted in the common pleas of Dauphin county; nine injunction proceedings in the same court; three equity proceedings in the same court; two actions of assumpsit in the same court; nine mandamus proceedings in the same court; thirty-four bridge proceedings in the same court, under the acts of 1895 and 1903; and five hundred and fifty tax appeals in the same court.

The detail will be found in Schedules F, G, H. Appendix III.

SPECIAL CASES.

Some of the cases included in the foregoing general statement deserve special mention because of their unusual character and far-reaching importance.

Cherry Hill Township Water Company vs. Samuel W. Pennypacker,
Governor et al.

MANDAMUS AGAINST THE GOVERNOR.

The first of these concerns the power of a court to control the action of the Governor by injunction or mandamus. This power is denied by the Governor. The question was fully argued by the Attorney General, but unfortunately was not decided by the court, because the matter was disposed of on other grounds, denying to the complainants an exclusive right as water companies in the district sought to be invaded by a rival. The question recurring at a later date in subsequent cases, and the same objection being taken by the Attorney General to the jurisdiction of the court, this time by a motion to dismiss the bill, instead of a demurrer, the question was again left undecided through the abandonment of the proceedings by the eminent counsel seeking an injunction upon a study of the brief filed by the Attorney General in the earlier cases. The Attorney General regrets the absence of a judicial decision upon this important point—for it leaves the Governor in the future open to similar assaults upon his independence as a coordinate and independent branch of the government. It is confidently believed that the courts have no power to issue an injunction or to address a mandamus to the Governor, and that if such writs should be issued, so addressed, in the future, it will be entirely proper for the Chief Executive officer of the State to decline to be served with process. As the question was fully examined in the light of the authorities, and goes to the very root of the distribution of power under the Constitution, the brief of the Attorney General in support of his contention will be found in full in Appendix II, in the belief that it may prove of service in future examinations of the matter, should any occur.

INCREASE OF JUDICIAL SALARIES.

By act of 14th of April, 1903 (P. L. 175-177), the Legislature fixed the salaries of the judges of the Supreme Court, of the Superior Court, of the Courts of Common Pleas, and of the Orphans Courts, increasing the amounts theretofore paid to them. The question arose under the Constitution whether the increased amounts could be paid to those judges who were in commission at the time the act went into effect. The Auditor General, Hon. E. B. Hardenbergh, requested the official opinion of the Attorney General, who elaborately reviewed the question and advised that official that the act was constitutional, was uniform in operation, and applied to all the judges irrespective of the dates of their commissions. The opinion will be found post, pages 109-150. The Auditor General thereupon proceeded, in accordance therewith, to draw warrants in favor of the judges upon the State Treasury. These warrants the then State Treasurer, Hon. Frank G. Harris, declined to pay, under the advice of private counsel. It became necessary to institute mandamus proceedings. These were heard by the Hon. Martin Bell, president judge of Blair county, and the Hon. Robert Von Moschizker, associate judge of the court of common pleas No. 3 of Philadelphia county, both of whom were invited, because of their freedom from pecuniary interest in the result, to hold the Dauphin county court in place of the Hon. John H. Weiss, president judge, and Hon. George Kunkel, both of whom declined to sit from motives of delicacy.

It was held, contrary to the contention of the Attorney General, that the Treasurer as a constitutional officer had the right in behalf of himself and his sureties to raise the question, but on the main point—the constitutionality of the act—the decision upheld the opinion of the Attorney General, and a writ of peremptory mandamus was awarded. The decree being in favor of the Commonwealth on the main point, it became impracticable to appeal from the ruling as to the Treasurer's powers. This Department considers that question as still open, and only to be settled on some future occasion, in a proper suit, by the Supreme Court. It is believed that the State Treasurer has none but ministerial powers as to a question of this character, and cannot exercise judicial authority by challenging the constitutionality of an act which it is his duty to obey. A proper conception of the character of administrative authority requires the final settlement of this question by the highest court.

In the meantime an effort was made by a private citizen to obtrude himself into the case, then in the hands of the State authorities, which was effectively disposed of by the Dauphin county court, and

its action was affirmed by the Supreme Court. An appeal from the decision in the Harris case was taken by Hon. William L. Mathues, the successor of Mr. Harris, as State Treasurer, and the case was fully argued by Hon. Ward R. Bliss, of Delaware county, Hon. Lyman D. Gilbert, of Dauphin county and by Hon. William B. Broomall, of Delaware county, as counsel for the appellant, and by the Attorney General, and John G. Johnson, Esq., of Philadelphia, as counsel for the Commonwealth, appellee, before six of the Supreme Court justices sitting at Pittsburg. Upon consideration of their interest in the result, five of the justices refrained from a decision of the question, and the powers of the court devolved *ex necessitate* upon Mr. Justice Thompson, who was free from interest. The decree of the lower court was affirmed.

A citizen of a foreign State, alleging the payment by it of taxes in Pennsylvania, filed a bill in the Circuit court of the United States for the Eastern District of Pennsylvania, against the State Treasurer, as a citizen of this State to restrain the payment of the salaries to the judges as increased by law. The Federal jurisdiction was denied by the Attorney General, who moved to dismiss the bill. After two arguments, the latter upon a motion for leave to amend the bill by matter challenging the right of Mr. Justice Thompson to act for the Supreme Court, the motion to amend was refused, and the bill was dismissed by Hon. John B. McPherson, United States district judge sitting at circuit. The opinion of the Attorney General, as given to the Auditor General, has been twice judicially affirmed, and his contention as to the absence of Federal jurisdiction has also been judicially sustained. The question, after six arguments, is now at rest, and the salaries as increased have been paid to all judges.

DANVILLE BESSEMER CASE.

This case, together with that of the Crucible Steel Company of America, and the American Steel and Wire Company of New Jersey, constitutes a type of cases in which an effort was made to secure for the Commonwealth, under the act of May 8, 1901 (P. L. 150), a bonus from foreign corporations doing business within the State. The cases were begun under the administration of Attorney General Elkin, but came into my hands upon appeal from the decision of the Dauphin county court, and were argued by me in the Supreme Court. Had the court sustained the contention of the Commonwealth, a very large amount of money could have been collected, but the Supreme Court decided, in the case of Commonwealth, appellant, v. Danville Bessemer Company, 207 Pa. St. Reps., 302, that the act of May 8, 1901, imposing a bonus on foreign corporations, affects only those foreign corporations which located their

chief places of business within the State, or brought capital within the State and actually employed any part of such capital after the passage of the act, and that it had no retrospective effect. This case ruled many similar ones, and consequently the claims of the Commonwealth for bonus against all foreign corporations doing business in the State prior to the passage of the act of May 8, 1901, have been abandoned.

THE PROVIDENT LIFE AND TRUST COMPANY CASE.

This was an appeal by the Commonwealth from a decree in equity of the Court of Common Pleas No. 2 of Philadelphia County, in which it had been decided by the lower court that The Provident Life and Trust Company was not liable to pay the four mill personal property tax upon assets held by its Insurance Department in the amount of thirty-one millions and upwards. The company had successfully resisted, in the Dauphin County Court of Common Pleas, an effort to impose a capital stock tax, based upon a valuation including the said thirty-one million dollars of assets, the exclusion being made by the court below on the ground that the assets did not belong to the company in its own right, but were held for the Insurance Department of its business. This being the case, the Commonwealth then sought to impose the four mill personal property tax upon the assets referred to, and was met by the strangely contradictory position on the part of the defendant company, that the assets were owned and possessed by them in their own right. To carry this question to a conclusion, an appeal was taken; the case has been argued before the Supreme Court and is now awaiting decision.

BRIDGE PROCEEDINGS UNDER THE ACT OF JUNE 3, 1895, AS AMENDED BY THE ACT OF APRIL 21, 1903.

During the two years embraced by this report there has been a great increase in the number of applications for the rebuilding of bridges carried away or destroyed during that period. From 1895, the date of the passage of the original act, to 1899, while the Hon. Henry C. McCormick served as Attorney General, applications for only two bridges were made under the provisions of the said Act. From 1899 to 1903, during the term of office of Attorney General Elkin, proceedings were instituted for the rebuilding of 35 additional bridges. In the last two years there have been 34 proceedings under the provisions of the Acts for the reconstruction of bridges destroyed or carried away, the aggregate cost of which will not be far from \$1,250,000. In view of this striking increase and the very serious drain which it entails upon the State Treasury,

it is important that the Legislature give this matter its earnest consideration, with a view of devising some means whereby this great burden upon the revenues of the State may be lifted or at least checked in its growth. Since the State, by virtue of these Acts of Assembly, has gone into the business of building bridges, additional and arduous duties have been imposed upon this Department which have greatly augmented its work. In seven cases, after the proceedings had been regularly instituted, the Attorney General, in behalf of the Commonwealth, filed exceptions to the reports of the viewers because, in his judgment, the provisions of the Act of Assembly had not been complied with either by the county seeking the new bridge or by the viewers recommending its construction.

IN RE ALLENTOWN BRIDGE.

In the case of the bridge over the Lehigh River at Allentown, note of which was made in the last report of Attorney General Elkin, on page 36, exceptions were filed by the Attorney General on the ground that the viewers appointed by the Court had recommended in their report a more elaborate and costly bridge than was necessary, and considerably increasing the height, width and length, as compared with the old bridge, together with a recommendation that the bridge be so constructed as to permit a double track for the trolley line, and other features which were desired by the Central Railroad of New Jersey in order to obviate a grade crossing. The matter came to argument at length before the Court of Dauphin County, and subsequently, on May 9, 1903, the Court, in an elaborate and well-considered opinion, sustained the exceptions of the Attorney General in every particular, and set aside the report of the viewers. Subsequently an agreement was entered into between the Commonwealth, on one side, and the Lehigh Valley Traction Company and the New Jersey Central, on the other, by which the additional cost made necessary by the construction of the bridge as recommended was to be paid by the corporations, and the decree of the court was amended and the bridge is being built.

IN RE CATAWISSA BRIDGE.

This case presented an unusual feature and one not provided for explicitly by the language of the Act.

This was the first bridge built under this law, and it was finished in 1897 at a cost of about \$82,000. During the high water in the early part of March, 1904, the bridge was damaged by having two of its four spans precipitated into the stream by the destruction of

a pier. The remaining abutments and parts of the superstructure being of approved modern construction and in a good state of preservation, the Attorney General filed exceptions to the report of the viewers appointed on April 1, 1904, which said report, after setting forth the facts clearly and fairly, recommended that an entirely new bridge be built at the expense of the Commonwealth. In these exceptions the contention of the Attorney General was that the bridge was neither carried away nor destroyed within the meaning of the language used in the Act of Assembly, but that the damage which it had sustained required that the burden of the cost of repairing the same should rest upon the county. Argument was had on these exceptions in the court of Dauphin county, and an opinion was rendered by that Court on October 17, 1904, in which the exceptions of the Commonwealth were dismissed and a decree entered that the bridge be rebuilt at the cost of the Commonwealth. The Court adopted this interpretation of the Act: "If the bridge is so damaged by the flood or storm as practically to require rebuilding, it is clearly the duty of the Commonwealth to rebuild. If the damage is less, it is the duty of the county to repair."

IN RE BRIDGE ACROSS SWATARA CREEK, LEBANON COUNTY.

In this case the viewers appointed by the Court reported that they found that the bridge was damaged and weakened by high water on March 8, 1904, and that, though the Commissioners were notified of the weakened condition of the bridge, nothing was done to repair the damage, and that on the night of April 8th, after being in use for nearly a month subsequent to the date of the flood, the northern span of the bridge fell into the creek. For this reason they declined to recommend the rebuilding of the bridge by the Commonwealth. Exceptions to their report were filed by the County Commissioners, while the Attorney General's Department appeared in support of the report. The matter was argued before the Court, and subsequently, on the 17th of October, 1904, the Court delivered an opinion dismissing the exceptions filed by the county and sustaining the report of the viewers, thus relieving the State from liability to rebuild.

IN RE BRIDGE ACROSS THE SUSQUEHANNA RIVER AT BERWICK.

In this case, as in several others, the report of the viewers failed to conform to the requirements of law and exceptions were filed by this Department. Subsequently, amicable arrangements were

perfected, by which the interests of the State were safeguarded and the exceptions were withdrawn.

IN RE ARTHUR WADSWORTH

PROCEEDINGS IN SUPPRESSION OF RIOTS.

In the case of Arthur Wadsworth one of the most important decisions rendered by the Supreme Court in recent years was that of Mr. Chief Justice Mitchell, in the habeas corpus proceedings brought in behalf of Arthur Wadsworth by this Department. By reference to the last report of my predecessor Attorney General Elkin, on page xxxviii, a full and complete history of this most unusual case will be found. See also post, Appendix II.

A soldier, Arthur Wadsworth, by name, on duty during the great strike in the anthracite region in the summer of 1902 shot and killed a private citizen who refused to halt after having been challenged by the said Wadsworth, who was placed as guard at a house which had been dynamited on two previous occasions and which was occupied by the wife and four small children of a non-union worker at that time employed in the mines. The coroner's jury recommended that the district attorney proceed against the soldier for the shooting, and, in accordance with this recommendation, a warrant was sworn out, charging Wadsworth with murder and an attempt was made to arrest him. The Colonel in command of his regiment, acting under advice of this Department, declined to permit the warrant to be served. After the regiment was mustered out of service and the soldier had returned to private life, he was arrested in Pittsburg and charged with murder. The Deputy Attorney General thereupon appeared before the Supreme Court and secured a writ of habeas corpus, directing that the soldier be brought before that tribunal for a hearing upon the merits of the case. The matter was argued at length on the first Monday of January, 1903, and the Supreme Court, in a most able and forcible opinion, written by Chief Justice Mitchell, reported in 206 P. S. 165, discharged the prisoner from custody, sustaining the broad principle that, as a soldier under arms, he was subject to the orders of his superior officer, who, in turn, was acting under the authority of the Governor of the Commonwealth, upon whom is enjoined by the Constitution and laws of this State the duty and power of enforcing the laws and preserving the peace and quiet of the community. In view of the disturbed condition of society, brought about by frequent conflicts between capital and labor, to which this State is and has been for some years especially subject, this opinion is of great value in settling the law as to the extent of the authority of the Governor in the protection of life and property.

IV. DUTIES AS A MEMBER OF VARIOUS BOARDS.

The Attorney General is a member of the Board of Property, which is the successor of the land office; of the Board of Public Accounts, which revises and resettles accounts for tax or other debts due the State, whether from corporations, city or county officers or individuals; of the Board of Pardons, which makes recommendations to the Governor for the exercise of Executive clemency, or declines to act; of the Medical Council of the State, which is charged with delicate and responsible duties affecting the practice of medicine; of the College and University Council, and he is also an official visitor of the Philadelphia county prisons and of the State penitentiaries. The duties of the Pardon Board are onerous and exacting, frequently involving the examination of heavy records. The work of the Board of Property is not so constant, but requires care in the examination of ancient surveys.

V. MISCELLANEOUS DUTIES.

The Attorney General has been frequently invited to sit at hearings before the Governor touching the granting of charters. With the Secretary of the Commonwealth upon similar business; with the Board of Commissioners of Public Grounds and Buildings, and with the Banking Commissioner at hearings touching the appointment of receivers of financial institutions. He has also examined and joined in the approval of forty-two charters for insurance companies, and twenty charters for banks. He has also aided members of the Legislature and heads of departments in the framing of titles to bills.

I annex a summary of the business transacted during the period covered by this report.

SUMMARY OF BUSINESS IN THE ATTORNEY GENERAL'S OFFICE FROM JANUARY 1, 1903, TO JANUARY 1, 1905.

| | |
|--|----|
| Quo warranto proceedings in common pleas of Dauphin county, | 63 |
| (15 applications refused, 4 abandoned, 1 pending, 2 withdrawn.) | |
| Injunction proceedings in common pleas of Dauphin county, | 9 |
| Equity proceedings in common pleas of Dauphin county, | 3 |
| Actions in assumpsit instituted in common pleas of Dauphin county, | 2 |
| Orders to show cause, etc., against insolvent insurance companies, | 6 |
| Mandamus proceedings in common pleas of Dauphin county, | 9 |

| | |
|---|-----|
| Cases argued in Supreme Court of Pennsylvania, | 18 |
| Cases argued in Superior Court of Pennsylvania, | 1 |
| Cases argued in U. S. Circuit Court, | 1 |
| Tax appeals in common pleas of Dauphin county, | 550 |
| Bridge proceedings under the acts of 1895 and 1903, ... | 34 |
| Hearings before the Attorney General, | 102 |
| (Quo warranto, 90; use of the name of Commonwealth, 10; under act of May 7, 1887, 2. | |
| Insurance company charters approved by Attorney Gen- eral, | 42 |
| Bank charters, etc., approved by the Attorney General, | 20 |
| Formal opinions rendered in writing, | 186 |
| Cases now pending in Supreme Court of Pennsylvania, | 3 |
| Cases pending in the Supreme Court of United States, .. | 1 |

COLLECTIONS.

| | | |
|-----------------|--------------|--------------|
| For 1903, | \$265,272 40 | |
| For 1904, | 157,930 91 | |
| | <hr/> | \$423,212 31 |

COMMISSIONS.

| | | |
|-----------------|------------|--------------------|
| For 1903, | \$8,675 54 | |
| For 1904, | 7,538 27 | |
| | <hr/> | 16,213 81 |
| Total, | | <hr/> \$439,426 12 |

All of which is respectfully submitted,

HAMPTON L. CARSON,
Attorney General.

OFFICIAL OPINIONS

OF

The Attorney General

FOR THE

TWO YEARS ENDING DECEMBER 31st, 1904.

HAMPTON L. CARSON,

ATTORNEY GENERAL.

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OFFICIAL OPINIONS OF THE ATTORNEY GENERAL.

OPINIONS GIVEN TO THE GOVERNOR.

PEOPLE'S GAS LIGHT AND FUEL COMPANY OF BUCKS COUNTY—
CORPORATIONS OF THE SECOND CLASS—APPLICATIONS FOR CHARTER—NUMBER OF SUBSCRIBERS—ACKNOWLEDGMENT—ACTS OF
APRIL 29, 1874, AND MAY 29, 1901.

The act of May 29, 1901, P. L. 326, reduces the minimum number of applicants for a charter of a corporation for profit from five to three; reduces the number of necessary subscribers from five to two persons, but one of whom must be a citizen of Pennsylvania, and reduces the number of those who are to make acknowledgments and subscription under oath from three to two persons, and repeals the provision of the act of April 29, 1874, section 3, P. L. 73, which requires that the acknowledgment and oath be taken before the recorder of deeds of the county in which the chief operations are to be carried on. Hence, an application which has five subscribers, three of whom are citizens of New Jersey and two of Pennsylvania, and the acknowledgment and subscription under oath to which is made before a notary public by the two subscribers who are citizens of Pennsylvania, is valid.

Office of the Attorney General,
Harrisburg, Pa., March 25, 1903.

Hon. Samuel W. Pennypacker, Governor of the Commonwealth of
Pennsylvania:

Sir: In accordance with your request I have examined the application for letters patent presented in behalf of a proposed corporation of the second class to be known as "People's Gas, Light and Fuel Company of Bucks County, Pennsylvania." There are five subscribers, three of whom are citizens of New Jersey, and two of whom are citizens of Pennsylvania. The acknowledgement before a notary public is made by the two subscribers who are citizens of Pennsylvania. The subscription upon oath is made by the same two persons. You request my opinion as to whether this application is in proper form.

The act of April 29, 1874, (P. L. 73), by the third section, requires that the charter of an intended corporation must be subscribed by

five or more persons, three of whom at least must be citizens of this Commonwealth. The same section, by a later clause, requires that the certificates for corporations of the second class "shall be acknowledged by at least three of the subscribers thereto before the Recorder of Deeds of the county in which the chief operations are to be carried on, or in which the principal office is situate, and they shall also make and subscribe an oath or affirmation before him, to be endorsed on the said certificate, that the statements therein are true."

The act of 29th May, 1901, (P. L. 326), entitled "A supplement to an act entitled 'An act to provide for the incorporation and regulation of certain corporations,' approved April twenty-ninth, one thousand eight hundred and seventy-four," provides that thereafter corporations for profit (second class) "may be formed by the voluntary association of three or more persons, and the charter of an intended corporation must be subscribed by two or more persons, one of whom at least must be a citizen of this Commonwealth, and all laws or parts of laws inconsistent herewith are hereby repealed." It is suggested that the later act operates as a repeal of the requirements of the act of 1874 as to acknowledgement by at least three of the subscribers before the Recorder of Deeds and subscription upon oath or affirmation by the same three persons as those who make the acknowledgement.

There is inexactness in the wording of both acts. In strictness, it could not have been meant that the "charter" should be subscribed by the applicants, but that the "application" or "certificate" should be so subscribed. Making this reasonable correction, and reading the acts together, I am of opinion that there is no actual or necessary inconsistency between the provisions of the earlier and later acts as to acknowledgement and subscription upon oath. The act of April 29, 1874, fixed five as the minimum number of applicants for a charter and three as the minimum number of citizens of Pennsylvania. The act of May 29, 1901, fixed three as the minimum number of applicants, but provided that the application must be subscribed by two or more persons, one of whom must be a citizen of this State. No reference was made to acknowledgement and subscription upon oath before the Recorder of Deeds, both of which requirements were substantial provisions of the act of April 29, 1874.

The primary effect of the later act is threefold—to reduce the minimum number of applicants for a charter from five to three, to reduce the number of necessary subscribers from five to two persons, and to reduce the minimum number of three citizens of Pennsylvania to the minimum number of one. The secondary effect is to reduce the necessary number of those who are to make acknowledgement and subscription upon oath from three to two persons,

This follows from the nature of an acknowledgement, which implies a preceding act which is acknowledged and confirmed. It would be but a pointless provision to require an acknowledgement from one who was not required previously to sign, and, inasmuch as subscription is now required of but two persons, it follows that acknowledgement, in its true sense, can be required of but two. The subscription upon oath is required by the act to be made only by those who make acknowledgement, and if acknowledgement is required of but two, it follows that subscription upon oath can be required of but two.

In the application for a charter now under consideration, the applicants are five in number, the subscribers are five, three of whom are citizens of New Jersey, and two of whom are citizens of Pennsylvania. The acknowledgement to the subscription upon oath before a notary public is made by two persons. Regarding the signature of three of the five subscribers as in excess of the requirements of the law, the certificate may be regarded as being signed by two persons. It is acknowledged by two persons and sworn to by two persons. It is, therefore, in the form required by the act of May 29, 1901, modifying the provisions of the act of April 29, 1874. I conclude, therefore, that it is in proper form and may be approved.

Very respectfully,

HAMPTON L. CARSON,

Attorney General.

BUTLER RAILWAY COMPANIES.

Extensions of route on the part of a street railway company filed subsequent to the filing of charter applications and prior to the contemplated action of the Governor upon the said charter applications will operate to defeat such applications under the act of June 7, 1901, P. L. 514, when the proposed routes conflict with the routes described in the extensions.

Office of the Attorney General,
Harrisburg, Pa., April 14, 1903.

Hon. Samuel W. Pennypacker, Governor:

Sir: I have examined the articles of association of the Butler Traction Street Railway Company and those of the Citizens' Street Railway Company of Butler, both of which were sent to me by you, accompanied by a communication addressed by John F. Whitworth, Esq., corporation clerk, to the Secretary of the Commonwealth.

These applications were filed in the office of the Secretary of the Commonwealth on the 10th and 12th of March, 1903, respectively. Upon examination of the records of the State Department it was

ascertained that, at the time of the filing of said articles, the routes described therein did not conflict with the route of any prior incorporated company. Since said examination, however, the Butler Passenger Railway Company, incorporated June 22, 1899, filed in said Department several duly adopted extensions of its route over certain streets in the borough of Butler, over which the routes described in the said articles of the two applicants for charters, if granted, must pass. The question, therefore, arises whether the extensions of route on the part of the Butler Passenger Railway Company, occurring as they did on the 21st of March, 1903, and prior to your own contemplated action upon the applications for charters of the Citizens' Street Railway Company of Butler and the Butler Traction Street Railway Company, will operate to defeat the applications because of the conflict of the proposed routes with the routes as described in the extensions. It is clear, upon authority, that letters patent for a street railway under the act of May 14, 1889, (P. L. 211), as amended by the act of June 7, 1901, (P. L. 514), will not be granted where, after the filing of the articles of association, but before action has been taken upon them by the Governor, an extension has been filed by another company, covering the same route as that indicated in such articles of association. Such was the ruling of the Secretary of the Commonwealth in the case of the Rock Glen Street Railway Company, reported in 10 District Reports, 592. The ruling of the Department was sustained by Judge Butler, of Chester county, in the case of Commonwealth *ex rel* vs. Uwchlan Street Railway Company, reported in 11 District Reports, 236. In this case it was distinctly held that an "Extension" under the act of June 7, 1901, (P. L. 516), becomes a portion of the route of the street railway adopting it as soon as it is recorded in the proper office and the exemplification thereof is filed in the office of the Secretary of the Commonwealth at Harrisburg. This decision was carried, upon appeal, to the Supreme Court, and there affirmed, that court holding, upon the 13th of October, 1902, (203 P. S., 616), that the learned judge of the court below was right in the results reached by him, and that it had been clearly shown that the whole policy of the street railway law has been to prevent conflict as to routes on streets between rival companies, by prohibiting any incorporation of a company to adopt a street on which a track is laid or authorized to be laid. This was in conformity with the view previously expressed by the same Court in the case of Homestead Street Railway Company vs. Pittsburg Railway Company, 166 P. S., 162. The only difference, in fact, between the cases now before Your Excellency and the cases referred to in this opinion, consists of the feature that in the present cases the applications for charters were made prior to the actual filing in the office of the Secretary of the Commonwealth of the

extensions of route by the Butler Passenger Railway Company. There can be no doubt, however, that the "extensions" were filed before the applications of the Citizens' Street Railway Company of Butler and the Butler Traction Street Railway Company could be acted upon, and it is suggested that the hardship of the case is so manifest that some difference in result or in ruling might be properly reached.

I am of opinion that you have nothing whatever to do with the hardship of the case. It cannot affect the principle involved. The Butler Passenger Railway Company had the legal right to extend its route, if it did so in a proper manner, and upon filing of its extension papers with the Secretary of the Commonwealth its original chartered route became properly and legally extended, under the view expressed by the Supreme Court. This was a risk which the present applicants were bound to know, were bound to assume, and from which they cannot escape. The Secretary of the Commonwealth is allowed no discretion in the matter, but he is obliged, upon the receipt of the papers of extension, to file them in his office. Such was the ruling of Judge Simonton in the case of the West Chester Street Railway Company vs. W. W. Griest, reported in 6 Dauphin County Reporter, page 13. The extensions become operative from the date of filing.

Therefore, it appears that at the present date—to which your consideration will be properly confined—the applications conflict with routes already belonging to the Butler Street Passenger Railway Company. In my judgment the applications should be refused.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

WARREN ACADEMY OF SCIENCES—CHARTER—CORPORATIONS NOT FOR PROFIT—ACT OF JUNE 14, 1887.

A corporation organized for the purpose of "educating the public by exhibiting artistic, mechanical, agricultural and horticultural products, and providing instruction in the arts and sciences," is not within the act of June 14, 1887, P. L. 383, entitled "An act to provide for the incorporation and regulation of companies, not for profit, organized for the encouragement of the arts and sciences, and of agriculture and horticulture, and to confer upon such companies the right of eminent domain," and a charter for such a corporation will be refused.

The act contemplates the incorporation of companies for the purpose of holding Expositions.

Office of the Attorney General,
Harrisburg, Pa., Dec. 14, 1903.

Hon. Samuel W. Pennypacker, Governor of the Commonwealth of Pennsylvania:

Sir: I have examined the application for letters patent filed by the Warren Academy of Sciences, under the act of June 14, 1887,

(P. L. 383). This act is entitled "An act to provide for the incorporation and regulation of companies, not for profit, organized for the encouragement of the arts and sciences, and of agriculture and horticulture, and to confer upon such companies the right of eminent domain."

I am of opinion that the act was never intended to cover the case of the applicants. They are individuals, residing at Warren, Pa., and their purpose, as stated by themselves, is of "educating the public by exhibiting artistic, mechanical, agricultural and horticultural products, and providing instruction in the arts and sciences." Substantially this is an educational institution, particularly as this purpose imposes upon it the burden of providing instruction, which would seem to imply something more than a mere exhibition of a collection. The words above quoted, it is true, are taken from section 1 of the act of Assembly, and so far as literal compliance with the act is concerned, the certificate appears to be in proper form and within the terms of the act.

There are several features of the act, however, which cause me to reach the conclusion that it never was intended by the Legislature to confer upon an academy of sciences the great power of eminent domain. The word "academy" or "institution" does not appear in the act. The term "academy" has a distinct and fixed meaning, applying to an institution of learning, such as a college or university relating to or connected with higher education. Thus we speak of "Academic studies," and of "academical degrees," or "academical controversies" and of "academic proceedings," and we speak of an "academician" as a member of an academy or a society for promoting arts and sciences. These kindred titles suggest a very different kind of institution or establishment from an Exposition.

The preamble of the act is as follows:

"Whereas, Expositions of artistic, mechanical, agricultural and horticultural products have proved of great benefit in the education of the people, and have become a prime and general necessity as a popular means of disseminating knowledge, and to accomplish such purpose, it is necessary to confer upon associations a permanent organization and power to acquire, hold and improve permanent locations for such expositions by the exercise of the power of eminent domain, now, therefore, be it enacted, etc."

Clearly this language relates to an enterprise upon a scale of public and not private importance, and the term Exposition in popular use has become associated with national, interstate and international exhibitions or expositions, such as the Centennial Fair held at Philadelphia in 1876, the World's Fair at Chicago in 1893, the New Orleans

Exposition, the Charleston Exposition, and the present St. Louis Exposition, and others of a similar character, nations, states and cities, as well as individuals, being called upon to contribute exhibits and participate in the work of erecting buildings. So much so is this the case that in the Century Dictionary, under the word "exposition," the definition is given "An exhibition or show, as of the products of art and manufacture," explained by this quotation from the thirty-first volume of "The Century Magazine," page 153, "With steam transportation from the heart of the city (Philadelphia) to the exposition grounds, and with unprecedented low railroad rates, there is every assurance of success."

The preamble, of course, can be resorted to for the purpose of ascertaining the meaning of a doubtful statute, for, as Lord Coke says: "It is a key with which to unlock the meaning of the statute." I am satisfied that the word was used as applying to an enterprise far different from that contemplated by the subscribers associating themselves under the designation of the "Warren Academy of Sciences." An examination of section 4, which confers the right of eminent domain, confirms this interpretation of the statute. The language is as follows:

"The taking of such public lands for the erection and maintenance thereon of buildings, or other structures, for the public exposition of manufactured articles, agricultural products, minerals and all articles pertaining to the arts and sciences, by the exercise of the right of eminent domain, is hereby declared to be taking of said land for public use."

I shall not attempt an interpretation of this language as applied to the case of an Exposition. I doubt if any Court would or could give it literal interpretation. The case of an exposition is not before me, and I cannot conceive that it ever was intended by the Legislature to confer upon an academy of sciences, even though exhibiting artistic, mechanical, agricultural and horticultural products, power so sweeping and dangerous. It is a cardinal rule of construction that statutes giving authority to condemn property under the right of eminent domain are strictly construed. All grants of power by the government are to be strictly construed, and this is especially true with respect to the power of eminent domain, which is more harsh and peremptory in its exercise and appropriation than any other. Such is the doctrine laid down in many cases cited by Lewis, in his work on Eminent Domain, section 254. Judge Bland, in Binney's case, 2d Bland, Chancery, Md., 99, said:

"An act of this sort deserves no favour; to construe it liberally would be sinning against the rights of property."

The same rule is stated by Judge Endlich, in his work on the Interpretation of Statutes, section 343. After referring to various statutes which should be strictly construed, he says: "*A fortiori* must the rule apply to statutes for the taking of the property of individuals for public purposes." In the case of Pittsburg, etc., Railroad Company vs. Bruce, 102 Pa. S., page 24, Judge Bredin said:

"As against the Commonwealth, these sections might be construed strongly in favor of the corporation. As against the owner of land whose property is taken and apportioned under the right of eminent domain, we think no presumptions are in favor of, but all are against the corporations."

The judgment in this case was confirmed by the Supreme Court.

To the same effect is the case of Varick vs. Smith, 5th Paige Chancery, 137 (N. Y.), 28 American Decisions, page 420. Chancellor Walworth said:

"But in a State which is governed by a written constitution like ours, if the Legislature shall so far forget its duty and the natural rights of an individual, as to take his private property and transfer it to another, where there was no foundation for a pretense that the public was to be benefited thereby, I do not hesitate to declare that such an abuse of the right of eminent domain was an infringement of the spirit of the Constitution; and, therefore, not within the general powers delegated by the people to the Legislature."

No educational institution in the land has power to take public property or the property of a private citizen for its purposes. Our great universities and other educational and scientific institutions possess collections of great value and magnitude of the highest educational importance, and yet they do not possess the power of eminent domain. I see no justification for stretching the terms of the statute so as to cover the present application, even though the applicants have literally quoted the language of the act in the statement of their purposes or complied with the provisions of the act as to the form of the certificate required as a charter.

I am of opinion, therefore, that the letters patent should be refused.

I return the paper submitted.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

IN RE VICTOR COAL COMPANY—CORPORATIONS—AMENDMENT OF
CHARTER—EXTENSION OF TIME OR OF TERRITORY—ACT OF JUNE 13,
1883.

A corporation organized under the act of April 29, 1874, P. L. 73, as a corporation of the second class, cannot extend its term of existence or enlarge its territory by amending its charter under the act of June 13, 1883, P. L. 122.

Office of the Attorney General,
Harrisburg, Pa., February 5, 1904.

Hon. Samuel W. Pennypacker, Governor:

Sir: I have examined the papers submitted to me in the matter of the request of the Victor Coal Company to be advised whether it would be permitted to amend its charter by an extension of its term and territory, without the payment of further bonus, and now express my views thereon.

It appears that the Victor Coal Company was incorporated on the 12th of January, 1888, for the term of twenty years, for the purpose of "carrying on the business of mining coal in the county of Clearfield, in the State of Pennsylvania, and in the said county of purchasing and leasing coal lands and opening and working the same; and for mining, quarrying, shipping, transporting, buying and selling coal, and with the power of erecting, constructing, purchasing and owning such buildings, machinery and other appliances of whatever nature necessary or convenient in the conduct or management of the said business." The company now desires to amend its charter by making the term thereof perpetual, and by removing the limitation upon the territory in which it may carry on its operations. It proposes to accomplish this under the provisions of the corporation amendment act of 13th of June, 1883, (P. L. 122). This act provides, *inter alia*, as to corporations formed for profit under the act of April 29, 1874, or any of its supplements, that whenever such corporation shall desire "to improve, amend or alter the article and conditions of the charter or instrument upon which said corporation is formed and established, it shall and may be lawful for such corporation to apply to the Governor of this Commonwealth for such improvement, amendment or alteration in the manner provided by this act."

Under the practice that has grown up under the act, the certificate of amendment goes to the Governor through the office of the Secretary of the Commonwealth, with such recommendations as the Secretary may feel called upon to make; and in the present case the position is taken by the State Department that a certificate proposing to amend a charter by extending the term of its existence and removing the limitation upon the territory in which it may operate, will not meet with the approval of the Secretary unless

it be accompanied by an amount of money sufficient to pay a bonus of one-third of one per cent. upon its authorized capital stock, just as though such certificate of amendment were an application for a charter for a new corporation.

On behalf of the applicant it is urged that this is a new ruling, reversing the practice of the Department under the act of 1883, and that, before going to the trouble and expense of advertising its intention to apply for an amendment to its charter, as provided by that act, the Victor Coal Company desires to present to you, through counsel, several considerations why this ruling should not obtain.

The matter is learnedly and ably discussed in the papers submitted, turning chiefly upon the payment of bonus, it being contended, on the one hand, that none of the statutes authorizing amendments of charters require the payment of a bonus as a prerequisite, and, on the other hand, that the payment of the bonus should be exacted because the amendments suggested practically amount to a re-chartering of the corporation. It must be observed that so far as the form of the request is concerned, the application is not for the re-chartering of a corporation, nor is it an application for a new charter. The time for that has not arrived, because the present charter term does not expire until 1908. But, whatever the form in which it is presented, the real question is, whether the proposal to make the term of the charter perpetual—it now being limited to the term of twenty years—and the removal of the limitation upon the territory in which it may now carry on its operations, constitute improvements or alterations within the meaning of the act of June 13, 1883?

It may be conceded that if the proposed changes are within the meaning of the act, there is no statute imposing a bonus as a condition of their allowance. On the other hand, if the proposed changes are not within such meaning, then the question of bonus need not be discussed at the present time.

The Victor Coal Company was chartered under the provisions of the act of April 29, 1874, as a corporation of the second class. It was required by that act that the application of an intended corporation must set forth, *inter alia*, the place or places where its business is to be transacted and the term for which it is to exist. The fourth section provided that "The charter for incorporations named in this act may be made perpetual, or may be limited in time by their own provisions." It is clear that an amendment, under the act of 1883, to be effective as an amendment, must be deemed and taken to be part of the original charter. If the life of that original charter is circumscribed by a period of its own limitation, whatever amendments, valid in themselves, are attempted, must necessarily be operative during the life of the charter and would necessarily expire with it. That which affects the corporate life or term of existence of a

corporation, does not, in my judgment, come within the true meaning of the term "amendment." The statute gave to the applicants the option of stating a term or of making their charter perpetual. They saw fit to select the former. They contracted with the State upon that basis. If a charter be a contract, the right should at least be mutual, and the State should have the same latitude of objection to a change in the terms of a charter, which consists of a grant of its own sovereignty, and which by agreement has been specifically limited in time, as the incorporators would have were an attempt made by State action to abrogate any of the provisions of a charter or to impair the obligations of a contract.

The doctrine of the Dartmouth College case must be extended equally to the protection of the Commonwealth as well as to the protection of the incorporators. It does not affect the validity of this position to argue, as is done in this case, that the corporation might have had a perpetual charter for precisely the same price that it paid for a limited charter. The all-sufficient answer to this is that it saw fit to apply for a limited term and got it. Now that it finds itself in the position of desiring to extend its corporate life, it must do so on the basis of a new contract, and it cannot, under the guise of an amendment operative only within the time limits prescribed in the original charter, seek to give an indefinite duration to a grant of State sovereignty which, by the express contract between the parties, was limited in duration.

The illustration put by the State Department, that there is no difference in principle between the renewal of a charter and the renewal of a lease of real estate, strikes me as apposite. It is asked what would be said of the lessee if, upon the expiration of his lease, he should demand of the lessor a perpetual lease without compensation? It is no answer to this proposition to argue that, if the original lease contained a stipulation that upon its expiration it might be renewed and made perpetual without the payment of any further rental on the part of the lessee, it would probably be said of the lessee, in case he exercised his option, that he was merely insisting upon his rights. This argument is based upon the assumption that the act of 1883 authorized the Victor Coal Company to extend its term indefinitely, and that therefore the act of 1883 constituted a part of the contract with the State. This is a begging of the major premise. The whole question is, What is the true meaning of the act of 1883? If it authorized such a change in the charter as is contended for in this case, then undoubtedly the act of 1883, being passed prior to the incorporation of the company, would constitute a portion of the contract made between that company and the State, but, inasmuch as, in my judgment, the act of 1883 does not sanction

such a change as an amendment, alteration or improvement of the charter, the act of 1883 cannot be made to cover the case in such a way as to read into it the gift of perpetual life and the further gift of extended territory unnamed and unthought of at the time of the incorporation.

Attorney General Cassidy, under date of September 28, 1883, ruled that a telephone company could not extend its territorial limits to counties not named in its original charter within the meaning of the act of June 13, 1883, and discusses in detail the question whether the addition of territory could be fairly considered an improvement, amendment or alteration within the meaning of the act. While dealing with the question of an extension of territory he uses language which is equally pertinent to the extension of time within which a corporation has to live. He says:

“When we speak of the improvement of a charter we obviously mean the improving or bettering of the charter already granted, and if the operations of such charter are confined to prescribed limits, we mean it is improved within those limits. Hence, we think that the addition of territory to a limited charter is not an improvement within the meaning of this act.

“Is it an amendment? To amend a thing, as defined by Webster, is to change it in any way for the better, to remove what is erroneous, superfluous, faulty and the like; to supply deficiencies, to substitute something else in place of what is removed. The word is synonymous with to amend, correct, reform, rectify. An amendment, therefore, is change or alteration for the better, a correction of faults or errors, an improvement, a reformation, an emendation * * * In respect to the amendment of a charter of incorporation, the amendment must relate to the charter as originally granted, and if it does not correct, improve, reform, rectify or alter something in the original charter, it is not properly speaking an amendment to that charter. * * * Hence, I am led to the conclusion, after a very careful consideration, that the proposed extension of this charter to new territory is not an amendment within the fair meaning of the act of 1883. Of course, this conclusion relates only to the question in hand. Whether it would also apply to a corporation whose territorial limits are not prescribed in its charter, I do not pretend to decide. I am also construing the act in its relation to charters which are thus prescribed, the extension of which into new territory, by general amendment, ought not to be allowed except under clear warrant of law.

“I do not deem it necessary to consider particularly whether the proposed amendment is an alteration with-

in the meaning of the act, since it will scarcely be claimed that it falls within that designation alone. It does not pretend to alter in any proper sense any article or condition in the original charter, and if not, it cannot be said to be such an alteration as is contemplated by the act."

Reference should also be made to the opinion of Deputy Attorney General Snodgrass, under date of March 21, 1884, where, in an application for a water company to amend a charter by extension of its territory, the amendment was allowed by virtue of the express provision of the third section of the act of 1883, as follows:

"That nothing herein contained shall authorize the amendment, alteration, improvement or extension of the charter of any gas or water company so as to interfere with or cover territory previously occupied by any other gas or water company."

It is plain that this conclusion was reached because there was a legislative grant of the right to extend its territory on the part of a water company, the only limitation being upon the interference or occupation of territory previously occupied by any other gas or water company.

I see nothing in the opinion of Deputy Attorney General Snodgrass to modify the conclusions reached by Attorney General Cassidy, and just as he concluded that the extension of territory could not come within the meaning of the words "improve, amend or alter," so I cannot see how the extension of the term of corporate existence can come within the meaning of those words. A perpetual charter is no better legally than a limited charter; that is to say, there is nothing defective in a twenty year charter, merely because it is limited in term. And there is nothing defective in a limitation as to territory. As to time and place it is perfect. If the extension of the territory of a telephone company is not within the meaning of the words "alter," "improve," "amend," neither is the extension of the time of the corporate existence of a coal company. Such an extension is not an amendment, improvement or alteration in any sense of these words. It is in substance the creation of a new term, the creation of a new corporation, the creation of a contract with the State, within new bounds. The words cannot mean that any alteration or amendment which the applicant may consider an improvement must be allowed. That would be to make the applicant the sole judge of the value of the alteration attempted, and to ignore the standpoint of the State. It might well happen that at the time of the expiration of the term the State might prescribe an increase of bonus as her gifts of sovereignty advanced in value. To deprive

the State of that right now, would be to sacrifice her rights without consideration. A contract must bind both of the contracting parties.

In my judgment the request should receive a negative answer.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

IN RE THE PORTLAND WATER AND POWER COMPANY—CORPORATIONS—CHARTERS—WATER SUPPLY—WATER POWER—CONFINEMENT TO SINGLE LOCALITY—ACTS OF APRIL 29, 1874, MAY 16, 1889, AND MAY 21, 1889.

There are three classes of water companies: (1) For the supply of water to the public; (2) for the supply, storage and transportation of water and water power for manufacturing and commercial purposes; (3) for the storage, transportation and furnishing of water for manufacturing and other purposes, and for the erection, establishing, furnishing, transmission and using of water power therefrom.

An application for a charter for a corporation of the first or second class is made under paragraph 9, section 2, of the act of April 29, 1874, P. L. 73, as amended by the act of May 16, 1889, P. L. 226, and must disclose the district or locality in which the corporation is to operate.

An application for a charter for a corporation of the third class is made under paragraph 18, section 2, of the act of April 29, 1874, as amended by the act of May 21, 1889, P. L. 259, and is not required to confine the operations of the corporation to a single city, borough or district where the water and water power are to be furnished.

Office of the Attorney General,
Harrisburg, Pa., Feb. 5, 1904.

Hon. Samuel W. Pennypacker, Governor of the Commonwealth of
Pennsylvania:

Sir: You referred to me the application of the Portland Water and Power Company for a charter for a corporation to be formed for the purpose of "storage, transportation and furnishing of water for manufacturing and other like purposes, and for the creation, establishing, furnishing, transmission and using of water power therefrom, such water and water power to be furnished within the county of Northampton, Pennsylvania." The business of the corporation is to be transacted in the village of Portland, in the county of Northampton.

This application is protested against by certain citizens of the borough of Portland, in the county of Northampton, who are applicants for a charter under the name of the Portland Water Company, whose purpose is to "supply an abundance of good and wholesome water to the public at the borough of Portland, Pennsylvania."

These papers are accompanied by a query as to whether the place of storage and location of works, and the territory to be supplied, ought not to be designated. Accompanying these papers is a brief submitted in behalf of the State Department, in which the objection is raised that the application of the Portland Water and Power Company is defective, inasmuch as it is not confined to a single town, city, borough or district, where the water and water power are to be furnished, but extends to the entire county of Northampton.

Two questions arise:

1. As to whether there is any conflict of purpose between the two applications; and
2. Whether both applications are in proper form.

In my judgment, the application of the Portland Water Company is for a water supply company, while that of the Portland Water and Power Company is for a water power company. It is clear, however, that some confusion as to the purpose of the latter company has arisen in the minds of the protestants, because they state that if, in your judgment, the purposes of the two intended corporations do not conflict, no protest is intended, but, if otherwise, they will stand on their objection.

A consideration of these matters involves an examination of all of the acts of Assembly and the decisions of the courts thereon relating to water companies. Under the acts of 29th April, 1874, (P. L. 73); 16th of May, 1889, (P. L. 226); 21st of May, 1889, (P. L. 259); 2nd of July, 1895, (P. L. 432), and 9th of May, 1901, (P. L. 624), there are three classes of water companies known to the law:

1. For the supply of water to the public;
2. For the supply, storage and transportation of water and water power for manufacturing and commercial purposes; and
3. For the storage, transportation and furnishing of water for manufacturing and other purposes, and for the creation, establishing, furnishing, transmission and using of water power therefrom.

Applications for charters for either the first or second class must be made under the ninth paragraph of section 2 of the act of April 29, 1874, as amended by the act of May 16, 1889. Although application for these specified purposes is to be made under the same amended paragraph, yet these purposes are distinct and cannot be united in one application. (Sowego Water Company, 16 County Court Reports, 179). Application for the third class must be under the eighteenth paragraph of section 2 of the act of 1874, as amended by the act of 21st of May, 1889.

There can be no doubt that companies of the first class are purely local, and the application for the charter must disclose the district or locality in which they are to operate. This follows from a con-

sideration of section 2, clause 9 of the act of 29th of April, 1874; also section 34, clause 2; section 34, clause 4, and section 34, clause 7, of the same act; the supplementary act of May 16, 1889 (P. L. 226), amending the ninth paragraph of the second section of the act of 1874; *Sowego Water Power Co.*, 16 County Court Reports, 179; opinions of Attorneys General Lear, Kirkpatrick and McCormick; *Meredith & Tate*, page 214; *Pittsburg Supply Company*, Biennial Report of the Secretary of the Commonwealth for 1888, page 65; act of 16th of May, 1889; 2nd of July, 1895, (P. L. 432); *Bly v. White Deer Mountain Water Company*, 197 P. S., 80; and *Monongahela Water Company*, 9 County Court Reports, 57.

As to the second class I am of opinion that they also are local, and the application must disclose the locality or district in which they are to operate, because, being authorized by an amendment of paragraph 9 of section 2 of the act of 1874, they are swept by force of the amending acts within the ninth clause, and are, therefore, embraced by the provisions of the law which emphasize the local character of companies chartered under that paragraph. I find no decisions as to the second class. They occupy a border ground between the companies as originally authorized by the ninth paragraph of the act of April 29, 1874, as unamended, and the eighteenth paragraph of the same act as unamended. The result, however, of the amendment of May 16, 1889, was to cause a partial introduction into clause 9 of the act of April 29, 1874, of what had theretofore constituted the substantial part of clause 18 of that act.

Clause 18 of the act of April 29, 1874, is saved, however, from destruction and absorption, by the later act of May 21, 1889, which amends it in such a manner as to establish a material and substantial distinction between the two classes designated in this opinion as one and two by creating what I have called the third class at the head of this opinion. I find no decisions as to the third class.

With these distinctions in view, notwithstanding the mixed character of the second class, I am of opinion that the statutes must be read in such a manner as to give full force and effect to each of them, if possible, and that any construction which would subject the third class to the provisions of the law applicable to the first and second classes would practically obliterate the distinction established by, and entirely ignore, the act of May 21, 1889. This would be inadmissible.

The proper method of interpreting statutes passed at the same session of the Legislature is laid down by the Supreme Court in the case of *White v. City of Meadville*, 643, in which Mr. Justice Dean, adopting the language of *Smith v. People*, 47 N. Y., 330, said:

“Statutes enacted at the same session of the Legislature should receive a construction, if possible, which

will give effect to each. They are within the reason of the rule governing the construction of statutes *ni pari materia*. Each is supposed to speak the mind of the same Legislature, and the words used in each should be qualified and restricted, if necessary, in their construction and effect, so as to give validity and effect to every other act passed at the same session."

Adhering to this rule of construction, I cannot doubt that the two acts of May 16, 1889, (P. L. 226), and of 21st of May, 1889, (P. L. 259), relate to different paragraphs of section 2 of the act of April 29, 1874, and are not to be confounded. The two acts must be read consecutively. Both must stand, if possible. As there was an original distinction between the two classes of water companies in the act of 1874, so this distinction has been preserved through both of the amending acts, and it cannot be safely concluded that the Legislature intended to abolish these distinctions or to create a practical merger of paragraphs 9 and 18 of section 2 of the act of April 29, 1874. I cannot conclude that the effect of the act of May 16, 1889, in amending paragraph 9 of section 2 of the act of 1874, by practically reading into the ninth paragraph the substantive provisions of the original eighteenth paragraph, as it stood unamended, accomplished as a result the complete absorption of the eighteenth paragraph. That would be to entirely ignore the later act of 21st of May, 1889, and would amount to a practical annihilation or repeal of that act. Such a construction is inadmissible.

A close reading of the eighteenth paragraph of section 2 of the act of 1874, as it originally stood, with the amending act of May 16, 1889, reveals a certain similarity of phrase, so as to make it doubtful whether the companies originally contemplated by the eighteenth paragraph of section 2 of the act of 1874, as unamended, would not in future be embraced by applications under the ninth paragraph of section 2 of the act of 1874, as amended by the act of 16th of May, 1889, but it cannot accomplish as a final result the complete annihilation of the eighteenth section of the act of 1874, because such a construction is at once repelled by the distinct legislative act of May 21, 1889. This act in its very title, specifically refers to the eighteenth paragraph of section 2, of the act of 1874 as the subject of amendment, and by the introduction of the words "and for the creation, establishing, furnishing, transmission and using of water power therefrom," removes the original eighteenth paragraph from the danger of absorption in the ninth paragraph as amended.

We have, then, as the result of the foregoing analysis of the statutes, the three distinct classes of water companies described in the opening of this opinion. As to the purely local character of the first purpose there can be no doubt. The water is not only sup-

plied to citizens of a given locality, but it is consumed upon the spot. As to the second purpose there may be doubt as to whether it is purely local, judging from the fact that the provisions as to pure water supply would not necessarily apply to manufactories or to commerce, but I am of opinion that companies of this class, because specifically included in the ninth paragraph of section 2 of the act of 1874, as amended by the act of May 16, 1889, must necessarily be subject to all the statutory provisions which emphasize the local character of companies chartered under the ninth paragraph of section 2 of the act of 1874, as amended, and which have been interpreted by the decisions hereinbefore referred to.

Such considerations, however, do not appear to apply to water power companies. With power companies the water is not consumed but is converted into a force which, after it has been created and stored away, electrically or otherwise, is returned to the stream, and is not consumed in the sense of the consumption by a municipality of water for drinking or washing purposes. It is also noticeable that the usefulness of power companies might be much interfered with, if not practically destroyed, if the transmission of power were confined solely to the district in which it originated.

I find that the eighteenth paragraph of section 2 of the act of April 29, 1874, even as amended by the act of 21st of May, 1889, was again amended by the act of 19th of July, 1901 (P. L. 624), but the amendment contains nothing which varies the language of paragraph 18 of section 2 of the act of 1874 so far as water power companies are concerned, leaving that statute to stand as amended by the act of 21st of May, 1889, and there is no provision in the act of 9th of July, 1901, which would localize the activities of a water power company. In making a comparison of the statutory provisions bearing upon water companies, under the ninth paragraph of the act of 1874, as amended, and the eighteenth paragraph of the same act as amended, I do not find that the provisions which emphasize the local character of the first and second classes are extended to the third class, and I do not find any ruling, so far as a water power company is concerned, which requires the application to be confined to a single city, town, borough or district where the water and water power are to be furnished. The presence of such restrictive provisions as to the first and second, and their absence as to the third class, lead me to believe that the Legislature, having distinctions between the two classes of companies clearly in mind, did not intend to subject water power companies to the restrictive local features of water supply companies and supply, storage and transportation water companies for commercial and manufacturing purposes.

The decision of the Supreme Court in the case of *Bly v. White Deer Mountain Water Company*, 197 Pa. S., 80, does not cover appli-

cations under the eighteenth paragraph, even as amended; that is, it does not apply to water power companies alluded to in this opinion as the third class. The decision in *Keller v. Riverton Water Company*, 161 Pa. S., 422, does not apply to the form of the application for a charter. I cannot conclude that the effect of the act of May 21, 1889, relating, as it does, to the incorporation of companies under the eighteenth paragraph of section 2 of the act of April 29, 1874, is practically for the same purpose as the act of May 16, 1889, relating, as the latter does, to clause 9 of the act of 1874. The verbiage is not the same, and one cannot be permitted to destroy the other; nor can I reach the conclusion that, if a company, incorporated under clause 18, is not restricted, but may be operated anywhere, it follows as a consequence that clause 9 is practically useless.

The difficulty in the discussion has arisen from the lack of clear distinction between the overlapping words of the eighteenth paragraph of section 2 of the act of 1874, as it originally stood, and the words of the ninth paragraph of the same section of the same act, as amended; but if we keep clearly in mind the undoubted fact that there was a distinction, material and substantial, between paragraphs 9 and 18 of the original act, and that this distinction has been preserved so far as the eighteenth paragraph is concerned by the act of 21st of May, 1889, which it is impossible to ignore, then we find that, by the amending act of May 16, 1889, what was originally a part of the eighteenth paragraph of the act of 1874 has been injected in part into the ninth paragraph, as amended; and we find further that, by the later act of May 21, 1889, the Legislature has seized upon the eighteenth paragraph of the act of 1874, and by distinct and positive amendment carried it beyond the reach of a merger or absorption, and has planted water power companies upon a distinct and separate footing from water supply companies, or from companies for the supply, storage and transportation of water and water power for commercial and manufacturing purposes under the ninth clause of section 2 of the act of 1874, as amended. I am compelled to take the legislation as it stands as a whole, and give effect to all parts of it. I cannot do this if, by a construction of the act of May 16, 1889, I practically ignore the later act of May 21, 1889. Besides, if there were any inconsistency between the two acts, the later act must stand as being the last expression of legislative will; but, by preserving the distinctions herein pointed out, all of the acts can be read together, and the restrictive features as to locality, which are imposed upon the two first classes of water companies, are not imposed upon those embraced within the third class.

I conclude, therefore, that there is no conflict between the two applications. The application of the Portland Water Company is

for a charter within the first class; the application of the Portland Water and Power Company is for a charter within the third class.

I now come to the form of the applications.

The application of the Portland Water Company specifies distinctly the district or municipality to be supplied, and, in my judgment, complies with all the requirements of the law.

The application of the Portland Water and Power Company, while not required by law to confine the sphere of its operations to a fixed district or municipality, does state that the water and water power to be furnished are to be furnished within the county of Northampton, Pennsylvania, and that the business of the corporation is to be transacted in the village of Portland, in the county of Northampton. In this respect the application is sufficiently definite in form.

I therefore recommend that both applications be allowed.

I herewith return the application of the Portland Water and Power Company, the protest and the brief submitted by the State Department.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

IN RE DOCTOR DUFF MEDICAL COMPANY—APPLICATION FOR A CHARTER.

There is no statutory authority for the granting of a charter to a corporation for the practice of medicine.

Office of the Attorney General,
Harrisburg, Pa., March 21, 1904.

Hon. Samuel W. Pennypacker, Governor of the Commonwealth of Pennsylvania:

Sir: I herewith return the application of the Doctor Duff Medical Company for a charter, together with the brief in support of such application.

In my judgment there is no statutory authority for the granting of a charter in a case of this sort. The general language used in the act of July 9th, 1901, providing for the incorporation of companies for the transaction of any lawful business not otherwise specifically provided for by act of Assembly does not, in my judgment, cover this case. My better judgment tells me that this is an effort to escape from the acts of Assembly which require medical examination and medical registration by those who intend to practice the medical profession. I do not think that it is competent for a corporation to practice medicine, even through duly qualified agents.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

PROVIDENCE HYDRO-ELECTRIC COMPANY — CORPORATIONS —
POWER COMPANIES—EXTENT OF POWER—ACT OF JULY 2, 1895.

The words "with the right to generate electric current and supply the same to any place or places," in the statement of the purpose for which a power company, which is applying for a charter, is formed, do not embrace the statement of a purpose, but the statement of a power conferred by the act of July 2, 1895, P. L. 425, and, in the absence of any judicial decision as to their extent, should be stricken from the application.

Office of the Attorney General,
Harrisburg, Pa., March 23, 1904.

Hon. Samuel W. Pennypacker, Governor of the Commonwealth of
Pennsylvania:

Sir: I herewith return the application of the Providence Hydro Electric Company. I have passed my pencil, in the shape of parenthetical marks, about the words, which, in my judgment, should be omitted from this application. The full statement of the purpose for which the company is formed, in exact conformity with the act of Assembly, terminates with the word "therefrom." The words "with the right to generate electric current and supply the same at any place or places" do not embrace the statement of a purpose, but the statement of a power conferred by act of Assembly of 2nd of July, 1895, (P. L. 425). The extent of the power is not stated in the act of Assembly, nor do I find any judicial determination of the extent. It is not usual, nor do I think it good form, to enumerate powers in the statement of purpose. Nor do I like to see so broad a power stated in the absence of any specific words which would justify it, and in the absence of any judicial decision. It is true that the act of 1895, after giving authority to make, erect and maintain the necessary buildings, machinery and apparatus for developing power and current, all of which must be necessarily localized, contains a clause which empowers the company "to distribute the same to any place or places, with the right to enter upon any public road, street, lane, alley or highway for such purposes, and to alter, inspect and repair its system of distribution: Provided, That no such company shall enter upon any street or alley in any city, borough or township of this Commonwealth until after the consent to such entry of the councils of the city or borough or supervisors of the township, in which such street or alley may be located, shall have been obtained." Exactly how far these words authorize a water company to go in the distribution of its power I am not advised. I therefore return the application to you for such action as you may see fit to take under the circumstances.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

DUQUESNE BREWING COMPANY.

The proposed amendment to the charter of the Duquesne Brewing Company of Pittsburg contemplates the selling, leasing or other disposition from time to time of any of the real estate of the corporation. Held, that the purpose of the amendment does not appear to be in conformity with the original object of the charter (it might make it impossible to carry on the purposes of the corporation because of a diminution of its assets or a change in the character of its assets) and such amendment should not be approved.

Office of the Attorney General,
Harrisburg, Pa., March 23, 1904.

Hon. Samuel W. Pennypacker, Governor of the Commonwealth of
Pennsylvania:

Sir: I herewith return the certificate of amendment of the Duquesne Brewing Company of Pittsburg.

I cannot advise you to approve of this amendment. The amendments of charters are controlled by the terms of the act of 13th of June, 1883, (P. L. 122). The third section of that act requires the proposed improvement, amendment or alteration of the charter to be produced to the Governor who "shall examine the same, and if he find it to be in proper form, and that such improvements, amendments or alterations are or will be lawful and beneficial and not injurious to the community, and are in accordance with the purposes of the charter, he shall approve thereof and endorse his approval thereon."

There is a provision also in section 4 which forbids a change in the objects and purposes of such corporation as shown by its original charter. The amendment proposed in this case contemplates the selling, leasing or other disposition from time to time of any of the real estate of the corporation—a purpose which does not appear to me to be in conformity with the original object of the charter, and which might make it impossible to carry on the purposes of the corporation because of a diminution of its assets or a change in the character of its property.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

BELLEVUE AND PERRYVILLE STREET RAILWAY COMPANY AND
THE HOWARD AND EAST STREET RAILWAY COMPANY—STREET RAIL-
WAY MERGERS.

The act of 29th of May, 1901, P. L. 349, authorizes the merger of railroads other than those which own, operate or control parallel or competing lines, and applies to railway companies.

The constitutionality of an act should not be doubted by an Executive Officer,

but is a question for the courts. The Governor should treat the act of 29th of May, 1901, P. L. 349, as constitutional, and enforce its provisions.

Where an application for a merger discloses the original companies to have had a combined capital stock of \$26,000, and the merger company, calls for a capital stock of \$750,000, the papers are defective.

The fixing of the term of the constituent companies at 995 years is without authority of law.

For these and other defects in the papers, it is advised that letters patent be withheld.

Office of the Attorney General,
Harrisburg, Pa., June 8, 1904.

Hon. Samuel W. Pennypacker, Governor of the Commonwealth of
Pennsylvania:

Sir: I have examined the articles of consolidation and merger between the Bellevue and Perrysville Street Railway Company and the Howard and East Street Railway Company, which you submitted to me with a request to advise you whether you should grant letters patent to the consolidated corporation under the terms of the act of 29th of May, 1901, (P. L. 349).

That act provides, in section 3, that the merger and consolidation shall not be complete and no "such consolidated corporation shall do any business of any kind until it shall have first obtained from the Governor of the Commonwealth new letters patent, and shall have paid to the State Treasurer a bonus of one-third of one per centum upon all its capital stock in excess of the amount of capital stock of the several corporations so consolidating, upon which the bonus required by law had been theretofore paid."

It has been contended that the act of 1901 is not applicable to this case, but that the proceedings are governed entirely by the act of May 16, 1861, (P. L. 702), and its supplements, on the ground that the act of 1901 is supplementary to an act entitled "An act to provide for the incorporation and regulation of certain corporations," approved the 29th day of April, 1874, and therefore inapplicable to railway mergers. I find, on comparing the two acts, that the earlier act entitled "An act relating to railroad Companies" stood as a model for the later one. The structure and order of subjects are identical, and, in most of the important features common to both acts, the phraseology is the same.

I find, in section 1 of the act of 1901, that the enacting clause embraces corporations other than those authorized or organized under the terms of the act of April 29, 1874, because, after providing that it shall be lawful for any corporation, now or hereafter organized under or accepting the provisions of the act of April 24, 1874, or any of the supplements thereto, the additional words appear "or of any other act of Assembly authorizing the formation of corpora-

tions," which are words in themselves broad enough to include railroads.

This construction is confirmed by the proviso which appears also in section 1, to the following effect:

"Provided, That nothing in this act shall be construed so as to permit railroad, canal, telegraph companies which own, operate or in any way control parallel or competing roads, canals or lines, to merge or combine."

The plain meaning of this proviso, coupled with the generality of the preceding words, leads to the conclusion that railroads, other than those which own, operate or control parallel or competing lines, are within the terms of the act. This seems to me a fair construction of section 1 in its entirety. Section 5 speaks of "*any* corporation which shall become a party to an agreement of merger and consolidation hereunder" without confining the reference to corporations organized under the act of April 29th, 1874.

The argument is pressed, however, that the act is unconstitutional because of a lack of definiteness in its title, which fails, it is urged, to give notice of the fact that railway companies are included. The title reads as follows:

"An act supplementary to an act entitled 'An act to provide for the incorporation and regulation of certain corporations,' approved the twenty-ninth day of April, one thousand eight hundred and seventy-four; providing for the merger and consolidation of certain corporations."

Unless the act itself be read, the title does not indicate the kinds of corporations which can be merged and consolidated, unless, indeed, the professional knowledge be borne in mind that the act of 29th of April, 1874, does not relate to railroads. It requires, therefore the knowledge of an expert lawyer, one trained in corporation law, and particularly in railway statutory law, to know that the reference to the act of 29th of April, 1874, is tantamount to the exclusion of railroads. Without this knowledge the title clearly points to the main fact that the act provides for the merger and consolidation of *certain* corporations, and when the first section is read it will be perceived that the act applies, not only to corporations now or hereafter organized under the act of 28th of April, 1874, or any of its supplements, but that it also relates to corporations formed under any other act of Assembly authorizing such formation, limited, however, by the proviso that, so far as railroads are concerned, railroads which own, operate or control parallel or competing roads or lines are excluded from the terms of the act. If the main purpose of a title be to point the reader to the subject-matter of the act, and not to furnish an index of its contents, then the

conclusion would be that the act applied to the merger and consolidation of certain corporations, the exact character of which was not specified in the title, but which could be ascertained only from a reading of the act itself, unless, indeed, there be superadded to the reading of the title professional knowledge of the fact that the act of April 29, 1874, and its proper supplements, do not relate to railroads.

The act contains but one subject, to wit: the consolidation and merger of corporations. The title in this respect, by the use of the word "certain," compels the reading of the statute itself in order to ascertain its scope and extent. I am doubtful whether a title to an act can be declared unconstitutional because, if a certain element of professional expert knowledge be added thereto, and that expert knowledge be read, so to speak, into the title of the act itself, it would be found to be narrower in its scope than at first indicated. This, however, is a question of construction, and lies at the basis of the contention that the act should be declared unconstitutional because of a lack of clear designation in its title of the subject-matter of the act. Or it might be contended that the subject of railroads, as covered by a supplement to the act of April 29th, 1874, was not germane to the subject of the original act.

In my judgment, both of these are questions for the courts and not for the Executive. It must be borne in mind that the act of 29th of May, 1901, was duly approved by the then Governor of the State, and stands upon the statute book as an existing law, which so far as I know, has never been interpreted by the courts or declared to be unconstitutional. I do not perceive that it is a part of the Executive function, in dealing with an act of Assembly which has not been declared unconstitutional by the courts, to undertake to set it aside upon a line of argument which, if addressed to a court, might induce it to declare the act to be in violation of the Constitution. To do so would require the exercise of judicial power which belongs to a separate department of the Government. While the Governor is sworn to obey the Constitution and to uphold the laws, yet this does not clothe him with judicial authority or impose upon him the responsibility of passing upon questions which can be more properly addressed to the courts. For one Governor to substitute his own judgment for that of his predecessor, (for judgment must necessarily have been exercised at the time that the act was approved), would be to substitute the individual judgment and discretion of a successor in the office of Governor for that of his predecessor, and practically to annul an act of Assembly approved by a previous Governor upon the ground that the act was unconstitutional and should not have been approved. This does not constitute a

part of the executive function. I am of opinion that it is not within the scope of your duty or authority to consider the question, but that you are bound, for the purposes of executive administration of the law, as it is found upon the statute book, to enforce its provisions and to assume the constitutionality of the act.

I therefore conclude that the act of 1901 does relate to the merger and consolidation of railroads, and as the Supreme Court has held that railways are within the term "railroads," the act is applicable to the case in hand.

The papers themselves are objectionable: first, because of the provision in the agreement for a capital stock of \$750,000, which is \$724,000 in excess of the aggregate of the capital stock of the constituent companies. The capital stock of the constituent companies in the aggregate amounts to the sum of \$26,000. In the case of the Bellevue and Perrysville Street Railway Company it is \$5,000, and in the case of the Howard and East Street Railway Company it is \$21,000. The capital of the consolidated companies amounts to the sum of \$750,000.

The Constitution of Pennsylvania, in section 7 of Article 16, declares:

"The stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock, first obtained at a meeting to be held after sixty days' notice, given in pursuance of law."

The act of February 9, 1901, was passed to carry into effect this constitutional provision, requiring sixty days' notice of the proposed increase by publication of the time of the meeting of the stockholders, called to act on the subject, and specifies with particularity the proceedings to be taken, and requires further that returns showing the increase shall be filed in the office of the Secretary of the Commonwealth within thirty days thereafter, and provides a penalty for neglect or omission to make the return. Thus was a specific method provided for the increase of capital stock. The papers filed do not disclose that such steps have been taken.

It is true that to the papers filed is attached an affidavit of the secretary of each company that there was a waiver of the notice of the meetings of the stockholders required by the act, and there has been a practice prevailing to permit the sixty days' notice to be waived, such waiver being evidenced by a paper, signed by all the stockholders, filed with the proceedings. It is, in my judgment, doubtful whether such practice can be followed in proceedings involving the creation of a corporation under the merger and consoli-

dation act, but even were this allowed, in the present case there is no waiver filed signed by all the stockholders.

It further appears that the term of the constituent companies, as consolidated, is fixed by the papers at 995 years. Neither the act of 1861 nor of 1901 authorizes the term of a consolidated company to be fixed at such a figure.

There are other defects apparent in the paper. If the act of April 27, 1864, (P. L. 617), entitled "A supplement to an act entitled 'An act relating to railroad companies,'" applies, then the papers are in conflict with such act, for that act provides that, while the company into which such merger shall take place, may make such increase in its capital stock as may be expedient in carrying such merger or consolidation into effect, yet such increase shall not be more than the amount of the capital stock, and shares of the company or companies so merged and consolidated. Again it appears on the face of the papers that the Bellevue and Perrysville Street Railway Company is a corporation chartered on the 12th of November, 1902, and is, with its extensions, 6.02 miles in length. The act of May 14th, 1889, (P. L. 211), distinctly requires that no articles of association shall be filed and recorded in the office of the Secretary of the Commonwealth, and no charter shall be issued for such purpose, until at least \$2,000 of stock for every line of railroad proposed to be made shall have been subscribed thereto, and ten per centum thereof paid in good faith in cash, but this company, as set forth in the articles of merger, has a capital stock of but \$5,000, of which only 35 shares of a par value of \$50 had been subscribed, and ten per centum, or \$175, has been paid in cash to the treasurer of the company.

It further appears that the Howard and East Street Railway Company has a capital stock of \$21,000, of which amount only 140 shares of a par value of \$50 had been subscribed for, and upon this ten per centum, or \$700, had been paid in in cash to the treasurer of the company, which is less than the amount required by the above mentioned act.

The articles of merger further provide that these two companies, with a joint capital stock of but \$26,000, and only a small part of the same subscribed for, shall constitute a new company, which shall have an authorized capital stock of \$750,000, "all of which shall be taken and deemed as full paid up and shall be presently issued." The articles of merger also provide that the "shareholders of the present Bellevue and Perrysville Street Railway Company shall receive full paid up capital stock of the new corporation to the amount of \$500,000 at par value, consisting of 10,000 shares, which stock shall be divided among said stockholders pro rata in proportion

to their holding of the capital stock of the said Bellevue and Perrysville Street Railway Company." The articles also provide that the "stockholders of the Howard and East Street Railway Company shall receive full paid up capital stock of the new corporation to the amount of \$250,000, at par value, consisting of 5,000 shares, which stock shall be divided among said stockholders pro rata in proportion to their holdings of the capital stock of the Howard and East Street Railway Company."

There is attached to the articles of merger an affidavit made by James D. Callery, president, and G. A. Gilfillan, principal engineer, that the cash value of the property of the Bellevue and Perrysville Street Railway Company is equal to the amount of stock to be issued to the stockholders of the said company under the articles of consolidation and merger, to wit: \$500,000. There is a like affidavit made by James D. Callery, president, and T. Uhlenhaut, Jr., principal engineer of the Howard and East Street Railway Company, that the actual cash value of the property of that corporation is equal to the amount of stock issued to stockholders under these articles of association, to wit: \$250,000 of the capital stock of the new company.

It is apparent from an examination of this state of facts that such issue of stock on the part of the consolidated company is in violation of the act of April 27th, 1864, (P. L. 617), as well as the later act of 1889, (P. L. 211), and that the charters of these companies were issued inadvertently and erroneously in view of the statement which they themselves set forth in their articles of merger. It is contended that this is done under the authority of the act of 15th of May, 1889, (P. L. 205). I do not perceive in this act authority for so vast an increase. The authority seems to be limited to what would be "necessary to equalize the interests of the parties to the said joint agreement."

For the foregoing reasons I am of opinion that the letters patent should be withheld.

I herewith return the articles of consolidation and merger, dated the 17th day of February, 1904.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

W. B. URLING COMPANY—CHARTER—STOCK BROKERS—ACT OF MAY 27, 1841, AND MARCH 24, 1842.

Charter for a corporation "for the purpose of buying and selling of municipal bonds and other municipal securities, and stocks, bonds, mortgages and commercial paper" will be refused. The creation of such a corporation is not authorized by any act of Assembly, and is in conflict with legislative policy, as indicated by the acts of May 27, 1841, P. L. 396, and March 24, 1842, P. L. 166, requiring the licensing of stock and exchange brokers.

Office of the Attorney General,
Harrisburg, Pa., July 20, 1904.

Hon. Samuel W. Pennypacker, Governor of the Commonwealth of
Pennsylvania:

Sir: I have examined the application of the W. B. Urling Company for a charter "for the purpose of buying and selling of municipal bonds and other municipal securities and stocks, bonds, mortgages and commercial paper."

The question arises: Can a corporation be a stock broker?

Neither the general corporation act of April 29, 1873, nor any of its supplements or amendments, makes such a provision. The contention in support of the application is based upon the loose phrase "any lawful business" in the act of 8th of July, 1901, (P. L. 624), and it is argued that the stock brokerage business is a lawful one. Undoubtedly it is. But so is the practice of a profession. All of the acts of Assembly referred to as instances of legislative recognition of the legality of the business are striking illustrations of the steady policy of the State to regard it as a personal and individual business or occupation, calling for the issuing of a separate personal commission or license, the making of annual returns and the imposition of penalties, stated in such language as to forbid the idea that the powers conferred or the duties exacted are such as could be enjoyed in one case or performed in the other by a corporation.

The act of 27th of May, 1841, (P. L. 396), requires stock brokers to be licensed and commissioned, and defines their powers of dealing in stocks. In the same way exchange brokers are to be licensed. The act of 24th of March, 1842, (P. L. 166), defines exchange brokers as those who pursue the business or occupation of purchasing and selling bills, notes, checks, drafts, certificates of deposit or other obligations or securities of any authorized corporation, foreign or domestic. The licenses are to be renewed annually, and in case of death, removal or discontinuance of the business are "to inure to and be continued in his, her or their legal representative or assignee." The same person may be licensed as a stock exchange and bill broker, but he cannot have more than one place of business.

Under the act of 15th of May, 1861, (P. L. 768), annual returns are to be made to the Auditor General of "his business," and penalties are to be recovered. The same provision occurs in the act of 27th of June, 1895, (P. L. 196), and in the act of 13th of June, 1901, relating to taxation.

None of these statutes are repealed by the act of July 9, 1901. I doubt if their provisions can be abrogated by the device of a charter for a purpose which is nowhere authorized in terms by our corporation acts. Such corporations would be without regulation by statute, if such could be erected, and the personal and individual responsibility hitherto so sedulously preserved would be lost.

The matter is closely akin to the principle asserted by the Court of Common Pleas of Dauphin County in the case of Commonwealth ex rel Attorney General v. Alba Dentist Company, Legal Intelligencer, July 1, 1904, p. 293, in which it was held that a "corporation could not practice denistry and was not a person within the meaning of the law.

The same principle applies to the application of the Whippo Company, sought to be incorporated for a general brokerage business, which is open to the further objection that the purpose stated might cover more than one kind of business, and would thus offend the proviso to the act of 9th of July, 1901, (P. L. 625).

I return both applications.

Very respectfully,

HAMPTON L. CARSON, -
Attorney General.

IN RE THE SAYRE TRACKLESS TROLLEY COMPANY—CHARTER—
TROLLEY COMPANY—ACT OF JULY 9, 1901.

A charter for a corporation for the purpose of "installing, equipping and operating a line of trackless cars and coaches, with electric motive power, to furnish transportation to the public" in certain specified boroughs in one of the counties of the Commonwealth will be refused.

The creation of such a corporation is not authorized by the language of the act of July 9, 1901, P. L. 624, which provides for the creation of corporations for the transaction of any lawful business not otherwise specifically provided for by act of Assembly.

Office of the Attorney General,
Harrisburg, Pa., July 20, 1904.

Hon. Samuel W. Pennypacker, Governor of the Commonwealth of
Pennsylvania:

Sir: I herewith return the application for a charter of the Sayre Trackless Trolley Company, which was referred to me with a request

for my opinion as to whether its purpose is within the acts of Assembly authorizing the granting of charters.

The purpose is stated to be "installing, equipping and operating a line of trackless cars and coaches, with electric motive power, to furnish transportation to the public in the boroughs of South Waverly, Sayre and Athens, and in Athens township, Bradford county, Pennsylvania."

It is not pretended that this purpose is within the specific terms of the act of April 29, 1874, or any of its supplements or amendments prior to 1901, but it is contended that it is within the spirit and language of the act of 9th of July, 1901, (P. L. 624), which is an amendment of the eighteenth section of the act of April 29, 1874, intended, as its title and text declare, to authorize the formation of companies "for the transaction of any lawful business not otherwise specifically provided for by act of Assembly."

These words, it must be admitted, are extremely broad, and their vagueness is not relieved by any attempt at a definition of the words "lawful business." On the surface the words import any business not contrary to law; that is, not prohibited by law or conducted by methods not forbidden by law. But, as to this, the question arises whether the word "business" is confined to what was known as a business at the time of the passage of the act, in which sense the word would be read with a restricted meaning, or whether it would embrace a business unknown at the time, but developed subsequently in consequence of an advance in scientific knowledge and improved methods of utilizing the forces of nature.

Business, in a general sense, means an occupation pursued continuously and systematically as a means of livelihood, usually in connection with trade or traffic, as distinguished from the practice of a profession or the pursuit of the arts, literature or science. We speak of business habits, business methods, business hours, business men, business cards—all of which import a fixed and well-known system based on practice and experience, and having no reference to that which may be revealed in future as a means of gain.

In the present case, trackless trolleys were unknown at the time of the passage of the act of 1901. The novelty of the proposed system is fully disclosed by the literature submitted by counsel in support of his application. The American Trackless Trolley Company is incorporated under the laws of the State of Maine, and owns "broad patents and rights, covering the American Trackless Trolley system." "The inventor of our system is a graduate of the Worcester Polytechnic Institute of Massachusetts, and a former examiner in the United States Patent Office."

"The patents issued to the company are dated March 10, 1903, and October 13, 1903, and others are pending." "Our trackless trol-

ley coaches, since they require no rails, can run on any good road, hence there is opened up to us a vast field, closed to the track systems, such as parks, boulevards, State highways, avenues, narrow streets, and wherever track rails are forbidden." "The advantages of our system for street railways are so evident that many corporations are already considering arrangements with us for the use of the trackless trolley, to enable them to go upon streets and roads where track rails are forbidden to them."

In an article appearing in "The Street Railway Journal," under date of November 14, 1903, the statement is made: "Moreover, the system permits the operation of combination passenger and freight lines, the trolleys of the slow freight cars being merely pulled off the wires at any point to allow the faster passenger coaches to pass * * * Furthermore, by means of a removable line extension, the freight cars may be run off, one hundred feet or more, from the trolley line to distant stores or warehouses."

The foregoing quotations are sufficient to indicate the vast scope of such a system, wandering at will, bound to no course except that defined by a wire, the location of which and its supporting poles may or may not depend upon local consent, expressed according to the terms of existing ordinances passed without reference to such an untried and unknown condition. It must be borne in mind that there are no statutes at present upon the statute books which limit or regulate such companies. All existing and future railroads and street railways and motor companies are subjected to express regulations, as found in the statutes. There is the well-known railroad act of April 4, 1868, (P. L. 62). There are constitutional provisions subjecting railroads, canals and other transportation companies to the provisions of article XVII and to the general supervision of the Secretary of Internal Affairs. The formation of stage and omnibus lines is controlled by the supplement of April 17, 1876, (P. L. 30). The act of March 22, 1887, (P. L. 8), provides for the construction and operation of motors and cables or other necessary machinery for supplying motive power to passenger railways, and the necessary apparatus for applying the same. The very Legislature which passed the act of 9th of July, 1901, under which the present claim is made, passed two acts, both dated June 7, 1901, (P. L. 514, 543), amending the act of 1887 for the government of surface street railway companies, regulating corporations for the purpose of constructing, maintaining and operating street railways for public use in the conveyance of passengers by any power other than locomotives, and for the construction and operation of passenger railways, either elevated or underground, or partly both, for the transportation of passengers, and with power and authority to contract for and locally gather, carry and distribute the mails of the United States.

All existing companies are subject to restraint. This proposed company would be without restraint. No statute applies to it. It is not a railroad nor a railway nor an omnibus line. If it were attempted to subject it to the restraint of existing statutes, it might be found that no statute in terms applied to it, and that no statute could be judicially stretched so as to cover it, and hence that a gigantic creature of the State's begetting had arisen to roam at will, uncontrollable because beyond the reach of existing law.

In my opinion the application should be refused.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

NATIONAL METAL EDGE BOX COMPANY—FOREIGN CORPORATIONS—
ADVERTISEMENTS—BONUS—ACT OF JUNE 9, 1881.

A foreign corporation availing itself of the provisions of the act of June 9, 1881, P. L. 89 becomes a Pennsylvania corporation, subject to the provisions of the act of April 29, 1874, P. L. 73, requiring notice of its application by advertisement, and of the act of May 2, 1899, P. L. 160, in regard to the payment of bonus on charters and upon the authorized increase in capital stock, and unless the application has been duly advertised and the bonus paid to the Commonwealth, letters-patent cannot be issued to it.

Office of the Attorney General,
Harrisburg, Pa., Dec. 1, 1904.

Hon. Samuel W. Pennypacker, Governor:

Sir: I have examined and herewith return the application of the National Metal Edge Box Company, a corporation chartered under the laws of the State of New Jersey and seeking to become a corporation of the Commonwealth of Pennsylvania under the provisions of the act of 9th of June, 1881, (P. L. 89). I have also examined the brief of argument in support of the application and the brief submitted by Mr. Whitworth, corporation clerk.

I am of opinion that the application should be advertised and that a bonus should be paid to the Commonwealth before letters patent can be issued. I am aware that the requirement as to advertising has hitherto been waived by the practice prevailing in the office of the Secretary of the Commonwealth, based upon an opinion by Deputy Attorney General Stranahan, reported under the title "Application of the Sherman Manufacturing Company," 12 Pennsylvania County Court Reports, 165.

My reading of the act of 9th of June, 1881, (P. L. 89), under which this application is made, differs from that of the Deputy Attorney

General. The act is entitled "An act to authorize foreign corporations to become corporations of Pennsylvania, and to prescribe the mode for their so doing." The first section distinctly states that corporations, created by or under the laws of any other State, doing business in this State, embraced within corporations of the second class defined in section two of the act of April 29, 1874, providing for the incorporation and regulation of certain corporations, may become corporations of this State under the provisions of said last mentioned act; and the second section requires that the certificate to be made in the form prescribed by the first section, and setting forth the various matters therein required, shall be produced to the Governor, who shall examine the same, and if he find it to be in proper form and within the purposes named for corporations of the second class in the said section two of the act of April 29, 1874, he shall approve thereof and endorse his approval thereon and direct letters patent to issue in the usual form, incorporating said stockholders and their successors into a body politic and corporate in deed and in law by the name chosen.

This, in my judgment, is the creation of a Pennsylvania corporation and not the adoption or naturalization of a foreign corporation. The act itself requires a distinct renunciation of the foreign charter and of all the privileges not enjoyed by corporations of its class under the laws of this Commonwealth. I cannot understand how a foreign corporation is to become a corporation of this State "under the provisions" of the act of April 29th, 1874, unless the provisions of that act as to notice are complied with. It is true that the contents of the certificate prescribed differ in some respects—notably in the eighth and ninth paragraphs—from the contents of the certificate required for a company applying for a charter under the act of April 29, 1874; but the propriety of such a difference is manifest from a mere reading of the clauses. To the extent that the requirements of the certificate under the act of 9th of June, 1881, differ from the requirements of the certificate required by the act of April 29, 1874, the later act may be said to supersede and supplant the former because of an inherent incompatibility arising from the nature of the case; but when the foreign corporation applies under the act of 9th of June, 1881, for a Pennsylvania charter and expressly renounces its original charter, it comes, by virtue of the language of the first section, under the provisions of the act of April 29, 1874, one of which provisions is the requirement as to notice. There is nothing, therefore, inconsistent between the two acts, one being silent as to notice and the other being express upon the point. The two must be read together as being *in pari materia*.

I can well understand how the requirements of the law of 1874 as to notice might in practice be entirely superseded if a foreign cor-

poration should become domesticated under the act of 1881 without notice, for it would be easy to evade all the provisions of the act of 1874 by taking out a foreign charter in States where no notice whatever is required, and then immediately becoming domesticated in our own State without any notice to our citizens. In my judgment, a foreign corporation, availing itself of the provisions of the act of 1881, becomes a Pennsylvania corporation, subject to the provisions of the act of April 29, 1874, by which notice is expressly required.

I am also of opinion that the corporation, thus created, is subject to the provisions of the act of 3rd of May, 1889, providing for the payment of bonus on charters and upon the authorized increase of the capital stock of such corporations. The language of the first section is:

“That all corporations hereafter created under any general or special law of this Commonwealth, except building and loan associations, and excepting all corporations named in the first class of section two of an act, entitled ‘An act to provide for the incorporation and regulation of certain corporations,’ approved the twenty-ninth day of April, Anno Domini one thousand eight hundred and seventy-four, shall pay to the State Treasurer, for the use of the Commonwealth, a bonus of one-third of one per centum upon the amount of the capital stock which said company is authorized to have, and a like bonus on any subsequent authorized increase thereof.”

It is clear that both the act of April 29, 1874, and the act of 9th of June, 1881, are general laws of this Commonwealth. There is no exception made in favor of corporations domesticating—if that be the proper phrase—under the latter act. Compliance with the terms of the act of 1881 constitutes the creation of a Pennsylvania corporation under a general law of the State, and this brings the corporation entirely within the terms of the act of 3rd of May, 1899.

It is no answer to this to assert that the foreign corporation, while it was a foreign corporation, paid a bonus under the act of 9th of May, 1901, (P. L. 150). That was a revenue act, as the title distinctly shows—an act providing for the raising of revenue for State purposes, by imposing upon certain corporations * * * a bonus of one-third of one per centum upon the capital actually employed in Pennsylvania, and requiring the filing of certain reports in the office of the Auditor General. The bonus exacted under the act of 1899 is not for the purposes of revenue, nor is it a tax; it is a price paid for the charter, a compensation to the Commonwealth for privileges conferred on the corporation by its charter. (*Commonwealth v. Coal Company*, 13 Weekly Notes of Cases, 324).

Any other construction would create a gross inequality between corporations created under our own laws and foreign corporations seeking to become domesticated under the act of 1881. The first would be required to pay a bonus and the second, under the construction contended for, would escape. The effect on the revenues of the State would be equally disastrous. It would be possible for foreign corporations securing charters without notice to come into our Commonwealth and obtain all the advantages and powers of our own corporations without notice of their intention to do so, and without paying to the Commonwealth the price exacted of her own children. Such an inequality of result and such a diminution of State revenues are consequences which could not have been contemplated by the Legislature and ought not to be encouraged by construction. It would be easy to create a situation by which charters would no longer be secured under our own laws, and where the citizens would be no longer notified of applications for charters containing, perhaps, extraordinary privileges and conflicting with many existing rights, and, at the same time, escaping the payment to the Commonwealth of that which has been regarded as a fair consideration for the privileges of sovereignty bestowed.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

THE BLAIRSVILLE AND DERRY STREET RAILWAY COMPANY, AND
THE BRADENVILLE AND DERRY STREET RAILWAY COMPANY—CON-
SOLIDATION OF STREET RAILWAY COMPANIES.

The papers for the consolidation of these companies present the same objectionable features dwelt upon in the case of the consolidation and merger of The Bellevue and Perrysville Street Railway Company, and The Howard and East Street Railway Company. The capital stock of the constituent companies should first be legally increased and then the merger for the aggregate amount may properly take place.

Office of the Attorney General,
Harrisburg, Pa., Dec. 21, 1904.

Hon. Samuel W. Pennypacker, Governor, of the Commonwealth of
Pennsylvania:

Sir: I have examined the agreement of consolidation and merger between the Blairsville and Derry Street Railway Company and the Bradenville and Derry Street Railway Company and herewith return the same.

In my judgment, these papers present the same objectionable feature that was dwelt upon in the case of consolidation and merger

of the Bellevue and Perrysville Street Railway Company and the Howard and East Street Railway Company. It is unnecessary for me to repeat the reasons therein stated. My judgment is that the capitals of the constituent companies should be first increased under the law, and then the merger for the aggregate amount can properly take place.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

WETZEL'S CASE—APPLICATION FOR REQUISITION.

In view of the agreement reached by the representatives of the several States in the Inter-State Extradition Conference of 1887, requisitions will not issue in case of desertion except under special and aggravated circumstances.

In certifying the papers connected with the application for a requisition, the district attorney should add the words "under circumstances of aggravation;" and there should also be an affidavit from a person having personal knowledge of the facts, setting forth the circumstances of the desertion and the special acts showing aggravation, but such circumstances need not be set out in the indictment.

Office of the Attorney General,
September 10, 1903.

Hon. Samuel W. Pennypacker, Governor of the Commonwealth of
Pennsylvania:

Sir: I have examined the papers connected with the application for a requisition in the case of John H. Wetzel, and herewith return them.

In view of the agreement reached by the representatives of the several States in the interstate Extradition Conference, held in New York in August, 1887, that requisitions will not issue in cases of desertion, except under special and aggravated circumstances, I believe that it would be better to require the district attorney in certifying the papers to add in clause eight the words "under circumstances of aggravation," and that there should also be an affidavit from some one, who has personal knowledge of the facts, setting forth the circumstances under which the desertion took place and the special facts which are relied upon as showing aggravation. I do not believe that it is necessary that these circumstances should be set forth in the indictment, as the indictment is sufficient, if it charges a crime under the act of Assembly; but, as the papers now stand, there is nothing to show these circumstances of aggravation except the letter of Mr. Scott, solicitor of the Bureau of Charities and Correction, which department is not charged with the administration of the criminal law.

I note also in the papers a mistake in the name of the district attorney upon the first line of his certificate, and also an omission of the name of the county following his signature. When these matters are corrected, it appears to me that the application for a requisition should be allowed, in view of the act of Assembly of the 13th of March, 1903 (P. L., page 24).

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

GERMANTOWN BATTLEFIELD MONUMENT.

The language of the act of May 15, 1903, P. L. 453, points to a single monument (not to a series of memorial tablets) to be erected at such place (not places) as the commissioners may deem proper, in commemoration of the battle of Germantown.

Office of the Attorney General,
Harrisburg, Pa., July 23, 1903.

Hon. Samuel W. Pennypacker, Governor of the Commonwealth of
Pennsylvania:

Sir: I herewith return the letter of Mr. Arthur H. Brockie, secretary of the commission appointed to erect a monument on the Battlefield of Germantown, and asking for an expression of opinion whether the erection of a series of memorial tablets marking the important incidents of the battle of Germantown could be substituted for the monument designated in the act.

In my judgment, the act of 15th of May, 1903, (P. L. 453), contemplates the erection of a monument at a single place, either upon the Chew place or at such other place in Germantown as the commissioners may deem proper. I can see no authority for the substitution of the memorial tablets for a monument or of many monuments for one monument, or of places for a single place. The language of the act points to a single monument to be erected at such place as the commissioners may deem proper in commemoration of the battle of Germantown, and the amount of appropriation indicates the dignity and importance of the monument to be thus erected. I find no room for the substitution of a series of tablets at numerous places, even though, in the judgment of the commission, the important incidents of the battle might be more fittingly commemorated in this way.

Very respectfully yours.

HAMPTON L. CARSON,
Attorney General.

JUSTICE OF THE PEACE.

Reviewing the proceedings under which the borough of Mechanicsburg was divided into wards, and holding that said borough is entitled to two justices of the peace, and that there is a vacancy in said office which the Governor is authorized to fill.

Office of the Attorney General,
Harrisburg, August 3, 1904.

Hon. Samuel W. Pennypacker, Governor:

Sir: I am in receipt of and have carefully examined the papers in the application of J. C. Reeser for a commission as justice of the peace in the borough of Mechanicsburg, to fill the vacancy now existing in the said office, caused by the decision of this Department that the borough in question is entitled only to borough justices, and asking for an official construction of the law in this matter.

It appears that the borough of Mechanicsburg was incorporated under the special act of April 12, 1828, (P. L. 308), which act does not fix the number of justices. The various supplements to the charter, down to June 21, 1839, (P. L. 376), are also silent as to the number of justices to which the borough is entitled. Section one of the last named act, however, provided that in each borough not divided into wards two justices of the peace shall be elected. Mechanicsburg was not then divided into wards and it never subsequently proceeded to increase the number of justices in accordance with the provisions of the said law. In pursuance of a resolution of council, on application to the court, an order was granted on August 21, 1857, whereby the general borough act of April 3, 1851, was adopted as the charter of the borough of Mechanicsburg, and the provisions of the original charter in conflict therewith were annulled. By the act of April 13, 1868, (P. L. 989), the borough was divided into two wards, and it was therein stipulated that one of the two justices to which Mechanicsburg was then entitled should be elected in each ward. On November 19, 1879, a petition was filed in the Court of Quarter Sessions of Cumberland, asking for a division of the South ward on account of its size and extent. These proceedings were begun in pursuance of the General act of Assembly of May 14, 1874, (P. L. 157), commonly known as the general borough law. The South ward was divided into the First and Second wards in accordance with the prayer of the petitioners. By a similar proceeding begun at the same time the North ward was also divided into two wards: the Third and Fourth. Subsequently, by a similar proceeding, under the same act, the First ward was divided into two wards, thereby creating what is known as the Fifth ward. By reason of this action the borough was brought for all purposes under the general borough

law, and from that time forth the borough has been entitled to only two justices of the peace, who should have been elected for the whole borough. However, through a misconception of the law as to justices, the wards proceeded to elect ward justices up until the present time. There is at present only one justice in commission in said borough who was regularly elected as a borough justice. The other regularly elected borough justice died on October 17, 1903, while in commission, thereby leaving a borough justice vacancy to be filled by appointment, and for this appointment the applicant, J. C. Reeser, is a candidate.

Under all the circumstances of the case I am of the opinion and advise you that a vacancy exists in the office of justice of the peace in the borough of Mechanicsburg, which you are authorized by law to fill.

Very respectfully yours,

FREDERIC W. FLEITZ,
Deputy Attorney General.

JUSTICE OF THE PEACE.

Where there is a dispute as to whether or not a vacancy exists in the office of a justice of the peace by reason of the incumbent moving out of the district, it is wise for the Governor not to make another appointment, as such action would result in confusion.

Office of the Attorney General,
Harrisburg, Pa., May 27, 1904.

Hon. Samuel W. Pennypacker, Governor:

Sir: I have before me your letter of recent date, together with the papers in the application of E. W. Grubb, for appointment as justice of the peace in West Caln township, Chester county. An inspection of the record shows that there are two justices now in commission in that township, but it is alleged, on behalf of the applicant for the appointment, that a vacancy exists because of the removal of Elmer E. Schrack, one of the present justices, from the township. A petition setting forth this fact is numerously signed by the residents of the township, but the claim is refuted by Mr. Schrack himself, who files a statement denying his removal from the township and insisting upon his legal right to hold and perform the duties of the office to which he was elected.

This precise question has arisen several times in the past few years, and in each instance the Legal Department of the Commonwealth has decided that, where the question of vacancy was in dis-

pute, it would be wise for the Governor not to make another appointment, as such action would only result in confusion.

I enclose herewith a copy of the opinion of Hon. John P. Elkin, Deputy Attorney General, dated December 11, 1896, which sets forth clearly the position of this Department on the subject.

Very respectfully yours,

FREDERIC W. FLEITZ,
Deputy Attorney General.

JUSTICE OF THE PEACE—OLD FORGE BOROUGH, LACKAWANNA COUNTY.

Where in an election legally had to increase the justices of the peace from two to three and a majority vote returned in favor of the increase, and duplicate returns were made, one filed with the prothonotary, and the other sent by mail to the office of the Secretary of the Commonwealth, but not received by him; held that the commission for the third justice of the peace, properly elected, should issue.

Office of the Attorney General,
Harrisburg, Pa., August 10, 1904.

Hon. Samuel W. Pennypacker, Governor:

Sir: Your letter of recent date, enclosing affidavits and other papers in reference to the claim of certain citizens of Old Forge, Lackawanna county, that that borough is entitled to an additional justice of the peace, increasing the number from two to three, and asking for an official opinion upon the same, has been received.

It appears that Old Forge was organized under the general borough law and consequently was originally empowered to elect two justices of the peace, but on account of its rapid growth and its large territorial extent, at the February election in 1899 the question of increasing the number of the justices of the peace from two to three was properly submitted to the qualified electors of the said borough and a majority vote was returned in favor of said increase. It also appears by an affidavit made by Matthew Bean, who, at the time, was constable of the borough, that all the requirements of law regulating such elections were complied with and immediately following the election true duplicate returns of the same were made out, and in compliance with law he filed one of the returns in the office of the prothonotary of Lackawanna county, and transmitted the other by mail to the Governor of the Commonwealth. The records of the Executive Department fail to show that the return transmitted to it was ever received, and it appears that the return to the prothonotary of Lackawanna county has been mislaid and cannot be found.

On account of the incomplete state of the records no commission

has been issued to any justice elected to fill the vacancy caused by this increase and the question now submitted to me is whether such a vacancy now exists as would justify you in appointing a person to fill the office.

It was held by Attorney General McCormick in a somewhat similar case that the will of the people as expressed in a regular and legal election properly held cannot be set aside or rendered null and void by a failure on the part of the constable to file the returns in accordance with the law, and that upon proof being made that such an election was held and such an increase provided, the vacancy thus created legally existed and could be filled either by a gubernatorial appointment or by an election, although several years had elapsed since the vote on the matter had been taken. In this conclusion of law I concur and it has been followed in several cases since.

I am, therefore, of the opinion and advise you that by the legal action of the electors of the borough of Old Forge that borough is entitled to three justices of the peace, and, inasmuch as there are but two now in commission, a vacancy exists which you are authorized to fill by appointment until the first Monday of May, 1905.

Very respectfully yours,

FREDERIC W. FLEITZ,
Deputy Attorney General.

JUSTICE OF THE PEACE.

Under the general borough law of 1851, under which the borough of Tamaqua was operating. B. and L. were elected two justices of the peace and commissioned for five years. In 1903, S. was also elected a justice of the peace. B. and L. protested that no vacancy existed as the borough was only entitled to two justices of the peace, and that no commission should issue to S. Held, that a commission should not issue to S.

Office of the Attorney General,
Harrisburg, Pa., August 3, 1903.

In re claim of John H. Stidfole for a commission as a justice of the peace.

To the Hon. Samuel W. Pennypacker, Governor of the Commonwealth of Pennsylvania:

Sir: This appears to be an old controversy, waged for some years by the same parties.

In April, 1900, Samuel Beard and John H. Lutz, claiming to have been elected justices of the peace for the borough of Tamaqua, ap-

plied to the Secretary of the Commonwealth for commissions, and a protest was filed by John H. Stidfole.

The matter was referred to the Attorney General, who, relying on the case of Commonwealth ex rel. v. Morgan, 178 Pa. S., 204, and on the election returns, overruled the protest and directed commissions to be issued to the applicants.

At the present time Mr. Stidfole claims a commission, and a protest is filed by his old antagonist. Mr. Stidfole's election took place on February 17, 1903. The Secretary of the Commonwealth, whose records show that there was no vacancy existing at the time of Mr. Stidfole's election—the general borough law of the Commonwealth, under which the borough of Tamaqua is now operating, specifically limiting the number of justices of the peace in each borough to two—has declined to issue the commission, and an appeal has been made to you.

Mr. Stidfole contends that there is a vacancy, because, as he asserts, Mr. Lutz was improperly elected and commissioned. No steps have been taken to test Mr. Lutz's right or title to his office by *quo warranto*; and no mandamus has been applied for by Mr. Stidfole.

To understand the origin of the controversy the following history is given:

The borough of Tamaqua, Schuylkill county, was incorporated by a special act, approved the 9th day of April, 1833, and, under that act and subsequent acts prior to 1874, was divided into three wards, each of which elected a justice of the peace until 1899. On the 30th day of January, 1899, a petition was filed in the Court of Quarter Sessions of Schuylkill county, asking for a division of the East ward of Tamaqua borough into two wards on account of its large size and population. These proceedings were begun, and in pursuance of the provisions of the general act of Assembly, approved May 14, 1874, (P. L. 159), known as the general borough law, the ward was divided in accordance with the prayer of the petitioners. Under numerous decisions of the courts—(Fox v. Pattison, 2 District Reports, 128; Com. ex rel. Fenner v. Pattison, 3 District Reports, 599; Com. v. Taylor, 159 P. S. 451; Com. ex rel. v. Morgan, Appellant, 178, P. S. 198,)—this action brought the entire borough under the general borough law, and from that time the borough was entitled to only two justices of the peace, who should be elected for the whole borough, ward justices being abolished. According to the regular practice in such cases, however, the justices holding commissions were not disturbed, but were allowed to remain in office until their commissions should expire.

The following were the justices for the various wards:

John H. Lutz, elected ward justice for the South ward in February 1897, and commissioned for five years;

William Priser, elected for the East ward in February, 1898, and commissioned for five years;

John H. Stidfole, elected in February, 1898, for the North ward, and commissioned for five years.

It appears that at the spring election in 1900 all of these justices, together with several other citizens, ran for the office of borough justice, and that a proper proclamation or notice of such election was given by the high constable of the borough. In that election Samuel Beard received 283 votes; John H. Lutz, 180 votes; William Priser, 179 votes; John H. Stidfole, 15 votes; J. K. P. Sheffield, 5 votes; George Crist, 2 votes, and A. L. Lutz, 2 votes. Samuel Beard and John H. Lutz, having received the highest number of votes, were duly commissioned borough justices for the five years next ensuing, under the direction of the Attorney General, and their commissions will expire on the first Monday of May, 1905. No election has been held since until February of this year, when Stidfole's commission expired as ward justice. It seems that Priser, whose commission expired at the same time, was not a candidate for the office of borough justice. Stidfole, who had been acting as justice under his old ward commission, became a candidate for borough justice, and having received the highest number of votes cast for that office, has presented his acceptance to the prothonotary and was placed upon the return list made by that office to the Secretary of the Commonwealth's Department, as indicated, to succeed himself. It is doubtful whether he could do this, as the office of ward justice expired with his commission. But he now makes a request to be appointed as borough justice, claiming that Lutz had been improperly commissioned in 1900, because he (Lutz) was then holding a commission as ward justice. It is to be observed that Stidfole himself was a candidate in that election, as were the other remaining ward justices. Such seem to be the facts.

The legal position is as follows:

The general borough law of the Commonwealth, under which the borough of Tamaqua is now operating, specifically limits the number of justices of the peace in each borough to two. Two men, claiming to be regularly elected and actually commissioned (Beard and Lutz) were serving in that capacity February, 1903, at the time of Mr. Stidfole's election, under commissions which will not expire until 1905. They protest that no vacancy in the office of borough justice existed at the time of Stidfole's election, and further claim that an election for the office of justice of the peace, under these circumstances, was invalid, and that no commission should be issued to Stidfole. The Secretary of the Commonwealth, whose records disclose no vacancy, has declined to prepare Mr. Stidfole's commission. If it be desired to raise the legality of Lutz's tenure in holding

his present commission as justice of the peace, such action can be taken under the law as it stands, on a *quo warranto*, in the court of Schuylkill county. If Lutz should be ousted by a decree of that court and a vacancy is thereby created, that vacancy can be filled by your appointment as Governor until the first Monday of May next, when the person who shall be successful in receiving the largest number of votes cast at the election next February for that office will go into commission.

To deviate from what has been the settled practice in the State Department and issue a commission to the claimant under these circumstances, will lead to confusion in that Department and throughout the Commonwealth. Aldermen and justices of the peace alike are very remiss each year in complying with the requirements of the law in reference to qualifying, and many trivial and annoying questions have arisen annually on this account. To hold that a commission must issue to every person who makes an application and claims under an alleged election, without regard to the law as to the number of incumbents, would be productive of grave results.

The practice of this Department has been to advise against the issue of a commission to a claimant in a doubtful case. In Fox's case, 1 District Reports, 513, Attorney General Hensel, in advising that no commission should issue in a similar case, said:

"It also appears that, should the commission issue, the Commonwealth will be asked to test the commissioned officer's title by a *quo warranto*, to be issued in the name of the Commonwealth, and, pending the final determination of that inquiry, the official acts of the respondent will be tainted with doubt, whereas a denial of the commission will result in an application for a mandamus, wherein the Commonwealth's executive officers can consistently maintain the attitude they assume in refusing to issue the commission."

The case was tried subsequently upon petition and answer in proceedings in mandamus, and Judge Simonton held that the petitioner, Fox, was not entitled to a commission. (Com. ex rel. Fox v. Pattison, 2 District Reports, 128). In a later case—that of Com. ex rel. Fenner v. Pattison, 3 District Reports, 599,—where a similar form of proceeding and practice was followed, the petitioner was held to be entitled to his commission, after a judicial investigation of the facts.

Following these cases, this Department, in an opinion given by the Deputy Attorney General, In re commission of a justice of the peace, (8th District Reports, 295), ruled that, as the Executive Department was not a judicial tribunal, disputes of this kind should be settled in the proper forum—the courts of the Commonwealth.

It is manifest that in the present case the facts and law are in dispute, and should be passed on by the courts, either by testing Lutz's title by *quo warranto*; or by a petition by Stidfole for a mandamus. To grant a commission to Stidfole would not settle the controversy, for *quo warranto* proceedings would follow. Litigation is inevitable. It matters not who moves in the first instance.

I cannot advise a step which would disturb settled practice, overrule precedents, place the executive officers of the government in an inconsistent position, and prove inconclusive in the end. I advise you against the issue of the commission.

I return the papers for the files of the office of the Secretary of the Commonwealth.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

COMMISSION TO DEPUTY SECRETARY OF INTERNAL AFFAIRS—PUBLIC OFFICERS—DEPUTY SECRETARY OF INTERNAL AFFAIRS—COMMISSION BY GOVERNOR WHERE APPOINTMENT IS BY ANOTHER OFFICER—ACT OF APRIL 18, 1895, AND APRIL 24, 1903.

The power to appoint and the duty to commission are clearly associated, and a commission, if such is necessary, should emanate from the appointing power. Hence, the act of April 24, 1903, P. L. 294, empowering the Secretary of Internal Affairs to appoint a deputy Secretary, repeals the act of April 18, 1895, section 2, P. L. 38, which provides that the Governor shall commission the deputy secretary.

The Governor cannot be called upon to certify the act of the Secretary of Internal Affairs, nor to issue letters-patent in support of an appointment not his own.

Office of the Attorney General,
Harrisburg, Pa., Sept. 9, 1904.

Hon. Samuel W. Pennypacker, Governor of the Commonwealth of Pennsylvania:

Sir: You have requested my opinion whether you are officially required to issue a commission to the Deputy Secretary of Internal Affairs.

There are two acts of Assembly which bear upon the matter. The act of 18th of April, 1895, (P. L. 38), in its second section, provides:

"That, on the recommendation of the Secretary of Internal Affairs, the Governor shall commission a person as Deputy Secretary, and the person so appointed and commissioned shall hold his office at the pleasure of said secretary; he shall act in the capacity of Superintendent of the Bureau of Railways of said Department,

and shall have full authority to execute papers and transact all business concerning said Department, under the direction of or during the absence of the Secretary, and shall receive a salary of three thousand dollars per annum."

The act of 24th of April, 1903 (P. L. 294), provides, *inter alia*:

"That the number and salaries of the officers, clerks and employes, in the Department of Internal Affairs, which the Secretary of Internal Affairs is hereby authorized and empowered to appoint, shall be as follows:

"One Deputy Secretary of Internal Affairs, at a salary of three thousand dollars per annum, who shall also be Superintendent of the Bureau of Railways."

Whatever view might be taken of the earlier act, if it stood alone, it is clear that under the law as it now stands the power to appoint the Deputy Secretary of Internal Affairs is lodged with the Secretary. Under the first act the Secretary might recommend, but, while the power to appoint was left in doubt, the Governor was required to issue a commission, and the language used would imply that the appointment was to be made by the Governor. The latter act, by its second section, expressly repeals all acts or parts of acts inconsistent therewith. In my judgment, it repeals the act of 1895 *pro tanto*. The power to appoint and the duty to commission are clearly associated, for, while a commission is not the appointment, but only the evidence of it, in strictness the commission, if such be necessary, should emanate from the appointing power.

I am of opinion that you, as Governor, cannot be called upon to furnish evidence of an act with which, under the terms of the statute, you have nothing whatever to do. You cannot be called on to certify the act of the Secretary or to issue the letters patent of the State in support of an appointment not your own.

Very respectfully yours,

HAMPTON L. CARSON,
Attorney General.

NOTARY PUBLIC'S FEE.

There is no authority of law by which any return can be made to the estate of a notary public of any part of the fee which was paid by him for his commission as notary public.

Office of the Attorney General,
Harrisburg, Pa., Sept. 9, 1903.

Hon. Samuel W. Pennypacker, Governor of the Commonwealth of Pennsylvania.

Sir: I herewith return the letter of Rev. N. L. Upham, of Germantown, which you referred to me.

I find no authority in the law by which any return can be made to the estate of Mr. Taylor of any part of the fee which was paid for his commission as notary public. It is unfortunate that he died before his term of office expired, but it is a matter without remedy so far as the return of the money is concerned.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

PUBLIC PRINTING.

The act of July 15, 1897 (P. L. 279), and the act of April 14, 1903 (P. L. 180) contain no provision which confers directly or indirectly any authority of law for the publication of the Report to the President on the anthracite coal strike of May-October, 1902, by the Anthracite Coal Strike Commission, as a bulletin report or other publication of the Department of Mines.

Office of the Attorney General,
Harrisburg, Pa., Sept. 10, 1903.

Hon. Samuel W. Pennypacker, Governor of the Commonwealth of
Pennsylvania, Harrisburg, Pa.:

Sir: I can find no authority of law for the publication of the report to the President on the anthracite coal strike of May-October, 1902, by the Anthracite Coal Strike Commission, as a "Bulletin," report or other publication of the Department of Mines.

The act of July 15th, 1897, (P. L. 279), establishing the Bureau of Mines, and the act of April 14, 1903, (P. L. 180), establishing the Department of Mines, contain no provision which confers directly or indirectly any such authority.

In the absence of express legislative authority such a proposed publication would be debarred by the act of May, 1876, (P. L. 73), section 20. Section 20 provides:

"That no public printing shall be performed for any department or officers of the State government unless previously ordered or authorized in writing by the Superintendent of Public Printing, except only the laws, journals of the two houses of the Legislature, the legislative and executive documents and the reports of the several heads of the executive departments; nor shall any bulletin be published at the expense of the State unless by virtue of express authority of the law, provided that the executive heads of the several departments of government be permitted to exercise such a reasonable discretion in ordering the printing and binding and miscellaneous work as to the kind and quality of paper to be used, of the style or the execution

thereof, as in their judgments shall best subserve the public service and interest.

"Provided also, That the Superintendent of Public Printing shall receive no order for the printing of any papers, documents, blanks or miscellaneous works unless the same be in writing, signed by the executive or head of the proper department."

In my judgment the report to the President of the Anthracite Coal Strike Commission does not fall within the purview of the foregoing section.

The Agricultural Department, which publishes many bulletins, has wide and express authority given it in the matter of publishing bulletins, but only by virtue of express legislative enactment.

See act of April 22, 1903 (P. L. 252.)

I herewith return the copy of the report which you sent me.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

ST. LOUIS COMMISSION.

Mr. Harris, late State Treasurer, was duly appointed a member of the St. Louis Commission; he still continues to hold the office, and is still treasurer of the Commission. The expiration of Mr. Harris' term and the succession of Mr. Mathues, does not affect the question.

Office of the Attorney General,
Harrisburg, Pa., May 20, 1904.

Hon. Samuel W. Pennyacker, Governor:

Sir: Having examined the act of Assembly creating the St. Louis Commission, I am of opinion that Mr. Harris, late State Treasurer, was duly appointed a member of the commission; that he still continues to hold the office; and that he is still the treasurer of the commission. I am further of the opinion that the expiration of Mr. Harris' term and the succession of Mr. Matthues does not affect the question. I herewith return the letter of Colonel Lambert so as to enable you to reply.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

SUPERINTENDENT OF CONSTRUCTION—STATE BRIDGES.

The act of April 21, 1903, P. L. 233, contemplates the appointment of a Superintendent of Construction for each bridge constructed under its terms, and not one Superintendent as a permanent officer for all bridges.

Office of the Attorney General,
Harrisburg, Sept. 2, 1904.

Hon. Samuel W. Pennypacker, Governor of the Commonwealth of
Pennsylvania:

Sir: Replying to your question as to whether the Board of Public Grounds and Buildings should select a person to be superintendent of the construction of bridges as a permanent officer, or whether the act of April 21, 1903, (P. L. 233), contemplates the appointment of such a superintendent for each bridge as the occasion arises, I reply that, in my judgment, the act clearly contemplates the appointment of a superintendent of construction for each separate bridge, as his compensation is fixed upon the amount of the contract, and the general construction of the act, as well as the language of its various sections, indicate separate and distinct treatment in each and every case. This is particularly true of Section three, a part of which reads as follows:

“In case the report of the viewers, or a majority of them, is in favor of the erection of the bridge, and the same is confirmed by the Court, the Court shall order and decree such rebuilding; and thereupon it shall be the duty of the Board of Public Grounds and Buildings immediately, to proceed and have prepared, in conformity with the report of the viewers, such plans and specifications of the proposed bridge as may be necessary, and appoint a superintendent of construction, and fix his compensation for said services, which shall not exceed five per centum of the amount of the contract.”

I do not find in the above language, nor in any other part of the act, any provisions which would justify me in concluding that the act contemplated the appointment or selection of a person as superintendent of the construction of bridges as a permanent officer.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

BRIDGE OVER SUSQUEHANNA RIVER.

The Attorney General's Office will take no steps in re bridge across the Susquehanna river unless fully advised of all the facts by sworn petition, asking for the use of the name of the Commonwealth to restrain the prosecution of the work, a copy of which must be served upon the party affected with notice of time and place fixed for the hearing.

Office of the Attorney General,
Harrisburg, Pa., March 23, 1904.

Hon. Samuel W. Pennypacker, Governor of the Commonwealth of
Pennsylvania:

Sir: I have examined the letter of Mr. Quigley, of Lock Haven, in relation to the building of a bridge across the Susquehanna River west of Oak Grove Station, by the New York Central and Hudson River Railroad Company.

The practice of this Department has been to take no steps unless fully advised of all the facts in the shape of a sworn petition somewhat in the nature of a bill in equity, asking for the use of the name of the Commonwealth to restrain the prosecution of the work, a copy of which must be served upon the party to be affected, together with notice of the time and place fixed for a hearing before this Department and service of such notice of appointment made with the Attorney General. The State does not move except upon due consideration, and I prefer to adhere to the practice of the Department. I have already had one instance of this in the matter of the Reading Railroad bridge across the Schuylkill at Norristown. A sworn petition was presented, notice was given of the time fixed, and both parties appeared by counsel and many witnesses attended on both sides, and there were also affidavits filed. Mr. Quigley should act in some such manner and should consult counsel.

I herewith return the papers.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

NOTARY PUBLIC.

The revocation of a commission of a notary public should not be made by the Governor upon mere ex parte statements, but the notary whose conduct is complained of, should be given a hearing on a day to be fixed, the proceedings to be in the nature of a rule to show cause why he should not be removed and his commission revoked.

Office of the Attorney General,
Harrisburg, Pa., Feb. 24, 1904.

Hon. Samuel W. Pennypacker, Governor of Pennsylvania:

Sir: I herewith return the letter of the Secretary of the Department of the Interior, dated February 4, 1904, and also the letter of E. F. Ware, Commissioner, addressed to the Honorable the Secretary of the Interior, in the case of Notary Public Harry M. Fox, No. 1309, South Twentieth street, Philadelphia. I observe that he is charged with executing pension vouchers in violation of the act of Congress of July 7th, 1893. I find that a similar complaint and a request for an opinion was referred to my predecessor, Attorney General McCormick, by Governor Hastings, and that Mr. McCormick, under date of January 23, 1895, (Opinions of the Attorney General, 1895-6, page 39), advised that the charge, if true, would require the removal of the notary, and the revocation of his commission. I acquiesce in the suggestion made by my predecessor that such action should not be taken upon mere ex parte statements, but that the notary whose conduct is complained of, should be given a hearing; a day to be fixed; the proceedings to be in the nature of a rule to show cause why he should not be removed and his commission revoked.

I return the papers so that you may have them before you.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

OPINIONS REQUESTED BY THE SECRETARY OF THE COMMONWEALTH.

SIMILARITY OF CORPORATION NAMES.

The practice of the State Department has been to guard against such similarity of names of corporations as would be confusing to the State in the imposition and collection of taxes, or would produce uncertainty in the judicial process of courts in which such corporations might sue or be sued. Trade competition cannot be considered, nor possible financial results, nor the mental attitude of possible customers. Hence, the applications for charters of the "West End Savings and Trust Company" and of the "West End Trust Company of Pittsburg" approved, notwithstanding the protests of each other and of the "West End Savings Bank" against the latter.

Office of the Attorney General,
Harrisburg, Pa., March 12, 1903.

Hon. Frank M. Fuller, Secretary of the Commonwealth:

Sir: I have examined the applications of the West End Savings and Trust Company and the West End Trust Company of Pittsburg for charters, together with the protests filed by each against the other, as well as the protest of the West End Savings Bank against the latter. The objection made is to the similarity of names, and the request is made that the words "West End" be eliminated.

The practice of the State Department has been to guard against such similarity only as would be confusing to the State in the imposition and collection of taxes, or would produce uncertainty in the judicial process of courts in which such corporations might sue or be sued. Trade competition cannot be considered, and possible financial results or the mental attitude of possible customers are matters which, if capable of adjudication at all, must be determined in the courts.

It has been held that the name of "Kidd Brothers & Burgher Steel Wire Company" was not so similar to the name "The Kidd Steel Wire Company, Limited," as to produce any confusion or uncertainty on the part of the State in the imposition and collection of taxes. (Biennial Report of the Secretary of the Commonwealth for 1896, page 36). For the same reason the name of "The Crystal Water Company of Pittsburg" was held not to conflict with "The Crystal Ice Company of Pittsburg and Allegheny." (Ibid 41). So, too, the objection of the Penn Publishing Company was overruled to the name "The Penn Printing and Publishing Company." (Ibid 57).

Applying these principles to the case in hand, and stating the competing names in tabulated form, they appear as follows, heading the list with the oldest institution and following it with the elder application for a charter:

West End Savings Bank.

West End Savings and Trust Company.

West End Trust Company of Pittsburg.

If the words "West End" were stricken from the titles of the corporations now under consideration and the word "Pittsburg" was substituted, we might have:

Pittsburg Trust Company.

Pittsburg Savings Bank.

Pittsburg Savings and Trust Company.

In none of these arrangements of words do I perceive room for confusion. The words "West End" are no more capable of individual and exclusive appropriation, although descriptive of a locality, than the word "Pittsburg" or the word "Philadelphia." In the city of Philadelphia we have corporations known as:

The Philadelphia Bank.

The Philadelphia Saving Fund Society.

The Philadelphia Trust and Safe Deposit Company.

The Western Bank.

The Western Savings Fund Society.

The Fidelity Trust Company,

The Fidelity Insurance Company.

The Real Estate Title Insurance Company.

The Real Estate Trust Company.

None of these has led to confusion.

Moreover, in the case in hand, it is observable that the application filed in behalf of the West End Trust Company of Pittsburg distinctly states that the words "of Pittsburg" constitute a part of the proposed corporate title. The protests filed in behalf of the West End Savings Bank and of the West End Savings and Trust Company failed to notice the fact that the words "of Pittsburg" are to constitute a portion of the corporate title of the West End Trust Company of Pittsburg.

I am of opinion that the applications for charters may be approved without violation of law.

Very respectfully yours.

HAMPTON L. CARSON,
Attorney General.

APPLICATIONS FOR STREET RAILWAY CHARTERS.

Where applications for street railway charters are in due form and within the terms of the law, the charters should be allowed. Objections which raise questions of fact and of law, should not be determined by the Secretary of the Commonwealth, but by the courts.

Office of the Attorney General,
Harrisburg, Pa., April 4, 1903.

In re applications for charters for street railway companies to be known as the Pittsburg Rapid Transit Street Railway Company, the Bankers' Street Railway Company, the Iron City Street Railway Company, and the Squirrel Hill and Wilkesburg Street Railway Company.

Hon. Frank M. Fuller, Secretary of the Commonwealth:

Sir: I have considered the briefs filed in support of the oral arguments made before the Deputy Secretary of the Commonwealth and myself by counsel for the applicants and protestants in the above matters. In accordance with your request I state the following conclusions:

An examination of the applications, as amended, discloses the fact that they are in conformity with the act of May 14, 1889, and its supplements; that the routes contained therein are physically continuous, and that the routes to be pursued are, with but slight variations, laid out upon public streets.

The objections urged are as follows:

That the construction of the proposed railways would involve the entire appropriation and exclusive use of certain streets and alleys named in the applications; that the construction and operation of street railways upon alleys would amount to additional servitudes because the streets and alleys, upon which tracks are proposed to be laid, are, in some instances, quite narrow; that the proposed route in part passes over private property, and in part is laid upon private rights of way; that the proposed crossings involve diagonal crossings for distances varying between 115 and 300 feet along and across streets already laid with tracks, or upon which an exclusive right to lay tracks is vested in another company in order to connect two streets, both opening on the streets so crossed diagonally, but not at directly opposite points, and, this, too, whether the streets which are opposite each other, or not directly opposite to each other, bear the same or different names; and that, therefore, the proposed routes are not legally continuous.

To these objections it is replied that the routes contained in the several charter applications are legally as well as physically continuous, and can be constructed so as to form a complete circuit, as required by the act of May 14, 1889, and the amendments thereto.

The contention involves a consideration of several important questions:

A. Whether a company, under the first section of the amended street railway act, can occupy streets, highways, bridges or private property, in whole or in part occupied by tracks previously laid and belonging to other companies;

B. Whether a proposed street railway can locate its rails for short distances upon private property.

C. Whether it can cross other street railways diagonally because of the alleged necessity for establishing a crossing in this manner in order to complete a continuous circuit.

D. Whether the effect of the decision of the Supreme Court in the case of Philadelphia, Morton and Swarthmore Street Railway

Company's petition, 203 P. S., 354, is to forbid such a diagonal crossing.

E. Whether the facts that the streets to be occupied are narrow and abutting property-holders may be inconvenienced by the operation of a street railway constitute a valid objection.

F. Whether the construction of a street railway upon a highway in a city imposes an additional servitude on the adjacent property, for which compensation could be claimed.

It is plain that these questions are purely judicial. In my judgment, they are beyond the scope and powers of your office, which, it must be borne in mind, is a part of the executive and not of the judicial department. To determine them it would be necessary to resolve disputed questions of fact and to compare, interpret and apply several acts of Assembly. To find facts and to apply the law are of the very essence of judicial duty. Such a duty is not cast upon you. You ought not to be called upon to consider such questions because they are not within your jurisdiction, and because, lacking all the machinery and powers of a court, you have neither the right nor the power to decide them.

These views are in harmony with rulings of the Department, made in the following cases: Monongahela Water Co., v. South Side Water Co., 15 Penna. County Court Reps., 604; Union Water Co., 12 Pa. C. C. Reps., 61; the Granite Water Company, same volume, 63; New Castle Company v. Water Co., 18 Penna. C. C. Reps., 498; the Relief Bridge Co., 30 Weekly Notes, 200. In all of these the principle is laid down that, where there is a dispute as to facts, and claims are presented which are in conflict with each other, the parties must be remitted to the courts for final and conclusive determination of the controversy, and that, while many facts, alleged on the one side and denied on the other, would doubtless be material in a suit at law, yet they are not to be decided in the State Department, which is confined to an examination as to whether the applications are in form, whether the purposes of the proposed corporations are legal, whether ten per centum of the authorized capital has been paid in cash, and whether or not, on the face of the records and the law requiring the purpose to be clearly stated, a charter should issue. Where applications are in due form and the purpose of the charter asked for is within the terms of the law, and the amount of capital subscribed seems *prima facie* sufficient for the purpose, it is asking too much of the State Department to refuse a charter because there is an apprehension that the applicants contemplate doing something in violation of law or may perform acts *ultra vires* or both. (Sowego Water and Power Co., Biennial Report of the Secretary of the Commonwealth for 1896, page 22). If a doubt be raised as to the soundness of the positions contended for, opportunity for its final and

judicial determination should be afforded, particularly where the precise questions raised have never been adjudicated. The right to secure such a hearing and adjudication would be entirely defeated should the State Department refuse the applications for the charters now asked for (Pittsburg Illuminating Co., Biennial Report of the Secretary of the Commonwealth for 1896, page 26).

The fundamental principle underlying the whole matter is best stated in the language of Judge Ludlow, of the Court of Common Pleas of Philadelphia County, in the case of Mitcheson v. Harlan, 3 Phila. Reports, 394, where that learned judge said:

“We can readily conceive of a question of fact being presented to the consideration of the Governor, connected with the issuing of letters patent, so embarrassed by conflicting testimony as to render the satisfactory solution of it a matter of very great doubt and uncertainty; in such a case, for the Executive to deny the letters patent, would be to assume a power which would destroy a right without the intervention of a court.”

In my judgment, the charters applied for should be allowed.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

TIME OF FILING PAPERS IN THE OFFICE OF THE SECRETARY OF THE COMMONWEALTH.

Papers filed with the corporation clerk late at night, outside of the office of the Secretary of the Commonwealth, should be marked filed at eight o'clock A. M. of the next business day.

Office of the Attorney General,
Harrisburg, Pa., June 23, 1903.

Hon. Frank M. Fuller, Secretary of the Commonwealth:

Sir: I have considered your letter of the 18th inst., and its enclosures, accompanied by exemplifications of the record of extensions of route of the Ferry Street Railway Company and of the New Grant Street Railway Company. You ask me for my official opinion as to what date, under the facts set forth, the said extensions should be marked filed. The facts as stated are as follows:

On Saturday, June 13, Mr. Whitworth, the corporation clerk, received a telegram from Mr. McGriffin, of Pittsburg, saying he would be in Harrisburg that night at 11.35 with street railway extensions, and desiring him to file them that night. He remained at the Lochiel Hotel, and there, at 11.45 P. M., June 13th, he was handed the enclosed extensions and was asked to file them as of June 13th. Mr. Whitworth told him that he would receive them subject to instructions as to when they should be marked filed.

In my judgment the extensions should be considered as filed at 8 A. M. on Monday, June 15th, 1903. Notwithstanding the practice alluded to as having existed for some years, of receiving and filing papers outside of business hours—a practice dictated, no doubt, by a disposition to oblige the public—I am of opinion that papers handed to the corporation clerk almost at midnight on Saturday night at a hotel cannot be properly considered as filed in the Department, even though the clerk was notified by telegram to expect the papers. The Department is the proper place for filing papers and business hours constitute the proper time. It is unreasonable to expect the Department to be open at all hours of the day or night, and equally unreasonable to extend its territorial limits to places outside of the Department.

The filing of a paper is a business act. Its receipt is an official act, of which an open and official record might properly be kept. In a race of diligence in the filing of papers, the desire of Mr. Whitworth to give no unfair advantage to any one is eminently proper. The best means of securing such a result is to protect him and all others against appeals for indulgence at a time when the office cannot be said to be open in the business sense. The business world fully recognizes the fact that there are just limits to a business day, and the hours of opening and closing a department can be made the proper subject-matter of rules or regulations.

So sensible of this was the Legislature that, by the act of April 17, 1843, (P. L. 328), it was enacted:

“That from and after the passage of this act it shall be the duty of the Auditor General, State Treasurer, office of the Canal Commissioners, Secretary of the Commonwealth and Surveyor General to open and keep open their respective offices from eight o'clock in the morning until twelve o'clock, noon, and from two o'clock until six o'clock in the afternoon, each and every day except Sundays, during the session of the Legislature.”

I do not find that this act has been repealed in terms. It relates to a time during the sessions of the Legislature, but the principle which underlies it can be made applicable to times when the Legislature is not in session.

I return herewith the extensions exemplified, which can be marked as filed as of Monday, June 15th, at 8 A. M.

I also return the correspondence which you enclosed, showing the basis of this opinion.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

STREET RAILWAY CHARTERS—DUTY OF SECRETARY OF COMMONWEALTH.

Where an application for a street railway charter is in conformity with the act of May 14, 1889, P. L. 241, and its supplements; its route is physically continuous, and, with but slight variations, is laid out on public streets, and can be constructed so as to form a complete circuit, the charter should be granted.

Whether such a company can occupy streets in whole or part occupied by another company, can lay its rails for a short distance on private property, can cross other street railways diagonally, can occupy an alley, or add an additional servitude to the abutting owners in doing so, are questions for the court after the charter has been granted.

The Secretary of the Commonwealth cannot assume the judicial duty of determining disputed questions of fact and law.

Office of the Attorney General,
Harrisburg, Pa., October 27, 1903.

Hon. Lewis E. Beitler, Deputy Secretary of the Commonwealth:

Sir: I have examined the application for a charter for an intended corporation to be known as the Camp Hill Turnpike Road Company. It is in the proper form and is within the purpose of the second section of the act of April 29, 1874 (P. L. 73), as amended by the act of May 24, 1887 (P. L. 186), and as interpreted by Attorney General Kirkpatrick in *Pennsylvania Paving Company*, 6th Pa. Court Reports, 122. If granted, the company will be subject to all legislation of the State relating to turnpike companies.

I have also examined the protest filed by the Harrisburg, Carlisle and Chambersburg Turnpike Company. The protest raises questions of engineering, of law, and of public policy, with which your Department cannot deal. You have no means at your command, and no power in the law to determine problems of scientific engineering, nor can you consider possible interferences with the legal rights of others; this must be left to the courts to determine when they arise upon proceedings legally instituted. The matter of public policy is for the Legislature.

I adhere to the principle announced in my opinion to your Department on April 4, 1903, in re application for charter for street railways. You have no judicial power to decide disputed facts or to settle legal questions. *West Chester Street Railway Company vs. Griest*, Secretary of the Commonwealth, 27 Penna. County Ct. Rep. 427; *Bryn Mawr Water Company*, 10th Penna. County Ct. Rep. 670; *Seneca Bridge Company*, 11 Penna. County Ct. Rep. 337; *Fayette Fuel and Gas Company*, 11th Penna. County Ct. Rep. 488; *Pittsburgh R. T. Street Rwy. Co. Charter Application*, 28th Penna. Co. Ct. Rep. 151.

In my judgment the application for a charter should be allowed. I herewith return the application and the protests, accompanied by maps.

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

IN RE PENNSYLVANIA CORRESPONDENCE SCHOOL—CHARTERS—
CORPORATE TITLES—INTERFERENCE WITH PRIOR CORPORATIONS.

A charter should be refused to a corporation under the title of "The Pennsylvania Correspondence School" as too like the title of "The Pennsylvania Correspondence Institute," the work undertaken by both being identical, being conducted by correspondence, and both corporations being located at Scranton.

Office of the Attorney General,
Harrisburg, Pa., October 27, 1903.

Hon. Lewis E. Beitler, Deputy Secretary of the Commonwealth:

Sir: I have examined and now return the papers sent me by you, relating to an amendment to the charter of incorporation of the Correspondence Institute of America, Clark Company proprietors, and an application certificate of the Pennsylvania Correspondence School (Scranton, Pa.). Both of these papers are protested against.

I instruct you to refuse both applications: the amendment, because proceedings in quo warranto to forfeit the charter are now pending and undetermined; it is idle to graft a tree when the axe is laid to the root: the charter application because the proposed name is too like that of the protestant, The Pennsylvania Correspondence Institute.

My opinion, under date of March 12, 1903, in re Similarity of Names, The West End Trust Company, has no application. There the applicants were a savings company, a trust company, a bank, and a savings and trust company, the legal characteristics of which are all distinct and could lead to no confusion. Here, the alleged character of the applicant and the protestant are precisely the same. The business is not limited to a fixed locality, but is conducted by correspondence, and the correspondents would not be apt to distinguish at a distance between the Pennsylvania Correspondence Institute and The Pennsylvania Correspondence School, when the work undertaken by each is identical, and both are located at Scranton, Pa. The case falls within my opinion rendered at the request of the Insurance Commissioner, February 26, 1903, in re Knights of the Maccabees, Post, p. 180.

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

HARRISBURG AND BRIDGEPORT STREET RAILWAY COMPANY—
STREET RAILWAYS—CHARTER—QUESTIONS OF FACT INVOLVED—DE-
TERMINATION OF.

Where a protest is filed to the granting of a charter to a street railway company on the ground that the route of the applicant conflicts with that of the protestant, and the rejoinder is that the application of the protestant was improvidently approved because its route conflicted with the route of another company, questions of fact are involved which the Secretary of the Commonwealth cannot determine, and which should be judicially inquired into. The only fair method of enabling the contending parties to fully present to the court their conflicting claims is to overrule the protests and grant the charters.

Office of the Attorney General,
Harrisburg, Pa., December 14, 1903.

In re Applications for Charter of The Harrisburg and Bridgeport Street Railway Company.

Hon. Frank M. Fuller, Secretary of the Commonwealth:

Sir: I herewith return the applications for letters patent of The Harrisburg and Riverton Street Railway Company and The Harrisburg and Bridgeport Street Railway Company. The first paper was filed in the office of the Secretary of the Commonwealth on the 19th of January, 1903, and was approved by the Governor on June 15, 1903. The second paper was filed June 22, 1903, and is protested against by the former as involving a conflict of route. The rejoinder is that the application of the protestant was improvidently approved, because the route therein described conflicted with that of the Dauphin County Street Railway Company, incorporated on the 19th of June, 1901, as to which the two years limit of exclusive grant had not expired at the time of the Governor's approval of the application of the Harrisburg and Riverton Street Railway Company.

An examination of the routes described in the three applications discloses a conflict of route, and questions of fact are involved which your Department cannot determine. They should be judicially inquired into. The only fair method of enabling the contending parties to fully present to the court their conflicting claims is to overrule the protests and allow charters to issue to the Harrisburg and Riverton Street Railway Company and also to the Harrisburg and Bridgeport Street Railway Company. This will give equality of legal status to all the parties interested to maintain or defend their respective rights. The Department should not, in my judgment, undertake to determine the controversy or to make it impossible for one of them to come before the court. I advise that action be taken in accordance with this opinion.

In an opinion given to you under date of April 4, 1903, in re Pittsburg charters, I relied on the language of Judge Ludlow in the case of Mitcheson v. Harlan, 3 Phila. Reports, 394, which I here repeat:

“We can readily conceive of a question of fact being presented to the consideration of the Governor, connected with the issuing of letters patent, so embarrassed by conflicting testimony as to render the satisfactory solution of it a matter of very great doubt and uncertainty; in such a case for the Executive to deny the letters patent would be to assume a power which would destroy a right without the intervention of a court.”

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

PUBLIC OFFICERS—DEPUTY SECRETARY OF THE COMMONWEALTH
—POWERS—ACT OF MARCH 12, 1791.

The Deputy Secretary of the Commonwealth, appointed by the Secretary under the act of March 12, 1791, 3 Sm. Laws, 9, is authorized to act for the Secretary in all matters pertaining to his office, and sign his name as Deputy Secretary of the Commonwealth. Hence, a certificate issued to a foreign corporation in accordance with the act of April 22, 1874, P. L. 108, which prohibits foreign corporations from doing business in Pennsylvania, without having known place of business and authorized agents, and requiring that certain statements shall be filed in the office of the Secretary of the Commonwealth, and a certificate of the Secretary of the Commonwealth, under the seal of the Commonwealth, secured, may be signed by the Deputy Secretary.

Office of the Attorney General,
Harrisburg, Pa., June 11, 1903.

Hon. Frank M. Fuller, Secretary of the Commonwealth:

Sir: I have your letter of to-day, stating that under the act of April 22, 1874, “prohibiting foreign corporations from doing business in Pennsylvania without having known places of business and authorized agents,” and requiring that certain statements shall be filed in the Office of the Secretary of the Commonwealth, and a certificate of the Secretary of the Commonwealth, under the seal of the Commonwealth, shall be secured, etc., the question has been raised that such certificate may be signed only by the Secretary of the Commonwealth and not by the Deputy Secretary.

I am of opinion that the objection is not well taken.

You also request my official opinion as to how far the Deputy Secretary of the Commonwealth may serve in your stead and name, and what official duties he may or may not so perform, in order that

the powers and prerogatives of the Deputy Secretary of the Commonwealth may be definitely decided, not only as to the specific case in point but also as above stated.

The act of March 12, 1791 (3 Smith's Laws, page 9), provides that the Secretary of the Commonwealth "shall have a Deputy, to be by him appointed, with the approbation of the Governor, and the said Deputy shall be removable by the said Secretary, whenever he shall think expedient." This, so far as I know, is the only legislative provision upon the subject. You will observe that the word "Deputy" is used without any qualifying adjective such as "special deputy," and I interpret it in the general sense which has been uniformly attached to the word "Deputy."

Bouvier in his Law Dictionary defines a Deputy as "One authorized by an officer to exercise the office or right which the officer possesses, for and in place of the latter." He quotes with approval Comyn's Digest, title "Officer" to the following effect: "In general, ministerial officers can appoint deputies, unless the office is to be exercised by the ministerial officer in person." He also states "In general, a deputy has power to do every act which his principal may do; but a deputy cannot make a deputy."

Anderson in his Dictionary of Law gives the following definition:

"Deputy; one who acts officially for another; the substitute of an officer—usually of a ministerial officer."

The American and English Encyclopedia of Law defines the word as follows:

"A deputy is one who, by appointment, exercises an office in another's right, having no interest therein, but doing all things in his principal's name, and for whose misconduct the principal is answerable. He must be one whose acts are of equal force with those of the officer himself; must act in pursuance of law, perform official functions, and is required to take the oath of office before acting."

Wharton in his Law Dictionary states that a deputy differs from an assignee or agent in that an assignee has an interest in the office itself and does all things in his own name, for whom his grantor shall not answer except in special cases; but a deputy has not any interest in the office, and is only the shadow of the officer in whose name he acts. And there is a distinction in doing an act by an agent and by a deputy. An agent can only bind his principal when he does the act in the name of the principal; but a deputy may do the act and sign his own name, and it binds his principal; for a deputy has, in law, the whole power of his principal."

The definition given in the Century Dictionary is as follows:

“A deputy is a person appointed or elected to act for another or others; one who exercises an office in another’s right; a lieutenant or substitute. In law, one who by authority exercises another’s office or some function thereof, in the name or place of the principal, but has no interest in the office. A deputy may in general perform all the functions of his principal, or those specially deputed to him, but cannot again depute his powers. Specifically, a subordinate officer authorized to act in place of the principal officer, as, for instance, in his absence. If authorized to exercise for the time being the whole power of his principal, he is a general deputy, and may usually act in his own name with his official addition of deputy.” .

In the Confiscation Cases, reported in 20 Wallace’s Reports of the Supreme Court of the United States, page 111, Mr. Justice Strong, in disposing of an objection which had been urged against proceedings in the District Court, to the effect that they had not been signed by the clerk of the court but had only been signed by the deputy clerk, used these words:

“This was sufficient. An act of Congress authorized the employment of the deputy, and in general a deputy of a ministerial officer can do every act which his principal might do.”

The legal and the popular definitions agree, and I am of opinion that, inasmuch as the act which authorized you to appoint a deputy uses the term in its general and not in a special sense, the Deputy Secretary of the Commonwealth is authorized to act for you in all matters pertaining to your office, signing his name as “Deputy Secretary of the Commonwealth”; and this, as I am informed, and so far as my examination has gone, has been the unbroken practice of the Commonwealth for more than one hundred years. To require you to personally sign every paper or certificate would be to deprive you of that aid, and the Commonwealth of that service, which it was the purpose of the act of 1791 to secure.

I am,

Very sincerely yours,

HAMPTON L. CARSON,
Attorney General.

POLITICAL PARTIES—ELECTION LAW—PARTY NAME— BALLOT ACTS
OF JUNE 10, 1893, JULY 9, 1897, AND APRIL 29, 1903.

A body of citizens nominating a candidate for Congress or a senator or a member of the House of Representatives in the General Assembly, or a judge or other candidate or set of candidates, to be voted for in only one district or county, but making no nominations for State officers who are to be voted for throughout the entire State, is entitled to a political appellation and square in the first column upon the official ballot as certified from the State Department under the Ballot Act of June 10, 1893, P. L. 412, and its supplements of July 9, 1897, P. L. 223, and April 29, 1903, P. L. 338.

It is not, however, necessary that such political appellation and square should appear in all the official ballots certified to in every district or county throughout the entire State, where no such electoral district is interested in the contest.

Office of the Attorney General,
Harrisburg, Pa., October 14, 1903.

Hon. Lewis E. Beitler, Deputy Secretary of the Commonwealth:

Sir: You have asked me for an opinion to guide the action of your Department on the following questions arising under the ballot act of June 10, 1893, as amended by the several subsequent acts, particularly the act of April 29, 1903:

“Is a body of citizens which nominates a candidate for Congress, or a Senator, or a Member of the House of Representatives in the General Assembly, or a judge or other candidate or set of candidates, to be voted for in only one district or county, but makes no nominations for State officers who are to be voted for throughout the entire State, entitled to a party name and square in the first column upon the official ballot as certified from the State Department under the several acts above stated?”

“And, if so entitled, must that party name and square appear in all the official ballots certified to in every district or county throughout the entire State?”

Taking these questions in the reverse order, I answer the second in the negative: Aside from the manifest objection that no electoral district in the Commonwealth is interested in local contests arising elsewhere, and that it would lead to confusion to place upon the official ballot party names or political appellations foreign to the district and thereby bewilder voters, the question is definitely disposed of by the consideration that the printing and distribution of the ballots and of the cards of instruction for the elections in each county and the delivery of the same to the election officers, and all other expenses incurred, are properly county charges, payment of which is to be provided for by each county, in the same manner as the payment of other election expenses.

It is the duty of the Secretary of the Commonwealth to prepare forms for all the blanks made necessary by the amended ballot law,

and to furnish copies of the same to the county commissioners of each county, who shall procure further copies of the same at the cost of the county, and to furnish them to the election officers or other persons by whom they are to be used.

The foregoing provisions of the law clearly indicate that the official ballot to be paid for by each county or electoral district shall contain only such matter as concerns the interests of the respective electoral districts, and that the addition of any foreign or extraneous matter or the introduction of any subjects which do not directly and properly relate to the interests of each electoral district, could be properly objected to as items of expense, and if thrown out by the counties, there is no provision in the law for the payment of such expenses by the Commonwealth.

Hence I instruct you that it is not your duty to certify official ballots to every electoral district or county throughout the entire State containing party names or political appellations and corresponding squares outside of the fair and legitimate demands of each electoral district or county.

In the consideration of the first question, let me premise that the question as put is too narrow. It does not cover all of the features of the case. If, in the question put, you use the words "a party name and square" in the strict legal sense of "a party," I answer the question unhesitatingly in the negative, because "a body of citizens" is not, and cannot pretend to be "a party." But this would not dispose of the real difficulty, for the question would still remain whether such "a body of citizens," making the nominations indicated, is entitled to a square in the first column upon the official ballot, as certified from your Department, not—be it observed—under "a party name," but under "a political appellation," selected and appropriated as described in the act and its various amendments. This is the real question.

It is clear that a discussion of the matter must start with full recognition of the fact that certain legal distinctions exist between "a political party" and "a political body," or "a body of citizens or electors."

The phrases "a party name" and a "political appellation" have been definitely appropriated by the courts to "a political party" and "a political body" respectively, the first making its nominations by nomination certificates, and the latter by nomination papers. The courts have settled this, and it is unnecessary to do more than refer to the following authorities which are directly in point.

In the case entitled "In re Objection to Nominations of Citizens' Party," 1st Dauphin County Court Reports, page 326, Judge Stewart said: "The law recognizes a clear distinction between combinations of electors that are parties and combinations of electors that

are less than parties. Combinations of electors that are parties place their candidates in nomination by filing certificates of nomination; combinations of electors that are less than parties place their candidates in nomination by filing nomination papers."

In the case entitled "In re Nomination of Jeffries," 3rd Dauphin County Court Reports, 291, Judge Weiss said: "The Fusion Party of Chester county, so designated, is composed of persons identified, some with one and some with another existing political party, with which they act in national or State affairs, or both, who unite in support of a local ticket, the candidates upon which are not pledged to the attainment of any end, or the advocacy of any public measures, which some one of the established political parties does not seek or profess to accomplish. Such an association, however, respectable in numbers, or reputable in character, is not a political party within the meaning of the act of Assembly."

These decisions are in harmony with the result reached by President Judge Pennypacker, in the case entitled "In re Certificates of Nomination of McKinley Citizens' Party," 6th Pennsylvania District Reports, page 109. In that case, after quoting the definitions of Webster, the Century Dictionary, Edmund Burke, and Sidgwick in his "Elements of Politics," the learned judge said: "It will be observed that the thought which is common to all of these definitions is that a party must have distinctive aims and purposes and be united in opposition to others in the community within which it exists." The learned judge after still further pointing out the distinctions between a political party and a body of electors or a political body continued: "While any body of electors in sufficient numbers may file a nomination paper, the test to be applied is, did they intend the accomplishment of but a single specific act, or did they indicate continuity of aim or policy, and give evidence of such purpose by some kind of organization." After discussing the facts of the case, the conclusion was stated as follows: "For these reasons, we think the McKinley Citizens' did not constitute a political party within the act The objections are sustained."

The foregoing distinctions were stated by the courts after considering and interpreting the language of the act of the 10th of June, 1893 (P. L. 419), as amended by the act of the 9th of July, 1897 (P. L. 223). In the latter act, the different methods of nomination by nomination certificates and nomination papers are distinctly drawn, and the fourteenth section of the amending act of the 9th of July, 1897, speaks in express terms of the candidates of "each political party or body of electors," thus contrasting the phrase "political party" with the phrase "body of electors." The act then goes on to speak of "the party or political appellation" which is to be placed at the head of each column, and distinctly enacts that "there

shall be printed above each column of candidates of a political party or body, a circle three-fourths of one inch in diameter, and there shall be printed around, but without the circle, the following words: 'For a straight ticket mark within this circle.' "

The right of each political party and of each political body to a circle above the party name or the political appellation of the body was thus given in distinct terms. This right was confirmed by judicial action, notably that of Judge Simonton in an unreported case occurring in Dauphin county in the year 1900, wherein after a consideration and comparison of the acts of 1893 and 1897, the judge ruled that it was the intention of the Legislature that a circle should be placed above each column on the ballot and that the insertion of the words "or body" after the words "a political party," as contained in section fourteen of the act of 1897, placed the Legislative intention beyond the reach of dispute.

A similar result was arrived at by Judge Audenried, of the Philadelphia County Court of Common Pleas No. 4, in granting the right to a separate column upon the ballot and a circle over the Municipal League column to a group of citizens in Philadelphia, which had nominated by nomination papers candidates for the Legislature and county officers, under the name or political appellation of "Municipal League."

With distinctions and rights thus established by the courts plainly in view, the Legislature passed the act of 29th of April, 1903 (P. L. 338). This is not a complete ballot law, but simply an amendment of certain specified sections of the preceding acts. The question under discussion turns upon an interpretation of the fourteenth section of the most recent act. Before specifically considering that section, which is the controlling one, it is pertinent to observe that section four of the act of June 19, 1891 (P. L. 345), expressly provided that all certificates of nomination and nomination papers shall specify: One (1) "the party or policy" which such candidate represents, expressed in not more than three words, adding "to the party or political appellation," in the case of Presidential electors, the names of the candidates for President and Vice President. Two (2), The name of each candidate nominated therein, his profession, business or occupation, if any, and his place of residence, with the street and number thereon, if any. Three (3), The office for which such candidate is nominated, "Provided, That no words shall be used in any nomination papers to describe or designate the party or policy, or political appellations, represented by the candidate named in such nomination papers, as aforesaid, identical with or similar to the words used for the like purpose in certificates of nominations made by a convention of delegates of a political party, which, at the last preceding election polled three per centum of the largest vote cast."

The foregoing provision was repeated in terms in the fourth section of the act of the 10th of June, 1893 (P. L. 419), with a reduction of the percentage of the vote cast. The same provision appears in the act of the 9th of July, 1897 (P. L. 223), with the addition to the words "convention of delegates" of the words "or primary meeting of electors or caucus held under the rules of a political party or any board authorized to certify nominations, representing a political party, which, at the last preceding election, polled two per centum of the largest vote cast." To guard against an interpretation based upon the strict meaning of the word party, the distinctions previously established are strengthened by an express provision as to the method to be pursued in settling disputes or objections as to "the party or political appellations," used in the "certificate or paper." Moreover, the third section of the act of the 9th of July, 1897 (P. L. 223), amending the third section of the act of 1893, provides a method by which bodies of electors not possessing the rank or legal rights of a political party can make nominations by nomination papers, and designates with particularity the method by which they shall adopt "a certain political appellation to designate their policy," subject to certain limitations regarding the selection of names, so that thereafter, "such political body" shall have the exclusive right to use "the said name or appellation," for the election for which said nomination or nominations are made.

All of the foregoing provisions are still in force, and constitute a part of the present ballot law, entirely unaffected by the provisions of the act of the 29th of April, 1903.

Coming now to a consideration of section fourteen of the act of April 29, 1903, the inquiry must necessarily be whether the Legislature, by fit and proper words, has modified the former distinctions of the law, and either abrogated or abolished distinctions hitherto well settled and existing; or whether, with a full recognition of such distinctions, they have changed in any manner the rights theretofore accorded by statute and decisions to political parties, making their nominations by nomination certificates, and to political bodies making their nominations by nomination papers.

I must assume for the purpose of this opinion the constitutionality of the statute, and I am equally bound to assume that the Legislature did not intend to violate any provision of the Constitution, which by section five of article first, constituting a part of the declaration of rights, expressly provides that "elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

A critical examination of the act of 29th of April, 1903, satisfies me that this constitutional equality has been carefully preserved, and that the rights of parties and of political bodies are fairly and

equitably dealt with by balancing each specific provision in each specific clause. The first clause of section fourteen, in providing for the method of arrangement of the names of candidates for Presidential electors, upon the ballot, declares that they shall be arranged in party groups, as presented in the several certificates of party nomination and nomination papers. It is clear from the use of the phrases "party certificates of nomination" and "nomination papers," that the word "party," preceding the word "groups" is not to be read in the sense of awarding to a "party" rights superior to those of a "political body," because, when speaking of certificates of party nomination, the statute clearly refers to the appropriate method of making nominations, under the law, by a political party; and in speaking of nomination papers, the statute equally refers to the method appropriate, under the law, to nominations made by political bodies, which do not possess the legal characteristics of a party. This construction is still further confirmed by the proviso following the provision relating to the order in which the names of parties nominating shall appear, by expressly providing that in the case of political parties not represented on the ballot at the last Presidential election, the order of arrangement shall be alphabetical.

The equality of right is maintained in the second clause of section fourteen by providing that at the head of each group of candidates shall be printed "the appropriate party name or political appellation," thus adopting language already fixed in meaning by judicial decision. I find the same balance maintained in the third clause, where provision is made for a square at the right of the name of each candidate for Presidential elector, in addition to the provision that at the right of the space containing the surnames of the candidates "for President and Vice President, and their party name or political appellation, there shall be a square of sufficient size for the convenient insertion of a cross mark."

The same equality of right and perfect balance are preserved in the fourth clause, by providing that the names of candidates for all other offices (that is, for offices other than those of Presidential electors) shall, in all cases, be arranged under the title of the office for which they are candidates, and be printed in the order of the votes obtained for the head of the respective tickets of the parties or bodies nominating at the last Presidential election, beginning with the party obtaining the highest vote, provided that in the case of parties not represented on the ballot at the last Presidential election, the name of the nominees of such parties shall be arranged alphabetically, "according to the party name or political appellation." At the right of the name of each nominee or candidate shall be printed "the name or appellation" of the political

party presenting or nominating him, and at the right of such "party name, or political appellation" there shall be a square of sufficient size for the convenient insertion of a cross mark.

It is clear that in all of the foregoing clauses, the phrases "party name" and "political appellation" are meant to signify the distinctions hitherto established, and there is nothing in the language of the statute, as thus far referred to, which indicates any intention to make the phrase "political appellation" an exchangeable equivalent for the phrase "party name." In fact, the phrase "party name" is separated from the phrase "political appellation" by the disjunctive conjunction "or," and thus emphasizes the absence of any intention on the part of the Legislature to deprive "a political body," claiming a "political appellation," of the right which had previously been secured to it by legislation interpreted by the courts, and to confine the right to "a party" strictly so called.

Continuing the examination of section fourteen, I find in clause five the provision that "whenever any candidate shall receive more than one nomination for the same office, his name shall be printed once, and the names of each political party so nominating him shall be printed to the right of the name of such candidates, as arranged in the same order as candidates' names are grouped, that is to say, in the order of the votes obtained by such party at the last preceding Presidential election, beginning with the party obtaining the highest vote."

This language might at first sight appear to be the introduction of a narrower thought by confining the right to "a party" strictly so called, were it not for the immediately succeeding sentences, which are as follows:

"If such candidate shall be nominated by any political party not represented on the ballot in the last Presidential election, the name of such parties shall follow the other names, and be arranged alphabetically, according to the party name or appellation. At the right of every party name, or political appellation, shall be a square of sufficient size for the convenient insertion of a cross mark."

Balance and equality of right are thus restored.

The sixth and seventh clauses are not relevant to the present discussion, relating, as they do, to blank spaces and votes upon constitutional amendments.

The eighth clause preserves equality of right by providing that the ballots shall be so printed as to give to each voter a clear opportunity to designate his choice of candidates by a cross mark in a square of sufficient size at the right of the name of each candidate, and upon the ballot may be printed instructions how to mark, and

such words as will aid the voter to do this. There is nothing in this clause which disturbs the equality hitherto preserved.

The ninth clause, consists of a proviso, by which a voter may designate his choice of an entire group of candidates for Presidential electors by one cross mark in a large square, which shall be placed at the right of the names of the candidates for President and Vice President at the head of such group, and such mark shall be equivalent to a mark against every name in the group. This does not narrow the interpretation hitherto placed upon the section as thus far analyzed, because in both clauses four and five, there are express provisions by which the nominees of any political party not represented on the ballot in the last Presidential election may be placed upon the ballot, "according to the party name or political appellation," and it is observable that the provisions of clause four relate to candidates for all "other offices," meaning thereby other offices than those of Presidential electors. The full intention of the proviso is to give the voter a substituted method of voting from that designated in the immediately preceding clause.

I come now to the proviso contained in the tenth clause of section fourteen, which in express terms states: "That each voter may have the opportunity of designating his choice for all the candidates, as nominated by one political party, there shall be printed on the extreme left of the ballot, and separated from the rest of the ballot, by a space of at least one-half inch, a list of the names of all the political parties or groups of nominees, represented on such ballot and presenting candidates to be voted for at such election."

It might appear upon the first reading of this language that here was the introduction of a narrower thought than that hitherto expressed, and a limitation of the right to "a party" strictly so called, were it not for the introduction of the words "each voter" at the beginning of the sentence, and of the words "or groups of nominees" immediately following the phrase "political parties." The words "groups of nominees" cannot mean a printing of the names of candidates upon the extreme left of the ballot. Such an interpretation would clearly be out of harmony with the other provisions of the statute. The words themselves are indeed obscure, as was conceded by counsel on both sides upon the argument. I shall not attempt to give them a strained construction, but it is certain that the clear and harmonious provisions of the section cannot be over turned by words of doubtful import; this would be to make darkness conquer light. The meaning becomes plain once more and the balance is restored by the language which immediately follows that above quoted. It is as follows:

"Such names shall be arranged in the order of the votes obtained, at the last Presidential election, by

the candidate at the head of the respective tickets of the parties or bodies nominating, beginning with the party that received the highest vote."

The introduction of the words "or bodies nominating" and the use of the disjunctive conjunction "or" clearly indicate that the phrase "bodies nominating" is not to be read in the sense of a mere repetition of the thought embodied in the word "parties" immediately preceding the word "or," but constitutes a maintenance of the distinction hitherto observed and never deviated from in the statute between "parties" and "bodies nominating."

This view is confirmed by the remaining language of the clause: "Following the names of such political parties, shall be the names of the parties or principles not presented on the ballot at the last Presidential election, arranged alphabetically, according to the party name or political appellation."

Here again appears the phrase "political appellation," contrasted with the phrase "party name," and thus is the balance or equality of right again restored.

Then follows the all important provision: "A square of sufficient size for the convenient insertion of a cross mark, shall be placed at the right of each party name or appellation. Every mark within such square shall be equivalent to a mark against every name designated by that political appellation, or party name, including candidates nominated by more than one party, or group of citizens." The question discussed is definitely answered here. This provision is more emphatic than any of those preceding, not only because of the specific directions, amounting to a mandate, that a square of sufficient size for the insertion of a cross mark "shall be placed at the right of each party name or appellation," but because of the repetition, in the provision as to the effect of such mark within the square, of the phrases "political appellation or party names." The thought is still further pointed and sharpened by the use of the concluding words "including candidates nominated by more than one party, or "group of citizens." From this it is apparent that the words, "group of citizens" must be contrasted with the preceding phrase "one party." To reach any other conclusion would be to throw the entire statute out of joint.

I have examined finally the instructions to be printed at the head of every ballot. "To vote a straight party ticket mark a cross (X) in the square opposite the name of the party of your choice, in the first column. A cross mark in the square opposite the name of any candidate, indicates a vote for that candidate."

I am well aware that the introduction of the word "party" between the words "straight" and "ticket" is a departure from the language of the fourteenth section of the act of 9th of July, 1897,

the proviso there being that "a voter may designate his choice of all the candidates of a political party by one cross in the circle above such column, and such mark shall be equivalent to a mark against every name in the column," and that "there shall be printed above each column of candidates of a political party or body a circle three-fourths of one inch in diameter, and there shall be printed around but without the circle the following words: 'For a straight ticket mark within this circle,'" I cannot conclude that the introduction of the single word "party" in the last clause of a section consisting of twelve clauses, shall operate as a virtual destruction of all of the carefully adjusted balances established and maintained throughout ten clauses of the section, and existing throughout the entire body of the ballot law, viewing it as a whole. To put pressure upon a single word to accomplish such a result would be to over strain the statute to the breaking point.

I am well aware that it is the office of a proviso to operate as a limitation upon the generality of the preceding enacting clauses, but a proviso can never become operative as a repeal of a statute, for a proviso repugnant to the body of a statute is undoubtedly void. To hold otherwise would be to impute to a Legislature the folly of specific enactment and of immediate repeal. Repeal by implication is never favored by the courts unless the implication be so express and positive as to be unmistakable, and a proviso, moreover, even if given its full force and effect, must be limited in its operation. It cannot go to the length of annulling the statute. The Supreme Court, speaking by Mr. Justice Clark, in the case of *West Branch Broom Company vs. Lumber and Land Company*, 121 Pa., etc., 139, said: "It is a general principle in the construction of statutes that a proviso or saving clause, which is directly repugnant to the body of the act, will not have effect to defeat the purpose of the enactment." The same view was taken in *Dugan vs. The Bridge Co.*, 27 Pa. S. 303.

It is self-deceptive to argue that because of a failure to nominate candidates for offices to be voted for throughout the State, a purely local body of citizens has no right to a square in the first column of the ballot in a district election. A local body cannot claim to be a party in the proper sense. Limited in its purposes, limited as to the territory in which it proposes to operate, it can assert no right to nominate candidates to be voted for throughout the Commonwealth. Being a local and temporary body, it can neither create nor acquire a right to be a State party beyond the confines of the electoral district in which it exists. If it made such a claim, it would be futile. This has been expressly decided by Judge Simon-ton in the case of *Hendly vs. Reeder*, confirming the decision in *Crow Anti-Combine Party Nomination Paper*, 5th District Reports, 665, to the effect that it was not the purpose of the ballot act to enable local

factions or candidates to promote their political interests by duplicating nominations for electoral and State offices. It is clear that if it can create or acquire no rights by nominating a full State ticket, it can lose no rights by its failure to do so. Its right to a square depends, not upon the boldness of its claims or its moderation and forbearance, but on the terms of the law. The law does not give the square only to parties in the strict sense, but, says that it shall belong alike to parties and to those bodies having a political appellation making nominations by nomination papers.

It follows that the incompleteness of the ticket from a general point of view does not affect its validity or legality within the district to which it properly confines itself. The statute takes a broad and equitable view, maintaining that equality of right which promotes the spirit and letter of the Constitution. It denies to no body of citizens the right which it confers on parties. It merely points out the different methods in each case by which the same right to vote is to be secured.

I, therefore, conclude, after a careful consideration of the matter, that the introduction of the word "party" in the last clause in section fourteen, embodying the instructions to be placed at the head of the ballot, does not operate to control, limit and annul the distinctions previously established by statute, by the decisions of the courts, and carefully maintained throughout the preceding clauses of section fourteen of the act of 29th of April, 1903, and existing elsewhere throughout the statutes which constitute our system of ballot law. I, therefore, instruct you that a body of citizens nominating a candidate for Congress, or Senator or Member of the House of Representatives in the General Assembly, or a judge or other candidate or set of candidates to be voted for in only one district or county, but making no nominations for State officers, who are to be voted for throughout the entire State, is entitled to a square in the first column of the official ballot as certified from your Department under the ballot act of June 10, 1893, as amended by the several subsequent acts, particularly the act of April 29, 1903.

It is not correct, however, to designate it under a "party name." It must be under a phrase consisting of not more than three words and properly selected as a "political appellation."

In the Dauphin county case which was argued before me, it is to be observed that while a full State ticket has not been nominated by the political body terming itself Anti-Machine, yet it has nominated a candidate for judge, to be voted for in the electoral district of Dauphin. A judge is beyond doubt a State officer. The term "officers," as used in the fifth section of the act of 1893, and as repeated in the later acts, includes judges as well as Senators and Representatives in the General Assembly. Such has been the uniform

ruling of this Department, notably in an opinion delivered by Attorney General Hensel in the case entitled "Certificates of Nomination Papers" delivered February 17, 1894, and confirmed by an opinion of Deputy Attorney General Reeder, entitled "In re Nomination Certificate Charles L. Hawley," delivered September 9, 1898. See Amended Ballot Law and Decisions of the Court of Dauphin County and Opinions of the Attorney General relative to the Baker ballot law, compiled by W. W. Griest, Secretary of the Commonwealth, 1902, pp. 199-206).

This is particularly true because of the express statutory provision in these words: "including those of judges and Senators." A judge is in every sense of the word a State officer, the certificate of his nomination, if made by a party, or his nomination paper, if made by a political body less than a party, must be filed with the Secretary of the Commonwealth, and not with the county commissioners.

The judges are all paid out of the State Treasury, and the judges in Dauphin county are particularly charged by statute with the transaction of the State's business.

In making a nomination for the office of judge alone, but in failing to make nominations for State officers who are to be voted for throughout the entire State, the rights of voters can not be impaired, for the full power has not been exhausted. The case falls within the ruling of the Supreme Court in the case of Gearhart township election, 192 Pa. S. Reports, page 446. There the Republican column in the ballot contained the name of only one candidate for an office, and the Democratic column contained the names of two candidates, and two persons were to be elected. It was held by the Supreme Court that a voter might make a cross in the circle at the head of the Republican column, and might also make a cross in the square opposite the name of one of the Democratic candidates for the office. Chief Justice Sterrett delivered the opinion of the court and in doing so used these words: "In the case before us, the Republican column on the ballot was incomplete. Two persons were voted for and elected to the office of supervisor. The name of only one person for that office was in said column, while the names of two persons for the same office were in the Democratic column. By voting the Republican ticket by placing a cross in the circle, the voters had not exhausted their privileges, and they therefore had the undoubted right of voting, as they did, for one candidate for supervisor in the Democratic column."

This opinion was by an undivided court, consisting of the Chief Justice, and Justices Green, Mitchell, Dean and Fell.

Applying the principle announced in this decision to the case in hand, it is clear that a voter by placing a cross in the square to the right of the political appellation Anti-Machine as printed in the

left hand or first column of the official ballot, does not exhaust his privileges of voting for the candidates of the various political parties for State officers to be voted for throughout the Commonwealth. He must be careful, however, having marked his cross in the square to the immediate right of the political appellation Anti-Machine as contained in the left hand or first column of the official ballot, to mark a cross in the squares to the right of the names of the candidates of his choice for the respective State officers to be voted for throughout the entire Commonwealth. He cannot place a cross within another one of the squares to the right of the party names contained in the first left hand column of the official ballot; in other words, he cannot vote two squares in the left hand column without invalidating his vote for the candidates who would be thus duplicated.

HAMPTON L. CARSON,
Attorney General.

OPINIONS GIVEN TO THE AUDITOR GENERAL.

COLLATERAL INHERITANCE TAX—ATTORNEYS FOR COLLECTION—
APPOINTMENT OF—RESPONSIBILITY FOR—ACT OF MAY 6, 1887.

Under the act of May 6, 1887, P. L. 79, either the register of wills in a county or the Auditor General may appoint attorneys for the collection of collateral inheritance tax. There is no room for a double appointment, and therefore whichever appointment has priority in time is effectual.

The responsibility for the acts of such counsel in the collection of collateral inheritance tax rests on the party appointing him, and therefore the register of wills would not be responsible for the acts of the appointee of the Auditor General.

Office of the Attorney General,
Harrisburg, Pa., March 11, 1903.

Hon. E. B. Hardenbergh, Auditor General:

Sir: From the correspondence between yourself and George A. Stengel, register of wills of Allegheny county, which you have submitted for my opinion, copies of which Mr. Stengel has also sent to me for a similar purpose, as well as from the written statement as to the custom which has hitherto prevailed, I gather the following facts:

For sometime past, until recently, there had been employed in the office of the register of wills of Allegheny county three attorneys and three clerks to look after the business of the Commonwealth in the collection of collateral inheritance tax. On December 30, 1902, just prior to the assumption of office by Mr. Stengel as register of wills, you notified him that it had been necessary in the past, in order to facilitate the collection of the collateral inheritance tax and bring to the Commonwealth the largest return, for your Department to place in the Register's office a force of clerks and to employ special counsel to assist in this particular work, and you desired to notify him, as the incoming register, that you had appointed a chief clerk and two assistants for the ensuing year, and that you had appointed a law firm to represent the Auditor General's Department in the register's office as special counsel for the Commonwealth.

To this Mr. Stengel replied that when he assumed the duties of the office of register of wills he would be responsible to the public and to his sureties for the faithful performance of the duties thereof, which included the collection and transmission of the collateral tax, and stating that he was unable to find any act which authorized the Auditor General to appoint clerks or others to assist him in per-

forming these duties, and asking for information as to the authority you claimed to exercise, insisting that, in the absence of any law to the contrary, the work should be done by persons of his own selection and responsible to him.

Thereupon an invitation was extended by you to Mr. Stengel to call at the Department when an endeavor would be made to give the desired information, and to arrange for the care of the State's interests in an economical manner. Before the receipt of this invitation, by a letter which evidently crossed yours, Mr. Stengel informed you that he had appointed an attorney to act as counsel and a clerk to take charge of that branch of official business which related to the collection of the collateral tax, and suggesting that you, as Auditor General, make allowances of salaries at the rates theretofore paid. To this you replied by referring him to your former communication.

The matter stood there until recently, when a bill for legal services for the month ending January 31, 1903, was presented by the counsel chosen by Mr. Stengel, as well as a charge for clerk hire. You approved of the charge made for the clerk, he being one of those appointed by yourself, but you refused to allow the charge made for counsel, taking the ground that the appointee of Mr. Stengel, in view of the notice to him of your prior appointment, was his private counsel and not counsel for the State. Mr. Stengel insists that his appointee is in no sense his private counsel, but was employed under the authority of section 15 of the act of May 6, 1887.

My opinion has been requested by you as Auditor General and by Mr. Stengel as register of wills as to your respective rights and power in the premises.

The answer depends upon the interpretation of several acts which are *in pari materia*. The act of 17th of April, 1861, (P. L. 371), entitled "An act to facilitate the collection of debts due the Commonwealth" provides that "whenever, in the opinion of the Auditor General or Attorney General, the interests of the Commonwealth require it, they or either of them shall have power to employ the services of resident attorneys, to assist in the prosecution and trial of causes and the prosecution of claims, for which services such reasonable compensation as the circumstances will justify, or as may have been agreed upon, shall be allowed by the Auditor General."

This was followed by the act of May 6, 1887, (P. L. 79), entitled "An act to provide for the better collection of collateral inheritance taxes." After designating the estates subject to the payment of collateral inheritance tax, and making it the duty of executors or administrators or trustees to make payment thereof, and other provisions as to notice to the register of any estates subject to tax, it is provided by section nine that it shall be the duty of any executor or administrator, on the payment of the tax, to take duplicate

receipts from the register, one of which shall be forwarded forthwith to the Auditor General, whose duty it shall be to charge the register receiving the money with the amount, and seal with the seal of his office, and countersign the receipt and transmit it to the executor or administrator; whereupon it shall be a proper voucher in the settlement of the estate, but in no event shall any executor or administrator be entitled to a credit in his account unless the receipt is so sealed and countersigned by the Auditor General.

By the twelfth section it is made the duty of the register to appoint an appraiser to fix the valuation of estates which are or shall be subject to the tax, and returns made by the appraiser so appointed are to be entered in a book to be kept by the register of wills; and it is made the duty of such register to transmit to the Auditor General, on the first day of each month, a statement of all returns made by the appraiser during the preceding month, which statement shall be entered by the Auditor General in a book to be kept by him for that purpose. Taxes unpaid within the year may be collected by proceedings in the orphans' court, upon the application of the register, by bill or petition, and should the register discover that any collateral tax has not been paid over according to law, the orphans' court is authorized to cite the parties liable to file an account or to show cause why said tax should not be paid. The act then provides "and it shall be the duty of the register or of the Auditor General, to employ an attorney of the proper county to sue for the recovery of the amount of such tax; and the Auditor General is authorized and empowered, in the settlement of accounts of any register, to allow him costs of advertising, and other reasonable fees and expenses, incurred in the collection of taxes."

Under the sixteenth section the registers of wills are constituted the agents of the Commonwealth for the collection of the collateral inheritance tax; and for services rendered in collecting and paying over the same the said agents are to be allowed to retain for their own use such percentage as may be allowed by the Auditor General, not exceeding five per centum on all taxes paid and accounted for. By the seventeenth section it is provided that the register shall give bond to the Commonwealth in such penal sum as shall be directed by the orphans' Court of the proper county, with two or more sureties, for the faithful performance of the duties thereby imposed and for the regular accounting and paying over of the amounts to be collected and received, and said bond on its execution and approval by the orphans' court is to be forwarded to the Auditor General. These provisions display the relations occupied toward each other of the offices of Auditor General—a State office—and of register of wills—a county office—in regard to the duty of collecting the collateral inheritance tax. The relationship is still further controlled by a later act.

By the act of 15th of July, 1897, (P. L. 291), it is provided that, in the settlement of accounts and in the monthly returns of county officers required by law to be made to the Auditor General, the Auditor General shall have authority and power to devise the form of voucher, statement or return to be used, and to prescribe the requirements to be contained in the same, to the end that the public accounts can be adjusted and audited to the best interests of the Commonwealth; and by the second section he is empowered, as necessity may require, to appoint one or more expert accountants to examine the accounts of county officers, the necessary compensation to be paid upon filing vouchers on warrants drawn by the Auditor General.

Reading these acts together, and observing that the specific authorizations and powers—at times joint, at times several—are all bestowed for a common purpose, I am of opinion that the appointment made by you of clerks and of a firm of attorneys to perform services in the matter of the collection of the collateral inheritance tax, in connection with the office of register of wills in Allegheny county, was an appointment entirely within your powers, and one expressly authorized by the language of the fifteenth section of the act of May 6, 1887. That act in terms authorizes either the register or the Auditor General to employ an attorney for such a purpose, and your appointment having been made at a time when there was no existing appointment on the part of the register to conflict with it, gives it priority of operation. There is no power either express or implied on the part of the register to refuse recognition to your appointees, nor can he remove them. Had the appointment by the register preceded an attempted appointment by yourself, the conditions would have been reversed and an appointment by the register would have stood and yours would have been obliged to yield.

I do not see, under the act of 1887, room for double appointments, as it would prove burdensome to the public service to sustain so many agents at the expense of the State. The power to make the appointment was vested in either yourself or the register. Its exercise was open to both of you, and whichever one acted first pre-occupied the ground. The ground being so occupied, I see no room for an additional appointment, which would necessarily come in conflict with one already made. I am therefore of opinion that your action in refusing to recognize the right of the register to appoint an attorney in his own behalf was proper, particularly as his appointment was made after full notice of your prior appointment.

The basis of the contention of the register, as I understand it, is that in some way he would be responsible for the acts of counsel in the collection of the tax, inasmuch as he is the agent of the State for the collection of the tax from decedents' estates, and hence ought

to control the selection of counsel. This is a mistaken view of his agency which is special and not general. His agency primarily consists of the duty of collecting and forwarding the tax from executors and administrators paid without suit, and his responsibility is coextensive, but does not extend to taxes withheld or in arrear. The money not having come into his hands, he cannot in any way be responsible for it. It is the very fact that the tax is withheld and that suit is necessary which makes the appointment of an attorney proper, and the power of appointment being lodged under the statute either in the Auditor General or in the register, would impose responsibility solely upon the party so appointing counsel, for whom the counsel would then stand as agent and the appointing power as principal. Under no line of reasoning, from this point of view, could the register be responsible for the acts of attorneys not appointed by himself, nor could he be responsible for moneys which did not come into his hands.

Very respectfully,

HAMPTON L. CARSON,

Attorney General.

QUARTERLY REPORTS OF NORMAL SCHOOLS.

Under the act of 18th of July, 1901, the practice hitherto pursued of requiring the State Normal Schools to show a deficit in the maintenance account before they are entitled to receive the State appropriation is inapplicable, because that would be to deny force and effect to the express terms of the act requiring equality of distribution between the thirteen normal schools of the State.

Office of the Attorney General,
Harrisburg, Pa., June 2, 1903.

Hon. E. B. Hardenbergh, Auditor General:

Sir: I have considered your letter, stating that it has been the practice of your Department for many years to require the fiscal officers of the various State Normal Schools of Pennsylvania, in making their quarterly reports to your Department, to show an excess of expenses over receipts before issuing a warrant to the institution for its appropriations. Is any change in this practice required because of the act of 18th of July, 1901, (P. L. 685)?

The act consists of but a single section and is as follows:

“That the sum of two hundred and sixty thousand dollars, or so much thereof as may be necessary, be and the same is hereby specifically appropriated to the several State Normal Schools, organized and accepted as such under the laws of this Commonwealth, for the two fiscal years beginning June first, one thousand nine hundred and one, for the purpose of maintenance.

“Said appropriation to be distributed equally among the thirteen State Normal Schools of the Commonwealth.”

In my judgment the statutory requirement that the appropriation is to be distributed equally among the thirteen State Normal Schools overrides the force and effect of the words “so much thereof as may be necessary,” contained in the first clause of the section. The act in effect amounts to a specific appropriation of \$10,000 a year to each Normal School, without regard to the number of pupils or the necessities of the institution. Equality of distribution is in terms imposed by the act, and the law leaves you no discretion in the matter. Practically you are a disbursing officer of the Commonwealth without authority in this instance to judge of the amount that each school requires. Under this act State Normal Schools are not to be treated according to the method observed as to the various charitable institutions of the State, appropriation to which is made largely upon the understanding that the entire amount appropriated is necessary for maintenance, and hence a supervisory power over such appropriations is necessarily placed in the hands of the Auditor General.

I am of the opinion that the practice hitherto pursued of requiring the State Normal Schools to show a deficit in the maintenance account before they are entitled to receive the State appropriation is inapplicable under the act of 18th of July, 1901, because that would be to deny force and effect to the express terms of the statute requiring equality of distribution.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

AUDITOR GENERAL'S DEPARTMENT.

The Chief of the Department of Mines has the power to enter into a contract with a former Mine Inspector to make a report which was essential to the information of the Mine Department, and the Auditor General should issue a warrant for the amount agreed upon by the Chief of the Bureau of Mines for such service.

Office of the Attorney General,
Harrisburg, Pa., June 18, 1903.

Hon. E. B. Hardenbergh, Auditor General:

Sir: I have considered the matter of your communication of the 10th inst., in relation to the issuance by your Department of a warrant in the sum of one hundred dollars, presented by James Tinley, mine inspector, and approved by James E. Roderick, Chief of the Bureau of Mines, for services rendered by Edward Brennan on the 31st of March, 1903, in making an annual report for the year 1902.

The duties of anthracite mine inspectors are fully set forth in the acts of June 2, 1891, (P. L. 156); July 15, 1897, (P. L. 279), and June 8, 1901, (P. L. 535), the latter being an amendment of the act of 1891. The mine inspector is required to make annual reports, quarterly reports and special reports, and there is no mention in any of these acts for any compensation for performing this duty. It appears that Mr. Brennan went out of office through the expiration of his term on December 31, 1902, without making a report, and presumably having been paid in full. His successor was unable to make a report, not having the necessary information, and the Chief of the Bureau of Mines, requiring the special information which was alone in the possession of Mr. Brennan, employed him for the sum of one hundred dollars to make a report for the year 1902, dealing with him in this respect as one no longer in the employ of the Commonwealth. Whatever misconception of duty there was on the part of Mr. Brennan, and whatever steps might have been taken during the time of his continuance in office to secure the report, it is now useless to consider. I am of opinion that if the Chief of the Bureau of Mines deemed it necessary to secure the information, and could only obtain it by a special contract, made with one who was no longer in the service of the Commonwealth, and who alone had the needed information, it was entirely within his power to do so. I am of opinion, therefore, that you can properly, under the circumstances issue a warrant in payment of this bill.

I herewith return the papers.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

AUDITOR GENERAL'S DEPARTMENT.

Where the State enters into an agreement with a county, by which the State was to pay one-fourth of \$3,000 and the county three-fourths, and the State complies with its part of the agreement and the county repudiates its part, and the claimant seeks to have payment of the remaining three-fourths by the State, such payment should not be made.

The county is the fiscal agent of the State in collecting taxes, and services rendered by the county solicitor in collecting such taxes are not properly chargeable to the State.

Office of the Attorney General,
Harrisburg, Pa., July 9, 1903.

In re claim of Charles A. Snyder, of Schuylkill county, for \$2,250 as payment for services rendered in the collection of tax claims.

Hon. E. B. Hardenbergh, Auditor General:

Dear Sir: I have examined the statement of Mr. Snyder's claim, submitted by you to me, with a request for my opinion.

After a full consideration of the facts of this case I fail to see any legal way in which this claim can be allowed by you as Auditor General. As I understand the facts, the original agreement was that the county should pay three-fourths of the \$3,000, and the State should pay the remaining one-fourth. The State has paid its one-fourth, \$750, and the county having repudiated its part of the alleged contract, the claimant now seeks to require payment of the remainder by the State. The county is the fiscal agent of the State for the purpose of collecting taxes within its borders, and the fact that the claimant was the county solicitor at the time that the services alleged were rendered has been duly considered in this connection. I have no doubt whatever that the work rendered was worth the amount charged, yet I cannot see how you would be justified in approving of a payment of the amount of this claim under the statement of facts made by Mr. Snyder himself.

I return herewith the papers submitted.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

GENERAL MEREDITH'S MONUMENT.

The repose of the dead is a principle to be carefully observed, so as not to offend against the wishes of the living relatives; but if they concur or themselves take steps to change the location of a grave, there is no one to restrain them, provided there be unanimity among them.

Such removal should not be undertaken by the trustees of the Meredith Monument Association, nor should the monument provided for by the act of May 15, 1903, P. L. 419, be erected before the heirs have acted.

Office of the Attorney General,
Harrisburg, Pa., July 23, 1903.

Hon. E. B. Hardenbergh, Auditor General:

Sir: In relation to the correspondence which you have submitted, concerning the erection of a monument at the grave of General Samuel Meredith and the removal of his remains to a suitable lot in the village of Pleasant Mount, Pennsylvania, permit me to state that I think the proper order of procedure would be for his living heirs and the members of their families to formally remove his remains to a lot in the village before the monument is erected, and then the monument can be properly erected at the new site. I do not think this removal should be undertaken by the association, nor that the monument should be erected before the heirs have acted. The repose of the dead is a principle to be carefully observed, so as not to offend against the wishes of the living relatives, but if they concur or themselves take steps to change the location of a

grave, there is no one to restrain them, provided there be unanimity among them. Such being the case, I can perceive no difficulty in this instance of getting the heirs to act, in the first place, and then the question of the situs of the monument becomes easy of determination.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

FINES COLLECTED UNDER SABBATH OBSERVANCE ACT.

The fines collected under the Sabbath Observance Act of 1794, by the terms of the act of May 15, 1850, P. L. 773, are payable into the State Treasury, therefore the Auditor General should see that the same are collected, and for such purpose may employ counsel.

There is no authority of law for a magistrate having once imposed a fine, to remit the same.

Office of the Attorney General,
Harrisburg, Pa., August 1, 1903.

Hon. E. B. Hardenbergh, Auditor General:

Sir: In reply to your communication of the 29th inst., asking me to advise you whether the fines imposed by magistrates in accordance with information communicated to you should be remitted to the State Treasurer, and whether the Auditor General's Department has jurisdiction in a matter of this description, let me point out that the act of 15th of May, 1850, (P. L. 773), in section six, provides "that the penalty inflicted by the first section of the act of Assembly, entitled 'An act for the prevention of vice and immorality and unlawful gaming, and to restrain disorderly sports and dissipations,' shall hereafter be paid into the Treasury of the Commonwealth of Pennsylvania for the use of the Sinking Fund."

Under this act it is clear that the fines collected, or which ought to be collected, under the Sabbath observance act of 22d of April, 1794, (3 Smith's Laws, pages 177-183), should be paid into the State Treasury. I find no acts of Assembly amending the act of 1850 above quoted.

The fines being payable to the State Treasurer, the Auditor General has jurisdiction to see that the same are collected, and for that purpose, if he so desires, under authority of the act of Assembly of April 17, 1861; (P. L. 371), may employ counsel.

There is no authority of law for a magistrate, having once imposed a fine, to remit the same.

The facts upon which this opinion is based are as follows:

It is alleged that five druggists in the borough of Wilkesburg have combined under the name of "The Druggists' Association of Wilkesburg," for the purpose of resisting the enforcement of the

act of 1794, regulating Sunday observance. Their method of procedure is to appear with their employes at an early hour on Monday morning before some friendly magistrate in or near Wilkinsburg and have information made against themselves for violation of the Sunday law, and then, having gone through the regular proceedings of entering bail, having a hearing fixed and testimony taken, they enter a plea of guilty. The magistrate then fines each of them \$25 and costs, promptly remits the fine upon the payment of costs, thus enabling these druggists to carry on their business each Sunday simply upon the payment of nominal costs. The effect is that, when the druggists are arrested for the breach of law, and testimony proving their guilt has been placed before the magistrate, the druggists interpose a transcript of their former conviction in bar to conviction upon the ground of former jeopardy. The names of the magistrates before whom these informations have been made are known, and the matter is one which demands action in order to recover for the State the amount of fines improperly and illegally remitted.

I am clear that a magistrate has no power to remit a fine; that the remission of a fine is an act of pardon which is vested entirely in the Governor, and having once imposed this penalty the magistrate cannot, by any act of his, relieve the defendant from its payment. It follows, as a necessary consequence, that the magistrate should account to the State for all moneys due it, as shown by said act.

I herewith return the letter addressed to you, and which you referred to me.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

AUDITOR GENERAL'S DEPARTMENT—BOARD OF EXAMINERS OF INSPECTORS OF MINES.

The claim for services of the Board of Examiners of Inspectors of Mines in the Second Anthracite District in the examination made necessary by a vacancy caused by the resignation of E. H. Roderick, Mine Inspector, should be paid, because the limitation of the act of 1903, fixing the session of the Board at twenty days did not go into effect before the sitting of the Board. The Board did not sit twenty days after said act went into effect.

In the matter of the claim of the Board of Examiners of Inspectors of Mines in the Second Anthracite District, for payment for services rendered in the examination held at Scranton and extending from March 28th to May 27th, 1903.

Office of the Attorney General,
Harrisburg, Pa., Sept. 10, 1903.

Hon. E. B. Hardenbergh, Auditor General:

Sir: I have examined the papers submitted and herewith enclosed, and am of the opinion that the claim should be allowed and the

proper steps taken to insure its payment. The work was made necessary by a vacancy occurring in the Second Anthracite District through the resignation of E. H. Roderick, mine inspector, and was, in point of fact, actually performed.

At the time the work was done there was nothing in the statute law of the State which limited the number of days during which the examination should be held. On or about the 16th day of May, 1903, during the progress of the examination in question, the general appropriation bill of 1903 was signed by the Governor and became a law. By a clause attached to the appropriation, made for the purpose of paying the expenses of these examinations, they were limited in time not to exceed twenty days. The bill for the expenses of conducting this examination, not having been presented prior to the first of June, could not be paid out of the old appropriation made in 1901.

I understand that you entertain a doubt as to your right to pay this bill out of the appropriation made by the Legislature of 1903 because the time limit of the examination, for which the Board of Examiners of Inspectors of Mines is now asking to be paid, exceeds the time limit fixed by the act of 1903.

After a careful examination I am of opinion that the claim should and can be legally paid notwithstanding this limitation, inasmuch as the time the Board was in session, subsequent to the passage of the act, was less than twenty days. In other words, that the limitation contained in the act of 1903 should not be held to apply to the work performed prior to the date upon which it became a law.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

CAPITAL STOCK TAX—CORPORATIONS—CAPITAL STOCK—BONUS—
ACTS OF MAY 9, 1899, JUNE 8, 1891, AND JUNE 8, 1893.

A corporation organized under the act of May 9, 1899, (P. L. 261), is liable for the capital stock tax imposed by the acts of June 8, 1891, (P. L. 231), and June 8, 1893, (P. L. 353), and to a bonus of one-third of one per cent. upon the amount of its capital stock actually employed or to be employed wholly within the State, and a like bonus upon each subsequent increase of capital so employed.

October 30, 1903.

Hon. E. B. Hardenbergh, Auditor General, Harrisburg:

Sir: You asked me to advise you whether a company organized under the provisions of the act of May 9, 1899, (P. L. 261), is liable for a capital stock tax imposed by the provisions of the act of 1891 and its supplement passed in 1893.

Upon an examination of the revenue acts of June 8, 1891, (P. L. 231), and June 8, 1893, (P. L. 353), as well as of the act of May 9, 1899, (P. L. 261), as amended by the act of May 8, 1901, (P. L. 149), I am

satisfied that limited partnerships created under the latter act and its amendment are subject to the provisions of the revenue acts already referred to. The language of the acts pertinent to this question is plain, explicit and unambiguous. An examination of Whitworth's book on "Taxation for State Purposes in Pennsylvania" discloses but a single reference to this matter, as follows:

"Joint stock associations and limited partnerships have no capital stock in the common acceptance of the term, but every partner has a certain proportional interest in the assets of the company. The proviso to the first section of the act of 1893 declares that such interest for the purpose of taxation 'shall be deemed to be capital stock and taxable accordingly.'"

(Section 29, page 74.)

Commonwealth vs. N. Y. P. & O. R. R., 188 Pa. State, 169.

Commonwealth vs. National Oil Company, 157 Pa. State, 516.

Commonwealth vs. Sanderson & Robb Company, 3 Dauphin Co. R., 116.

Commonwealth vs. Sandy Lick Gas Coal Company, 1 Dauphin Co. R., 314.

Such an association would be liable also to pay a bonus of one-third of one per centum upon the amount of its capital actually employed or to be employed wholly within the State, and a like bonus upon each subsequent increase of capital so employed.

The Auditor General and State Treasurer are authorized to settle in the usual manner and have collected an account against any such limited partnership or joint stock association. (Act of 8th of May, 1901, P. L. 150.)

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

JUDICIAL SALARIES ACT—CONSTITUTIONAL LAW—ART. III, SEC. 13, ART. V, SEC. 18, CONSTITUTION OF PENNSYLVANIA—ACT OF APRIL 14, 1903.

The act of April 14, 1903, P. L. 175, entitled "An act to fix the salaries of the judges of the Supreme Court, the judges of the Superior Court, the judges of the courts of common pleas and the judges of the orphans' court," by which the salaries of the judges were increased, is not in conflict with Art. III, Sec. 13, of the Constitution of Pennsylvania, which provides that "no law shall extend the term of any public officer or increase or diminish his salary or emoluments after his election or appointment," in so far as it applies to the salaries of judges whose commissions antedate its passage, and is operative as to the salaries of such judges.

Art. III, Sec. 13, must be so construed as to harmonize with Art. V, Sec. 18, which provides that judges "required to be learned in the law shall, at stated times, receive for their services an adequate compensation, which shall be fixed by law and paid by the State."

Art. III, Sec. 13, cannot fairly be construed as relating to the judiciary, because the terms of the judges are specifically fixed by the Constitution itself and are not within the power of the Legislature.

Office of the Attorney General,
Harrisburg, Pa., January 27, 1904.

Hon. E. B. Hardenbergh, Auditor General :

Sir: You have asked for my official opinion as to the construction to be placed on the act of Assembly of April 14, 1903 (P. L. 175), entitled "An act to fix the salaries of the judges of the Supreme Court, the judges of the Superior Court, the judges of the court of common pleas, and the judges of the orphans' courts," and you state that as in all probability you will soon be called upon to issue warrants in accordance with the provisions of this act, you desire an official opinion as to the constitutionality of said act. You also state that if, in my opinion, the judges in commission prior to the late election are not entitled to the increase of salary under this act, it is your wish to be advised whether any provisions of the act, such as monthly payments and salary for extra services rendered, etc., can be regarded as effective.

I have the honor to reply. The act of 1903 is a statute passed by both Houses of the Legislature and has been approved by the Governor. It is supported by a legislative appropriation sufficient to carry into effect its provisions in their entirety. It is constitutional in form, equal in its terms, and is upon its face free from objection. It was passed in obedience to a constitutional mandate that the judges of the Commonwealth shall receive an adequate compensation, and embodies a legislative declaration that the salaries thereby fixed are adequate. The plain corollary is that less than the amounts named are inadequate. The act directs that the salaries as fixed by the act shall be paid monthly from and after the 1st of January, 1904, and that warrants shall be drawn accordingly by you as Auditor General upon the State Treasurer.

There is nothing in the act, either by express direction or by exception, which limits its provisions to those judges who were commissioned after its date, or after the date fixed for the beginning of its operation. You are a ministerial and not a judicial officer, and you can very properly obey the law without hesitation until restrained by a judicial decree made by a court of competent jurisdiction upon a case properly and regularly brought before it.

I might in strictness let the matter rest here, but the occasion is an unusual one. The question affects the judges themselves and involves a delicacy though not a disability. Cases have occurred in the Supreme Court of the United States and in our own Supreme Court, where the judges were obliged to rule on matters affecting their own interests, not because they invited the jurisdiction, or did

not recognize and acknowledge the delicacy of their position, but because they could not escape the duty of judicial utterance. Without looking far for illustrations the cases of *Pollock v. The Farmers' Loan and Trust Company* (157 U. S., 429), and *Commonwealth ex rel. v. Mann* (5 Watts & Sergeant, 403), occur to me as apposite. They relate to taxes upon judicial salaries resulting in a diminution of salary, and to the constitutionality of an act repealing an act increasing salaries. The opinions of Chief Justice Fuller and Mr. Justice Field, following an example set by Chief Justice Taney more than thirty years before, and of Mr. Justice Rogers are full in their discussion of the matter in its relation to judges, and have been justly admired for their candor, firmness, and ability, while detracting not a particle from their reputation as upright magistrates. I perceive no inherent difficulty arising from a lack of jurisdiction in a judicial consideration of the question, if such should become necessary, although I can well understand the reluctance of anyone to require a judicial consideration of the matter, as well as of a court in considering it. Being myself without interest, and zealous to perform my duty under a sense of my official oath to support the Constitution, I shall express my views without hesitation, having reached them after a painstaking examination of the subject.

Before examining the provisions of our present State Constitution I shall deal with certain preliminary objections to an increase which, in my judgment, will not bear the test of criticism. The first of these is an impression that the increase of the salary of judges already in commission constitutes per se a legislative assault upon the independence of the judiciary; that it would be dishonorable in such judges to accept the increase; and that it would involve an undermining of the integrity and freedom of the bench. The second objection embodies the idea that a judge, in accepting a term with a definite salary attached to it at that time, enters into a contractual engagement with the State that he will serve out his term without an increase of salary. I shall deal with these propositions from a purely legal standpoint, confining my discussion primarily to the period antecedent to the adoption of the present Constitution of Pennsylvania.

So far as the Constitution of the United States is concerned, no well informed student of our institutions can successfully contend that, at any time since the adoption of the Constitution to the present day, there has been any legal apprehension that an increase of the salaries of judges in commission involved an assault either upon the integrity or the independence of the bench, or that it was dishonorable in such judges to accept the increase. The debates in the Constitutional Convention of 1787 concerning the article relating to the judiciary disclose much instructive and illuminating mat-

ter. Examination will reveal that all of the objections which now occur were present to the thoughts of the framers. It is interesting to observe the exact form in which the original proposition as to the increase or diminution of judicial salaries was presented to the consideration of the Federal Convention, and how, in the course of the debate, the different phases of the question were fully discussed and finally disposed of, resulting in the definite form embodied in the Constitution of the United States as adopted, which has prevailed from then until now without amendment or the suggestion of amendment.

Upon the 28th of May, 1787, Edmund Randolph, then the Governor of Virginia, afterwards Attorney General of the United States, at a later date Secretary of State in the cabinet of Washington, and in part the author of what has become known historically as "The Virginia Plan," proposed for the consideration of the convention a resolution which was couched in these terms: "Resolved, That a national judiciary be established; to consist of one or more supreme tribunals, and of inferior tribunals; to be chosen by the national legislature; to hold their offices during good behavior, and to receive punctually, at stated times, fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution."

This proposition embodied in precise form the full expression of the thought that judges actually in commission should not be affected either by an increase or a diminution of salary, and presented it sharply to the consideration of the Convention. In the draft of the plan of the Federal Government presented by Charles Pinckney, of South Carolina, which has become known historically as "The Pinckney Plan" the thought was presented in substantially the same shape but was more concisely expressed. It read as follows: "The judges of the courts shall hold their offices during good behavior; and receive a compensation, which shall not be increased or diminished during their continuance in office." On the 5th of June, the matter being then before the Committee of the Whole, a resolution was agreed to in the following form: "To hold their offices during good behavior, and to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution." On the 14th of June, William Paterson, of New Jersey, subsequently an associate justice of the Supreme Court of the United States, laid before the Convention a plan which he proposed as a substitute for that of Mr. Randolph. This plan has become known historically as "The New Jersey Plan." The resolution relating to the judiciary was in the fol-

lowing form: "That a federal judiciary be established, to consist of a Supreme Tribunal, the judges of which to be appointed by the Executive, and to hold their offices during good behavior; to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution." On the 18th of June, Alexander Hamilton, of New York, read as a part of a speech to the Convention a sketch of a government in which the clause relating to the judiciary was as follows: "The supreme judicial authority to be vested in judges, to hold their offices during good behavior, with adequate and permanent salaries." (Elliott's Debates, Vol. V, pp. 128, 131, 192, 205).

With these various plans before the Convention as consolidated by the Committee on Detail, Gouverneur Morris, of New York, moved to strike from the clause "in which (salaries of judges) no increase or diminution shall be made so as to affect the persons actually in office at the time" the words "no increase." He thought "The Legislature ought to be at liberty to increase salaries as circumstances might require; and that this would not create any improper dependence in the judges." Benjamin Franklin was in favor of the motion. He said "Money may not only become plentier, but the business of the department may increase as the country becomes more populous." James Madison, of Virginia, expressed the view that "The dependence will be less if the increase alone should be permitted; but it will be improper, even so far, to permit a dependence. Whenever an increase is wished by the judges, or may be in agitation in the legislature, an undue complacency in the former may be felt towards the latter. If at such a crisis there should be in court suits to which leading members of the Legislature may be parties, the judges will be in a situation which ought not to be suffered, if it can be prevented. The variations in the value of money may be guarded against by taking, for a standard, wheat, or some other thing of permanent value. The increase of business will be provided for by an increase of the number who are to do it. An increase of salaries may be easily so contrived as not to affect persons in office." To this Gouverneur Morris replied: "The value of money may not only alter, but the state of society may alter. In this event, the same quantity of wheat, the same value, would not be the same compensation. The amount of salaries must always be regulated by the manners and the style of living in a country. The increase of business cannot be provided for in the supreme tribunal, in the way that has been mentioned. All the business of a certain description, whether more or less, must be done in that single tribunal. Additional labor alone in the judges can provide for addi-

tional business. Additional compensation, therefore, ought not to be prohibited."

On the question of striking out "no increase," Massachusetts, Connecticut, Pennsylvania, Delaware, Maryland and South Carolina voted "Aye"; Virginia and North Carolina, "No"; Georgia being absent. The whole clause, as amended, was then agreed to, *nemine contradicente*. (Elliott's Debates, Vol. V, pp. 330 331.)

On the 27th of August the article relating to the Judiciary being again under debate, Mr. Madison returned to his original idea, and, supported by Mr. McHenry, of Maryland, afterwards Secretary of War in the cabinet of Washington, moved to reinstate the words "increased or" before the word "diminished." Gouverneur Morris opposed it for reasons urged by him on a former occasion. George Mason, of Virginia, contended strenuously for the motion. There was no weight, he said, in the argument drawn from changes in the value of the metals, because this might be provided for by an increase of salaries, so made as not to affect persons in office—and this was the only argument on which much stress seemed to have been laid. He was replied to by Charles Cotesworth Pinckney, of South Carolina, who urged that the importance of the judiciary will require men of the first talents: large salaries will, therefore, be necessary, larger than the United States can afford in the first instance. He was not satisfied with the expedient mentioned by Colonel Mason. "He did not think it would have a good effect, or a good appearance, for new judges to come in with higher salaries than the old ones." Gouverneur Morris said: "The expedient might be evaded, and therefore amount to nothing. Judges might resign, and then be reappointed to increased salaries." The debate then closed, and on the question Virginia voted "Aye;" New Hampshire, Connecticut, Pennsylvania, Delaware and South Carolina voted "No;" Maryland was divided; Massachusetts, North Carolina and New Jersey were absent.

Again defeated, Mr. Madison made a third effort, which also proved ineffectual, to amend the article so that it might read "nor increased by any act of the Legislature which shall operate before the expiration of three years after the passing thereof." Upon this motion Maryland and Virginia voted "Aye;" New Hampshire, Connecticut, Pennsylvania, Delaware and South Carolina voted "No;" Massachusetts, North Carolina and Georgia being absent.

The result of the discussion, of motions to amend which were lost, and of the various amendments actually adopted, was a paring down of the original thought as presented by the Virginia, Pinckney and New Jersey plans, so as to present finally to the Convention for its consideration the following clause: "The judges, both of the Supreme and inferior courts, shall hold their offices during good be-

havior; and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

In this form the Constitution was ratified by the several States, and became the supreme law of the land. Thus it appears that though, as originally suggested by all of the plans of a national government, the thought was dominant that there should be no increase of judicial compensation applicable to the term of a judge then in commission; yet this thought was rejected upon mature deliberation, and language adopted finally which made it not only possible but entirely proper for a subsequent increase of judicial salaries equally applicable to judges then in commission and to judges thereafter to be commissioned.

It is clear that the framers of our national Constitution, after hearing the views of such men as Madison, George Mason and James McHenry, preferred to adopt those of Gouverneur Morris, Benjamin Franklin and Charles Cotesworth Pinckney, supported, too, by that consummate statesman, Alexander Hamilton. The Convention of the State of Pennsylvania on the adoption of the Federal Constitution met November 20, 1787. Among its members were James Wilson, Thomas McKean, Jasper Yeates, Anthony Wayne, William Findley, Frederick Augustus Muhlenberg and Timothy Pickering. Upon Wilson, who was the only member of the body who had been a member of the Federal Convention, fell the burden of explanation and defense. In the course of that series of extraordinary speeches which constitute according to George Ticknor Curtis "the most luminous exposition" of the work of the Fathers, he remarks: "I hear no objection made to the tenure by which the judges hold their offices; it is declared that the judges shall hold them during good behavior—nor to the security which they will have from their salaries; they shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." Thomas McKean, declared: "Three weeks have been spent in hearing the objections that have been made: and it is now time to determine whether they are of such a nature as to overbalance any benefits or advantages to the State of Pennsylvania by your accepting it. * * * The next objection is against the judicial department. 'The judicial power shall be vested in one Supreme Court.' An objection is made that the compensation for the services of the judges shall not be diminished during their continuance in office; and this is contrasted with the compensation of the President, which is to be neither increased nor diminished during the period for which he shall be elected. But that of the judges may be increased, and the judge may hold other offices of a lucrative nature, and his judgment be thereby warped. Do gentlemen not

see the reason why this difference is made? Do they not see that the President is appointed but for four years, whilst the judges may continue for life, if they shall so long behave themselves well? In the first case, little alteration can happen in the value of money; but in the course of a man's life, a very great one may take place from the discovery of silver and gold mines, in the great influx of those metals, in which case an increase of salary may be requisite. * * * Upon the whole, Sir, the law has been my study from my infancy, and my only profession. I have gone through the circle of offices, in the legislative, executive and judicial departments of the government; and from all my study, observation, and experience, I must declare that, from a full examination and due consideration of this system, it appears to me the best the world has yet seen." Elliott's Debates, Vol. II, pp. 489, 530, 539, 542.

Alexander Hamilton, in the 79th number of the *Federalist*, states with clearness the necessity for an increase in judicial salaries from time to time: "The enlightened friends to good government, in every State, have seen cause to lament the want of precise and explicit precautions in the State Constitutions on this head. Some of these indeed have declared that permanent salaries should be established for the judges; but the experiment has in some instances shown, that such expressions are not sufficiently definite to preclude Legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. The plan of the Convention accordingly has provided, that the judges of the United States 'shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office.' This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood that the fluctuations in the value of money, and in the state of society, rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant to-day, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the Legislature to vary its provision in conformity to the variations in circumstances; yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. * * * The salaries of judicial officers may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office, in respect to him. It will be observed that a difference has been made by the convention between the compensation of the president and of the judges. That of the former can neither be increased nor diminished, that of the latter can only not be diminished. This probably arose from the difference in duration of the respective offices. As the president is to be elected for no

more than four years, it can rarely happen that an adequate salary, fixed at the commencement of that period, will not continue to be such to its end. But with regard to the judges, who, if they behave properly, will be secure in their places for life, it may well happen, especially in the early stages of the Government that a stipend, which would be very sufficient at their first appointment, would become too small in the progress of their service."

No doubt as to the constitutionality of an increase of judicial salaries, even in the cases of judges then in commission, has since arisen to vex the halls of Congress or the deliberations of the courts. From time to time the salaries of the federal judges have been increased and the increase has been shared without objection or conscientious reluctance on the part of the judges in commission, the most recent act of Congress being that of 12th of February, 1903. Moreover, the correspondence, both public and private of justices of the Supreme Court of the United States, notably Chief Justice Marshall, Mr. Justice Story, Mr. Justice William Johnson and Mr. Justice Strong, display an entire freedom from doubt or objection on the part of the judges to accept an increase of salary.

So much, then, for the aspect of the question arising under the Constitution of the United States. I come now to the Constitution of Pennsylvania, passing over the Constitution of 1776, which was silent on the point. Among the members of the Pennsylvania Convention of 1790 were James Wilson, a signer of the Declaration of Independence, one of the framers of the Constitution of the United States, and an associate justice of the Supreme Court of the United States; William Lewis, a leader of the old bar of Philadelphia, of whom Horace Binney has written graphically; Thomas McKean, chief justice and later Governor of Pennsylvania; Thomas Mifflin, President of the Continental Congress, a member of the Federal Convention and subsequently Governor of Pennsylvania; Alexander Addison, a president judge in the western part of Pennsylvania, and the author of Addison's Reports; Albert Gallatin, subsequently Secretary of the Treasury; and Timothy Pickering, formerly of Massachusetts and subsequently Postmaster General and Secretary of State. These eminent men had before them as a model the Constitution of the United States.

The views of Wilson and McKean as expressed in the ratifying convention have been already quoted.

On the 9th of December, 1789, there was reported from the Committee of the Whole a resolution in the following form: "That the judicial Department of the Constitution of this Commonwealth should be altered and amended so that the judges of the Supreme Court should hold their commissions during good behavior, and be independent as to their salaries, subject, however, to such restrictions

as may hereafter be thought proper." The foregoing resolution was adopted and a committee of nine appointed to report a draft of a proposed Constitution, to which committee the resolution, as above quoted, was referred. That committee consisted, among others, of William Findley, Gen. Edward Hand, Mr. Justice James Wilson, Gen. Irvine, William Lewis, Thomas Ross and Alexander Addison. They reported as follows:

"The Chancellor of the Commonwealth, the judges of the Supreme Court and the common pleas judges shall be commissioned and hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office." This was amended in the Committee of the Whole to read: "The judges of the Supreme Court and the presidents of the several courts of common pleas shall, at stated times, receive for their services an adequate compensation, which shall not be diminished during their continuance in office." On a motion of William Lewis, seconded by Thomas Ross, this was further amended by the addition of the words "but they shall hold no other office of profit in this Commonwealth," and upon final consideration on motion of Mr. Sitgreaves, seconded by Thomas McKean, it was adopted in the following form: "The judges of the Supreme Court and the presidents of the several courts of common pleas shall, at stated times, receive for their services an adequate compensation to be fixed by law, which shall not be diminished during their continuance in office; but they shall receive no fees or perquisites of office, nor hold any other office of profit under this Commonwealth."

(Minutes of the convention of 1789 and 1790, pp. 149, 202, 256.)

In this precise form it became the second section of article V of the Constitution of 1790, and re-appeared in the same form in the amended Constitution of 1838. (Charters and Constitutions, by Ben: Perley Poore, Part II, pp. 1552 and 1561.) Placing the language of the Constitution of the United States and the Constitution of Pennsylvania of 1790 and 1838 side by side, it will be observed that they are identical in their provisions, with the exception that in the Constitution of Pennsylvania there is introduced the following phrase "an adequate compensation to be fixed by law," and the prohibition "they shall receive no fees or perquisites of office nor hold any other office of profit under the Commonwealth." "It cannot escape observation," as was said by Mr. Justice Rogers in the case of *Commonwealth v. Mann* (5 Watts & Sergeant, 403), "that there is an increased anxiety manifested by the Constitution of Pennsylvania to secure the independence of the judiciary by an injunction that there should be an adequate compensation for their services. In this respect the Constitution of Pennsylvania is an improvement on its great model.

* * *The framers of the Constitution of Pennsylvania did not order

simply a permanent salary, but directed an adequate salary to be provided, thereby securing, as far as human laws could do, the independence of the judiciary."

The thought expressed by the word "adequate" was first suggested, as has been seen, by Alexander Hamilton in his speech to the Federal Convention. It was not introduced into the Constitution of the United States, but it lodged in the minds of the members of the Pennsylvania Convention of 1790, and appeared, as has been shown, in the course of the debate and successive amendments of the judiciary article as presented to that body. I shall not stop at the present point to discuss the meaning or the force and effect of the word "adequate." That belongs to a subsequent part of this opinion, my purpose at the present time being to exhibit the exact historical and legal truth with regard to the attitude of great jurists, statesmen, and lawyers, in relation to an increase of judicial salary.

That the idea of an increase was legally unobjectionable to the jurists of Pennsylvania of the period prior to the Constitution of 1873, is manifest from the opinion of Mr. Justice Rogers in *Commonwealth vs. Mann*, 5 Watts & Sergeant, 403, in which, after quoting the provision of the Constitution of 1790, and the amended Constitution of 1838, he asks: "Now what is meant by an adequate compensation to be fixed by law? No other interpretation can be given to it than that the compensation is to depend upon some future legislative enactment. The Legislature are to determine, under their constitutional responsibility, from time to time, what constitutes an adequate compensation; but when the compensation is fixed, although it may be increased, they are expressly prohibited from decreasing it during the continuance in office. And the reasons for this distinction, and they are most satisfactory, are these: the fluctuations in the value of money, the state of society, render a fixed rate of compensation in the constitution inadmissible. What might be extravagant to-day might in half a century become penurious and inadequate. It was, therefore necessary to leave it to the discretion of the Legislature to vary its provisions in conformity to the variations in circumstances; yet under such circumstances as to put it out of the power of that body to change the condition of the individual for the worse."

Here, then, was an expression of views precisely similar to those of Franklin, Morris and Hamilton in the Federal Convention, of Wilson and McKean in the ratifying Convention, and of Hamilton in the *Federalist*, both as to the legal and economic aspects of the question.

The Legislature of Pennsylvania acted upon this theory, for by the acts of 13th of April, 1791; 4th of April, 1796; 28th March, 1814; 19th

of July, 1839; 13th May, 1856; 20th May, 1857; and later, up to 1872, by annual appropriations, judicial salaries were gradually increased. It is manifest from this historic review covering the Constitution of Pennsylvania from 1790 up to 1873, that there was nothing either in the Constitution itself, or in the view taken of it by the Legislature or the courts, which forbade an increase of judicial salary, even in its relation to judges then in commission. On the contrary, the right to that increase, and the legality of that right became firmly established.

I proceed now to the consideration of the second difficulty indicated at the outset of this opinion, based upon the thought that a judge, in accepting a term with a definite salary attached to it at the time, enters into a contractual engagement with the State that he will serve out his term without an increase of salary. This thought has recently been expressed in an article appearing in the columns of *The Legal Intelligencer* of July 24, 1903. It also finds expression in an opinion of Attorney General Lear, under date of July 30, 1878, appearing upon pages 354 and 360 of the publication entitled "Pennsylvania. Report of the Attorney General, 1875 and 1876." The thought is expressed in the following language: "When the Legislature shall so fix the adequate compensation prior to the election of any judge, so that he may enter upon his duties with a knowledge of what he is to receive, without reference to the compensation of his predecessor, he makes a contract with the State to perform the services required by the duties of his office for the compensation which the State has proposed, and which he accepts when he assumes the position." In the article appearing in *The Legal Intelligencer*, the thought appears in this form: "Judges, when accepting office, not only know the salary attached thereto, but they must be presumed to have accepted the office at the salary fixed by law, and for the term fixed by the Constitution. In other words, they take the office *cum onere*."

In neither of these expressions of opinion is there any discussion of the matter nor any examination of the subject in the light of judicial decisions. The view is permitted to rest upon a mere *ipse dixit* of the writer. The question was not involved, even upon his own statement of the facts, in the opinion of Attorney General Lear, and what he said must be viewed as *obiter dictum*. As to the article in *The Legal Intelligencer*, which is learned and able, there is no official weight to be attached to the utterance. Let me examine, then, the matter in the light of judicial opinions which were entirely ignored by both of these gentlemen.

In the case of *Commonwealth vs. Bacon* (6 Sergeant & Rawle, 322), Mr. Justice Duncan, examining an objection made on the part of the mayor of the city of Philadelphia to the action of city councils in

passing an ordinance reducing his salary after the commencement of his term of service, pointed out that the contention was endeavored to be supported on the principle of contract, and, after a full examination of the subject, he used these words: "These services rendered by public officers do not, in this particular, partake of the nature of contracts, nor have they the remotest affinity thereto." He also asserted that it was apparent that the compensation of the judges was a matter of constitutional provision and did not rest upon the theory of contract. The same view was expressed by the Supreme Court, in a *per curiam* opinion, in the case of *Barker v. The City of Pittsburg* (4 Pa. St. 49), in these words: "That there is no contract, express or implied, for the permanence of a salary, is shown by the constitutional provision for the permanency of the salaries of the Governor and judges, as exceptions. That there is a strong moral obligation, independent of constitutional provisions, is not to be disputed; but a moral obligation, however sacred, is not ground for the enforcement of it as a legal right, with which alone we have power to deal." The next consideration of the matter, in order of date, is to be found in the case of *Commonwealth vs. Mann* (5 Watts & Sergeant, page 418), where Mr. Justice Rogers says: "If the salaries of judges and their title to office could be put on the ground of contract, then a most grievous wrong has been done to them by the people by the reduction of the tenure during good behavior, and a tenure for a term of years. The point that it is a contract, or partakes of a contract, will not bear the test of examination. Moral obligations on this head are nothing to the purpose. We deal with legal rights." These authorities were reviewed and confirmed by the Supreme Court in *McCormick vs. Fayette County* (150 P. S., page 192), in which Mr. Justice Heydrick said: "Under the former Constitution it was held that the annexation of emoluments to an office was not in the nature of a contract, and was protected as well by the bill of rights as by the Federal Constitution, but that the Legislature might duly diminish the salaries of all public officers except the Governor and judges, which were specially protected."

The Supreme Court of the United States, in passing upon a precisely similar question, carried up from the State of Pennsylvania and arising under an act of the Pennsylvania Legislature, reached the conclusion, in an opinion delivered by Mr. Justice Daniel, that there was no contract between the State and office holders within the meaning of the Constitution of the United States, which forbade a State from passing a law impairing the obligation of a contract. After an exhaustive examination of the matter and after a full citation of authority, in which all of the Pennsylvania cases, were considered with the exception of the one last referred to, the court

distinctly approves of the doctrine as hitherto stated, and then uses these words: "We have already shown that the appointment to and the tenure of an office, created for the public use, and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error; do not come within the import of the term contracts or, in other words, the vested private personal rights thereby intended to be protected. They are functions appropriate to that class of powers and obligations by which governments are enabled, and are called upon, to foster and promote the general good; functions, therefore, which governments cannot be presumed to have surrendered, if indeed they can under any circumstances be justified in surrendering them." The learned justice then continued:

"The precise question before us appears to have been one of familiar practice in the State of Pennsylvania, so familiar, indeed, and so long acquiesced in, as to render its agitation at this time somewhat a subject of surprise; and the reasoning of the Supreme Court upon it in the case of the Commonwealth vs. Bacon, 6 Sergeant & Rawle, 322, is at once so clear and compendious as to render it well worthy of quotation here." In a concurring opinion Mr. Justice McLean concisely states that there was no contract which could be impaired. (*Butler et al. vs. Pennsylvania*, 10 Howard, Supreme Court of the United States Reps., p. 417.)

It is beyond the reach of controversy, therefore, that there is no substantial basis for the second objection above adverted to. We start, then, with a field clear of the difficulties suggested by the two thoughts at the opening of this opinion.

I now come to the provisions of the Constitution of Pennsylvania of 1873. Two thoughts, based on irrefutable facts, stand out prominently upon the threshold of the discussion: 1st. That there is nothing, either in Federal or State jurisprudence, which, prior to 1873, forbade the increase of the salaries of judges already in office, or which attached the slightest degree of ignominy to a judge accepting such increase; and

2d. That the relation of the judge to the State in the acceptance of his office did not bind him by the terms of a contractual obligation.

With these undoubted legal facts in view, let us look at the language of the present Constitution. The section pertinent to the matter under discussion is section 18 of article V, relating to the judiciary. It is in these words: "The judges of the Supreme Court and the judges of the several courts of common pleas, and all other judges required to be learned in the law, shall at stated times receive for their services an adequate compensation, which shall be fixed by law, and paid by the State. They shall receive no other compensation, fees or perquisites of office for their services from any source,

nor hold any other office of profit under the United States, this State or any other State." This language differs from that of the Constitution of 1790 and of the Constitution of 1838, in the substitution of the words "which shall be fixed by law" for the words "to be fixed by law;" in the striking out of the words "which shall not be diminished during their continuance in office," and further in a modification of the prohibition as to the holding of other offices of profit, so as to make the prohibition extend to offices of profit "under the United States, this State, or any other State."

I now proceed to trace the history of this constitutional provision.

The matter first came before the Convention on the 27th of March, 1873, in the shape of a report of the Committee on the Judiciary, presented through Mr. Armstrong, of Lycoming county, its chairman. Section 23 of that report read as follows: "The judges of the Supreme Court, the judges of the circuit court, and the judges of the several courts of common pleas, and all other judges required to be learned in the law, shall, at stated times, receive for their services an adequate compensation, to be fixed by law, which shall not be diminished during their continuance in office; but they shall receive no fees or perquisites of office, nor hold any other office of profit under this Commonwealth, nor under the United States or any other State." There was also a provision for judicial pensions, which need not be considered in this connection. The article, as reported by the committee, was read for the first time and laid on the table in order to be printed. (Constitutional Debates, Vol. 3: pp. 186-190.) At the same time there was presented a dissenting report by Mr. Kaine, of Fayette county, in which, after objecting to certain features not pertinent to this discussion, he added: "In addition to the provision in the present constitution that the salaries of the judges shall not be diminished during their continuance in office, I would provide that their salaries should neither be increased nor diminished during their continuance in office."

Minority reports were also submitted by Mr. Dallas, of Philadelphia, by Mr. Broomall, of Delaware, and Mr. Woodward, delegate-at-large. None of these, although they touched on compensation offered any suggestion that the legislature should be restrained from increasing the salaries of judges who might be on the bench at the time, but contented themselves with the prohibition of perquisites and additional compensation. The thought of prohibition against an increase rested with Mr. Kaine alone. On the 30th of April, the convention being resolved into a Committee of the Whole, Mr. Woodward moved the substitution of his minority report, in which, so far as features of prohibition were concerned, it was limited to an expression that "said judges shall hold no other office, whether

Federal, State, municipal or corporate; nor receive any fees, rewards, perquisites, emoluments or travelling expenses whilst holding and exercising the office of judge of any of the aforesaid courts."

On the 13th of May, Mr. Armstrong moved to insert a provision fixing in the Constitution itself the exact amount of judicial compensation, declaring that he brought the question up solely for the purpose of having the Convention determine whether it was wise to fix in the Constitution any minimum salary for judges of the courts, or leave the amount of salary entirely to the Legislature. The matter being associated with the provision for judicial pensions, the debate went off upon the inadvisability of judicial pensions and of having a constitutional provision as to the amount of the salaries, as well as upon the matter of perquisites and fees.

Mr. Purviance, of Butler, then moved to amend by inserting after the word "diminished," in the first sentence, the words "or increased," so that the sentence should read: "receive for their services an adequate compensation to be fixed by law, which shall not be diminished or increased during their continuance in office." He added that if the salaries of judges ought not be diminished they ought not be increased. Mr. Corbett suggesting that a provision had been made for that in another article, Mr. Purviance replied that it would do no harm here, and gave his reasons for thinking that the words "or increased" should be added after the word "diminished." Mr. H. W. Smith, of Berks, suggested that the same thought could be better expressed by striking out the words "not be" before the word "diminished" and inserting the words "neither be increased nor," so that the sentence would read "which shall neither be increased nor diminished during their continuance in office."

A spirited debate sprang up, Messrs. Purviance and Smith contending stoutly for their amendments, which were opposed by Mr. Armstrong, who declared that there had not been a provision at any time in the Constitution of Pennsylvania limiting the discretion of the Legislature in this regard. He added: "We are making a Constitution which we hope will last many years. We cannot foresee all contingencies; we cannot foretell what may happen in all the future any more than we could ten or twelve years ago; and yet if such a provision had been in the Constitution twelve years ago, there is not a judge in the State that would have been able to live on his salary. There have been no abuses connected with this subject. Judges have never received too much salary. I think, on the contrary, the error has been that they have received far less than they should have received." Mr. Purviance retorted that the remedy in that case would be to resign and be elected over again and come in under the increased compensation. To this Mr. Armstrong replied: "Now look at such a proposition as that! Judges must resign and submit

themselves again to an election, make themselves competitors again before the people! Under this Constitution Supreme Court judges will not be re-eligible. I think it would be a very unwise proceeding."

Mr. Corbett hoped that the committee would vote down the amendment, declaring that it was unnecessary, under the sixteenth (13th) section of the article adopted in the report of the committee on legislation. Besides, he was well satisfied that all acts passed by the Legislature increasing the salaries of judges for particular years were unconstitutional. They had the power to increase them generally, and he believed that the power was right, but it certainly was unconstitutional to pass laws allowing increased pay for a single year, because, by the Constitution as it existed before, they were to receive a stated salary. Mr. Armstrong pointed out that the commissions of judges expired at irregular times, and that under such a system there would be judges of the State receiving different compensation from others doing the same service, and if the amendment were adopted there would be no possible mode of avoiding it. After further debate the amendment was rejected.

I pause here to note, first, a difference of opinion among the members upon the floor as to the wisdom of inserting a provision in the judiciary article of the Constitution forbidding an increase of salary, and second, an opinion expressed by one member that the matter had already been provided for in the article relating to legislation, a view which does not appear, so far as the debates reveal, to have received careful consideration. The important fact remains, that in the shaping of the judiciary article the proposition to forbid an increase was voted down by the convention. (Debates, Vol. IV, page 266.)

The matter again rose on the 1st of July. There was much debate upon matters not pertinent to this opinion until Mr. Smith moved to amend by striking out the words "at stated times" and striking out the words "not be," and inserting the words "neither be increased nor," so that the sentence should read as follows: "The judges required to be learned in the law shall receive for their services an adequate compensation, which shall be fixed by law and paid by the State, which shall neither be increased nor diminished during their continuance in office." After a long argument, he closed by saying: "Now strike out those words. Frame it that they shall receive an adequate compensation to be fixed by law, which shall neither be increased nor diminished during their continuance in office. That will avoid this difficulty. Judges should be well paid, I admit, but they must not be overpaid; they must submit like others."

The yeas and nays were then called for. The President, in asking whether the call was seconded by ten members, was interrupted by

Mr. Ewing with the suggestion that perhaps the yeas and nays would not be called for, when he called attention to section 15 (13) of the article on legislation, which provided for these and all other officers: "No law shall extend the term of any public officer or increase or diminish his salary or emoluments after his election or appointment." That covered the case of all officers. Mr. Smith replied that he was aware of that, but asked "Why not pass the section as it is?" He called for the yeas and nays. The call was duly seconded by ten gentlemen rising, and the yeas and nays were then ordered. Mr. Armstrong declared: "The judgment of the convention was that it would not be wise to deprive the Legislature of the right to increase the salary of judges whose term is twenty-one years when we cannot foresee the exigencies which may make such an increase a necessity. As to the other salaries for judges for shorter terms, it is within the power of the Legislature to change them more frequently, and it is appropriately left there, and with that view I voted for the legislative provision. But as applied to the judges with such long terms as those of the Supreme Court, I think it is better not to deprive the Legislature of the opportunity to increase the salaries, if they should deem it wise to do so."

After further debate, in which Mr. Kaine participated, the yeas and nays were called and the amendment was rejected by a vote of 51 to 21. (Debates, Vol. VI, page 314.)

Thus for the second time the convention refused to amend the judiciary article by prohibiting an increase of the compensation of the judges. It is true that Messrs. Corbett, Ewing and Smith had expressed the view that the matter was covered by the article on legislation, a view combatted by Mr. Armstrong; but Mr. Smith was not willing to trust to this, and had insisted on a yea and nay vote on his amendment. The fact remains that the amendment was lost. On the 29th of September the committee on revision and adjustment reported the article on the judiciary, and it was laid upon the table. A fuller view of the situation thus reached may be obtained by considering what took place in regard to the section on legislation. Mr. Calvin moved on October 2d to go into committee of the whole for the purpose of amending section 15 (13) by adding these words "except judges whose salaries may be increased." He urged strongly that under the existing constitution there was a provision that the salaries or compensation of judges shall be fixed by law, and shall not be diminished during their continuance in office. This was inserted in the eighteenth section of the judiciary article as it had passed second reading. By the practice under the old Constitution, the salaries of the judges had been increased from time to time as the exigencies of the times required. The general principle was correct that during the continuance in office of any

incumbent his salary ought not to be increased, but an exception ought to be made in the case of judges.

Mr. Armstrong said he had noted that the provisions in the eighteenth section of the article on the judiciary provided that the salaries of the judges should not be diminished, and at the same time did not prevent them from being increased. He said further: "It is to be remembered that the convention considered this matter at that time very fully, and after very full debate concluded to leave the matter as to judges in the condition in which it stood in the eighteenth section. The term of the judges is so long that you cannot reasonably anticipate the exigencies which may require an increase of salary. As to offices of shorter continuance, they may be reasonably anticipated, and therefore the fifteenth section of the article on legislation would seem to be right as to them, but the exception suggested by the delegate from Blair harmonized the article on the judiciary with the article now under consideration, and I trust the amendment will be agreed to."

After debate the amendment was rejected. (Debates, Vol. VII, pp. 417, 419, 420.)

On October 3d the article on the judiciary was read a third time and consideration by the convention was resumed on October 6th. Mr. Calvin moved to go into committee of the whole for the purpose of amending the eighteenth section by inserting in the fifth line, after the words "in office" the words "but which may be increased." His attention being called to the fact that the words "in office" were not there, he stated that the purpose of his amendment was to leave the power to the Legislature to increase the salaries of the judges. His attention being called to the fact that the words "and which should not be diminished during their continuance in office" had been stricken out, he withdrew his amendment as he saw that it would not be congruous. (Debates, Vol. VII, p. 527.) On the 7th of October an attempt was made to provide by the Constitution that the salaries of the judges should not fall below what was then paid them. The effort did not prevail, but was subsequently provided for in the seventeenth section of the schedule. On the 8th, Mr. Armstrong moved to go into committee of the whole to amend the eighteenth section by adding after the word "State" the words "and which may be increased." A debate sprang up, in which it was pointed out that there might be inequalities in the amount of compensation received by judges, and that it would not promote the harmony of the system or the harmonious relation of the judges of the courts that one should be receiving more compensation than another for discharging precisely the same duties. The debate was participated in by Messrs. Armstrong,

Purviance, Broomall and Buckalew. Upon a vote, the motion to amend was not agreed to.

On October 9th Mr. J. W. F. White moved as a substitute for the eighteenth section of the judiciary article, as adopted by the convention, a provision in precisely the terms of the then existing Constitution of the State. Had this been adopted it would have been a re-enactment of the constitutional provision of 1790 and the amended Constitution of 1838.

The final act took place on the 9th of October when the convention refused to depart from the position already reached, and refused to reinsert as an amendment the old provision of the Constitution of 1790, and the matter was left in the shape which had been reached on October 3d, when, on the motion of Mr. Brodhead, the section had been amended by striking out the prohibition of diminution of judicial compensation. The result was finally expressed as follows: (Article V, section 18.) "The judges of the Supreme Court and the judges of the several courts of common pleas, and all other judges required to be learned in the law, shall at stated times receive for their services an adequate compensation, which shall be fixed by law and paid by the State. They shall receive no other compensation, fees or perquisites of office for their service from any source, nor hold any other office of profit under the United States, this State or any other State."

This brought the matter to the shape exhibited by the Constitution of 1790 and the amended Constitution of 1838, with the exception that the words "to be fixed by law" were altered so as to read "shall be fixed by law," and the striking out of the prohibition contained in the Constitution of 1790 against a diminution of salary during continuance in office.

The question, therefore, fairly arises: Does this constitutional provision prohibit an increase of judicial salaries, and is such prohibition operative against judges holding commissions at the time that the act of 14th of April, 1903, takes effect? The answer, if it were to rest alone upon the language of the article relating to the judiciary, would be free from doubt. There is no prohibition, either expressed or implied, against an increase of salary. There is an elimination from the article of a provision against a diminution of salary. But the elimination of the latter clause is not tantamount to the prohibition of an increase, and the further question, therefore, arises whether section 18 of article V, is controlled by section 13 of article III, that section reading as follows: "No law shall extend the term of any public officer, or increase or diminish his salary or emoluments after his election or appointment."

No reliance can be placed, for the interpretation of these sections, upon the opinion of the members of the convention, because

of the conflict of view among them; some, who were opposed to any increase of judicial salaries, relying upon section 13 of article III; and others, also opposed to any increase of salary, fearing to rely upon that section, and seeking ineffectually to amend section 18 of article V. The friends of an increase of salaries of judges were not willing to rely upon the language of section 18 of article V, as it stood, but sought to amend section 13 of article III by the insertion of an express exception in favor of the judges. The final fact is that the convention itself twice refused to amend section 18 of article V by the insertion of a prohibition against the increase of salaries, and refused also to amend section 13 of article III by the insertion of an express exception in favor of the judges.

I have gone into detail, although barren of result, for the purpose of thoroughly considering the question in all its aspects before reaching a conclusion. I attach no weight whatever to the statement of the clerk that section 13 of article III covered the subject. It is clear that the clerk could not interpret the Constitution or put any construction upon it which would be binding. The true rule of interpretation is given by the Supreme Court in *county of Cumberland vs. Boyd et al.*, 113 Pa. St., 57: "In giving construction to a statute we cannot be controlled by the views expressed by a few members of the Legislature who expressed verbal opinions on its passage. Those opinions may or may not have been entertained by the more than hundred members who gave no such expression. The declarations of some, and the assumed acquiescence of others therein, cannot be adopted as a true interpretation of the statute."

The question is reduced to this simple proposition: Is the prohibition against the increase of the salary or emoluments of "any public officer" after his election or appointment, as enacted in the thirteenth section of article III, to control section 18 of article V relating to the judiciary, which contains no provision against such increase?

A proper consideration involves a careful examination in the first place, of the meaning of the constitutional language, as used in section 18, article V, relating to the judiciary. After that meaning has been determined, the question will remain whether that meaning is to be overcome or controlled by the language employed in section 13 of article III relating to legislation.

It has been established by the historical discussion that up to the time of the meeting of the convention of 1873, under the Constitution of the United States and the then existing Constitution of Pennsylvania, there was no prohibition against the increase of judicial salaries, and there was no legal or historical ground for supposing in either case that such an increase was forbidden either by

the language or spirit of either Constitution. On the contrary, the views of the federal convention, followed for more than seventy-five years by the unbroken practice of Congress in increasing judicial salaries, were reproduced under the Constitution of 1790, and the amended Constitution of 1838, of the State of Pennsylvania, as interpreted by the Supreme Court in *Commonwealth ex rel. v. Mann*, 5 Watts & Sergeant, 403. The uniform and positive construction has always been in favor of an increase of judicial salaries. This was followed by the action of the Legislature in numerous changes in the amounts of the salaries paid to the judges, until, during the decade immediately preceding the Pennsylvania Constitutional Convention of 1873, the Legislature fell into the habit of passing annual acts of appropriation in regard to judicial salaries, instead of the passage of a general law upon the subject. This phase of the matter explains much of what was expressed in the debates, but it does not touch or alter the fact that, after all that was said and done, the convention of 1873 finally adopted a constitutional provision expressed in substantially the same terms as the old constitutional provision of 1790 and the amended Constitution of 1838, with the single exception of striking out the clause against a diminution of salary.

I cannot attach importance, after reflection, to the change of the words "to be fixed" to the words "shall be fixed." Both clearly relate to some future legislative action. I address myself, therefore, to a consideration of the nature and meaning of section 18 of article V of the present Constitution. The language is mandatory. In precise terms the Legislature is enjoined that the judges "shall at stated times receive for their services an adequate compensation, which shall be fixed by law and paid by the State." The meaning of these words is not open to doubt. Mr. Justice Rogers, in *Commonwealth ex rel. v. Mann*, 3 W. & S., 403, pertinently asks: "Why use the words in the future tense, if subsequent legislative action were not intended? The judges were then in the enjoyment of a salary fixed, and there was no necessity for the use of such language as existed in the Constitution of 1790, where they had not been fixed and where the officers themselves were afterwards to be appointed under the Constitution. That this is the light in which the Legislature viewed it, there is no reason to doubt, for we find them at the next session carrying into effect the pledge made by the members of the convention and by the people in their sovereign capacity by the increase of salary which is now the subject of controversy. In this respect they followed in the footsteps of the Legislature, which assembled after the adoption of the Constitution of 1790, who, on the 13th of April, 1790, in pursuance of the constitutional provision, fixed the salary at five hundred pounds, which, on the 4th of

April, 1796, was increased to the sum of sixteen hundred pounds per annum." He might have added "which was again increased by the act of 19th of April, 1839," and, had he lived, he would have seen the same principle exhibited in the acts passed so frequently since.

Convinced, therefore, that the words "shall be fixed by law" fairly mean future legislative action, and convinced also that the phrase "shall at stated times receive for their services an adequate compensation," means that the power is a continuing one, not exhausted or capable of exhaustion by a single legislative act, I proceed to a consideration of the meaning of the word "adequate" as contained in the Constitution. Mr. Justice Rogers asks: "Now what is meant by an adequate compensation to be fixed by law? No other interpretation can be given to it than that the compensation is to depend upon some future legislative enactment. The Legislature are to determine, under their constitutional responsibility, *from time to time*, (the italics are mine) what constitutes an adequate compensation * * * and the reasons for this distinction, and they are most satisfactory, are these: the fluctuations in the value of money, the state of society, render a fixed rate of compensation in the Constitution inadmissible. What might be extravagant today might, in half a century, become penurious and inadequate. It was, therefore, necessary to leave it to the discretion of the Legislature to vary its provisions in conformity to the variations in circumstances; yet under such circumstances as to put it out of the power of that body to change the condition of the individual for the worse."

These are precisely the reasons which were urged by Dr. Franklin, Gouverneur Morris and Charles Cotesworth Pinckney in the federal convention as against the views of Madison and George Mason. *A fortiori* do they apply, when the constitutional clause in question is strengthened and emphasized by the express insertion of the word "adequate." That the word was important is apparent from its introduction into the plan of Mr. Hamilton, and, although he did not prevail upon the federal convention in securing its adoption, yet, when it came to the Constitution of Pennsylvania of 1790, and James Wilson, who had been a member of the federal convention, was charged as a member of the committee of nine, to whom the resolution on the judiciary had been expressly referred, he inserted the word. It appears as a distinct amendment of the resolution as originally presented, which, up to that time, had been an exact transcript of the language of the Constitution of the United States.

The word "adequate" has a fixed and settled meaning. It is derived primarily from the word *adeo*, *adire*, to come to; and, secondarily, from *adequito*, *adequare*, to ride up to, to come to meet, to equalize or bring to a level. In a dictionary of synonyms and antonyms

by C. J. Smith, of Christ's Church, Oxford, published in London in 1881, the word "adequate" is said to mean "equal to in required measure or object or purpose; sufficient; fit; satisfactory; fully competent; able." The antonym is "unequal, insufficient, incompetent, inadequate." Webster defines "Adequate" as "equal, proportionate or correspondent; fully sufficient; commensurate." "Inadequate" as "not adequate; unequal to the purpose; insufficient to effect the object; unequal, incomplete, defective; as inadequate resources, power, ideas, representations and the like." The Century Dictionary defines "adequate" as "equal to what is required; suitable to the case or occasion; fully sufficient; proportionate; as an adequate supply of food." The antonym is "inadequate; incompetent; insufficient to effect the end desired; incomplete; disproportionate; defective."

Here, then, we have a solemn mandate of the organic law of the Commonwealth which makes it imperative that the judiciary department, one of the great co-ordinate departments of government, whose independence is one of the dearest and most precious of our possessions, and which, at all times, it has been the care of the people sedulously to guard, placed upon a footing of financial independence by a provision which exacts that the judges shall at stated times, which clearly means at successive times, receive for their services an adequate compensation, which shall be fixed by law, that is, by statute, and paid by the State. At the same time, and in the same clause, they are prohibited from receiving other compensation, fees or perquisites of office for their services from any source, and are prohibited from holding any other office of profit under the United States, this State or any other State. In the light, therefore, of the historical facts which have been alluded to, as well as the spirit and meaning of the words themselves, there being nothing to be found in the decision of any court to the contrary, the question arises: Can this substantial and emphatic declaration of the Constitution, relating as it does exclusively to the judiciary, and placed by the Constitutional Convention in an article exclusively devoted to the judiciary, be controlled, limited, annulled or destroyed in its operation by another section of another article of the Constitution, found, not in a clause relating to the judiciary, but in a clause placed by the framers under the head of legislation?

Section 18 of article V is a special provision as to the compensation of judges, whether they be public officers within the meaning of the words "public officers" or not, as used in section 11 of article III and section 13 of article III. (Whether they are so included I will consider hereafter.) It cannot be contended that they come within the provision of section eight of article II. It cannot be pretended that an increase of judicial salaries would be prohibited as "extra compensation" under section 2 of article III, nor can it be contended

that section 13 of article III will prevent an increase of judges' salaries for such judges as may be elected or appointed after the passage of the act of April 14, 1903. Nor can it be asserted that the fixing of the salaries by that act for the judges of the State, elected or appointed since its passage, should be held to be an abuse of legislative judgment or a mistake in judgment on the part of the Legislature and the Governor, because *more* than adequate compensation for the respective judicial services to be rendered. Certainly it cannot be said that the salaries given by that act are to be held as excessive compensation; if not, then the amount of the salaries fixed by the act would come, not only within the terms but within the meaning and the spirit of the power of the Legislature, under section 18 of article V, to fix adequate compensation, certainly for judges elected or appointed after its passage. It is clear, however, that the judges previously in office have, under the same provision of the Constitution, an equal right with the judges elected after the date of the act, to receive "at stated times" "an adequate compensation." If, then, the salaries fixed by that act be not grossly beyond adequacy for judges elected or appointed after its passage, how can it be asserted that they are more than adequate for judges elected or appointed before its passage? How can it be said that the right of the judges elected before the passage of the act to receive such adequate compensation at stated times—that is, at times to be stated by the Legislature, with the approval of the Governor—is unequal to the right of those judges commissioned or elected after the date of the act? Do the words "at stated times" refer merely to the times of payment or to the receipt of their salaries at different times, which may be at stated times adequate, and also at stated times be made adequate if not already so?

It is a well-known fact that the judges of the common pleas of Philadelphia, before the act of 14th of June, 1883 (P. L. 74), received the sum of \$5,000 annually from the State and the sum of \$2,000 annually from the city of Philadelphia. That act fixed their salary at \$7,000 per annum to be paid by the State. After a careful examination of the question it was concluded to be a recognition of the inadequacy of \$5,000 per annum as a compensation for them, and it was held, moreover, to be a suitable recognition of the mandate of section 18 of article V that their salaries should be paid by the State, and not partly by the State and partly by the city. This was a conclusion satisfactory to both bench and bar. It was also concluded that the provision of section two of the act of 14th of June, 1883, that "such annual salary shall be paid quarterly" was not a full enforcement of the provision that they should at stated times receive an adequate compensation, and if no provision had been made for any but annual payments, that mandate of section

18 of article V would still have been observed in that sense as fully as by quarterly payments, although not in the same degree and perhaps with much inconvenience to the judges.

This becomes very apparent when it is remembered that the original act, organizing the orphans' court, of the 19th of May, 1874 (P. L. 206), in section three, provided for the salary of \$5,000 a year for each judge, and in the subsequent act of June 13, 1883 (P. L. 91), equalized their salaries with those of the judges of the common pleas. Both acts were within the mandate of section 18 of article V, authorizing the fixing at stated times, of which stated times that was one. The provision of section four of the act of June 4, 1883, that "No judge of the said courts of common pleas hereafter appointed or elected and commissioned shall receive any compensation in addition to the salary and mileage fixed by this act" was explained to refer to official services rendered in their respective judicial districts, by the act of May 27, 1897 (P. L. 263). It was concluded that it could not be considered as intending to prohibit an increase of salary or an increased salary over that provided by that act for the judges appointed or elected and commissioned thereafter.

The question arises under section 18 of article V, taken in connection with the act of April 14, 1903, how much is the increase? Is it more than enough to make the salaries of judges adequate? Is it such legislation as was contemplated under the Constitution of 1873? This is important upon the question of power. It is interesting to observe that, by the seventeenth section of the schedule to the Constitution it was provided that the General Assembly "at the first session after the adoption of the Constitution," should fix and determine the compensation of the judges of the Supreme Court and the judges of the several judicial districts of the Commonwealth. Much controversy arose in view of the long delay on the part of the Legislature whether it could be done later. In carrying this provision of the schedule into effect it was doubted whether it could be done later. After due consideration of the matter it was held that it could be properly done, on the ground, it is true, that, although not done at the first session, there had been no fixing of the salaries of the Supreme Court judges until the act of 8th of June, 1881 (P. L. 56). That act increased the salaries of the judges of the Supreme Court after their election, and there was no fixing of the salaries of the common pleas judges until the act of 4th of June, 1883 (P. L. 74), and that act increased the salaries paid the common pleas judges by the State.

The act of 24th of June, 1895 (P. L. 212), fixed the salary of all the judges of the Supreme Court alike at \$7,500, and came within the power of the Legislature to establish new courts, and, presumably, the fixing of their salaries came within the power of the Legis-

lature and the Governor. Section 17 of the schedule had distinctly provided that the provisions of section 13 of article III should not be deemed inconsistent with it, and recognized thereby a right in the Legislature, upon the approval of the Governor, to increase the compensation of the judges after their election or appointment, while it expressly forbade the reduction of compensation of any law judge in commission, showing conclusively that the framers of the Constitution were not only solicitous to increase the compensation of judges, but also that they deemed an increase necessary to the adequacy of the compensation of the judiciary of the State.

The opinions of many eminent lawyers were taken upon the subject. I have examined them all, and will content myself with a reference to those of the late Richard C. McMurtrie, David W. Sellers, William Henry Rawle and George W. Thorne, all of them of the most conspicuous ability and two of them at least of the foremost reputation.

In considering the provisions of the seventeenth section of the schedule Mr. McMurtrie expressed himself as follows: "The persons who then held these offices were continued until their existing terms expired. If the class they belonged to is covered by this clause (thirteenth section of article III), the persons then holding the office of judge are of necessity included. Then what is to be done with the seventeenth section of the schedule? The Legislature are required to fix and determine the salaries of the then incumbents, and at a time, in all probability, when no one person but these incumbents would be affected by the law. It seems to me absolutely repugnant in the same instrument to prohibit a change of salary and direct it to be determined *de novo* for the same persons and during their existing terms. The eighteenth section of article V distinctly recognizes that all the judiciary are to be treated alike in this respect; that is, that there shall be future legislation extending to all of the same class or degree and irrespective of the time of their election and appointment."

Mr. Sellers was of opinion: "There is nothing in article V which prevents the increase of compensation during the term for which a judge may be chosen; nor is the power of the Legislature affected as to the increase by section 17 of the schedule. As I entertain the view that it is always competent for the Legislature to fix and determine the compensation for the judiciary, I hold the act of June, 1883, to be entirely valid."

Mr. Rawle was of opinion that no provision of the act of 19th of May, 1874, precluded the Legislature of 1883 from enacting a statute which should fix and determine the salaries of judges of the orphans' courts.

Mr. Thorne was of opinion: "That the words of the seventeenth section of the schedule annexed to the Constitution, as to the time when the Legislature should execute the direction contained in it, were directory and not mandatory." He was, therefore, of opinion that the judges of the courts, mentioned in the act of 1883, then in commission, were clearly entitled to receive the compensation provided in that act, viz.: the same salaries "as are paid to the judges of the courts of common pleas in the respective counties where such separate orphans' courts are established."

If, then, as was determined by these eminent lawyers, (and their views were shared by many more), the power of the Legislature, exercised long after the time fixed by the schedule, was not deemed lost because of the delay, may it not fairly be contended that the delay of the Legislature amounted to a declaration that the salaries existing at the time of the adoption of the Constitution were adequate until changed, and that each successive annual appropriation, although not in terms an exercise of the power directed to be exercised at a time certain by the schedule, amounted to a continuing declaration that the salaries, as then existing, were adequate for the time being? If, then, when the Legislature did actually exercise their power by fixing salaries in 1881, and again in 1883, would these acts exhaust the authority conferred upon the Legislature by the eighteenth clause of article V, or would such a declaration of adequacy, made in 1881 and again in 1883, preclude the Legislature from again obeying the mandate of the Constitution by readjusting the salaries and making a new declaration on the subject of adequacy in 1903?

If such a construction were to prevail, then clause 18 of article V, is robbed of its chief value; for, if a single exercise of the power amounts to its complete exhaustion, then is the constitutional mandate as to adequacy of salaries to be received at stated times to be fixed by the Legislature, completely gone until an amendment of the Constitution can be secured. Such a construction would paralyze the Legislature in its efforts to obey the constitutional mandate, and would deprive the judiciary of that support which, it appears to me, was legitimately and fairly intended to be their right under clause 18, article V. A constitution must be viewed as a living organism and not one which expires upon a single effort to obey its provisions, dying like an animal in giving birth to a single offspring. It must live and maintain a vigorous existence for the protection of the people, and for the support of the departments of the government so long as the people suffer it to remain without amendment. I cannot conceive of any construction which could properly be placed upon the clause and article in question which would view it at the present time as a dead portion of the Constitution, incapable of operation and powerless to protect the judiciary.

The thought was well expressed by Mr. Justice Paxson in *Wheeler vs. Philadelphia*, 77th Pennsylvania State, 338, when he said: "If the Constitution answers this question affirmatively, we are bound by it, however much we might question its wisdom. But no such construction is to be gathered from its terms, and we will not presume that the framers of that instrument, or the people who ratified it, intended that the machinery of their State government should be so bolted and riveted down by the fundamental law as to be unable to move and perform its necessary functions."

Having viewed, then, the provisions of the judiciary article, I turn now to a consideration of section 13 of article III of the Constitution, which, in the judgment of some of the members of the constitutional convention, operated as a restraint upon the judiciary article, and which creates the real stumbling block in the minds of many at the present date. Candor must admit that there is difficulty in the situation, and that the doubts entertained are honest doubts. It was such a doubt that led Governor Beaver, on the 31st of May, 1889, to veto a bill entitled "An act to fix the salaries of the judges of the courts of this Commonwealth," (*Veto Messages of 1889*, page 60.) It was such a doubt, also, which appeared in the opinion of my predecessor, Attorney General Lear, expressed on the 30th of July, 1878; (*Opinions of Attorneys General*, published under the title of "Pennsylvania Report of the Attorney General, 1895-1896, page 354"); it is such a doubt which has inspired the difference of opinion displayed in various publications, in the *Legal Intelligencer* and elsewhere, and it is such a doubt which exists in the minds of many members of the bar, and, as I am informed, in the minds of some of the judges. I have carefully considered all of these publications, so far as they have been brought to my notice, and I have endeavored seriously and candidly to weigh them fairly.

So far as the veto message of Governor Beaver is concerned, I observe that, without an historical or legal examination of the matter, he contented himself with a simple consideration of the literal language of section 13 of article III, and also expressed himself upon the effect of the failure of the Legislature to pass a general salary law at its first meeting after the adoption of the Constitution. While entertaining the highest respect for Governor Beaver's message, which is well expressed and was published fearlessly, I am not satisfied that it touches the question. It fails to examine the meaning, either historically or legally, of the constitutional clauses relating to the judiciary, and fails, therefore, to perceive the real importance and significance of those clauses, their immense constitutional value for the welfare and support of the judiciary, and their impressive historic surroundings. So far as his doubts as to the effect of the failure of the Legislature to act within

the time specified by the schedule is concerned, that doubt has passed into history. The subsequent action of the Legislature, and the opinions of the learned lawyers which I have quoted, are a sufficient answer to the Governor's queries.

So far as the opinion of Attorney General Lear is concerned, the question was not before him, and what he said is undoubtedly *obiter dictum*.

The word "fixed" was understood by Mr. Lear to mean "unalterable." This was an opinion which probably he would have rejected, had the question before him at the time compelled precision in this respect. The word "fixed" was in the Constitution of 1790 (Art. V, Sec. 2), and again in that of 1838 (V, 2); and yet the salaries were subject to change under those Constitutions in that they could be increased as to judges in office.

I think that it is undeniable that the word "fixed" has an historical derivation, springing from the act of settlement of 12 & 13 Wm., III. Art. III. (7) of that fundamental law is as follows:

"That after (&c.), judges commissions be made *quamdū se bene gesserint* and their salaries ascertained and established."

These words, "ascertained and established," used in the act of settlement, and the word "fixed," used in the Constitutions of Pennsylvania, are equivalents. It appears from Foss, in his *Lives of the Judges*, that before the act of settlement the puisne judges received a salary of £1,000 a year, but that "they were entitled to sundry fees and perquisites which greatly increased their profits; besides customary presents."

Judge Rokeby carefully recorded his annual profits from 1689 to 1698. In the earlier year, he received £1,378. In the latter, £1,631. In 1691, the profits of his office were £2,063. See Foss, Volume VII, 298.

These extras I have assumed to be the object of the provision, in the act of settlement, that the judges' salaries shall be ascertained and established; partly because of the language of the statute and partly because, although Foss mentions their salaries again, he says no more of the perquisites. See Foss, Vol. VIII, 10 86, 199.

The Constitution of Pennsylvania evidently meant the same prohibition of extras when it provided that the salaries should be fixed by law. This does not mean that they shall be unalterable.

Under the act of settlement the judicial salaries have often been raised. Take the *puisne* judges. Before 1700, they received as salary £1,000. This was raised £500 in 1714, 1 Geo. I, (8 Foss 10); £500 in 1759, 32 Geo. II, (8 Foss, 86); £400 in 19 Geo. III, in 1779 (8 Foss 199); and, another, twenty years later, £100 additional per annum was granted. *Ibid.*

So also the salaries of the Pennsylvania judges were frequently raised, notwithstanding the word "fixed" in the older Constitutions.

Let me now consider exactly what section 13 of article III really says, and let me briefly trace its history so that it may be placed side by side with the judiciary article which has already been reviewed

An examination of the debates of the Convention of 1873 discloses the fact that, on the 4th of June, when the article on legislation was before the Convention, and that which is now section 10, forbidding the Legislature from passing any local or special law, was under consideration, particularly that part embodied in clause 22, relating to the remission of fines, penalties, forfeitures or the refunding of moneys paid into the Treasury, Mr. Harry White arose and offered an amendment at this point as an additional paragraph, in the following words: "Creating, increasing or diminishing the salaries, perquisites or allowances of public officers during the term for which they were elected."

The amendment was agreed to. This was the origin of the section. Judge White observed what he termed an important omission immediately in connection with the section relating to fines, penalties and forfeitures. To use his own words: "I desire to offer an amendment at this point as an additional paragraph." It would seem, then, that the thought which has now become a separate section of article III was viewed as an additional protection to the public treasury, and the location finally given to it, with the sections immediately before and after it, constitute a striking confirmation of this view. In the course of the formation and elaboration of the article the amendment of Judge White was finally detached from the section concerning fines and forfeitures, and placed in an order which shows its relations. Thus, section 7 forbade special and local legislation; section 8 relates to notice of local and special bills; section 9 to the signing of bills; section 10 to the officers of the General Assembly; section 11 prohibited extra compensation; section 12 related to public contracts for supplies; and section 13, being the one under consideration, related to the extension of official terms and the prohibition of an increase of salaries. Section 14 related to revenue bills; section 15 to appropriation bills; and section 16 to the manner of the payment of public moneys out of the treasury. Section 17 related to appropriations to charitable and educational institutions; and section 18 to limitations upon appropriations. There is nothing in the history or in the location of this particular section which would suggest any relation whatever to the judiciary, and nothing could associate it with the judiciary except the views expressed by some of the members of the Convention upon the floor while in debate, which have been previously alluded to in the history

of the judiciary article. The exact language of the section is as follows:—

“No law shall extend the term of any public officer, or increase or diminish his salary or emoluments, after his election or appointment.”

The basis of the doubt existing in the minds of those who honestly believe that the act of 1903 cannot apply to judges then in commission must, upon final analysis, rest upon the generality of the phrase “public officer,” and the association of the two ideas of increase and diminution of salary. This is strengthened by the action of the Convention in striking out, from the eighteenth clause of article V, the provision which had theretofore existed against a diminution of judicial salary, and has led many to believe that the sole protection of the judiciary against diminution of salary must necessarily be found in section 13 of article III.

Let me examine this matter. In the first place, it must be remarked that, reading the section exactly as it is written, the opening words are as follows: “No law shall extend the term of any public officer.” If we stop here it cannot be pretended that such words could by any possibility of construction be applied to the judiciary. The clause is confessedly a limitation upon legislative power, and forbids the extension of the term of a public officer. Such a limitation, as applied to the judiciary, was wholly unnecessary, and cannot fairly be construed as relating to the judiciary, because the terms of the judges are specifically fixed by the Constitution itself, and are not within the power of the Legislature.

Section 2 of article V specifically fixes the terms of the judges of the Supreme Court at twenty-one years, and they shall not again be eligible. Section 15 of article V fixes the terms at ten years of all judges required to be learned in the law, except the judges of the Supreme Court. It is impossible, therefore, to read these words as relating to the judges. The doubt springs into existence, however, from the consideration of the words which next follow: “No law shall extend the term of any public officer, or increase or diminish his salary or emoluments after his election or appointment.” Such a doubt ignores the history of the section in question; ignores the character of the limitation of power on the part of the Legislature as to officers clearly within the authority of the Legislature in the sense of having their terms of office fixed by them, and ignores the sections of the article relating to the judiciary, fixing the terms of the judges of the courts; and ignores, moreover, the grammatical construction which, by being separated simply by a comma, would continue the prohibition as to an increase or diminution of salary or emoluments in its relation to the term of a public officer whose term was otherwise within the power of the Legislature.

It must be observed that the prohibition as to increase or diminution is of *his* salary or emoluments after *his* election or appointment, and that use of the possessive pronoun, which is relative in its character, must be taken in connection with the preceding words "No law shall extend the term of any public officer." Hence the word "his" can be fairly read in the sense of "such," and, if so construed, entirely satisfies the requirements for a full interpretation of the clause, without forcing it into a conflict with a subsequent, substantial and independent provision of the Constitution.

It is argued that the phrase used is "public officer." That is true; but it is not "public officer" without limitation. The preceding words qualify the generality of the phrase. The Constitution does not say "public officers." It says "No law shall extend the term of any public officer." This, taken in connection with the subsequent provisions of the Constitution, must necessarily mean such public officers whose terms would otherwise be within the power of the Legislature to extend, so as to guard against a legislative election of an officer or a legislative continuance in office of an officer whose term would otherwise expire, thus defeating the will of the people, who, having elected an officer for a specific term, should not have such officer imposed upon them without their consent or possibly against their will. •

It is argued that a judge is a public officer. Undoubtedly he is, but the question is whether he is such a public officer as is contemplated by this section of the Constitution. It is easy to quote definitions of a public officer, as was done in the learned article appearing in a recent number of *The Legal Intelligencer*, and it must be conceded that a judge is a public officer within the meaning of such definitions. But these definitions were given without a consideration of the particular clause of the Constitution now under examination. They are culled from various decisions in many States, and from many text books, and cannot be viewed as other than general definitions of the subject. Mr. McMurtrie, in the opinion previously quoted, wrote as follows: "In my opinion, the thirteenth section of article III of the Constitution of 1874 does not include the judiciary. Doubtless these are in one sense public officers, but to include in this clause the judiciary is inconsistent with the rest of the instrument."

Mr. David W. Sellers wrote:—

"I do not hold that the judiciary are within Section 13 or article III of the Constitution."

I concur in this view. The principles underlying the interpretation of a Constitution are based upon the fundamental distinctions which exist between the three great departments of the govern-

ment; the legislative, the executive and judicial, the powers of the government which are supreme being distributed among the departments in the manner willed by the people as expressed in their fundamental and organic law. All parts of the Constitution must be considered of equal authority and binding operation. All parts ought so to be understood and construed as not to conflict with one another. I cannot conceive that an unequivocal and mandatory provision, relating exclusively to one of the distributed powers or branches of the government, such as the judiciary, is to be overcome or impaired in its operation or made nugatory by a doubtful provision, couched in general terms, but which, when examined, cannot be accepted in a general sense, located in a distinct part of the Constitution relating to another distinct branch or distributed power—in this case, the Legislature. Certainly it would be a strained construction to allow a clause, relating to a mere limitation of power on the part of the Legislature, full and ample operation of which can be obtained by viewing it in its proper relations, without stretching it to an extraordinary extent, to completely annul and destroy a constitutional mandate which is laid as a solemn injunction upon the Legislature, and which the history of our legal institutions, a review of the decisions of our courts, and the utterances of statesmen, show to be absolutely essential to the proper support of the judiciary department. If section 13 of article III is to be viewed as a restrictive provision, and a latitudinarian construction would involve the result of the annihilation of section 18 of article V, it ought to be construed with strictness so as to avoid so fatal a result, because, unless so confined, it would conflict with the unequivocal and mandatory provision as to the adequacy of judicial salaries both in letter and spirit, as well as with its manifest purpose. It would be difficult to give any valid reason why overwhelming supremacy should be given to this portion of the Constitution, when it is clear that such a result would follow from such an interpretation. If clause 13 of article III ought to prevail against clause 18 of article V, why should not clause 18 of article V prevail against section 13 of article III? They are both provisions of the Constitution, each relating to a different department of the Government, of equal validity and solemnity.

This principle was the basis of the decision of the Supreme Court in the case of *Commonwealth vs. Griest*, 196 Pennsylvania State, 396. Mr. Chief Justice Green expressed himself in behalf of the court as follows:

“Before passing to the question of authority, only one more thought needs expression. It is that these two Articles of the Constitution are not inconsistent with each other, and both may stand and be fully executed

without any conflict. One relates to legislation only, and the other relates to the establishment of constitutional amendments. Each one contains all the essentials for its complete enforcement without impinging at all upon any function of the other. And it follows further that, because each of these articles is of equal dignity and obligatory force with the other, neither can be used to change, alter or overturn the other. It is not a tenable proposition, therefore, that because the Twenty-sixth Section of the Third Article requires that all orders, resolutions and votes of the two Houses shall be submitted to the Governor, the same provision shall be thrust into the Eighteenth Article, where it is not found and does not belong."

Mr. Buckalew, in his work on the Constitution of Pennsylvania (page 99), while discussing the meaning of Article III, section VII, (division XVII, in a note, announced the following as the proper method of interpreting the meaning of Constitutional provisions:

"We are to seek the meaning of that clause by examining its history, the avowed objects of those who framed it, the changes of form it underwent, its connection with other propositions adopted or proposed in convention, as well as in a just definition of its terms. Constitutions are popular as well as legal instruments, and are to be judged in full view of the facts which attend their formation, and with reference to the announced objects of those who made them. Especially in considering those parts of the Constitution which, like the Seventh Section of the Third Article, consist of general propositions in very condensed form—consequently without the qualifications and explanations which they require—we are to avoid the mischief of sticking fast in technical construction and losing grasp upon the true meaning of the matter before us. And we are to remember also, that the numerous and stringent provisions of this Seventh Section, detracting as they do largely from the powers of government, are not to be construed beyond their obvious or necessary meaning. Exceptions from the general grant of legislative power must be expressed with distinctness or be clearly implied. They are not to be carried beyond the proper import of the words used, nor where they admit of more than one meaning, are they to be taken in a sense which shall defeat or impair any power which apparently the convention intended to preserve."

If, then, we have two distinct provisions of the Constitution in conflict with each other, it would seem to be the proper course to so harmonize their relations to each other as to avoid that conflict. This is a principle familiar to all courts in the interpretation of documents. It is applied time and time again in the interpretation of

statutes, in the interpretation of wills and in the interpretation of written contracts. The instrument must be read as a whole, and such a construction must be arrived at as will give force and effect to each provision, so far as practicable. I cannot see how full and extended operation can be given to section 13 of article III without causing a conflict with section 18 of article V. I cannot see how the mandate of the Constitution in relation to the adequacy of judges' salaries can be obeyed if a sweeping and unlimited interpretation is to be put upon section 13 of article III. Such a construction would involve a repugnancy between the two clauses and make of the judiciary article a maimed and lifeless provision.

Do the words "any public officer" include judges? An affirmative answer implies that the words are used in the broadest generic sense so as to be equivalent to "all public officers," of which judges are a species. This construction, however, ignores the opening words of the section, which must operate as a restriction upon the generality of the phrase "any public officer." The first half of the sentence is "No law shall extend the term of any public officer:" this is a prohibition against an exercise of Legislative power in cases where, were it not for the prohibition, such an extension might be made or at least attempted. Clearly so; for in cases where the power to extend did not exist, such a prohibition would be unnecessary. It applies then to cases where but for the constitutional prohibition, the Legislature might extend or attempt to extend the term. But the Legislature can not fix or extend a judicial term; the term is fixed in the case of each court by the Constitution itself and is beyond Legislative reach. It will be conceded that the Legislature can not amend or change the Constitution, hence, if it passed such an act, it would be absolutely null and void. A declaration against an act which could not be performed would be as idle and needless as an edict that all birds should not swim or that dogs should not fly. The powerlessness in each case is inherent in the structure and nature of the organism. If then the words apply to those cases only which would but for the constitutional prohibition, be within Legislative power they must be read as a limitation of the generality of the words "any public officer." Take now the second half of the sentence, "or increase or diminish his salary or emoluments after his election or appointment." These words are clearly relative to those which precede and apply only to such officers as are spoken of, namely, those officers whose terms, but for the prohibition against extension, might have been extended or attempted to be extended. Viewing the section as a whole, it does not prohibit the extension of a term, in the sense of an alteration of a term, except as to the then present incumbent. It does not affect the Legislative power to declare that after the expiration of existing terms, the terms were in the

future to be either longer or shorter than the then existing terms. That would be fairly within the Legislative discretion. Hence it must be within the Legislative power. But as Legislative power does not cover judicial terms, judicial terms are necessarily excluded from the section. Besides, the prohibition is against the increase or diminution of salary or "emoluments." This clause can not relate to the judiciary. The term "emolument" as here used does not apply to them. It was so decided in *Apple vs. County of Crawford*, 105 P. S., 302. It is difficult to see how it could be otherwise, because in section 18 of article V, as a part of the provision relating to the compensation of judges, it is declared: "They shall receive no other compensation, fees, or perquisites of office, for their services from any source, nor hold any other office of profit under the United States, this State, or any other State." Here is an ample restriction as to them—at once comprehensive and specific. What need would there be for a second fulmination?

Again the words "any public officer" do not, as used in the thirteenth section of article III, include members of the Legislature. Their compensation is regulated by section 8 of article II. Buckalew, in his work on the Constitution, page 36, in discussing that section, says: "The last division of the section was necessary to prevent the increase of compensation to members by their own votes, pending their terms of service, because the 13th section of the article on legislation does not apply to them. They are not 'public officers' within the meaning of that section. The question raised and determined in the case of *Philadelphia County vs. Sharswood*, 7th Watts & Sergeant, 16, or any similar one, can hardly arise under the present Constitution." If, then, the members of the Legislature are not embraced within the words "any public officer," because ample provision had been made as to them by section 8, article II, why should the judiciary be included, ample provision having been made as to them by section 18, article V? If the words "any public officer" are not generic in the case of the Legislature, how can they become generic in the case of the judiciary? The declaration and distribution of powers and the limitations of power as to each of the three great departments of the Government have been partitioned between three separate articles of the Constitution, upon the theory that each article should be so far as possible complete in itself in its relation to its appropriate department. The provisions ought not to be forced into such antagonism as to destroy the symmetry and harmony of the instrument. Had it been intended to embrace all officers, it would have been a simple matter to have declared: "no public officer of any of the three departments of the Government, Legislative, Executive, or judicial, of any grade, supreme or subor-

dinate, shall receive an increase or suffer a diminution of salary during the term for which he shall have been elected or appointed, and no such term shall be extended." No such language appears in the Constitution, and I can not construe section 13 of article III in that sweeping way. It is plain to me that the section must be read as a limitation of power in cases where the Legislature would, but for the limitation, have unlimited authority. It can not apply to cases where the Legislature has no authority whatever. No single department of the Government except the judiciary, and no officers except judicial officers, are protected by a constitutional mandate that their salaries shall be adequate. It does not appear to me a sufficient answer to suggest that because of a possible *casus omissus* other officers may not be sufficiently protected. It may be that county officers and those in like position of defencelessness may be driven to take shelter behind it, because there is no other protection, but I can not ignore the fact that as to members of the judiciary, there are distinct provisions to the protection of which they are entitled. It is not reasonable to insist that the judiciary must surrender the advantage of a distinct provision in their favor, because, unless that is done, other officers may be exposed to attack. It does not commend itself to me as a practical result to declare that the judges must suffer because county officers may suffer; that a positive injury must be inflicted because a possible injury may arise; that a positive provision must be disregarded because a possible danger has not been sufficiently guarded against. This is to press the result of a *casus omissus*, if there be one, to an extreme. Such cases, however, are not before me. It will be sufficient to deal with them when they arise.

The syllogism animadverted upon may be expressed thus: All public officers are forbidden from having their salaries increased or diminished; all judges in commission are public officers; therefore all judges in commission are forbidden from having their salaries increased or diminished. The Constitution does not say so. The context shows a limitation of the generic use of the words "any public officer," and hence the vice of the syllogism lies in its major premise. The Constitution does not consist of the thirteenth section of article III alone. There are other provisions. It must be read as a whole, and reading it, I perceive a special mandate that the judges shall receive an adequate salary, which shall at stated times be fixed by the Legislature. This is a mandate. A mandate can not be obeyed if the one issuing the order fells his agent to the earth. It is idle to say "do this," and then bind the servant fast, so that obedience is impossible.

I come now to the thought arising from the dread—for it amounts to nothing more—of the helplessness of the judiciary against legis-

would be to anticipate a situation which does not now exist. When the Legislature makes such an attempt it will be time enough to deal with it. I shall not anticipate the views of one of my remote successors. The judiciary must rely for its support on the legislative performance of constitutional duty to provide an adequate support. The Legislature has done so, and it has been shown that there is not in article V nor in article III of the Constitution any reason why the judges should not avail themselves of the benefits of the act.

If it be the mere exercise of power which is terrifying, the re-assault in the way of a diminution of salaries unless section 13 of article III be read as applicable to the judiciary. This matter also was considered by Mr. McMurtrie. He said: "There seems some apprehension that, without calling in aid this clause, there is nothing that prevents the Legislature from diminishing salaries of the judiciary. It may have been supposed that this was a substitute for that which has always been deemed a cardinal principle since the Revolution of 1688, the independence of the judiciary. If it is the only barrier against the danger, it certainly cannot, I think, be read as an inhibition of the increase for the reason I have stated. I would rather look to the seventeenth section of the schedule, which plainly indicates that there should be secured to the existing incumbents and to all future judges a certainty of compensation. The only way to avoid this absolute contradiction, if we treat the thirteenth section of article III as including the judiciary, is to interpolate a sentence in substance such as this, after the word 'emoluments:' 'After the same have been fixed and determined for the judiciary by a law or laws hereafter to be enacted, as required by this instrument.' And I may here remark that the prohibition against the reduction of the then existing salaries of the judges during their terms is expressed in the seventeenth section of the schedule. I think it a better reading to exclude the thirteenth section from this class and look for the great constitutional provision of an independent judiciary in the character of the act when adopted pursuant to the requirements of the seventeenth section of the schedule."

A consideration of the matter has satisfied me that, whether complete and ample protection against the diminution of judicial salaries is to be found in the seventeenth section of the schedule, as Mr. McMurtrie thought, or whether it is to be found in the Constitutional mandate as to the adequacy of judicial salaries to be fixed at stated times by the Legislature, the question before me is not one of diminution but of increase. There is no statute before me attempting a diminution. I can see no reason why a legal and unobjectionable increase, made under a constitutional mandate which does not affect the independence of the judges, should be defeated because of the

dread that the independence of the bench may at some future time be undermined by a diminution of salary. This is not a proposition which commends itself to common sense. It is equivalent to saying that judges must now, in the present, be deprived of that which the Legislature has declared to be adequate under a mandate to so declare, because of a purely fictitious dread that at some future time the Legislature may attempt to deprive them of it, either in whole or in part. The judges must remain underpaid now, although offered an adequate salary, because they may be forced hereafter to confront a situation arising out of a clearly inadequate salary. This suring answer is that the question whether a statute is constitutional or not is always a judicial question, and can be made so without difficulty. Self-defense is not denied to the judiciary.

The construction I have put upon the act is still further enforced by a consideration of the consequences which would follow from any other interpretation. If the increase of salary is not to be received by the judges in commission at the time when the act goes into operation, then inequalities of treatment, amounting to injustice, at once arise. The youngest judges, and those least experienced, are to be paid the most while the veterans are to receive the least. The inequality could never be corrected without a constitutional amendment, and there would be presented, for the first time in the State, the sorry spectacle of the members of the judiciary being unevenly and unequally paid. It might force to resignation those best fitted by learning and experience to serve the public, and those least able from age and long absence from the bar to maintain themselves and their families. Less than ten per cent. of the judiciary would receive the benefits of the increase, while more than ninety per cent. would be doomed to that which the Legislature, by their declaration of adequacy as to one class have declared to be inadequate as to the other. Even though new judges should come upon the bench in the future, they would come at such irregular intervals, extended through such a course of years, that it might well happen that the Legislature, in the exercise of their constitutional duty to obey the mandate of the Constitution as to adequacy of salary, would feel called upon to make a new declaration on the subject, and the judges who now receive the benefit of the increase would find themselves, in their age and waning strength, in a position of inequality, enjoying competency in their youth and a burden of poverty in their feebleness. Thus the evil would continue incapable of correction until the Constitution could be amended.

These results have been described by some as grotesque. They would be so, did they not involve a pitiable condition, incapable of correction, and one which should not be tolerated, because of the injustice which it would produce. Moreover, it comes in conflict

with section 26 of article V of the Constitution, which provides that "All laws relating to courts shall be general and of uniform operation." Upon this point Mr. McMurtrie is clear. He wrote: "The eighteenth section of article V distinctly recognizes that all the judiciary are to be treated alike in this respect; that is, that there shall be future legislation extending to all of the same class or degree and irrespective of the time of their election. Section 26 is still more emphatic in compelling the legislation respecting the courts to be general and uniform."

Unless such uniformity of operation can be secured, it would be impossible at any time to carry out the provisions of section 18 and the provisions of section 26 of article V, for at no time could the Legislature pass an act which would include all the judges. The sections, therefore, would become so largely inoperative and nugatory as to amount to a practical annihilation of both.

The rule of construction in regard to the constitutionality of acts of the Legislature is well settled by the decisions of the Supreme Court. In the case of *Craig vs. The First Presbyterian Church*, 88 P. S., 46, it was said: "All the presumptions are in favor of the constitutionality of an act of Assembly. It comes to us with the seal of approval of two of the co-ordinate departments of the government. To doubt is to decide in favor of its constitutionality. It is only in a clear case that we are justified in declaring an act to be unconstitutional." In the case of *Commonwealth ex rel. Wolfe vs. Butler*, 99 P. S., 540, Chief Justice Sharswood, in delivering the opinion of the court, said: "To justify a court in pronouncing an act of the Legislature unconstitutional and void, either in whole or in part, it must be able to vouch some exception or prohibition clearly expressed or necessarily implied. To doubt is to be resolved in favor of the constitutionality of the act." In the recent case of *Sugar Notch Borough* 192 P. S., 355, Mr. Justice Mitchell, now the Chief Justice, said: "It must not be lost sight of that the attitude of courts is not one of hostility to acts whose constitutionality is attacked. On the contrary, all the presumptions are in their favor, and courts are not to be astute in finding or sustaining objections."

It follows as a necessary consequence of this principle that to successfully assail the constitutionality of the act of 14th of April, 1903, it must be established clearly that it is in conflict with some provision of the Constitution. If the question is doubtful the act must be sustained. The independence of the judiciary is a sacred thing not to be dealt with lightly, but we must not sacrifice its real independence or prostrate it as a separate and co-ordinate department of the government by resorting to a construction which, in my judgment, involves the serious conflict which I have endeavored

to point out, and which can be avoided by placing upon its various parts the construction which I have endeavored to express.

I instruct you to issue warrants upon the State Treasurer for the monthly proportions of the salaries as fixed by the act of April 14, 1903, and to do this in the case of all the judges, irrespective of the dates of their commissions. A doubt has been suggested as to the judges of the courts created after the date of the Constitution—such as the Superior Court and additional courts of common pleas. I perceive no merit in the suggestion. The first section of article V gave the General Assembly power to establish courts from time to time. The judges of the courts so established are required to be learned in the law, and section 15 of article V fixes the terms of such judges at a period of ten years. They are all outside of the prohibition of section 13 of article III.

The conclusion which I have reached renders it unnecessary for me to consider whether the provisions as to monthly payments and salary for extra services rendered can be regarded as effective. In my judgment, the whole act is operative and should be obeyed.

Very respectfully yours,

HAMPTON L. CARSON,
Attorney General.

FOREST FIRES ON LAND OWNED BY THE STATE—COST OF EXTINGUISHMENT—ACT OF MARCH 3, 1897.

Under the act of March 3, 1897, P. L. 9, providing for the extinguishment of forest fires and the payment of the costs thereof, each county must pay one-half of the latter, irrespective of who may be the owner of the land upon which the fires occur. It follows that when a fire occurs upon land owned by the State, the latter is liable only for one-half the cost of extinguishment of the said fire, and not for all.

Office of the Attorney General,
Harrisburg, Pa., February 3, 1904.

Hon. E. B. Hardenbergh, Auditor General:

Sir: I have before me your letter of recent date, in which you state that a question has been raised in your Department by the county commissioners of Potter county relative to a bill for expenses incurred in the extinguishment of forest fires under the provisions of the act of March 3, 1897 (P. L. 9), and you ask for an opinion thereon.

It appears from the facts contained in your letter, and the other papers submitted, that the county commissioners object to paying one-half of the expenses incurred in the extinguishment of two fires in Potter county on the ground that, inasmuch as the State owned the lands on which the fires occurred, it should bear all of the ex-

pense. A careful examination of the act of Assembly above mentioned discloses nothing which warrants this construction. The first section reads as follows:

"That on and after the first day of January, Anno Domini one thousand eight hundred and ninety-eight, the constables of the various townships of the Commonwealth shall be ex-officio fire wardens, whose duty it shall be, when fire is discovered in the forests within their respective townships, immediately to take such measures as are necessary for its extinction, and to this end to have authority to call upon any person or persons within their respective townships for assistance; the said fire wardens to receive fifteen (15) cents per hour, and the persons so assisting twelve (12) cents per hour, as compensation for their services; the expense thereof shall be paid, one-half out of the treasury of the respective county, and the remaining half of said expense shall be paid by the State Treasurer into the treasury of said county, out of moneys not otherwise appropriated, upon warrant from the Auditor General, but no such warrant shall be drawn until the respective county commissioners shall have first furnished, under oath or affirmation, to the Auditor General, a written itemized statement of such expense, and until the same is approved by the Auditor General: Provided, That no county shall be liable to pay for this purpose, in any one year, an amount exceeding five hundred dollars."

The plain intention of the Legislature in enacting this law was to prevent the destruction of the forests of the State by fire. Recognizing the great value accruing to all of the inhabitants of the State by the preservation of its forests, the Legislature saw fit to throw this safeguard about them, and the question of the ownership of the lands upon which the fire should occur was not considered at all in the matter. No provision is made anywhere in the act requiring the owner or owners of lands to contribute any part of the expense necessarily incurred in the extinguishment of the fires, the chief concern being the preservation of the forests from destruction thereby serving the public interest rather than protecting the property of an individual or individuals. Unless this is the clear purpose of the law there is no more reason why the State and the county should bear the expense of extinguishing these fires than that they should bear the expense of protecting the houses and business places of the residents of the Commonwealth. As an individual or corporate owner is not required to contribute any part of the cost for this protection afforded to his property, I see no good reason why the State should stand in a different position, so far as its lands are concerned, particularly as it is required,

under the terms of the act, to pay one-half of the entire expense so incurred.

I am therefore of opinion and advise you that the contention of the commissioners of Potter county should not be allowed, and that each county must pay its one-half of the cost of the extinguishment of all fires under the provisions of this law, irrespective of the ownership of the land upon which the fires may occur.

Very respectfully yours,

FREDERIC W. FLEITZ,
Deputy Attorney General.

OWNERSHIP OF FINES UNDER SUNDAY LAW.

Act of April 22, 1794, and the act of April 26, 1855, P. L. 321. Half of the fine collected under the Sunday act of 1794 by magistrates belongs to the prosecutor.

Office of the Attorney General,
Harrisburg, Pa., February 5, 1904.

Hon. E. B. Hardenbergh, Auditor General:

My Dear Sir: I herewith return the communication of Mr. W. T. Tredway, of Pittsburg, concerning which you request my opinion.

After examining the act of April 22, 1794, and the amending act of April 26, 1855 (P. L. 321), an act local to Allegheny county, and the opinion of Judge Ewing, in the case of Allegheny County vs. Commonwealth, reported in first Monaghan, page 119, I am of opinion that the prosecutors in the various actions are entitled to one-half the fines imposed, as provided by the sixth section of the act of 1794. The syllabus of the case decided by Judge Ewing is as follows:

“The act of Assembly of May 15, 1850, providing that fines inflicted under the Sunday act of April 22, 1794, shall be paid into the Treasury of the Commonwealth, is not repealed by implication of the act of April 26, 1855, providing for the payments of fines and penalties collected by aldermen and justices of the peace in the counties of Philadelphia and Allegheny.”

The local act of 1855 requiring magistrates to make return of the fines and pay them over was simply for the purpose of providing the method of having these various fines promptly put into the proper channel as directed by the various acts of Assembly and paid promptly to the parties entitled thereto.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

COLLATERAL INHERITANCE TAX—ESTATE OF JOHN J. KAERCHER.

Where the interpretation of a will is doubtful as to whether a life estate was vested, which under the conditions would be liable to the payment of collateral inheritance tax, or whether the purpose of the gift was merely to provide for the maintenance and education of the grandson, which purpose terminated on the death of the grandson, with reversion of the whole estate to the daughter of the testator; in such case no collateral inheritance tax being collectible, then the whole matter should be referred to the Orphans' Court of the proper county for decision.

Office of the Attorney General,
Harrisburg, July 6, 1904.

Hon. Sam Matt. Fridy, Deputy Auditor General:

Dear Sir: Replying to your letter of July 6, enclosing correspondence relative to the estate of John J. Kaercher, late of the borough of Pottsville, deceased, I answer that, in my judgment, the interpretation of the will is doubtful and ought to be passed upon by the orphans' court. If the gift of the testator to his daughter Kate of all his estate, real, personal and mixed, in trust nevertheless for the grandson Joseph Leib, to be used for his proper maintenance and education, is held to be a gift absolute to the grandson Joseph Leib, then, upon his death, intestate and unmarried, leaving to survive him as next of kin his mother and a brother and a sister, unquestionably the mother is vested with a life estate, and, under and subject to that life estate, the title would pass to the brother and sister in equal portions, and there would be due to the Commonwealth a collateral inheritance tax on the shares of the brother and sister, collectible at the expiration of the life estate.

If, on the other hand, it should be determined that the purpose of the gift was merely to provide for the maintenance and education of the grandson, and that that purpose terminated upon the death of the grandson during his minority, and that there was a reversion of the whole estate to the daughter of the testator, then and in such a case there would be no collateral inheritance tax due, because of the vesting of an absolute interest in the daughter.

The question is one which can be properly passed upon only by the Orphans' Court, and my advice would be to refer the matter to Mr. D. L. Thomas, attorney-at-law at Mahanoy City, representing your Department, with instructions to present the claim of the Commonwealth so that the question can be properly passed upon and judicially determined.

I herewith return the papers.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

ANNUITY; PENSION.

There is nothing in the act of Assembly granting an annuity to Barbara Ella Walter, nor in the State Constitution, which prevents her receiving an annuity from the State of Pennsylvania and a pension from the United States Government.

Office of the Attorney General,
Harrisburg, August 3, 1904.

Hon. Sam Matt Fridy, Deputy Auditor General:

Sir: Your letter of recent date enclosing papers in the claim of Barbara Ella Walter for an annuity under the act of Assembly approved April 4, 1877 (P. L. 81), and asking to be advised whether the claimant is entitled to receive from the Commonwealth the annuity in question while receiving a pension from the United States Government, is before me.

It appears that Miss Walter is the invalid daughter of Simon P. Walter, a veteran soldier of the late civil war who died on or about the 4th day of July, 1865, and that the pension from the United States Government which she received subsequent to his death ceased in 1875, by reason of her becoming sixteen years of age, leaving her in destitute circumstances. In 1877 the Legislature passed an act for her relief, which reads as follows:

"That the State Treasurer be authorized and required to pay out of any money in the treasury of Pennsylvania not otherwise appropriated to Barbara Ella Walter, of Jefferson township, Butler county, daughter of Simon P. Walter, late private of Company G, Fourth Regiment, Pennsylvania Cavalry Volunteers, the sum of ninety-six dollars annually, in half yearly payments, for the period of her natural life, to commence on the twenty-sixth day of September, Anno Domini eighteen hundred and seventy-five."

It further appears from the papers before me that at a subsequent period a pension was granted to the said Barbara Ella Walter by the United States Government which she is now enjoying conjointly with the annuity bestowed upon her by the State, and the question raised is whether or not she is entitled to receive the annuity from the State while enjoying the pension from the United States Government for substantially the same service rendered by her father to the United States Government.

There is nothing in the act of Assembly granting this annuity which in any way limits or restricts it. There are no conditions whatever imposed and no provision is made for a cessation of the annuity in the event of Miss Walter subsequently receiving a pension from the United States Government.

On careful investigation I find nothing in the Constitution of this Commonwealth which would justify your Department in withholding this annuity, for the reason above stated. I am, therefore, of the opinion and advise you that Miss Walter is entitled to receive the annuity granted her by the Legislature during the term of her natural life, unless the act be repealed, without regard to the pension which she also received from the United States Government.

Very respectfully yours,

FREDERIC W. FLEITZ,
Deputy Attorney General.

AUDITOR GENERAL'S DEPARTMENT.

There is neither law nor practice authorizing the taking of an appeal from the decision of the Board of Public Accounts.

Harrisburg, Pa., October 28, 1904.

Hon. Wm. P. Snyder, Auditor General:

Dear Sir: I herewith return the papers sent to me by you relating to the appeal of Wanamaker & Brown, including the paper marked "Specifications of Objections," and stamped "Filed November 19, 1902, Chief Clerk, Auditor General's Department."

I decline to file this paper in the Dauphin county court of common pleas because I am unaware of any statute which authorizes an appeal from the action of the Board of Public Accounts taken under the act of 8th of April, 1869, P. L. 19; nor am I aware of any practice which requires me to do so.

The appeals which in practice are handed to me for filing in the court of common pleas are appeals from the settlements made by you and approved by the State Treasurer, and such appeals must be made within sixty days after notice of settlement, and such notice must be given within thirty days after settlement against a debtor of the Commonwealth. The present is not a case of that kind.

I have notified the counsel of Wanamaker & Brown of my action in returning the papers to you, and in declining to file the appeal.

Very respectfully yours,

HAMPTON L. CARSON,
Attorney General.

COLLATERAL INHERITANCE TAX—ACT OF 5TH OF MARCH, 1903, P. L. 12.

Under the act of 4th of June, 1879, P. L. 88, every will shall be construed to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will; therefore where a will dated prior to January 1, 1904, expresses no contrary intention, it must be interpreted to come under the intent of an act going into effect January 1, 1904.

The act of 5th March, 1903, exempting devises for burial lots from payment of collateral inheritance tax must be construed strictly and where a devise as in the present instance is broader than the terms of the act, it must be subject to a collateral inheritance tax.

Office of the Attorney General,
Harrisburg, Pa., December 21, 1904.

Hon. W. P. Snyder, Auditor General:

Sir: I have your letter of recent date, in which you express a desire for an official opinion as to whether or not a certain case falls within the provisions of the act of 5th of March, 1903 (P. L. 12), which reads as follows:

“That hereafter all bequests and devises in trust, for the purpose of applying the entire interest or income thereof to the care and preservation of the family burial lot or lots of the donor, in good order and repair perpetually, shall be exempt from liability for collateral inheritance tax. This act shall take effect on and after the first day of January, one thousand nine hundred and four, and shall not apply to any bequest or devise, as aforesaid, made prior to that time.”

It appears from your letter and the papers accompanying it that a resident of this Commonwealth made and executed his will prior to the passage of the above mentioned act, but died subsequent to the date on which it was to take effect, to wit: January 1, 1904. In that will there was an item as follows:

“I give, devise and bequeath unto the Security Company of Pottstown, Pennsylvania, the sum of five thousand dollars, in trust, to invest and keep the same invested in good, reliable securities with full power to alter, change and re-invest the same as often as it may deem advisable, for the benefit of said trust estate, and the net income thereof to pay to the board of trustees of the Church, in township, county, Pennsylvania, for the purpose of keeping in good order and repair the wall, gate, enclosure and ground of the graveyard also in the aforesaid township, county, Pennsylvania, and particularly the lot comprising the three monuments and the graves of and the and the enclosed by said monuments and contigu-

ous to them. And I hereby authorize and direct the President of said board of trustees to designate a member of said board at a compensation of five dollars per year, whose duty it shall be to see that the provisions of this clause of my will are complied with and to employ a competent person at a reasonable compensation for each year, to keep in good order and repair said graveyard and the lot in which the before mentioned and and are buried. The above mentioned employee is also to dig up by the roots, at least once a year, all thistles, briars, elders, carrots and other noxious weeds and when needed to have the grounds manured and lawn grass seed sown therein."

These facts have raised two questions upon which you desire an official opinion.

1. Whether the will, having been executed prior to the time when the act went into effect, comes within the exemption contained in the act.

2. If the act applies to the will in question, whether the bequest, as above set forth, comes within the exemption contemplated by its terms.

1. The act of 4th of June, 1879 (P. L. 88) provides, in the first section, "That every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

There is nothing in the will under consideration which expresses any contrary intent, and therefore we must interpret it in accordance with the language of this act, and, although as a fact it was made and executed previous to January 1, 1904, it is presumed to have been executed since that date because the testator died subsequent to that time.

I am therefore of opinion and advise you that the act of 1903 applies to the will in question and to the devises and bequests made therein, if there be any such which fall within its terms and are entitled to the exemption which it provides.

2. A careful examination of the language of the item creating this bequest or devise in trust discloses the fact that it is too broad and general in its terms to be entitled to the exemption from payment of collateral inheritance tax provided by the clear and explicit language of the said act. It is a well-settled rule that all statutes granting exemptions from the general revenue laws of the State must be construed strictly. All bequests and devises in trust, which are entitled to the exemption provided by the act, must be for the purpose of applying the "entire interest or income thereof to the care and preservation of the family burial lot or lots of the donor,"

while the devise in question provides that the entire income from the trust estate of \$5,000 shall be paid to the trustees of a certain church for the purpose of keeping "in good order and repair the wall, gate, enclosure and ground" of a certain graveyard, and "particularly" the lots in which are interred the remains of members of the testator's family and other persons not of his own immediate family, so far as the record before us goes. The purpose of the devise or bequest contained in the will in question is too broad to fit the narrow terms of the act, and for this reason I am of opinion and advise you that the trust estate so created is not entitled to the claim for exemption from payment of the collateral inheritance tax imposed by the general law.

Very respectfully,

FREDERIC W. FLEITZ,

Deputy Attorney General.

OPINIONS GIVEN TO THE STATE TREASURER.

COLLATERAL INHERITANCE TAX—REMAINDER—TRUST TO CARRY ON BUSINESS—SURPLUS AFTER POWER OF DISPOSITION—ERRONEOUS PAYMENT—RECOVERY AFTER TWO YEARS—UNCERTAIN VALUE—ACT OF MARCH 25, 1901.

The collateral inheritance tax does not attach to the articles of property of which deceased dies possessed, but to what remains for distribution after expenses, debts, &c., are paid, or after the termination of a particular precedent estate.

Whether a taxable surplus will exist for a remainderman after a power of disposition has been exercised, cannot be determined until after the expiration of the time during which the power is to be exercised, so that, if the result of the exercise of the power is such as to destroy the existence of a surplus, then there is nothing on which the tax can be computed.

A testator made certain bequests absolutely, such bequests being subject to a collateral inheritance tax, and bequeathed his stock in a certain corporation, in which he was largely interested, to a trustee, with power to use the same as his own, to vote on, sell and exercise all rights of ownership in the same, to receive the dividends and proceeds, which he was to turn over to the executor; to become an officer in the corporation, if elected, and, as such, carry on the business of the corporation; to loan and advance money of the estate to the corporation, to endorse notes of the corporation binding the estate by so doing, giving him full power to carry on the business of the corporation, and directing him to wind up the trust and sell the stock at the expiration of fifteen years, or before, if he deemed it best, the testator expressing the desire that the business of the corporation should be carried on and conducted after his death in the same manner as it was before. He also directed that his estate should be liable for all losses occasioned by the dealing of the trustee as such, directed the executors to advance money of the estate on demand of the trustee, and authorized him to postpone payment of the legacies until such time as the same could be paid without embarrassing the estate, the paramount intention of the testator being the creation of a trust for the protection of the business of the corporation and the interests of the estate therein. The trustee, in good faith, entered upon the execution of the business, which was not successful, and the estate became insolvent. Three months after the testator's death the executor paid the collateral inheritance tax on the legacies. Held, that the collateral inheritance tax was not due on the legacies until distribution was to be made, and then only on the amount to be paid. Held further, that payment of the tax by the executor was an erroneous payment; therefore, the tax was recoverable, under the act of March 25, 1901, P. L. 59, by the executor from the Commonwealth, although more than two years had elapsed since payment.

Office of the Attorney General,
Harrisburg, Pa., April 16, 1903.

Hon. Frank G. Harris, State Treasurer:

Sir: I have examined the papers submitted by you in the matter of the claim made by Samuel Weiss, executor of John H. Lick, deceased, of Lebanon, Pa., for a refunding to him of the balance of collateral inheritance tax paid by him to the State as executor and trustee of the estate of John H. Lick, deceased, such balance being the sum remaining in the hands of the Commonwealth after the payment of the sum of \$6,344.12, which payment was made by the previous State Treasurer upon a settlement of the Auditor General duly had on July 2, 1902, such payment being made without prejudice to the rights of the Commonwealth or of the claimant as to the principles in dispute or as to the sum now in dispute.

From the papers submitted to me it appears that John H. Lick died on the 21st of October, A. D. 1891, in the county of Lebanon, having first made his last will and testament, together with certain codicils annexed thereto, copies of which were attached to the petition presented to the State Treasurer by the executor. Of this will

Samuel Weiss and Josiah Desh were appointed executors and Samuel Weiss sole trustee. Josiah Desh refused to act as executor, and letters testamentary were accordingly granted to Samuel Weiss as sole executor on the 31st of October, 1891. On the 19th of January, 1892, the executor paid to John W. Hartman, at that time register of wills of the county of Lebanon, for the use of the Commonwealth, the sum of \$9,570.11, in full of the collateral inheritance tax. The computation was made upon an appraisement of the estate of the decedent, both real and personal, at the sum of \$418,969.40, from which there was deducted, on account of debts and other expenses, \$217,493.53, leaving a balance of \$201,475.87, upon which the collateral inheritance tax was paid, and from which tax there was a deduction of five per cent. allowed for prompt payment within the statutory period of three months after the death of the decedent, E. N. Woomey, who was appointed appraiser by the register, filed his appraisement in the office of the register, fixing the valuation of the estate subject to tax at the sum of \$201,475.87. Upon this valuation there was due to the Commonwealth collateral inheritance tax in the sum of \$10,073.79, but, owing to the fact of payment of the same within three months after the death of the decedent, a discount of five per cent. was allowed, thus reducing the actual sum paid to \$9,570.11. There has already been refunded to the executor, on account of over-valuation, the sum of \$6,345.12 in three items in the collateral tax appraisement, as to which there was shown to have been clear error. The claim now made upon your

Department for repayment, also upon the ground of error, consists of the difference between the amount originally paid and the amount already refunded. The claim is now made on behalf of the executor that the entire payment was an erroneous payment and the petition of the executor is presented to you under the authority of the act of 25th of March, 1901 (P. L. 59).

That act is an amendment of the act of June 12, 1878, and provides:

“In all cases where any amount of collateral inheritance tax has been heretofore paid erroneously to the Register of Wills of the proper county, for the use of the Commonwealth, it shall be lawful for the State Treasurer, on satisfactory proof rendered to him by said Register of Wills of such erroneous payment, to refund and pay over to the executor, who may have theretofore paid such tax in error, the amount of the tax thus erroneously paid, provided that all such applications for the repayment of such tax, erroneously paid into the treasury, shall be made within two years from the date of said payment, except when the estate, upon which such tax shall have been so erroneously paid, shall have consisted in whole or in part of a partnership or other interest of uncertain value, or shall have been involved in litigation by reason whereof there shall have been an over-valuation of the estate on which the tax has been assessed and paid, which over-valuation could not have been ascertained within said period of two years; then, in such case, the application for repayment may be made to the State Treasurer within one year from the termination of such litigation, or ascertainment of such over-valuation, or if that period has already expired at the time of the passage of this act, then within six months after the passage of this act, notwithstanding any limitation contained in any previous act of Assembly.”

So far as the time limit is concerned the present application is clearly proper.

The claim is made by the executor of John H. Lick that the interest of his testator in the stock and bonds of the Lickdale Iron Company, which constituted by far the larger part of the estate, was an “interest of uncertain value” within the meaning of the foregoing act of Assembly; that the appraisement made was an over-valuation; that the fact of such over-valuation was incapable of ascertainment within the period of two years after the death of the testator; and that, in point of fact, it has been ascertained, since the expiration of two years following the testator’s death, that the estate was insolvent, no account having been taken by the appraiser

of certain commercial paper of the Lickdale Iron Company upon which the decedent was endorser, and which formed, at the time of his death, a contingent and not an absolute liability. The exact amount of the paper, upon which the decedent was endorser, outstanding at the time of his death, is not given with particularity, nor does it clearly appear in the evidence presented as to how far the insolvency of the estate results from the conduct of the business of the Lickdale Iron Company by the executor since the death of the testator. The petition proceeds upon the theory that the fact of insolvency at the date of the death of the testator is a fact now capable of demonstration, but at that time was unknown to the executor, and, moreover, incapable of being known within the period of two years following the testator's death, which was the period of limitation fixed by the act of 1878, which limitation it was the purpose of the act of 1901 to remove.

A careful examination of the facts in the case, of the exhibits attached to the petition, and particularly of the will and the codicils thereto of the late John H. Lick, satisfies me that it is unnecessary for you to go into the labor of stating an account with the estate of John H. Lick as of the time of his death, or of reviewing in detail the appraisement made by the special appraiser appointed by the register of wills of Lebanon county, because there is a broad and substantial ground upon which you can act and safely dispose of the case without going into the enormous labor of stating an account and ascertaining its correctness.

So far as the formal requirements of the act of 1901 are concerned, it does appear in the papers presented, upon the oath of the register of wills of Lebanon county, that the payment of collateral inheritance tax, for which repayment is asked, was erroneously made, "and that in fact said estate is insolvent and no collateral inheritance tax was due thereon to the Commonwealth." This statement of the register of wills of Lebanon county under oath, for the years 1891 to 1893 inclusive, is corroborated and confirmed by the sworn statement of Ulrich Welkman, his successor in that office; and is still further supported by the sworn statement of the executor in the petition filed, that "by reason of the over-valuation of said interest of the testator in the Lickdale Iron Company, your petitioner paid the collateral inheritance tax upon the valuation in excess of \$200,000, whereas, in truth and in fact, said estate was totally insolvent." There is nothing in the papers submitted to contradict these three sworn statements.

I am of opinion, however, that the contention that the tax was, in point of fact, "erroneously paid," rests upon a different ground and can be properly disposed of on that ground alone. In other words, it is unnecessary to ascertain with exactness whether or not

the estate was insolvent at the time of the decedent's death. The real ground upon which I place this opinion is that the executor ought not to have paid the tax at all, and that the payment was an erroneous payment. The reason for this conclusion rests upon an examination of the decisions of the Supreme Court in interpreting the act of May 6, 1887 (P. L. 79), relating to collateral inheritance tax, as well as upon a consideration of the terms and provisions of the last will and testament and the codicils thereto of the late John H. Lick.

The will and the codicils, which were probated on October 1, 1891, considered together, contain the following provisions: By will the testator gave certain specific and pecuniary legacies to certain legatees, upon all of which collateral inheritance tax would be properly chargeable, were it not for the provisions contained in the codicil, the codicil being worded in such a manner as to override and overshadow the provisions of the will itself, and also were it not for the provisions contained in the last codicil. The dominant thought in the mind of the testator was the management of that portion of his estate which was invested in the stock and bonds of the Lickdale Iron Company, and the clauses of the codicil which it is pertinent to consider in this connection are in substance as follows:

By the provisions of the first codicil, which is the dominant one, the testator, after reciting that a portion of his estate was invested in the stock and bonds of the Lickdale Iron Company, expressed the desire that the business of said company shall be carried on and conducted after his death in the same manner as when he was living, and, in order that his interests in the company might not be prejudiced by hasty action, he appointed Samuel Weiss as trustee under his will and codicil to exercise all the powers therein granted. In order to carry out this purpose he gave to Samuel Weiss, as trustee, all his shares of stock in the Lickdale Iron Company, and all of his shares of stock in the Bookwalter Iron and Steel Company, to be held on the following trusts: that he might vote such shares of stock, whenever occasion arose, in such manner as might be deemed most advantageous; that he might receive all dividends declared upon such shares of stock; and, after deducting the costs and expenses of the trust, including the compensation of the trustee, that he should pay the net balance annually to the executors of his estate. The trustee might exercise all rights of ownership over all such shares of stock in trust as therein provided. The testator empowered his trustee to sell any or all of said shares of stock, at public or private sale, on such terms as he might deem most advantageous, at any time or times, accompanied by the positive direction that such shares should be sold at the expiration of fifteen years from his death; the proceeds of such sales, after deducting the costs and

expenses of administering the trust, to be paid over to the executors of the estate for distribution, as provided in the will. The trust was to continue for the term of fifteen years from the decease of the testator, or the trustee might terminate it sooner, if he deemed it advantageous so to do, by the sale of all of the stock aforesaid, or by agreeing to the dissolution of both of said companies, if he deemed that advantageous, or he might agree to a dissolution and winding up of either of said companies, and might then receive and pay the amount coming to the estate to the executor, as aforesaid.

The trustee was further authorized, during the terms and continuance of the trust, as a shareholder or as a director and officer of the Lickdale Iron Company, if he be elected as such, to take all legal and proper steps to advance the interests of the company and to carry on and increase its business as fully as the testator might or could have done if living. In order to enable the trustee to act for the best interests of the Lickdale Iron Company and of his estate, the testator expressly authorized him, as trustee, to loan and advance moneys and funds of his estate, with or without security, to the said Lickdale Iron Company from time to time during the continuance of the trust, and whenever he required money for such a purpose he might address a written request to that effect to the executors, who were thereupon directed to advance him the moneys required for such a purpose, and on repayment of said loans by said iron company all such sums were to be repaid to his executors.

The trustee was further expressly authorized to renew all negotiable paper on which the name of the testator appeared as maker, either joint or several, or as endorser, from time to time as the trustee should think best, by signing as trustee, and by his signature as trustee on such renewals the credit of the estate should be pledged, and all of the testator's estate, not previously distributed, both real, personal and that portion held in trust, was specifically declared to be liable to pay and satisfy such renewable negotiable paper as though made and endorsed by the testator himself. The trustee was further expressly authorized, by his signature and endorsement as trustee upon negotiable paper, made by, or made to, or made for the use and benefit of the said Lickdale Iron Company from time to time, to pledge the credit of the estate, and all of the estate not previously distributed, both real, personal and that portion held in trust, was declared to be liable for the payment of any and all of such negotiable paper.

The testator further provided that, in order to carry out the provisions of the codicil, the executors might postpone distributions directed in the will, in whole or in part, in their discretion, or they might raise money by the sale of any of the testator's property from time to time as they might find necessary; and it was further

expressly provided that the surviving or acting executor should exercise all the powers conferred by the will and codicil upon the executors. It was further directed that the executors should not press or collect any debt, claim or demand which the estate might have against the Lickdale Iron Company at the time of the testator's death, by execution or other process of law, for or within three years after the death of the testator. The bonds of the Lickdale Iron Company, held by the estate, were to be held for such a length of time as the trustee thought advantageous to the interest of the estate and to the interests of the estate in the Lickdale Iron Company.

The trustee was further directed to use his best judgment in carrying out the trust as if it were his own business, and it was expressly declared that he should not be held liable to the estate, or to any of the legatees, for any losses that might occur in the conduct of the business, or that might result from any mistake in the exercise of his judgment or discretion in the matters committed to his care; and, in order further that the trustee might be saved harmless and held indemnified against all and any loss for which he might become liable as the holder of said shares of stock, held by him in trust as aforesaid, it was directed that the executors should pay and settle any and all losses, claims or demands for which said trustee might become individually liable as the holder of such shares of stock in the said Lickdale Iron Company or said Brookwalter Iron and Steel Company.

It is clear, from this recital of the provisions contained in the codicil, that the paramount purpose of the testator was the creation of a trust for the protection of the business of the Lickdale Iron Company and the interests of the estate of the testator in the said company. Each one of the provisions is specifically directed to this end, and all of the powers conferred upon the trustee were calculated to support and promote this end, but, in order to give his paramount purpose still further support and protection, the testator, by a later codicil, directed that the legacies given in the will or codicil to certain specific legatees should not be paid, so far as one-half of them was concerned, until the expiration of five years after his death, and this postponement was continued, by the further authorization expressly conferred upon the executors, that they might postpone the first and second distributions, except as provided in the previous codicil, in whole or in part, until such time as the executors or the acting executor might determine that said legacies could be paid without embarrassing the estate, as provided for in said codicil.

It is clear beyond dispute, therefore, that the trust created by the testator, and which was to run for a period of fifteen years after

the death of the testator, unless previously terminated by the action of the trustee in his discretion, dominated and controlled the whole disposition of the estate, and it is further clear that nothing whatever could come to the legatees named in the will and in the codicils until the purposes of the trust had been fully complied with, and the results of the administration of the trust handed over to the executors for distribution. In short, reading the will and the codicils together, the testator disposed of his estate by placing it in the hands of a trustee for administration during a period of fifteen years, if the trustee saw fit to take that time, or for a shorter period if the trustee exercised his discretion in that direction; and that no duty of payment or distribution to legatees was cast upon the executors until after the termination of the administration of the trust estate. This being so, it is undeniable that the payment of the collateral inheritance tax by the executor, within three months after the death of the testator, was an erroneous payment, one which the executor had no right to make, which he ought not to have made, and one which the Commonwealth could not exact. This position is fully sustained by the decisions of the Supreme Court of Pennsylvania.

In *Orcutt's Appeal*, 97 P. S., 179, it was held that the collateral inheritance tax does not attach to the articles of property of which the deceased dies possessed. It is imposed only on what remains for distribution, after expenses of administration, debts and rightful claims of third parties are paid or provided for. It is on the net succession to the beneficiaries and not on the securities in which the estate of the deceased was invested.

This decision was followed by that in *Nieman's Estate*, 131 P. S., 346. In this case a testator by will, after providing for certain legacies to collateral relatives in the shape of direct gifts, which were particularly subject to collateral inheritance tax, the widow was given power to appropriate the residuum to her own use during life, with a disposition over, and it was held that the amount of the collateral inheritance tax, if any, payable thereon, could not be ascertained until her death. The Supreme Court in its opinion used this language:

“As to the residue of the estate, it goes to the widow under the terms of the will. It is true there is a disposition of the surplus remaining after her death, but there may be no such surplus. The widow is given full power over the estate, and should there be a surplus, the amount of it can only be ascertained after her death.”

This case illustrates the principle involved here, to wit: that the fact as to whether a surplus will exist after a power of disposition

has been exercised, cannot be judged of until after the expiration of the time during which the power of disposition is exercised, and that, if the result of that power of disposition is such as to destroy the existence of a surplus, then there can be no surplus on which the tax can be computed.

It was also held by Mr. Justice Mitchell in *Coxe's Estate*, 181 P. S., 369, that, under the third section of the act of May 6, 1887 (P. L. 79), relating to collateral tax on estates in remainder, the word "owner," as used in that section, referred to the remainderman and not to the executor. The primary intent of the statute was to charge the beneficiary of the estate, and whether the phrase used is "person liable" or "person who shall come into actual possession" or "owner," it always means the same person, to wit: the remainderman. It was further held that "executors cannot be compelled to make present payment of the collateral tax on estates in remainder, for the reason that they are not the parties primarily charged with the payment, either present or future, and are not responsible for the owner's default of return and security, which makes the future tax payable immediately."

This was followed by the very recent decision of the Supreme Court in *Coxe's Appeal*, 193 P. S., 100, which gives a further interpretation to section 3 of the act of May 6, 1887 (P. L. 79). It was held that "persons who do not take their estates until after the termination of a preceding estate for life or years are not subject to any liability for the collateral inheritance tax until they come into actual possession of their estate by the termination of the precedent estates, and the tax shall be assessed upon the value of the estate at the time the right of possession accrued to the owner." In this last named case the testator left his whole estate, including mining leases, to trustees to pay the income to his wife, and, after her death, to various nephews and nieces. From the terms of the will it could not be presently ascertained what persons would actually come into possession of the estate upon the death of the widow; nor could the value of the estate at that time be determined. Therefore the Commonwealth could not compel any person to enter security to pay the tax, but was obliged to wait until the death of the widow, when the tax would be deducted from the shares of the persons then entitled to the estate. In this case the Supreme Court dealt with the claim which grew out of the character of the estate left by the decedent. The following language of Mr. Justice Green is pertinent to the present discussion:

"The remaindermen are only subject to the tax upon its valuation at the time they received it. The present valuation shows that \$200,000 of it consists of coal leases, in which the testator was lessor. By the time

of the widow's death it is entirely possible these leases will become valueless by reason of the exhaustion of the coal. The same is true as to the common and preferred shares of the Cross Creek Coal Company and the notes of that company, amounting in the aggregate to upward of \$300,000. What will these be worth when the widow dies? Nobody can possibly tell, and hence the present valuation may be very largely impaired when the time arrives at which alone the estate is to be valued for the present taxation."

The court adopted the conclusions reached by the court of appeals of the State of New York in the *Estate of Curtis*, 142 N. Y., 219, and in *Matter of Roosevelt*, 143 N. Y., 120, and in *Hoffman's Estate*, 143 N. Y., 327, in all of which the decisions were rested upon the theory that the tax could not be imposed until after the termination of the precedent life estates, and then only upon that which came to the ultimate remaindermen. Upon the whole case the Supreme Court was clearly of the opinion, and so declared, that the tax could not be determined until after the expiration of the life estate of the widow; that it would not become due and payable until that event had transpired; and that it was the value of the property as it should then appear to be that must constitute the basis upon which the tax must be declared.

Applying the principle contained in these decisions of our own Supreme Court to the facts in hand, it is beyond the reach of controversy that the interests of the legatees, upon which collateral inheritance tax due the Commonwealth could alone be computed, were necessarily in suspense until the termination of the trust, specifically created by John H. Lick, for the management and preservation of the interests of his estate in the Lickdale Iron Company. The management of that trust was discretionary, both as to the manner in which it was to be conducted and the time within which it was to be administered. The trustee was clothed with ample powers to carry on the business. The title to the shares of stock belonging to the estate was specifically vested in him. He was to vote it as his own property. He was to renew the notes upon which the testator was liable as endorser; he was authorized to pledge all of the interests of the estate in order to carry out this paramount purpose; and he was expressly discharged from liability for any loss arising from the exercise of his discretion upon any of these matters or resulting from the exercise of that discretion. The result appears to be that the expected profits, anticipated by the testator from the business of the Lickdale Iron Company, were not realized. The Lickdale Iron Company was the owner of a process for the manufacture of steel, which did not prove a business success. The executor, in the conduct of the business, called to his

assistance, legal and business advisers, and an examination of the papers submitted to me shows that he acted in entire good faith in accordance with the earnest desire of the testator, as expressed in the codicil to the will, and according to the advice that was given to him, both by lawyers and laymen acquainted with the character of the business conducted. It was through no fault of his that the enterprise was fruitless of results. The end, however, having been insolvency, there is nothing whatever left, now that the business has been wound up, for the legatees. They can claim nothing of the executors under the will because their rights were entirely subordinated by the testator himself to the execution of his primary and favorite purpose. There is nothing, therefore, coming into their hands, or into the hands of the executors for distribution.

It follows, therefore, under the principles stated in the decisions of the Supreme Court, quoted in this opinion, that there is nothing upon which the tax can be computed. Inasmuch as the executors were not obliged to make payment of the tax, the payment was erroneously made. The facts of the case are fully within the terms of the act of 25th of March, 1901, and, inasmuch as that act expressly declares that it shall be lawful for the State Treasurer, on satisfactory proof rendered to him by said register of wills of such erroneous payment, to refund and pay over to the executor, who has paid any such tax in error, the amount of such tax thus erroneously paid, I am of opinion that the prayer of the petitioner should be granted, and that you are fully authorized by the terms of the statute, as well as by the principle of the decisions of the Supreme Court, in interpreting the act of 1887, to make payment of the sum of \$3,224.99.

Very respectfully,

HAMPTON L. CARSON,

Attorney General.

STATE TREASURER—JUDICIAL SALARY BILL.

The office of the State Treasurer is a ministerial one, and it is his plain duty to pay out money under the terms of a law which has been legally construed by the legal officer of the Commonwealth and upon a warrant drawn by the Auditor General.

Office of the Attorney General,

Harrisburg, Pa., February 4, 1904.

Hon. Frank G. Harris, State Treasurer:

Dear Sir: I am in-receipt of your letter of the third instant. Let me say in reply that all the questions raised by you were considered by me very carefully before rendering my opinion to the Auditor General, and a careful perusal of that opinion will show that I have

answered them fully. There are, it is true, some newspaper rumors of certain judges having expressed a doubt as to their right to accept the compensation fixed by the recent act, but I have no official knowledge of any such sentiment or refusal; nor am I aware that any of them have read my opinion in full. I am informed that vouchers are coming into the Auditor General's office very rapidly from all over the State, and that warrants have been issued by that official in compliance with the law and with my opinion. So far as your own responsibility is concerned, I can see no ground for apprehension. The duties of your office are clearly ministerial, and you are not only legally justified in paying out money on the authority of a law duly enacted, particularly when such law has been officially construed by the legal officer of the Commonwealth, and a warrant drawn by the proper State officer upon you for payment, but it is your plain duty to make payments promptly.

A taxpayer can take the question into court upon an application for an injunction. Over that method of raising the question I have no control. I am clear that the question ought not to be and cannot be made the subject of a case stated between the various branches of the administration. As the legal officer of the Commonwealth, the duty of enforcing laws of this nature devolves upon me, and I have accepted the responsibility without reservation. If litigation ensues, I would much prefer to be in a position where I could freely act for the Commonwealth in all its branches, and not be placed in a position where, apparently at least, I am endeavoring, by the legal process of mandamus, to compel a State official to perform his duty. My opinion to the Auditor General, and my directions to him contained therein, apply with as much force to you as to him. He has seen fit to obey the law as I have construed it. You will be entirely justified in doing the same thing. The discretionary power lodged in him does not apply to your office; therefore the question was raised by him and my opinion sent to him instead of to yourself. The injustice of depriving all the judges of the Commonwealth of their compensation during the progress of a litigation which may be extended in time should be apparent.

Considering all these facts, I am of opinion that there is no such discretion lodged in your office as to enable you to raise the question submitted by your letter, or to appear as a party in a case stated. I must, therefore, respectfully but firmly decline to consent to the proposition contained in your letter.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

STATE TREASURER—COLLATERAL INHERITANCE TAX.

A legacy and devise for life is clearly liable to the payment of collateral inheritance tax, and the tax being once paid, should not be returned to the payor.

Office of the Attorney General,
Harrisburg, Pa., December 21, 1904.

Hon. William L. Mathues, State Treasurer:

Sir: I am in receipt of your letter of the 15th instant, enclosing the petition of the executors of the estate of Alexander McElroy, deceased, requesting the return of the collateral inheritance tax which they claim was by mistake paid by them to the register of wills of Philadelphia on the annuity and life interest in certain real estate devised by the decedent to Helen B. Laubach.

I have carefully examined the copy of the record which you enclosed, and I find nothing which would justify you in acceding to their request. Under the collateral inheritance tax law of the State the legacy and devise to the said Helen B. Laubach for life is clearly liable to the payment of the tax. It appears from the copy of the will which you enclosed that this devise is made in the following language:

"Item 4. I do give and bequeath unto my esteemed friend, Mrs. Helen B. Laubach, for the kindness and friendship shown to me by her, the sum of three hundred dollars per annum for and during the term of her natural life, to be paid to her in equal monthly payments.

Third Codicil. "In addition to the bequest to Mrs. Helen B. Laubach, in Item No. 4 of my will I give and bequeath unto the said Helen B. Laubach the sum of one hundred dollars per annum during the term of her natural life, to be paid to her in equal monthly instalments."

Fourth Codicil. "In addition to the bequests to Mrs. Helen B. Laubach in Item 4 of my will and Codicil 3 thereto, I hereby order and direct my executors and trustees to allow her, the said Helen B. Laubach, to have, use and occupy any one of my houses Nos. 662, 664, 666 North Forty-second street, for and during the term of her natural life free of charge. The said Helen B. Laubach to have the selection of said house and the said executors and trustees to keep the same in good order and repair, and to pay the taxes, water rent and all other necessary and proper expenses."

Fifth Codicil. "I revoke the bequest to Mrs. Helen B. Laubach in Item No. 2 of Codicil No. 1 of my last will and revoke the whole of Codicil No. 4 of my will. I give and bequeath unto the said Helen B. Laubach all the furniture contained in my dwelling No. 5179 Columbia

avenue at the time of my decease. I hereby order and direct my executors and trustees to allow the said Helen B. Laubach to occupy my said house No. 5179 Columbia avenue for and during all the term of her natural life. The said executors to pay all taxes and charges and all the necessary and proper expenses."

By the terms of the will the estate for life settled upon Mrs. Helen B. Laubach by the testator is devised and bequeathed at her death to the trustees of the First Association of Spiritualists of Philadelphia and their successors and assigns forever. The residuary legatee and devisee, the First Spiritualistic Society of Philadelphia, must pay a collateral inheritance tax upon the residue and remainder of this life estate when it comes into their possession, and it is equally clear that the life estate of Mrs. Laubach is liable for the payment of the collateral inheritance tax which is now in the hands of the State Treasurer, having been paid over by the executors and the return of which they are now demanding.

So far as can be ascertained from the papers and the record before me, the only point in controversy is whether the collateral inheritance tax paid on the estate for life of Helen B. Laubach shall come out of her interest or whether it shall be charged against the whole estate of the decedent. The determination of this question does not concern the Commonwealth. Her officers are only interested in securing the collateral inheritance tax due the State, and this they have received. I am of opinion, and advise you, that this payment was properly made and should not be returned.

Very respectfully,

FREDERIC W. FLEITZ,
Deputy Attorney General.

OPINIONS GIVEN TO THE SECRETARY OF INTERNAL AFFAIRS.

PUBLIC OFFICERS—DEPARTMENT OF MINES—BUREAU OF MINES CONVERTED INTO DEPARTMENT OF MINES—SALARY.

Where the act creating the Bureau of Mines was repealed by that creating the Department of Mines, the duties of the chief of the bureau, his assistant and messenger, being subsequently performed by the same persons as officers of the department, and an appropriation had previously been made for the salaries of the officers and employes of the bureau until a future time, held, that such persons were entitled to such salaries until such future time.

Office of the Attorney General,
Harrisburg, Pa., May 20, 1903.

Hon. Isaac B. Brown, Secretary of Internal Affairs:

Sir: In reply to your letter of May 13th, asking whether, in view of the recent creation of a Department of Mines, the Chief of the Bureau of Mines, his assistant and messenger can be paid to the first of June under the general appropriation act of 1901, which covers the two fiscal years ending May 31, 1903, I answer in the affirmative. As the appropriation was made to cover those offices for two years and the men are now engaged in doing their work, it is entirely proper that they should be paid the money that was appropriated to them for their salaries. I suggest that you prepare the pay-roll, including the names of the present Chief of the Department of Mines, his assistant and messenger, covering the balance of the fiscal year ending May 31, 1903. There is no good reason, in my judgment, why the Chief of the Department of Mines, his assistant and messenger should not be paid, even though the act creating a Department of Mines in effect repeals the act creating a Bureau of Mines in the Department of Internal Affairs.

I have an analogous case in my own Department. My stenographer was made my private secretary and his salary was increased, but I certainly shall not take the position that his office as stenographer is abolished and his pay stopped until the first of June, because he is still in the employ of this Department and is continuing to perform his work.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

FIREMAN'S RELIEF ASSOCIATION.

The State is not directly interested in matters affecting Fireman's Relief Association, but as a courtesy to the Deputy Secretary of Internal Affairs, who requested the opinion, the Attorney General advises him unofficially that a fireman injured while bedding the horses should be paid relief. Such service is directly connected with the work of the fire department and necessary to its efficiency.

Office of the Attorney General,
Harrisburg, Pa., October 8, 1903.

Hon. Theodore B. Klein, Deputy Secretary of Internal Affairs:

Dear Sir: I herewith return, as requested, the letter of your correspondent, A. M. Stager, of Chambersburg, Pa. He states that he is the treasurer of the Local Firemen's Relief Association, which receives its funds from the State.

I do not understand the basis upon which this statement is made, as I do not find in the general appropriation act of 1903 any appropriation made for that purpose, nor do I understand why the question which Mr. Stager asks should be submitted to your Department. I am unable to perceive that there is any interest of the State involved, and therefore I am not called upon to give an official opinion; but, as a matter of courtesy to you, and unofficially, I may state that I see no objection to making payment to the driver who was injured while bedding his horses. Such service was directly connected with the work of the fire department and necessary to the efficiency of the department. If neglected, disaster might follow. The words "while doing public fire duty" are not to be read in the narrow sense of "while actually engaged in putting out a fire," but can be fairly interpreted to mean "while engaged in any work connected with the work of the fire department." Suppose the man had been hurt while cleaning the hose or while housing the ladders, it would be clear that his injuries were received while caring for the necessary implements, for unless they be kept in proper order a fire could not be promptly or efficiently extinguished. Caring for the horses to draw the carriages, trucks and engines is quite as necessary as attention to the hose and ladders. In my judgment, therefore, the man should receive his money.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

SECRETARY OF INTERNAL AFFAIRS—INSPECTORS OF WEIGHTS AND MEASURES—CONSTITUTIONALITY OF THE ACT OF 26TH OF JUNE, 1895, CONSIDERED IN CONNECTION WITH THE ACT OF 11TH APRIL, 1903.

Neither of the acts above cited conflicts with Article III, Section 7, of the Constitution of Pennsylvania.

While entertaining no doubt as to the constitutionality of the Inspectors of Weights and Measures Act, the Attorney General refrains from expressing an official opinion, because there is no authority for an Attorney General to pass upon the constitutionality of an act of Assembly. The proper course is, when an application is made to him for the initiation of a proceeding to test the matter in court, to allow process to be instituted.

The first section of the act of 26th of June, 1895, allows the county commissioners to designate the number and fix the salaries of the inspectors, but the matter of selecting the inspectors rests with the Governor.

Office of the Attorney General,
Harrisburg, Pa., January 7, 1904.

Hon. Isaac B. Brown, Secretary of Internal Affairs:

Dear Sir: I have your letter of the 2d of January, relative to the subject of inspectors of weights and measures, and asking my opinion as to the constitutionality of the act of 26th day of June, 1895, considered in connection with the act of 11th of April, 1903.

I have carefully examined and considered article III, section 7, of the Constitution of 1874 and can perceive nothing in either act which conflicts with its provisions. The decision of the Supreme Court in the case of *Commonwealth vs. Moir*, 199, P. S., 536, and the authorities therein cited, completely cover the point. While entertaining no doubt upon the subject, I, at the same time, refrain from expressing an official opinion. In my judgment, I have no authority as Attorney General to pass upon the constitutionality of acts of Assembly. I am not armed with judicial authority; I am bound to assume that an act of the Legislature, duly passed and approved by the Governor, is constitutional, and I must govern my acts accordingly. The most that I can do is, when such a question is called in doubt by an application to me for the initiation of a proceeding to test the matter in court, to so allow process to be instituted as to bring the question fairly before a court for its determination. No such application is at present before me, and therefore I cannot act. This is the rule which has invariably governed the action of the Attorney General's Department, not only in this State, but in other states, and it is the only practicable rule that I can follow.

The bridge case, wherein you and I and the Secretary of the Commonwealth raised a question of constitutionality, is not an exception. There we simply declined to proceed, and we were brought

into court by a proceeding instituted in mandamus, so that the court decided the question and we did not.

Allow me, in passing, to express a difference of opinion on the matter of the interpretation of the first section of the act of 26th of June, 1895. I do not agree that that section provides that the county commissioners shall designate to the Governor the names of the parties whose appointments are desired for inspectors in cities of the first and second classes. The only authority that I can find lodged by that section in the county commissioners is to designate the number and fix the salaries of the inspectors, but the matter of the selection of the names rests entirely with the Governor.

You have not asked me what your duties are as to the expenditure of the fund provided under the act of April 11, 1903, and I therefore refrain from expressing any opinion thereon.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

DEPUTY SECRETARY OF INTERNAL AFFAIRS—APPOINTMENT AND DUTIES—ACTS OF APRIL 18, 1895, AND APRIL 24, 1903.

The act of April 24, 1903, P. L. 294, repeals so much of the act of April 18, 1895, P. L. 38, as relates to the appointment and commissioning of the Deputy Secretary of Internal Affairs, and provides that that official shall be appointed by the Secretary of Internal Affairs, at whose pleasure the deputy shall hold his office.

The deputy can exercise all the powers specifically conferred upon him by the act of April 18, 1895, which, in this respect, is not affected or repealed by the act of April 24, 1903, and can also act for the secretary in all matters pertaining to his office, signing himself "Deputy Secretary of Internal Affairs."

Commission to Deputy Secretary of Internal Affairs, 13 District Reps. 362, corrected and explained.

Office of the Attorney General,
Harrisburg, Pa., February 5, 1904.

Hon. Isaac B. Brown, Secretary of Internal Affairs:

Sir: In answer to your letter, relating to the Deputy Secretary of Internal Affairs, I have the honor to reply that, in my judgment, the act of 24th of April, 1903 (P. L. 294), repeals so much of the act of 18th of April, 1895 (P. L. 38), as relates to the appointment and commissioning of the Deputy Secretary, the later act authorizing and empowering you to make the appointment, and repealing that portion of the earlier act which provided that, on the recommendation of the Secretary of Internal Affairs, the Governor should commission a person as Deputy Secretary.

As the law now stands, you are specifically authorized to appoint the Deputy Secretary of Internal Affairs, and he holds his office

at your pleasure. He can also exercise all of the powers specifically conferred upon him by the act of 18th of April, 1895, which, in this respect, is not affected or repealed by the act of 24th of April, 1903.

On the 9th of September last, at the request of the Governor, I gave him an official opinion that he was not required to issue a commission to the Deputy Secretary of Internal Affairs. If you are not acquainted with the terms of that opinion, it will be my pleasure to send you a copy of it. If you already have a copy, I ask you to note an error in the typewriting. In the copy now before me it appears that, in speaking of the act of 24th of April, 1903, it is stated "In my judgment, it repeals the act of 1895 in its entirety." This is an error so far as the words "in its entirety" are concerned. The sentence should read: "In my judgment, it repeals the act of April, 1895, *pro tanto*."

As to the powers of the Deputy, outside of the specific enumeration of them in the second section of the act of 1895, I am clear that at common law your Deputy has the right and the power to act for you in the transaction of all of the business of the Department. The word "deputy" is used without a qualifying adjective, such as "special deputy," and I interpret it in the general sense which has been uniformly attached to the word "deputy."

Bouvier, in his Law Dictionary, defines a deputy as "One authorized by an officer to exercise the office or right which the officer himself possesses, for and in place of the latter." He quotes with approval Comyn's Digest, title "Office," to the following effect: "In general, ministerial officers can appoint deputies, unless the office is to be exercised by the ministerial officer in person." He also states "In general, a deputy has power to do every act which his principal may do; but a deputy cannot make a deputy."

Anderson, in his Dictionary of Law, gives the following definition:

"Deputy. One who acts officially for another; the substitute of an officer—usually of a ministerial officer."

The American and English Encyclopedia of Law defines the word as follows:

"A deputy is one who, by appointment, exercises an office in another's right, having no interest therein, but doing all things in his principal's name, and for whose misconduct the principal is answerable. He must be one whose acts are of equal force with those of the officer himself, must act in pursuance of law, perform official functions, and is required to take the oath of office before acting."

Wharton, in his Law Dictionary, states that a deputy differs from an assignee or agent in that an assignee has an interest in the

office itself, and does all things in his own name, for whom his grantor shall not answer, except in special cases; but a deputy has not any interest in the office, and is only the shadow of the officer in whose name he acts. And there is a distinction in doing an act by an agent and by a deputy. An agent can only bind his principal when he does the act in the name of his principal; but a deputy may do the act and sign his own name, and it binds his principal; for a deputy has, in law, the whole power of his principal:

The definition given in the Century Dictionary is as follows:

“A deputy is a person appointed or elected to act for another or others; one who exercises an office in another's right; a lieutenant or substitute. In law, one who by authority exercises another's office or some function thereof, in the name or place of the principal, but has no interest in the office. A deputy may in general perform all the functions of his principal, or those specially deputed to him, but cannot again depute his powers. Specifically—a subordinate officer authorized to act in place of the principal officer, as, for instance, in his absence. If authorized to exercise for the time being the whole power of his principal, he is a general deputy, and may usually act in his own name with his official addition of deputy.”

In the confiscation cases, reported in 20 Wallace's Reports of the Supreme Court of the United States, page 111, Mr. Justice Strong, in disposing of an objection which had been urged against proceedings in the district court, to the effect that they had not been signed by the clerk of the court, but had only been signed by the deputy clerk, used these words:

“This was sufficient. An act of Congress authorized the employment of the deputy, and in general a deputy of a ministerial officer can do every act which his principal might do.”

The legal and the popular definitions agree, and I am of opinion that, inasmuch as the act which authorized you to appoint a deputy uses the term in its general and not in a special sense, the Deputy Secretary of Internal Affairs is authorized to act for you in all matters pertaining to your office, signing his name as “Deputy Secretary of Internal Affairs.” To require you to personally sign every paper or certificate would be to deprive you of that aid and the Commonwealth of that service which it was the purpose of the acts of 8th of May, 1876 (P. L. 143); 2d of May, 1887 (P. L. 78); 18th of April, 1895 (P. L. 38), and 24th of April, 1903 (P. L. 224), to secure.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

OPINIONS GIVEN TO THE SUPERINTENDENT OF PUBLIC INSTRUCTION.

MEDICAL COUNCIL.

The act of May 18, 1903, does not confer any authority upon the Medical Council to issue a certificate to Dr. Pilcher, permitting him to practice, unless he has passed a successful examination.

Office of the Attorney General,
June 30, 1904.

Hon. Nathan C. Schaeffer, Superintendent of Public Instruction:

Sir: I herewith return to you the letter of Doctor Pilcher, addressed to Dr. Henry Beates, concerning which you requested my opinion.

I cannot find in the act of 18th of May, 1903, any authority vested in the Medical Council or the State Board of Medical Examiners which will enable them to issue a certificate to Doctor Pilcher, permitting him to open an office or appoint a place to meet patients or receive calls within this State unless he has passed a successful examination. Section 15 of the act, referred to by you in your letter, does not confer this authority, but, on the contrary, by exclusion prohibits it. The first part of the section, dealing with medical officers serving in the army and navy of the United States, plainly applies only to such as may be in commission and actually engaged in Pennsylvania.

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

SCHOOL DIRECTORS.

Under the laws, in all cities, boroughs or townships having a population of over 5,000 inhabitants, the school directors may elect every third year viva voce, a city, borough or township superintendent and determine the amount of his compensation.

Section 13, Article II of the Constitution does not apply to the case. The action of school directors is not a "law."

Office of the Attorney General,
Harrisburg, Pa., December 22, 1904.

Hon. N. C. Schaeffer, Superintendent of Public Instruction:

Sir: The act of April 9, 1867, (Section 7, P. L. 53); the act of June 15, 1871 (P. L. 390), and the act of May 7, 1885 (P. L. 15), are to be read together.

In effect they provide that the school directors of any city or borough or township in the Commonwealth, having a population of over five thousand inhabitants, may elect every third year *viva voce* by a majority of the directors present one person of literary and scientific requirements and skill and experience in the art of teaching, as city, borough or township superintendent for the three succeeding school years, and "determine the amount of his compensation."

The word "determine" means to fix, settle or decide, and implies discretion.

In my judgment the result, once reached, is not unalterable, as much depends upon varying conditions, such as the value of the services, the worth of the incumbent, the increase of work, the increased cost of living, the necessity or advisability of retaining a competent man. I find nothing in the acts which limits the discretion of the directors. The matter is left to their good sound judgment, exercised under a sense of duty to the public as well as to the superintendent.

Section 13, article III, of the Constitution of the State does not apply to the case. The prohibition therein contained is aimed at legislative action, and forbids the passage of a law increasing or diminishing the salary of a public officer. The action of the school directors in determining the salary of a superintendent cannot be regarded as a law. The matter is fully covered by the decision of the Supreme Court in the case of *Baldwin vs. City of Philadelphia*, 99 Pa. St. Rep., 165.

That decision makes it unnecessary to consider whether a city, borough or township superintendent is a public officer in the constitutional sense.

I am of opinion that the increase is lawful.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

OPINIONS GIVEN TO THE INSURANCE COMMISSIONER.

INSURANCE COMMISSIONER—REVOCATION OF INSURANCE
BROKER'S LICENSE.

Section 45 of the act of May 1, 1876 (P. L. 53) as to the granting of licenses to insurance brokers is mandatory upon the Insurance Commissioner. There being no act of Assembly allowing the Insurance Commissioner to revoke the license of a broker who has violated the terms of the license, he is without authority to do so.

Office of the Attorney General,
Harrisburg, Pa., February 12, 1903.

Hon. Israel W. Durham, Insurance Commissioner:

Sir: You ask me for an opinion whether you, as Insurance Commissioner, have the right to revoke the license of an insurance broker convicted of violating the insurance laws or acting in excess of the powers conferred upon him by the certificate of authority.

The limits of the authority of the broker are clearly stated in section 44 of the act of May 1, 1876 (P. L. 53), to which the certificate as granted strictly conforms. The licensee is authorized and empowered "for and during the term of one year from the date hereof to negotiate contracts of insurance or place risks or effect insurance with any insurance company established in this Commonwealth or its agents, and with the agents of any insurance company not incorporated by this Commonwealth, which is duly authorized to do business therein." The granting of such a license is governed by section 45, which is in the following terms:

"The Insurance Commissioner shall grant certificates of authority *** which shall continue in force for one year from the date thereof, and shall be renewed annually thereafter."

This language is mandatory and vests no discretion whatever in the Insurance Commissioner. Upon application being made and the payment of the prescribed fee, the license must be granted. Although there has never been, so far as I know, a judicial interpretation of this particular statute, yet similar statutes have been frequently interpreted by the courts.

In the case of *Commonwealth v. Stokely*, 12 Philadelphia, 316, it was said by Judge Mitchell, in dealing with a statute relating to places of amusement, in which the language was almost similar:

"The language of this section is plain and peremptory, 'which license shall be granted' * * * upon the payment,' and no discretionary power can be found in it unless we are at liberty to gather it from some other section of the act, or from some clear and established rule of general law."

In the course of his opinion Judge Mitchell calls attention, by way of contrast, to the language of the act of April 11, 1868, section six, which refers to the licensing of foreign insurance companies to do business in this State, and to various other statutes where a discretion was in terms vested in the official empowered to grant such licenses, and draws a sharp distinction between such statutes and those, like the act under consideration, where the verb used is "shall" without qualifying language. And in Stedman's Appeal, 14 Philadelphia Reports, 376, the same judge, dealing with an act which empowered the mayor of cities to grant licenses for theatres, concert saloons, etc., in terms almost identical with those under consideration, said:

"Under this act, the license was a matter of right, to which the applicant was entitled on the payment of the amount fixed by law. The mayor had no discretion in the matter."

Similar results were reached in *Commonwealth v. Kutz*, 4 District Reports, and *Smith's Petition*, 5 District Reports, 465.

Such, then, being the nature of the act which you are called on to perform when an application is made to you for the granting of a license, have you power to revoke the license so granted upon a violation by a broker of its terms?

A close reading of the acts relating to your Department discloses the fact that no such power of revocation is anywhere given, and, in the absence of any provision either in the act of May 1, 1876, or any other statute, conferring the power to revoke a certificate once granted in accordance with a mandatory law, I am of opinion that no power to revoke exists or can be properly exercised.

It is noticeable that in the acts discussed by the judges in the cases above quoted, in two instances, there were provisions covering the matter of revocation. Thus, in Stedman's Appeal, the provisions of the act were as follows:

"That for violation of any provisions of the act the mayor might vacate the license."

Much stress was laid upon this provision. The conclusion reached is fortified by the view taken by the Supreme Court in *Dolan's Appeal*, 108 Pa. St., 564, where it was held that the courts of quarter sessions have the power to revoke licenses granted for the sale of intoxicating liquors, and the basis of the decision was

that such power was expressly conferred by the statute in the following terms: "Upon sufficient cause having been shown, the said court shall have power to revoke any license granted by them." As no such words are to be found in the insurance acts, the power to revoke a license, in my judgment, does not exist.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

REGISTRATION OF FOREIGN BENEFICIAL SOCIETIES—INSURANCE
COMMISSIONER—SIMILARITY OF NAME.

The commissioner of insurance may refuse, at his discretion, registration, under the act of April 6, 1893, P. L. 7, to a foreign fraternal beneficial society on the ground of the close similarity in its name and title to that of a society already registered in Pennsylvania.

Office of the Attorney General,
Harrisburg, Pa., February 26, 1903.

Hon. Israel W. Durham, Commissioner of Insurance:

Sir: You have called my attention to section two of the act of April 6, 1893 (P. L. 7), and section one of the act of 25th of June, 1895 (P. L. 281), and request an opinion whether you, as Commissioner of Insurance, can at your discretion refuse registration to a foreign fraternal beneficial society bearing a strong similarity in name to one already registered and having a number of lodges and a large membership in Pennsylvania.

Accompanying your letter are a number of papers showing that there is already registered with your Department a fraternal beneficial society of the State of Michigan under the title of "Knights of the Maccabees for Pennsylvania," and protesting against the registration of a fraternal beneficial society from the State of Michigan under the title of "Knights of the Modern Maccabees of Michigan." Similar protests are lodged in behalf of "The Supreme Hive, Modern Ladies of the Maccabees of the World" and "The Great Hive of the Ladies of the Maccabees of the State of Pennsylvania" against the registration of "The Ladies of the Modern Maccabees for Michigan" and the "Knights of the Modern Maccabees of Michigan."

I am of opinion that you are at liberty to refuse the present applicant for registration solely upon the ground of the close similarity in name and title to that of the society already registered in Pennsylvania. With the merits of the contention between these societies you have nothing whatever to do, nor can you pass upon the contested questions of power or priority of status in the home State. Neither can you determine the rights of competing subordinate

lodges. It is sufficient for you to guard your Department and the public against the confusion that will arise from the close similarity in the titles of societies engaged in precisely the same kind of work. The present applicant is seeking to enter a territory occupied by a society already registered and publicly known under a designation which has been appropriated by it through priority of application and registration.

Your power to exercise a discretion in this matter does not rest upon the second section of the act of April 6, 1893. If that section stood alone, you would have no discretion in the matter, but the act of 25th of June, 1895 (P. L. 280), must be read in this connection. That act relates to fraternal beneficial or relief societies, as defined in the act of 6th of April, 1893, and provides that the Commissioner of Insurance shall be appointed as the attorney in this State of any foreign society seeking admission into this State, on whom process can be served. It is expressly provided that any lawful process against it, which is served on said attorney, shall be of the same legal force and validity as if served upon the association itself, and that the authority shall continue in force so long as any liability remains outstanding in this State. Service upon such an attorney shall be deemed sufficient service upon the association. It is made the duty of the Commissioner of Insurance, when served with process, immediately to notify the association of such service, and copies must be forwarded. A record is to be kept, showing the day and hour upon which service is made, and other formalities must be observed by the Commissioner of Insurance. This undoubtedly requires careful action on the part of the Commissioner of Insurance, as agent, in order to guard effectually the rights of the principal. The Commissioner of Insurance has a right to protect himself against liability to error in the transaction of the business of his principal, and to this end it is reasonable that he should require that his principal should do business under a name and title so far distinct and individual that no confusion may arise either in his own Department or in the public mind as to the identity of the principal for whom he is acting. The introduction of a qualifying adjective is so slight as to effect no real change in the title. Names so closely similar as those under consideration are objectionable, and you can reject the present application upon the principle of *idem sonans*.

Very respectfully,

(Signed.)

HAMPTON L. CARSON,
Attorney General.

LIVE STOCK INSURANCE BY MUTUAL FIRE INSURANCE COMPANIES.

Mutual fire insurance companies, incorporated under Section 1 of the act of May 1, 1876 (P. L. 53) may insure live stock against loss by fire.

Office of the Attorney General,
Harrisburg, Pa., April 30, 1903.

Hon. Israel W. Durham, Insurance Commissioner:

Sir: I have your letter of recent date, in which you state that the question has been raised before your Department as to the right of mutual fire insurance companies, incorporated under the first paragraph of section one of the act of May 1, 1876 (P. L. 53), to insure live stock against loss by fire, and asking for an official opinion thereon.

The part of the section in question reads as follows:

"And any ten or more persons, citizens of this Commonwealth, may associate in accordance with the provisions of this act, and form an incorporated company for any of the following purposes, to wit:

"First. To make insurance either upon the stock or mutual principle against fire on all kinds of buildings, merchandise and other property, and to effect marine and inland insurance on vessels, cargoes and freights, and on merchandise and other property in course of transportation."

Nearly all of the fire insurance companies incorporated in this State have been formed under the provisions of the above act, and their right to make insurance against loss by fire on all kinds of property has never been questioned until in the present instance. This doubt seems to have arisen from a mistaken construction of the fourth paragraph of the first section, which permits companies organized as above "to make insurance either upon the stock or mutual principle upon the lives of horses, cattle and other live stock, against loss, damage or liability arising from any unknown or contingent event whatever, except the perils and risks enumerated in the preceding paragraphs of this section.

It will be readily seen that the purpose of paragraph four was to authorize the formation of companies to do what is known as "live stock insurance;" that is, to make insurance upon the lives of horses, cattle and other live stock against any loss, damage or liability except such as are covered in the preceding paragraphs of the section, and it does not limit or restrict the powers of companies organized under the preceding paragraphs in any way, but specifically exempts them in terms. Inasmuch as a company organized under the first paragraph has the right to make insurance against

fire "on all kinds of property," and as live stock is unquestionably property, it follows logically that such companies may insure live stock against loss by fire.

I am therefore of opinion, and advise you, that a company incorporated under the provisions of the first paragraph of the first section of this act may make insurance against loss by fire upon all kinds of property, including live stock.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

NATIONAL INSURANCE COMPANY—CORPORATIONS—INCREASE OF STOCK—ACT OF FEB. 9, 1901.

The act of February 9, 1901, P. L. 3, entitled "An act to provide for increasing the capital stock and indebtedness of corporations," relates, in express terms, to any corporation created by general or special law, and therefore applies to a corporation created by a special act whose charter contains nothing which exempts it from compliance with the terms of any act subsequently passed for the regulation, control and management of corporations.

The requirements of the act of February 9, 1901, P. L. 3, considered.

Office of the Attorney General,
Harrisburg, Pa., September 17, 1903.

Hon. Israel W. Durham, Insurance Commissioner:

Sir: You ask me whether the resolution, of which you send me a duly certified copy, as filed in the office of the Secretary of the Commonwealth, adopted by the stockholders of the National Insurance Company of Allegheny, Pa., on the 4th day of May, 1903, covering the increase of the capital stock of said company, is in legal form and in compliance with the requirements of the law.

The certificate shows that a meeting of the stockholders of the said company, held on the date specified, at the office of the company, 1,703 shares out of 2,000 being represented, the following resolution was unanimously adopted:

"Resolved, That the capital stock of the National Insurance Company of Allegheny, Pa., be and is hereby increased from \$100,00 to \$200,000; and it is further resolved that the officers and board of directors be authorized to issue two thousand new shares of stock at a par value of fifty dollars; and it is further resolved that each stockholder shall have the right to subscribe of the new stock pro rata of his present holdings, subject to the price and terms as proposed by the directors at a meeting of its board, held March 16, 1903."

The foregoing resolutions are duly certified to by the president of the company and the secretary.

I am of opinion that the resolutions as adopted do not comply with the requirements of the act of 9th of February, 1901 (P. L. 3), and I am further of opinion that this act is binding upon the company. The company was chartered under a special act of Assembly, dated the 6th day of February, 1866, under an act entitled "An act to incorporate the National Insurance Company of the City of Allegheny." By the first section certain individuals therein named, citizens of Allegheny county, were appointed commissioners who were authorized and empowered to establish an insurance company, to be located in the city of Allegheny, in the county of Allegheny, by the name and title of "The National Insurance Company," with a capital of \$100,000, with a privilege of increasing the same to \$200,000, and said company should be organized and managed according to the provisions of an act to provide for the incorporation of insurance companies, approved the 2d day of April, 1856, excepting section eight, and be limited to the risk designated in the first class in the seventh section of said act, and that section third be amended by allowing the payment of stock to be made in lawful money of the United States instead of gold and silver.

The foregoing provisions constitute the substance of the charter. It is observable that, while the charter confers the power to increase the capital stock from \$100,000 to \$200,000, yet there is no provision prescribing the manner in which said increase shall be made. The act of 9th of February, 1901 (P. L. 3), entitled "An act to provide for increasing the capital stock and indebtedness of corporations," relates in express terms to "any corporation created by general or special law." It applies, therefore, directly to the National Insurance Company of the City of Allegheny, which was created by a special law, and there is nothing in the charter which exempts that company from compliance with the terms of any acts subsequently passed for the regulation, control and management of corporations.

Section two of the act prescribes specifically the mode by which an increase in capital stock shall be made, how notice shall be given, how the consent of the stockholders shall be obtained and certified; and provides further for a special meeting of stockholders, together with notice of the object, followed by publication in the newspapers, how the vote shall be taken and the election conducted, how the judges shall be sworn, how they shall make out their returns in duplicate, how ballots shall be endorsed, how proxies shall be received; how a statement of the amount of capital stock shall be furnished to the judges of election; and, further, how the returns of actual increase shall be made within thirty days thereafter to the Secretary of the Commonwealth, and how a bonus shall be paid to

the State Treasurer upon the increase. There is also a penalty imposed for neglect or omission to make said return.

In my judgment, all of the foregoing provisions of the act are binding upon this company, and compliance with them is a prerequisite to any valid increase of capital stock.

I herewith return the papers.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

HEALTH INSURANCE COMPANIES—JOINT STOCK HEALTH INSURANCE COMPANIES—CAPITAL STOCK—ACT OF MAY 1, 1876, AND APRIL 28, 1903.

The effect of the acts of April 28, 1903, P. L. 329, and May 1, 1876, P. L. 53, is that a corporation organized for the purpose of insuring the health of individuals upon the joint stock plan cannot commence business until its capital has been paid in full. Until then it cannot issue certificates to the persons entitled to the same, and it cannot call upon the Insurance Commissioner to examine the assets of the company and to empower it to issue policies and engage in the business of insurance for which it was organized.

October 31, 1903.

Hon. Israel W. Durham, Insurance Commissioner:

Sir: I write in reply to your request for an opinion as contained in your letter of October 10th, calling my attention to the provisions of the act of first of May, 1876 (P. L. 53), and also to the act of 28th of April, 1903 (P. L. 329).

You particularly direct my attention to the third section of the act of 1903 and ask whether your Department is required to issue authority to a company incorporated under the provisions of the act of 1903 as soon as ten per centum has been paid in on the capital, or whether you must insist that such a company shall comply with the requirements of the act of 1876 and have its capital fully paid up before a license is granted.

I find nothing in the act of 28th of April, 1903 (P. L. 329), which would authorize a corporation formed for the purpose of making insurance upon the health of individuals upon the joint stock basis to commence business with but ten per cent. of its capital paid in. There are but three sections of the act which are pertinent to the subject under discussion.

The first section provides for the incorporation, "either upon the stock or mutual principle, for insurance upon the health of individuals, and against personal injury or disablement, and against death, resulting from natural or accidental causes; provided, that such corporation shall not issue policies agreeing to pay more than

ten dollars per week in the event of sickness, accident or disablement, nor more than two hundred and fifty dollars in the event of death."

So far as this section is concerned, it is a slight modification of section one of the act of May 1, 1876, but it is entirely silent as to the time when business can be commenced.

The second section provides that:

"Such persons shall associate themselves together and the company shall be formed and incorporated, in the manner provided by law for the incorporation of insurance companies, and shall be authorized to transact the business of insurance in the same manner and upon the same conditions as insurance companies are by law authorized to do, in so far as such laws are not inconsistent with the provisions of this act."

This throws the inquiry back to the act of first of May, 1876, (P. L. 53), in order to ascertain the conditions upon which such business can be transacted. The only sections which are pertinent are sections; 2, 3, 4, 5, 6, 10 and 12.

Section two expressly provides what the articles of agreement shall specify as to the name of the corporation, the class of insurance for the transaction of which it is constituted, the plan or principle upon which the business is to be conducted, the place in which it is to be established, the amount of its capital stock, if any, the general objects of the company, the proposed duration of the same and the powers it proposes to have and to exercise.

The third section provides the method by which the articles shall be acknowledged and forwarded to the Commissioner of Insurance and submitted to the Attorney General for examination, followed by a certificate to the Governor.

The fourth section provides as to the election of officers, the opening of books for subscriptions in the case of a joint stock company.

The fifth section provides that:

"The capital stock of a joint stock company, shall be divided into shares of not less than ten dollars each, payment of which shall be made in lawful money, ten per centum on each share at the time of subscribing, and the balance at such times as the company may direct, not exceeding six months from the time of subscription; and the company may prescribe such rules with regard to forfeiture of partial payments on subscriptions as they may deem advisable, which rules shall be binding upon subscribers, providing they be made known at the time of subscription."

I quote this section in full for purposes of comparison with the third section of the act of 28th of April, 1903, and it will be observed

that the only change made by the later act is in substituting the words "one year" in place of the words "six months" from the time of subscription.

The sixth section provides that:

"Whenever one half of the capital stock mentioned in said Articles of Agreement shall have been subscribed, and twenty per centum on each share paid into the hands of the treasurer of the company, the president, treasurer and a majority of the directors of said company, shall, under their respective oaths and affirmations, make a certificate to the Governor, stating the number and par value of the shares of stock in said company, the names and residences of the subscribers, the number of shares subscribed by each, the amount paid in on each share, and the amount of money in the hands of the treasurer on account of such payments, and where the same is deposited. Upon the receipt of such certificate, the Governor shall, in case he approves of the Articles of Agreement certified to him as hereinbefore provided, endorse his approval thereon, and cause letters patent to issue erecting the subscribers to said Articles of Agreement and their associates into a body corporate with succession under the name designated in said Articles of Agreement, but they shall not have the power to engage in the business of insurance until they have otherwise complied with the provisions of this act."

Here it will be observed that there is a distinct provision as to when they shall have the power to engage in the business of insurance.

The tenth section provides:

"As soon as the whole amount of the capital stock of a joint stock company, * * * duly incorporated under this act, has been paid in, certificates shall be issued therefor to the persons entitled to the same, which certificates shall be transferable at any time upon the books of the company; and the president or secretary of the company shall notify the Insurance Commissioner that the capital of the company has been paid in, and that it is ready to commence business, whereupon the Insurance Commissioner shall, in person or by deputy, examine the assets of the company, and in case he finds that it is possessed of money or assets invested in the manner hereinafter specified, equal to the amount of its capital stock, less the necessary expenses of organization, he shall issue to said company a certificate showing that it has been organized in accordance with the provisions of this act, and that it has the requisite amount of capital for the transaction of business in the State, which certificate shall empower the company to issue policies and otherwise do the business of insurance for which it was organized."

The second clause of section 12 reads as follows:

"Joint stock companies organized to insure health or against accidents * * * must have a capital stock of at least one hundred thousand dollars," and by the thirty-sixth section all insurance companies except those specially exempt shall be subject to the provisions and requirements of the act dated the 4th day of April, A. D. 1873, entitled "An act to establish an insurance department," and the several supplements thereto.

It is clear, therefore, that all of the foregoing provisions of the act of 1876 are to be read in connection with the provisions of the act of 28th of April, 1903, and it is further clear that an insurance company incorporated under the later act can only be authorized to transact the business of insurance in the same manner and on the same conditions as are prescribed by the act of first of May, 1876, except in so far as the provisions of the later act are inconsistent with those of the earlier one.

The only section of the act of 28th of April, 1903, which it is necessary to consider in this connection is the third. It will be found upon comparison that the third section is a re-enactment of section five of the act of first of May, 1876, with the exception that the limit of time, as has been heretofore stated, within which subscriptions to stock can be met, is extended from six months to one year; and with the further feature that the minimum of capital stock fixed by the eleventh section of the act of 1876 is reduced from one hundred thousand dollars to twenty-five thousand dollars. In all other respects the act of 1876 remains unchanged, and it is observable that there is nothing in the third section of the act of 28th of April, 1903, which authorizes a company organized under it to begin business upon the payment of ten per centum on each share at the time of subscription.

Giving full effect, therefore, to the later act, it results simply in a reduction of the authorized capital to a minimum of twenty-five thousand dollars and in an extension of the time of subscription to stock from six months to one year. There is nothing whatever in the later act which relates to the time of doing business, and the provisions of the act of 1876 specifically contained in sections 6 and 10 remain in full force.

I conclude, therefore, that the effect of both acts read together is to require of a company organized for the purposes of a health insurance company upon the joint stock plan, that it cannot commence business until its capital has been paid in full, as required in the express terms of section 10 of the act of 1876; that not until then can certificates be issued to the persons entitled to the same, and not until then can the Insurance Commissioner be called upon

to examine the assets of the company and empower it to issue policies and engage in the business of insurance for which it was organized, and this can only be done after the president or secretary of the company shall have notified the Insurance Commissioner that the capital stock of the company has been paid in and that it is ready to commence business.

In my judgment, after critically comparing the two statutes, the Legislature never intended that health or accident insurance companies should begin active business before their capital was fully paid up. It would be contrary to the spirit and reason of all insurance legislation as it appears upon the statute books to hold that this class of insurance companies could begin active business upon the payment of ten per cent. of their capital stock without waiting until it be paid in full.

Very truly yours,

HAMPTON L. CARSON,
Attorney General

INSURANCE COMMISSIONER.

The yearly renewal contracts, the special adviser's contract and the application for appointment as special adviser, submitted to the Attorney General by the Insurance Commissioner, are in substantial violation of the act of May 7, 1889, P. L. 116, and the amendment thereto, approved July 2, 1895, P. L. 430, because they discriminate in favor of individuals, between insurants of the same class and equal expectations of life, in the amount or payment of premium or rates charged for policies, and special favors, benefits, considerations and inducements not specified in the policy contract of insurance.

Office of the Attorney General,
Harrisburg, Pa., December 11, 1903.

Hon. Israel W. Durham, Insurance Commissioner:

Sir: I have examined the copies of the yearly renewal contracts, the special adviser's contract and the application for appointment as special adviser, which you sent me, and I have considered in connection therewith the act of May 7, 1889 (P. L. 116), and the amendments thereto, approved July 2, 1895 (P. L. 430). I am of opinion that the contracts referred to are in substantial violation of the above acts, because they discriminate in favor of individuals, between insurants of the same class and equal expectations of life, in the amount or payment of premium or rates charged for policies, and special favors, benefits, considerations and inducements not specified in the policy contract of insurance. The inequality of the terms and conditions of the contracts, so coupled with policies of insurance, are quite apparent, and, in my judgment, are improper under the law.

To reach this conclusion it is but necessary to compare the provisions of the contracts with those of the statute. The yearly renewal commission contract of the Security Life and Annuity Company of America, with an office in Philadelphia, after reciting that the company has the good will and favorable influence of many of the leading business men of the country, and, that, to extend the benefits and advantages of the company and to further increase its business throughout the United States, an advisory board shall be composed of well-known citizens whose good will and favorable influence shall be a considerable factor in sustaining the present high standing of the company, provides that, in consideration of the foregoing and the continued favorable influence, good will and assistance in building up the company of the holder of the certificate, the company, to compensate the person therein named for his services, agrees to create from its expense appropriation a special renewal commission fund each year during the succeeding forty years, based on the number of thousands of dollars of insurance which the company shall have in force in the United States on the 30th day of June of each year, and which was issued during the ten years between July 1, 1903, and June 30, 1913, both inclusive.

The company further agrees to appoint not to exceed four hundred members of said board, and in the event of any such member forfeiting his membership therein his place will not be filled, but the number of persons who shall thereafter be considered as members of said board shall thereby to that extent be forever decreased. On June 30, 1904, and annually thereafter, during the period of the forty years mentioned above, the company shall determine the number of thousands of dollars of such insurance then in force; also the number of members then remaining in said board; and each member shall at all times be entitled to representation in said board in each distribution of funds in the proportion of one unit to each one thousand dollars of insurance (and proportionately for other amounts) upon which he has caused the company to receive the regular premiums, and for the number of units written in the contract. Within sixty days from June 30, 1904, and annually thereafter, during the period specified above, and during the continuance of the contract A B of shall each year be paid such sum of money as shall be obtained by dividing an amount equal to twenty-five cents for each one thousand dollars of said insurance then remaining in force by the total number of units represented by the then persistent members of said board, and by then multiplying the quotient thus obtained by the number of units of representation to which the holder of the certificate shall be entitled in each distribution of funds in which he shall participate,

less any agent's license fee paid by the company for the holder of this contract; this payment being his compensation for his assistance in securing and retaining on the books of the company the insurance on which the amount of said fund is based. This yearly renewal contract is issued and will remain in force upon the two following conditions, which are agreed to by the holder thereof: First, that the person therein named shall annually furnish to the company, upon its request, the names of ten people, residents of his county, whom he deems insurable; second, that he shall cause the company to receive the regular premiums on an amount of insurance aggregating at least thousand dollars. Should the person named in the certificate die or fail to comply with either of the above two conditions, then it may be construed that he has ceased to give the company the benefit of his influence, good will and assistance, required under the contract as a consideration for which payments are to be made thereunder, and the company may then cancel the agreement and discontinue further payments to him thereunder.

The yearly renewal commission contract issued by the Bankers' Life Insurance Company of the City of New York is similar in form and substance to that just analyzed, except that it boasted of its possession of the good will and influence of leading bankers in and around the city of New York, and then proposed to appoint an advisory board of five hundred Pennsylvanians without regard to their fitness or knowledge as life insurance agents, upon terms of like injustice to other policy holders.

The same vicious features of preference and inequality appear in the application for appointment as special adviser, and the special adviser's contracts issued by the State Life Insurance Company of Indianapolis, Ind., except that the agent, while agreeing to maintain in force a certain amount of insurance placed through his efforts, is not required, as a condition of his appointment, to take a policy on his own life. There is nothing, however, to prevent him from doing so if he so wills it. The temptation is strong that he will. There is nothing attractive in it to a "leading" business man who knows nothing of the calling of soliciting life insurance, and to whom the compensation as agent, pure and simple, would be but meager, unless it be the feature of endeavoring by this means to scale down the cost of his own personal insurance.

It remains but to quote the provisions of the act of 7th of May, A. D. 1889 (P. L. 116), as amended by the act of 2d of July, 1895 (P. L. 430). The act provides:

"That no life insurance company doing business in Pennsylvania shall make or permit any distinction or discrimination in favor of individuals, between insur-

ants of the same class and equal expectations of life, in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes, nor shall any such company or agent thereof make any contract of insurance or agreement as to such contract, other than as plainly expressed in the policy issued thereon, nor shall any such company or agent pay or allow, or offer to pay or allow, nor shall any insurant receive directly or indirectly, as inducements to insurance, any rebate or premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance."

Severe penalties are prescribed for violations of the act. The company, as well as its agent or agents, or any person violating the foregoing provisions of the law, shall be guilty of a misdemeanor and upon conviction shall be sentenced to pay a fine of \$500 on each and every violation, where the amount of insurance is \$25,000 or less, and for every additional \$25,000 insurance or less there shall be an additional penalty of \$500, and the offender or offenders so convicted shall thereupon be disqualified from acting as life insurance agents for the period of three years thereafter, and the fine or fines shall be collected as fines are by law collectible, one-half to be paid to the informer and one-half to the county treasurer for the benefit of the common school fund in the county where the offense is so committed.

It cannot be successfully contended that the foregoing contracts are bona fide contracts of agency. There is no specified commission; there is no selection because of the special fitness or knowledge of the agents so chosen. It would be difficult to determine whether there was any mutuality in the contract and whether, if broken on either side, the damages would be susceptible of accurate ascertainment. It cannot be doubted that the members of these so-called advisory boards, which are never called together and never intended to be called together, selected not because of their special skill or knowledge as solicitors of life insurance, but because of their alleged "influence," "good will and assistance" as business men of repute in helping the company by naming other citizens of their district deemed to be insurable, but who will not and cannot share the benefits, valuable considerations and inducements to activity conferred by the certificate of appointment, are in the receipt of that which is not specified in the policy contract of insurance, and constitute by themselves a favored class, receiving for services so vague as to be incapable of definition a distinct pecuniary reward,

which, in effect, reduces the cost of their own insurance, and places all those who may be induced to insure through their efforts, but who cannot enter the favored class, at an appreciable disadvantage as the result of discrimination against them.

The only decisions of a court of last resort which I have been able to find are those of the State of Michigan. In the case of State Life Insurance Company vs. Strong, 127, Mich., 346, the Supreme Court, affirming a decision of the court below, and in disposing of the contention of counsel that the contract of insurance was separate and distinct from the advisory representative contract, said: "We are of opinion that they were both a part of one transaction and within the prohibition of the statute."

Subsequently, in mandamus proceedings against the Insurance Commissioner, 128 Mich. 85., the court sustained the Commissioner in holding that a general statute, forbidding discrimination among insureds, applied alike to assessment and legal reserve associations.

The decisions are in the line of the rulings of the Attorneys General and the Insurance Commissioners of several states, and are a safe guide for you to follow.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

OPINIONS GIVEN TO THE COMMISSIONER OF BANKING.

RIGHT OF BANKING INSTITUTIONS TO ESTABLISH BRANCHES IN THE CITY OR COUNTY WHERE SUCH INSTITUTIONS ARE LOCATED.

Banking institutions, incorporated under the laws of this State, must have a fixed place for the transaction of business. It is apparent that it was the intention of the Legislature to confine the business of such banking institutions to one place, and there is no authority of law for such institutions to establish branch offices.

The Western Saving Fund Society's charter was amended by the court of common pleas of Philadelphia. The court in granting the amendment conferred upon the society the right to establish branch offices in the city of Philadelphia. The right of the Western Savings Fund Society to establish branch offices is not passed upon.

Office of the Attorney General,
Harrisburg, Pa., January 19, 1903.

Hon. Frank Reeder, Commissioner of Banking:

Sir: There has been pending in this Department for sometime an application by the Commissioner of Banking for an opinion on the question of the right of the Western Saving Fund Society of Philadelphia and other banking institutions incorporated under the laws of Pennsylvania to establish branches in the city or county where such institutions are located.

It is clear to me that a banking institution, incorporated under the laws of our State, must have a fixed place for the transaction of its business. It is also apparent that it was the intention of the Legislature to confine the business of such banking institutions to one place. I cannot find any authority for a bank with its location fixed undertaking to widen the scope of its banking privileges by creating one or several branch offices at different points, either in the city or the county where the principal banking institution is located. It is my opinion that such institution does not have this privilege conferred upon it by our acts of Assembly.

I will not undertake, however, to pass upon the question of the right of the Western Saving Fund Society to do business in the manner claimed by this institution. In that particular case it appears that said society had its original charter amended by the court of common pleas of the county of Philadelphia in 1902. The court wherein the application was made and amendment granted gave this society the right to establish branch offices in the city of Philadelphia. It seems to me, therefore, that this question cannot be raised collaterally in a proceeding asking for an opinion from the

Attorney General. The courts having already passed on the application of said society and it having acted under the authority conferred by the decree of the court, I do not feel warranted in giving an opinion upon the question involved in this collateral way. If there is doubt about the correctness of the position taken by the court, the whole question can be raised by a proper proceeding instituted in the courts.

Very respectfully yours,

JOHN P. ELKIN,
Attorney General.

BUILDING AND LOAN ASSOCIATIONS—ACT OF APRIL 29, 1874.

A building and loan association incorporated under the act of April 29, 1874, P. L. 73, which lends its money to an alien company or invests it in obligations of township officials, abuses its corporate powers, which are specifically enumerated in Section 37 of the act.

Office of the Attorney General,
Harrisburg, Pa., May 8, 1903.

Hon. Robert McAfee, Commissioner of Banking:

Sir: In your letter of April 28, you state that it appears from the report of an examination recently made by an examiner of your Department that the Building and Loan Association of Kennett Square, Pennsylvania, a majority of the shareholders and some of the officers of which are identified with the American Road Machine Company of Kennett Square, is loaning the funds of the association to the road company, as well as investing funds of the association in obligations given by township officers of various counties in southern and western States in return for American road machinery. You further state that your Department asserts that the building and loan association in question has exceeded the powers conferred upon it by its charter; that it is practically doing a banking business; and you request my opinion as to the right of a building and loan association, incorporated under the act of April 29, 1874, to do business of this character.

I have considered the matter and, assuming the facts to be as stated, I am of opinion that the position taken by your Department is correct. The powers of building and loan associations incorporated under the act of April 29, 1874, are specifically stated in section 37 of that act (P. L. 96). It is there expressly provided that "such associations shall have the power and franchise of loaning or advancing to the stockholders thereof the moneys accumulated from time to time, and the power and right to secure the repayment of such moneys, and the performance of the other conditions upon which the loans are to be made, by bond and mortgage or other security, as

well as the power and right to purchase or erect houses, and to sell, convey, lease or mortgage the same at pleasure to other stockholders or others for the benefit of their stockholders, in such manner also that the premiums taken by the said associations, for the preference or priority of such loans shall not be deemed usurious."

The remaining provisions of the act fully sustain this combined purpose. It would be an abuse and misuse of its corporate powers for a building association to lend its moneys to an alien company or to invest the same in obligations given by township officials, whether here or elsewhere. I am not passing upon the question of fact, but should the conduct of this association require my intervention, you can call it to my attention according to the settled practice in such cases, being prepared to prove the facts alleged, upon full notice to the officers of the association.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

BANK CHARTERS—BANKS AND BANKING—CHARTER CERTIFICATION
—ATTORNEYS-IN-FACT—ACT OF MAY 13, 1876.

The certificate required by the act of May 13, 1876, Sec. 2, P. L. 161, to be made and acknowledged by persons forming a corporation for banking purposes cannot be made by an attorney-in-fact for one of the incorporators.

Office of the Attorney General,
Harrisburg, Pa., May 20, 1903.

Hon. Robert McAfee, Commissioner of Banking:

Sir: After calling my attention to the provisions of the act of May 13, 1876 (P. L. 161), for the formation and regulation of banks of discount and deposit, as to the signing of articles of association and the making of a certificate under the hands of the associators, which certificate is to be acknowledged before a judge or notary public, you ask me to advise you whether or not the terms of the act would be complied with if one of the incorporators, who signed the articles of association but failed to sign the certificate, and has since gone broad, could have his name attached thereto by an attorney-in-fact, who was empowered to attend to the business pertaining to this particular matter.

Section two of the act in question provides that the persons forming such associations shall under their hands make a certificate which shall specify the name of the banking association, the location or place of business, the amount of capital stock and number of shares, the names and places of residence of shareholders, the number of shares held by each, and a statement that such certificate is made to enable the persons named to form a corporation for banking purposes under the act.

It is clear that this provision requires the certification and subsequent acknowledgment of certain matters of fact, the knowledge of which is necessarily personal. I am of opinion that a power of attorney would not be competent to enable the attorney to make such certification, as he has no knowledge of his own in the matter which would be competent, and he cannot have such knowledge delegated to him under the letter of attorney. While a man may execute a deed through an attorney and authorize that attorney to make acknowledgment in the name of the principal, the act so performed is but a ministerial act and involves no certification as to facts upon personal knowledge. Hence I am of opinion that, even though the power of attorney should be drawn in terms specifically covering the facts of this case, yet I believe, from the nature of the instrument, it would be legally incompetent to authorize the attorney so to act. A proper course—which I suggest for your consideration—is to have the paper sent to the gentleman in Europe, who can make the necessary acknowledgment before a Consul of the United States and return it to you after himself signing the certificate and making personal acknowledgment.

I am,

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

BANKS AND BANKING—FOREIGN BANKING CORPORATION SENDING AGENT THROUGHOUT PENNSYLVANIA TO SOLICIT BUSINESS—ACT OF APRIL 15, 1850.

The act of April 15, 1850, P. L. 494, prohibiting any bank in Pennsylvania or any other State from maintaining any branch or agency for the transaction of business at any other place than that named in its charter, does not prevent a foreign banking corporation, which makes a specialty of banking by mail and whose place of business is without the state, from sending an agent through the State to solicit business, provided such agent does not himself receive deposits of money, but simply acts as a solicitor. If he receives deposits of money in addition to soliciting business, such conduct is prohibited by the act.

Office of the Attorney General,
Harrisburg, Pa., February 5, 1904.

Hon. Robert McAfee, Commissioner of Banking:

Sir: I have yours of the 5th of January, stating that the Aetna Banking and Trust Company, incorporated under the laws of West Virginia, and doing business in Washington, D. C., has written your Department, asking if it can do business in this State by a traveling agent or agents, soliciting business for it in doing a banking business by mail.

You state that the banking act of 1850, in your judgment, prohibits banks in this or any other State from establishing branches in the name of one or more individuals, and also prohibits companies incorporated by the laws of any other of the United States from doing a banking business in Pennsylvania. You therefore ask me whether the business contemplated by the Aetna Banking and Trust Company can be legally done in this Commonwealth.

You accompany this letter by a statement of the Aetna Banking and Trust Company, over the signature of its cashier, that it is a corporation formed under the laws of West Virginia, with powers almost exactly similar to those of the title insurance companies of this State, but is engaged simply in the banking business and making a specialty of banking by mail, and that it desires to do business in this State, and for that purpose to send a traveling representative.

A later letter from the same corporation, over the signature of its cashier, states that it is not the desire of the Aetna Banking and Trust Company to establish a banking house or branch of a banking house in Pennsylvania, but simply to reinforce its newspaper and magazine advertising by the aid of a traveling solicitor who does not make collections for the Aetna Banking and Trust Company, but simply drums up business for it. The statement is further made that the business in this regard is similar to that of several of the banks in Pittsburg that advertise for banking by mail, and it is understood that they pursue the same method in other states as well as in Pennsylvania.

It is further stated that it is believed that the Banking Department of this State permits the issuance of money orders of the Bankers' Money Order Association, and the sale of money orders by express companies, these latter being strictly banking operations, whether viewed in the light of issuance of bills of exchange or, in a more exact description of express money orders, certificates of deposit, for, although the express money order is the outgrowth of the reception of money for direct transmission, it is in the present day simply the reception of a deposit and the giving, therefore, of a certificate of deposit, payable in any of the branch offices of the express company issuing the same.

Section 50 of the act of April 15, 1850 (P. L. 494) provides that:

"Each and every bank in this Commonwealth or any other State is hereby prohibited from establishing, maintaining, keeping or continuing, directly or indirectly * * * in any manner or by any device whatever * * * any branch or agency for the transaction of banking business or the issuing out of or the circulation of its notes at any other place than that fixed and named

in its charter for its location and the transaction of its business without express authority of the act of Assembly of this Commonwealth to do so."

In my judgment, the question whether or not the Aetna Banking and Trust Company, incorporated under the laws of West Virginia, and doing business in the city of Washington, D. C., seeks to open and maintain a branch for the transaction of banking business within this State, is purely a question of fact, depending entirely on the nature of the business which it proposes to transact. If such business consists simply of sending an agent through the State soliciting business, such agent not himself receiving deposits of money, but simply acting as a solicitor, such business would not, in my judgment, fall within the purview of the act of 1850. If, on the other hand, such agent or solicitor would not only solicit business but also receive deposits of money, thus constituting himself a branch of the banking business, as it were, such conduct would be clearly prohibited by the act in question.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

BUILDING AND LOAN ASSOCIATIONS—AUTHORIZED CAPITAL STOCK—ISSUING SHARES IN EXCESS OF AMOUNT THEREOF—ACT OF APRIL 29, 1874.

Building and loan associations organized and operating under the act of April 29, 1874, Sec. 37, P. L. 73, cannot issue shares in excess of the amount of their authorized capital stock, even though the amount paid in on the shares should be but a small portion thereof.

Office of the Attorney General,
Harrisburg, Pa., February 5, 1904.

Hon. Robert McAfee, Commissioner of Banking:

Sir: In your letter of January 12 you ask "Can a building and loan association, with an authorized capital of one million dollars issue shares in excess of 5,000, the matured value of which is \$200 per share, although a moiety of the amount only shall have been paid in on the same?" You state that your Department has uniformly held that such corporations could not issue more shares than its authorized capital permitted, notwithstanding the fact that some shares may have been matured and retired, and you further ask to be advised whether or not the Department is right in its construction of the law.

I reply that the act of April 29, 1874 (P. L. 73), section 37, provides:

“The capital stock of any incorporation created for such purposes, by virtue of this act shall at no time consist in the aggregate of more than one million dollars, to be divided into shares of such denominations not exceeding \$500 each, and in such number as the incorporators may specify in the application for charter.”

I have not been able to find any decisions on this precise question, but the general policy and spirit of the law, as well as the plain and unambiguous terms of the act itself, clearly prohibit the issuance of shares representing in the aggregate more than one million dollars, without regard to the amount of money paid thereon.

I am clearly of opinion that no building and loan association, operating under this act, with an authorized capital stock of one million dollars, can issue shares in excess of this amount, even though the amount paid in on the shares should be but a small portion thereof.

Very respectfully,
HAMPTON L. CARSON,
Attorney General.

BANKING ACT—BANKS AND BANKING—DIRECTORS—SERVING IN MORE THAN ONE STATE BANK—ACT OF APRIL 16, 1850.

Under the act of April 16, 1850, Art. 1, Sec. 10, P. L. 477, no person can legally serve as a director in more than one State bank, whether chartered under the provisions of the act of 1850, the act of May 13, 1876, P. L. , or under special acts of the Legislature.

Office of the Attorney General,
Harrisburg, Pa., February 5, 1904.

Hon. Robert McAfee, Commissioner of Banking:

Sir: In your letter of January 5, after calling my attention to the general banking act of April 16, 1850 (P. L. 477), prohibiting one person from acting as a director in more than one bank, you ask me to advise your Department whether or not this act applies to such corporations chartered under the act of May 13, 1876, as well as those incorporated by special acts of the Legislature prior to 1874.

I reply that I have examined the various subsequent acts on this subject, and can find nowhere any repeal of the provisions of article I, section 10, of the act of April 16, 1850. I am, therefore, of the opinion that no person can legally serve as a director in more than one State bank, whether chartered under the provisions of the act of 1850, the act of May 13, 1876, or under special acts of the Legislature.

Very respectfully,
HAMPTON L. CARSON,
Attorney General.

COMMISSIONER OF BANKING.

Building and loan associations have their powers well defined by law, and it is contrary to the principles upon which they are established, for them to do a life insurance business. Nor should a life insurance company do a building and loan association business.

Office of the Attorney General,
Harrisburg, Pa., March 21, 1904.

Hon. Robert McAfee, Commissioner of Banking:

Sir: Replying to your request for an opinion as to whether building and loan associations can engage in the business of life insurance or act as insurance agents, I answer that the powers of a building and loan association are well defined by law, and it would be doing violence, not only to the powers and privileges with which they are endowed by law, but would also be contrary to the principles under which they are established, for them to engage in a life insurance business. The powers of life insurance companies are also well defined in law, and there is no authority for either of these corporations to impinge upon the other in so far as the scope of their authority is concerned.

This is but a general answer, and its application ought to be made with extreme caution. If there are any individual cases in your mind, as to which you have a doubt, I would prefer to have the facts in each case stated with particularity and the exact character of the contracts that are being made and the security that is being taken.

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

BANKING COMMISSIONER—IN RE MIFFLIN COUNTY BANK.

Satisfaction of mortgage given by a State bank to the State may be made by the Banking Commissioner, upon compliance by the bank with the requirements of the act of 26th of March, 1860, Section 18.

Office of the Attorney General,
Harrisburg, Pa., April 21, 1904.

In re Mifflin County Bank.

Hon. Robert McAfee, Commissioner of Banking:

Sir: I have examined the correspondence between Messrs. Atkinson and Pennell and the Auditor General in relation to the satisfaction of a mortgage given by Edmund S. Doty, in 1861 to the Commonwealth, being a stockholder in a State bank which, in the year 1864, was converted into a national bank. An examination of the acts of Assembly discloses the following result:

The bank was incorporated under the act of March 26, 1860 (P. L. 346) as a State bank. A mortgage was given by Edmund S. Doty, being the mortgage in question, in 1861 to the Commonwealth, in accordance with the terms of that act. In 1864 the bank became a national bank. The mortgage, however, was not satisfied of record, and the bank, it appears, has been out of business as a State bank since 1864. The eighteenth section of the act under which the bank was incorporated imposed a duty upon the Auditor General with regard to the satisfaction of mortgages given by stockholders. This duty of the Auditor General with respect to banks was transferred to the Commissioner of Banking when the Banking Department was created under the act of 8th of June, 1891 (P. L. 217; see section 10). I understand, therefore, that you, as Commissioner of Banking, are requested to authorize satisfaction of the said mortgage under the provisions of the eighteenth section of the act incorporating the bank.

I see no objection whatever to you ordering the entry of satisfaction of said mortgage to be made on the record, provided, however, that the provisions of the act of 26th of March, 1860, as particularly set forth in section 18, are fully complied with. Compliance, in my judgment, requires the filing of affidavits exactly in the terms of that section, and I instruct you not to satisfy said mortgage of record until such papers have been prepared and submitted to me by counsel for the stockholder or his estate, and duly transmitted by me to you.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

BANKING COMMISSIONER—PUBLICATION OF NOTICES IN GERMAN NEWSPAPERS.

The act of April 30, 1901 (P. L. 109) directing the advertisement and notice required by law to be published in a German newspaper, does not apply to the publication of an abstract of the reports of banks and trust companies, made by the Banking Commissioner.

Office of the Attorney General,
Harrisburg, June 8, 1904.

Hon. Robert McAfee, Commissioner of Banking:

Sir: Replying to your request of June 4 for advice as to whether the act of April 30, 1901 (P. L. 109) requires publication of an abstract of the reports of banks and trust companies, made by your Department, in a German daily newspaper in such localities as might be affected by the act, I answer that, in my judgment, the act has no application. In terms it relates to "every advertise-

ment and notice required by authority of law to be published in any county of the Commonwealth. I do not interpret the words "advertisement and notice" as covering the reports of banks and trust companies. I therefore advise you that it is not necessary to publish those reports in a German daily newspaper.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

COMMISSIONER OF BANKING.

The payment of \$200,000 (the authorized capital), which includes therein 25 per cent. of a contribution to the surplus fund, does not justify a bank's officers in certifying that the full amount of the capital of the bank had been paid in.

Office of the Attorney General,
Harrisburg, Pa., September 2, 1904.

Hon. Robert McAfee, Commissioner of Banking:

Sir: I herewith return the two letters of George W. Pepper, Esq., addressed to the Deputy Commissioner of Banking, dated respectively July 21st and July 23d, and sent to me by you with a request for an opinion whether or not the payment of \$200,000 (the authorized capital), which includes therein 25 per cent. of a contribution to the surplus fund, would justify the bank's officers in certifying that the full amount of the capital had been paid in.

In my judgment, surplus is not capital in any true sense of the word, and a statement, setting forth that the entire capital stock has been paid in, if this be not the case, is erroneous and ought not to be allowed to stand. The surplus may at any time be reduced by action of the board of directors, without notice to your Department, whereas, the capital stock cannot be impaired. Moreover, a stockholder's liability for the debts of a concern in which he is a shareholder is limited to the amount of the capital stock which he holds, and in that way the surplus ought not to be made to count. I affirm your interpretation of the matter, and remain,

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

OPINIONS GIVEN TO THE SECRETARY OF AGRICULTURE.

COMMERCIAL FERTILIZERS—MANUFACTURE—SALE—ACT OF MARCH 25, 1901.

Facts in regard to the sale of commercial fertilizers, held to constitute a violation of the act of March 25, 1901, P. L. 57.

Office of the Attorney General,
Harrisburg, Pa., May 7, 1903.

Hon. N. B. Critchfield, Secretary of Agriculture:

Sir: You state that it has come to the knowledge of your Department that certain manufacturers of commercial fertilizers are in the habit of making special mixtures of such fertilizers for farmers in their respective localities, and selling the same without taking out a license for a brand of such commercial fertilizers, containing the percentage of nitrogen, phosphoric acid and potash that these fertilizers are by the terms of the contract to contain.

You state further that the fertilizers so sold are put up in sacks that are perfectly plain, and upon the outside of which there is no stamp showing the name of the manufacturer, the place of manufacture, the net weight of its contents, or an analysis stating the percentage therein contained of nitrogen in an available form, of potash soluble in water, of soluble and reverted phosphoric acid, and of insoluble phosphoric acid, as required by the act of 25th of March, 1901.

You state further that a firm agrees with a number of farmers, who club together for the purpose of purchasing at wholesale rates, to prepare for them a fertilizer containing two per cent. of nitrogen, eight per cent. of soluble phosphoric acid and six per cent. of potash; that the farmers go to the warehouse and load the goods upon their wagons and take them away, the same having nothing stamped or printed upon the packages to indicate the contents of the same.

You desire to be informed whether or not all such manufacturers are violating the provisions of the act of Assembly above alluded to.

This act was intended to regulate the manufacture and sale of commercial fertilizers, to provide for its enforcement and to prescribe penalties for its violation. I am of opinion that the acts complained of, if proved, constitute a violation of the law.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

SECRETARY OF AGRICULTURE—PUBLIC PRINTING.

The Secretary of Agriculture has legislative authority to order the printing of bulletins concerning crop diseases and insect pests.

The right to print bulletins as to the oleomargarine and other licenses issued by the Department, and the number of prosecutions brought for violations of the oleomargarine and pure food law, is doubtful; such bulletins are not within the scope of present legislative authority.

Office of the Attorney General,
Harrisburg, Pa., May 20, 1903.

Hon. N. B. Critchfield, Secretary of Agriculture:

Sir: I have your letter of the 16th inst., in which you state that it is the desire of your Department to publish, in addition to the bulletins already published by it at stated times, several small periodicals, giving timely information to the farmers of the State concerning the crop diseases and insect pests that may be expected to appear about the time of the publication, with instruction as to remedies to be applied. You also state that you wish to publish regularly and periodically statements of the oleomargarine and other licenses issued by the Department, and the number of prosecutions that have been brought for violations of the law regulating the sale of oleomargarine and the pure food laws of the State. You further state that of these periodical publications there will be in all three issued monthly and one quarterly. You ask me whether, under existing laws, this printing can be done by the State Printer at the expense of the State.

I reply that the matter is covered by the provisions of section 2 of the act of 13th of March, 1895 (P. L. 17). I observe that it is made "the duty of the Secretary of Agriculture, in such ways as he may deem fit and proper, to encourage and promote the development of agriculture, horticulture, forestry and kindred industries; to collect and publish statistics and other information in regard to the agricultural industries of the State; to investigate the adaptability of grains, fruits, grasses and other crops to the soil and climate of the State, together with the diseases to which they are severally liable and the remedies therefor; to obtain and distribute information on all matters relating to the raising and care of stock and poultry, the best methods of producing wool and preparing the same for market;" and further that he shall "diligently prosecute all such similar inquiries as may be required by the agricultural interests of the State, as will best promote the ends for which the Department of Agriculture is established." The Secretary is still further directed by the act to "give special attention to such questions relating to the valuation and taxation of farm land, to the variation and diversification in the kinds of crops and methods of

cultivation and their adaptability to changing markets, as may arise from time to time in consequence of a change of methods, means and rates of transportation, or in the habits or occupation of the people of this State and elsewhere, and shall publish, as frequently as practicable, such information thereon as he shall deem useful. In the performance of the foregoing duties the Secretary is enjoined, as far as practicable, to make use of the facilities provided by the State Agricultural Experiment Station, the State Board of Agriculture, and the various State and county societies and organizations maintained by agriculturists and horticulturists, whether with or without the aid of the State, and shall, as far as practicable, enlist the aid of the State Geological Survey, for the purpose of obtaining and publishing useful information respecting the economic relations of geology to agriculture, forestry and kindred industries." It is made the duty of the Secretary to report annually to the Governor, and he is enjoined to publish from time to time such bulletins of information as he may deem useful and advisable. The report and the bulletins are to be printed by the State Printer in the same manner as other public documents, not exceeding twenty-five thousand copies of any one bulletin.

The foregoing provisions of the law describe the nature and the scope of your duties in this respect. I am of opinion that the giving of information to farmers of the State concerning the crop diseases and insect pests that may be expected to appear from time to time, embodied in a publication, together with instruction as to remedies to be applied, is fully within the scope of your authority. Care, however, must be taken not to exceed twenty-five thousand copies of any one bulletin. I am of opinion that the form of publication should be under the designation of a "Bulletin" and not under the form of a periodical outside of and separate from the bulletin. The act gives to you complete discretion as to the time when such information can be given and when such bulletins shall be issued. I am not satisfied, however, that statements of the oleomargarine and other licenses issued by the Department, and the number of prosecutions that have been brought for violations of the law regulating the sale of oleomargarine and the pure food laws of the State, are within the terms of the act or the scope of your authority. I find no reference to such subjects in section 2, nor do I think that such information, while useful as a corrective and restraint upon possible violation or intended violation of law, can be properly said to be associated with the subjects already designated. Of course your bulletins, not exceeding twenty-five thousand copies of each can

be printed under the terms of the act, and are to be printed by the State Printer, and therefore necessarily at the expense of the State.

Very respectfully yours,

HAMPTON L. CARSON,
Attorney General.

BULLETINS OF THE AGRICULTURAL DEPARTMENT.

Under the act of March 13, 1895 (P. L. 17) it is made the duty of the Secretary of Agriculture to collect information and publish the same, of interest to agriculturists, and under this act the publishing of bulletins concerning the crop diseases and insect pests and oleomargarine licenses is fully authorized. No more than 25,000 copies of one bulletin to be issued, the time of issuing the bulletins is at the discretion of the Secretary of Agriculture.

Office of the Attorney General,
Harrisburg, Pa., June 2, 1903.

Hon. N. B. Critchfield, Secretary of Agriculture:

Sir: Since my opinion of May 20, 1903, in which I expressed myself as not satisfied that you could include in your bulletins information as to the granting of oleomargarine licenses and the number of prosecutions brought for violations of the law regulating the sale of oleomargarine and other matters affecting the pure food laws of the State, I have looked further into the statutes with a view of removing or confirming my doubt.

The act of May 29, 1901 (P. L. 327), relating to imitation butter, oleomargarine, butterine and similar substances, has an important bearing. By the fourteenth section the Dairy and Food Commissioner who, in another section, is distinctly declared to be an agent of your Department, is expressly directed to publish a semi-annual bulletin and distribute the same in the same manner as other bulletins of your Department are published and distributed, which shall contain the name and address of every person, firm or corporation to whom a license has been issued for the manufacture or sale of oleomargarine, butterine or other similar substances, and also a tabulated statement of all the actions, civil or criminal, which have been brought for violations of the act, giving the address of the defendant and the disposition of every such case.

This is a legislative declaration that these subjects are closely connected with the purpose of your Department, and enlarges the scope of the subjects which may be dealt with in your publications. At the same time, the act of 22d of April, 1903, amends sections 2 and 6 of the act of 13th of March, 1895. The second section, as amended, gives you authority to publish from time to time such

bulletins of information as you may deem useful and advisable, and increases the number of copies of each bulletin from five thousand to twenty-five thousand.

If, then, in your judgment you deem the information as to oleo-margarine licenses and prosecutions both useful and advisable, and calculated to promote the agricultural interests of the State, I am of opinion that you can include such information in your bulletins, without waiting for the semi-annual reports of the Dairy and Food Commissioner, care being taken to designate such publications as bulletins issued by your Department and not as reports of the Dairy and Food Commissioner. The latter should appear only at the intervals stated in the act of May 29, 1901.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

SECRETARY OF AGRICULTURE.

Instructions to the Secretary of Agriculture as to what matter should be contained in his annual report.

Office of the Attorney General,
Harrisburg, Pa., September 24, 1903.

Hon. N. B. Critchfield, Secretary of Agriculture:

Sir: I have your request of September 11th for my opinion upon the subject-matter of your official annual report, and whether it can be contained, as heretofore, in two parts, published and bound in separate volumes as has been the practice since 1896.

So far as the subject-matter of Part I is concerned, I can see no reason for including in it "A Synopsis of the Tax Laws of Pennsylvania," as was done in 1902. The subject is foreign to your Department, as there are no tax laws specially applicable to farmers as a class, and the number of subjects with which they have nothing whatever to do is legion. Nor can I see the necessity of printing papers upon "The Road Problem," as hereafter that subject will belong to the State Commissioner of Highways.

As to Part II, I can see no reason for reprinting the various acts of Assembly relating to the Department of Agriculture, the State Board of Agriculture, the State Live Stock Sanitary Board, or of acts to protect the health of domestic animals, or a supplement to an act for the taxation of dogs and the protection of sheep. The purely formal lists of officers and members of various societies, their constitutions and by-laws, and their minutes and rules can also be omitted.

It may be possible that these omissions and the printing of illustrative tables or rule or figure work in consecutive pages of octavo form, as required by the nineteenth section of the act of May 1, 1876 (P. L. 68), would avoid the problem of Part II.

Apart from the above-named objectionable items, an examination of the various papers, reports and communications hitherto printed in Part II satisfies me that they are strictly germane to the matters controlled by your Department, as well as useful and valuable to the farmer.

The act of 22d of April, 1903 (P. L. 252), amending sections 2 and 6 of the act of 13th of March, 1895, establishing the Department of Agriculture, clothes you with a liberal discretion. You are directed, in such ways as you may deem fit and proper, to encourage and promote the development of agriculture, horticulture and kindred industries; to collect and publish statistics and other information in regard to the agricultural industries and interests of the State; to investigate the adaptability of grains, fruits, grass and other crops to the soil and climate of the State, together with the diseases to which they are severally liable, and the remedies therefor; to obtain and distribute information on all matters relating to the raising and care of stock and poultry; the best methods of producing wool and preparing the same for market; and you shall diligently prosecute such similar inquiries as may be required by the agricultural interests of the State. You are to give special attention to the valuation and taxation of farm land, the diversification of crops, the methods of cultivation, and their adaptability to changing markets as may arise from time to time in consequence of a change of methods, means, rates of transportation, or in the habits or occupation of the people of the State and elsewhere.

In relation to these subjects you can publish such information as you may deem useful as frequently as possible. You are enjoined, as far as practicable, to make use of the facilities provided by the State Agricultural Experiment Station, the State Board of Agriculture, and the various State and county societies and organizations maintained by agriculturists and horticulturists, whether with or without the aid of the State, and you shall, as far as practicable, enlist the aid of the State Geological Survey for the purpose of obtaining and publishing useful information respecting the economic relations of geology to agriculture and kindred industries. You can publish from time to time, to the extent of 25,000 copies of any one bulletin, bulletins of information as you may deem useful and advisable. Of your annual report you may publish 31,600 copies, and in your annual report to the Governor you may include so much of the reports of other organizations as you may deem proper, which shall take the place of the present agricultural report.

It is plain that your discretion is a wide one, to be exercised wisely but liberally. It is clear that you can publish, for it is expressly enacted that "said report and bulletins shall be printed by the State Printer." I do not think that your report should contain reprints of bulletins.

The question of parts is one which has not been legislated upon. If the mass of pertinent matter which you deem advisable to publish as a part of your report would exceed the limits of a single volume, properly printed and spaced, it is within your discretion to publish a supplementary volume so as to avoid an inconveniently large and bulky book. So much can be done in the selection of material and the avoidance of matter not strictly useful or germane, and by adhering to the style of printing specified in the nineteenth section of the act of 1st of May, 1876 (P. L. 68), that a large amount of matter can be contained within the limits of a single volume without swelling it inordinately.

Should you find it necessary, in the exercise of your discretion, to publish your report in different parts, of course the presumption is that it takes all the parts to make the whole, and you would be entitled to have as may published for each part as for the whole. In reaching this conclusion I find myself in harmony with the principle previously announced by this Department. (Report of the Attorney General for two years ending December 31, 1896, page 162).

When you have selected the material for your report, and have prepared the manuscript of the report itself, you can easily aid your judgment by consulting the Superintendent of State Printing, who is a practical printer and can readily estimate the number of pages of type which will be probably required.

I return the volumes submitted to my examination.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

OPINIONS GIVEN TO THE COMMISSIONER OF FORESTRY.

STATE SANATORIUM AT MONT ALTO.

The Forestry Commissioner is empowered by law to decide upon a design for the State Sanatorium on the State Forestry Reservation at Mont Alto, to make contracts for its construction and to employ such necessary help required to erect and manage the sanatorium.

Office of the Attorney General,
Harrisburg, Pa., June 1, 1903.

Dr. J. T. Rothrock, Commissioner of Forestry:

Sir: I have examined the act entitled "An act making an appropriation for the erection and fitting of a sanatorium, and for the maintenance thereof, on the State Forestry Reservation at Mont Alto, in Franklin or Adams counties, and authorizing the Commissioner of Forestry to make and enforce rules and regulations governing the same."

This act specifically clothes you with authority to select and decide upon a design for said sanatorium and the material out of which it shall be constructed. You have full power to make contracts for its construction, provided such contracts are not in excess of the appropriation named. An appropriation is made for the purpose of carrying out the provisions of the act, and after the completion of the sanatorium the same is to be under the control and management of the Commissioner of Forestry, who is empowered to take control of the sanatorium, and make and enforce such rules and regulations in relation thereto and the use thereof as, in his judgment, shall be deemed best and proper. I am of opinion that you are undoubtedly authorized to employ such necessary help as may be required to successfully erect and manage the sanatorium. It is impossible for you to accomplish this unaided, and the proper help would seem to be fairly within the limits of your authority.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

FORESTRY RESERVATION COMMISSION—"MINERAL"—GANISTER ROCK—SURFACE STONE—REMOVAL OF—GIVING AWAY—ACT OF FEBRUARY 25, 1901.

The term mineral, in its most enlarged sense, comprises all the substances which now form or which once formed part of the solid body of the earth, both external and internal, and which are now destitute of and incapable of supporting animal or vegetable life.

Ganister rock, which is modified sandstone and a mineral in the commercial sense, lying loose on the surface of the earth and not in seams or veins, and which would not have to be dug out of the ground, mined or quarried, is a mineral within the provisions of the Forestry Reservation Commission Act of February 25, 1901, P. L. 11, which authorizes the commission "to make contracts or leases for the removal of any valuable mineral that may be found in said forestry reservations" after specified advertising to the highest bidder.

Although the removal of such loose surface stone might be of value to the land, either for forestry improvement or cultivation, yet the act contemplates that the mineral should produce some revenue to the State and should not be given away.

Office of the Attorney General,
Harrisburg, Pa., May 1, 1903.

Dr. J. T. Rothrock, Commissioner of Forestry:

Sir: You have requested my opinion as to the right of the Forestry Commissioner to sell ganister rock or lease lands for the purpose of the removal of ganister rock, under the act of February 25, 1901, creating the Department of Forestry, without first advertising the same, as provided in that act. You state that the whole question depends upon whether I consider ganister rock commercially a mineral. You further state that the stone is lying loose upon the surface of the earth; that it is not in seams or veins; and would not have to be dug out of the ground or mined or quarried. You ask whether, if a man should pick up the loose stones from land which he desires to clear for farming purposes, would those stones be considered a mineral commercially? Would they not be considered a detriment instead of a benefit? You further state that the stone referred to is a modified sandstone, and that you do not think it would be considered a mineral in a commercial sense. You further ask whether a mineral must not be quarried, mined or excavated? You ask further would stone quarried for ballast purposes be considered a mineral. You also state that you have requests for leases of some quarries, from which stone, if taken, would be used for ballast for turnpike purposes, and you ask me to include in my opinion all these phases of the question.

In my judgment, the commercial feature has nothing whatever to do with the determination of the question. The sole question the meaning to be placed upon the words contained in the act of Assembly. Your duty and your power in the premises are stated

in the first section of the act of the 25th of February, 1901 (P. L. 11), establishing a Department of Forestry. The body so established is referred to in the act as "The Forestry Reservation Commission," and in other parts of the act as "The Commission." The language of the act, pertinent to the point under discussion, is as follows:

"Said Commission is hereby empowered to make and execute contracts or leases in the name of the Commonwealth for the mining or removal of any valuable minerals that may be found in said forestry reservations, whenever it shall appear to the satisfaction of the Commission that it would be for the best interests of the State to make such disposition of said minerals; and provided that such contracts or leases shall also be approved by the Governor of the Commonwealth after the proposed said contracts or leases shall have been duly advertised in at least three newspapers published nearest the reservation designated, for one month in advance of said contract or lease, and the contracts or leases shall be awarded to the highest bidder, and he or they shall have given such bond as the Commission shall designate for the performance of his or their part of the contract, and the said bond shall have been approved by the court of the county wherein the contracts or leases are made. Provided, however, that when, by virtue of leases or contracts for removal of minerals and sale of timber from lands purchased by the State for forestry reservations there occurs a net revenue to the State, one-half of said net revenue derived from lands situate in any township shall be paid by the State Treasurer to the treasurer of such township for the application to township purposes and reduction of local tax levies in such township."

It is noticeable that no definition is attempted in the act of the words "mineral lands" or of "valuable minerals," but it is clear from the subsequent references to contracts and leases, and the necessity of advertising and the awarding of the contract or lease to the highest bidder, as well as from the subsequent provisions as to the application of one-half of the net revenues derived therefrom, that the transactions referred to necessarily contemplate the production of a revenue to the State, and do not, either expressly or by implication, suggest the thought that the State should part with any property without due and adequate compensation. The word "contract" imports an agreement based upon a valuable consideration, and the word "lease" contemplates a return in the shape of rental. There is nothing in the act to authorize the thought that anything can be given away, and the mere fact that loose stone lying on the surface might be removed with advantage to the land, either for the purpose of forestry improvement or for cultivation, does not

carry with it the further thought that the stones so removed should not produce a corresponding return in value to the State, whether great or little.

The term "mineral" has received judicial interpretation in many respects, and I do not find that this general interpretation is modified by the adjective "valuable." The value may be nominal or actual. It is not necessarily value in the sense of a precious metal, or in the sense of being capable of producing value reducible to a metallic basis. Hence I do not read the words "valuable mineral," as used in the act relating to the Forestry Commission, as a limitation upon the meaning of the word "mineral," as defined by the courts.

Bainbridge, in his work upon "The Law of Mines and Minerals," says:

"While a mineral has been defined to be a fossil or what is dug out of the earth, yet the term may, however, in the most enlarged sense, be described as comprising all the substances which now form or which once formed part of the solid body of earth, both external and internal, and which are now destitute of and incapable of supporting animal or vegetable life. In this view it will embrace as well the bare granite of the high mountain as the deepest hidden diamonds and metallic ores."

This definition was expressly approved by the Supreme Court in affirming the opinion of the lower court in the case of *Griffin v. Fellows et al.*, 81 P. S., 117. In *Gill v. Weston*, 110 P. S., 313, it was held that petroleum is a mineral substance obtained from the earth by the process of mining, and lands from which it is obtained may with propriety be called "mineral lands."

In *Stoughton's Appeal*, 88 P. S., 198, it was said: "Oil, however, is a mineral, and being a mineral is part of the realty."

In *Westmoreland Natural Gas Company v. DeWitt*, 130 P. S., 235, it was said: "Gas, it is true, is a mineral, but it is a mineral with peculiar attributes."

In *Commonwealth v. Hipple*, 7 Dist. Reps., 398, it was held that sand is a mineral, and that an indictment would lie for its removal above the ordinary low water mark from an island in the Susquehanna river. This last decision, which was delivered by Judge McPherson, is of particular importance in connection with the present inquiry because the decision sustained an indictment framed under the act of 8th of May, 1876 (P. L. 142), which was couched in these words:

"That if any person or corporation shall mine or dig out any coal, iron or other minerals, knowing the same to be upon the lands of another person or corporation,

without the consent of the owner, the person or corporation so offending shall be guilty of a misdemeanor, and being thereof convicted shall be sentenced to pay such fine, not exceeding a thousand dollars or to such imprisonment not exceeding one year, as the court in their discretion may think proper to impose, and the person or corporation so offending shall be further liable to pay to such owner double the value of the said coal iron, or other materials so mined, dug or removed, or in case of the conversion of the same to the use of such offender or offenders treble the value thereof to be recovered, with costs of suit by action of trespass or trover as the case may be, and no prosecution by indictment under this act shall be a bar to such action."

If, under the special terms of this act, restricted as at first sight they seem to be by the use of the words "coal, iron or other minerals," it was held that sand upon the shores of an island constituted a mineral within the meaning of the act, it is not at all difficult to reach the conclusion that the ganister rock or sandstone referred to in your communication constitutes a mineral within the meaning of the act establishing your Department. The mere fact that it is lying loose upon the surface of the ground does not, in my judgment, affect the question, nor is there anything in the act or acts referred to which would confine the definition of "mineral" to that which must be mined or quarried or excavated. It would raise quite a difficult and embarrassing question as to what properly constitutes the surface, if the parties seeking to move the stone were themselves to judge as to what is properly superficial and what is required to be excavated. The same features were of course presented by the case already alluded to of the sand upon the shore of the island, where excavation or digging necessarily formed a part of the removal.

I am of opinion, therefore, that the rock referred to is a mineral and that it is the duty of your Department, before making a contract or lease with anyone for its disposition, to advertise in the manner required by law.

In accordance with your request I herewith return the papers which you sent me, consisting of an opinion from Howard R. Rose, Esq., attorney-at-law, of Johnstown, Pennsylvania, and the definition of "mineral" copied from the Century Dictionary.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

FORESTRY COMMISSION—LEASING OF WATER OR LANDS FOR PRIVATE PURPOSES—ACT OF FEBRUARY 25, 1901.

The Forestry Commission, apart from the powers distinctly specified in the act of February 25, 1901, P. L. 11, to manage and control all the lands purchased under the provisions of the act, to establish rules and regulations with reference to the control, management and protection thereof, to sell timber and to make contracts or leases for the mining or removal of valuable minerals, is without authority to dispose of the property of the State in whole or part.

Hence, it cannot grant to private corporations the right to dam the river Juniata and to carry water as required through a conduit on land purchased by the commission for forestry reservation purposes, nor allow private persons to erect cottages for residential purposes on such lands, nor itself erect thereon cottages for the purpose of leasing them, nor lease the lands for grazing purposes.

Office of the Attorney General,
Harrisburg, Pa., September 9, 1903.

J. T. Rothrock, M. D., Commissioner of Forestry:

Sir: You have sent me a proposed form of lease which the Little Juniata Water and Water Power Company asks the Forestry Reservation Commission to execute, with the request that I will furnish you with an opinion thereon as to whether or not the act of February 25, 1901 (P. L. 11), creating a Department of Forestry, gives authority to enter into such a contract.

You further request an opinion as to whether your Department can grant permission to private persons to come upon the State reservations and erect cottages for residence purposes, under conditions protecting the Commonwealth, and from which the Commonwealth will derive a revenue in the way of rentals. You state that a number of such requests are now pending, mostly from invalids who would be benefited by residence in high altitudes. You also request an opinion whether the Forestry Reservation Commission is clothed with power to grant rights to build cottages as aforesaid, and, in addition, whether the Commission has power to erect suitable cottages upon the reservations belonging to the State, and lease them for the purposes aforesaid; and also whether the Commission has power to lease lands for grazing purposes.

Taking up these matters in their order, I begin with the proposed lease to the Little Juniata Water and Water Power Company. I find that it is a corporation existing under the laws of the Commonwealth of Pennsylvania, having its principal office in the city of Philadelphia, but having for its object the use of the waters of the Little Juniata river in the county of Huntingdon for the development of water power for industrial purposes. It is plainly avowed in the proposed lease that, in order to carry out such object, it is necessary to dam the river Juniata at a certain point indicated upon

an accompanying plan, and thence to carry so much water as may be required through a conduit to a point near the town of Petersburg, in said county, where the water will be utilized and returned to the river by way of Shaver's creek.

It is also avowed that the Commonwealth, by reason of the purchase by the Forestry Commission for forestry reservation purposes, is the owner of three or more tracts of land bordering upon or adjacent to the said Little Juniata river along the proposed route of the said conduit, for a distance aggregating upwards of two miles. It is proposed that, in consideration of the annual rental of one hundred dollars, payable in advance, the Commonwealth shall permanently and perpetually lease to the Little Juniata Water and Water Power Company a strip of land about seventy-five feet wide, along and over the slope of the tracts of land before indicated. Beginning at a point marked "Proposed Dam" on the plan attached to the lease, thence following a line therein marked "Proposed Conduit," in the valley of the said Little Juniata river, as and for a right of way for the construction and maintenance of a certain conduit for the carrying of water, and for the locating of the necessary transmission wires proposed to be erected, the right of way being about ten thousand feet in length, with full right of ingress, egress and regress to, over and across said lands on the line of said right of way.

The proposed lessee, while agreeing to pay the rental promptly at the time due, is graciously willing to agree to use the above right of way only for the purpose of locating its water conduit and transmission wires between the proposed diverting dam above Barree and Petersburg, and there are certain provisions as to the method in which said conduit is to be built, the kind of materials to be used, and the necessary stipulations as to the location of the same and the digging or opening of land, the cutting of timber, together with certain other provisions as to the height of the proposed dam, the impounding of the waters and the use of timber on the land covered by the impounded waters.

It is unnecessary to further recite the provisions of the lease, as I have now alluded to its most characteristic features. In my judgment, the making of such a contract is wholly beyond the powers of the Forestry Commission. The Commission is entirely without power to grant the use of the waters of the Commonwealth to private corporations, no matter how tempting the proposition of a rental might be.

The powers of the Forestry Commission are distinctly stated in the act of 25th of February, 1901 (P. L. 11). As they relate to your Department and are entirely familiar to you, I need not repeat them here by exact quotation. Suffice it to say that, apart from the

power to manage and control all the lands purchased under the provisions of the act, and the power to establish rules and regulations with reference to control, management and protection of forestry reservations, and all lands that may be acquired under the provisions of the act, the Commission is empowered to sell timber on terms most advantageous to the State, and to make and execute contracts or leases for the mining or removal of any valuable minerals that may be found in said forestry reservations whenever it shall appear to the satisfaction of the Commission that it would be for the best interests of the State to make such disposition of said minerals. Apart from these specific powers, which are several times alluded to in the subsequent provisions of the act, the Department of Forestry is without authority to dispose of the State's property, either in whole or in part. The leasing of rights of way or of strips of land along water courses for the purposes of the erection of a dam or the construction of a conduit is clearly not within the spirit or the terms of the act relating to the regulation and control of the forestry reservation, and is not related in any way to the selling of timber or the leasing of mining privileges.

I return the form of proposed lease which you sent me without my approval, and instruct you that you are without authority to execute it in behalf of the Department.

What has been already said upon the question of the powers of the Department of Forestry applies equally to the building of cottages, the permitting others to build cottages, and the leasing of lands for grazing purposes. I find nothing in the acts relating to your department which would authorize the carrying out of any such purposes. Should the State determine to establish a sanatorium or out-door hospitals upon a large scale, or open-air camps, or to permit tracts of its forestry reservation lands to be converted into grazing farms, it must do so through an act of Assembly conferring the authority in distinct terms. As the legislation of the State now stands, all of these purposes are beyond the scope of your authority.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

COMMISSIONER OF FORESTRY—STATE LANDS.

Where a railroad has committed trespass and laid pipes on the State land, the Commissioner of Forestry should before removing the pipes, notify the railroad of the trespass and request the removal by a certain date, and notify them further that unless the request for removal is complied with, the pipes will be removed by the State authorities at the expense of the railroad company, and with claim for damages for the trespass committed.

Office of the Attorney General,
Harrisburg, Pa., February, 24, 1904.

Hon. J. T. Rothrock, Commissioner of Forestry:

Sir: You have called my attention to a trespass upon State lands committed by the New York Central and Hudson River Railway Company in Burnside township, Centre county.

My judgment is that before you proceed to remove the pipes which the railroad company has buried in the State land, it would be proper for you to notify the officials of the company of the trespass and request their removal by a certain date, and notify them further that unless the request for their removal is complied with, the pipes will be removed by the State authorities, and the company held liable for the costs of removal, as well as for damages for the trespass committed.

I herewith return you the letters in the matter.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

OPINIONS GIVEN TO THE FACTORY INSPECTOR.

FACTORY INSPECTOR—SWEAT SHOPS—DWELLING HOUSE—FIRE ESCAPES—ACTS OF APRIL 11, 1895; MAY 5, 1897, AND MAY 29, 1901.

A permit under the act of May 5, 1897, P. L. 42, which is an act "to regulate the employment and provide for the health and safety of persons employed where clothing, cigarettes, cigars and certain other articles are manufactured or partially made,....." must be applied for and granted by the factory inspector before any room or apartment in any tenement or dwelling house can be used for such purposes, whether by the immediate members of the family occupying such room or apartment or not, and before any hiring or employment of any person to work in such room or apartment for such purpose.

The broader act of May 5, 1897, P. L. 42, may be regarded as a repeal of the act of April 11, 1895, P. L. 34.

A room or apartment in a tenement or dwelling-house, used for the manufacture of articles designated in the act of May 5, 1897, P. L. 42, is a manufacturing establishment within the meaning of the act of May 29, 1901, Sec. 13, P. L. 322, which requires the factory inspector to compel the owners thereof to provide and maintain fire-escapes and appliances for the extinguishment of fire.

Office of the Attorney General,
Harrisburg, Pa., May 8, 1903.

Hon. J. C. Delaney, Factory Inspector:

Sir: I acknowledge the receipt of your letter of April 28th, requesting my opinion as to your duties in the matter of granting permits and of making inspections, under the acts of April 11, 1895 (P. L. 34), and May 5, 1897 (P. L. 42), and also stating what has hitherto been the practice of your Department.

The act of April 11, 1895, which was an act to regulate the employment and provide for the safety of persons employed in tenement houses and shops, where clothing, cigarettes, cigars and certain other articles are made, or partially made, expressly provided "That no room or apartment in any tenement or dwelling house shall be used except by the immediate members of the family living therein, for the manufacture of coats, vests, trousers, knee-pants, overalls, cloaks, hats, caps, suspenders, jerseys, blouses, waists, waist-bands, underwear, neckwear, furs, fur trimmings, fur garments, shirts, hosiery, purses, feathers, artificial flowers, cigarettes or cigars."

It was further provided that "No person, firm or corporation shall hire or employ any person to work in any room or apartment in any rear building, or building in the rear of a tenement or dwelling house, at making, in whole or in part, any of the articles mentioned

in this section, without first obtaining a written permit from the Factory Inspector or one of his deputies, stating the maximum number of persons allowed to be employed therein."

It was further provided that such permit should not be granted until an inspection of such premises has been made by the Factory Inspector or one of his deputies, and such permit might be revoked by the Factory Inspector at any time the health of the community or of those so employed might require it.

The act of May 5, 1897, follows substantially the provisions of the act just quoted, and relates to the manufacture of the same articles, differing from the earlier act in this material provision. That there is no reference whatever to the use of such room or apartment by the immediate members of the family living therein.

The act of 1897, being broader in the scope of its protective features, may be regarded as a repeal of the act of 1895, so that the question with which you have to deal rests solely upon the language of the latter act. The act of 1897, in specific terms and without limitation, forbids the use of any room or apartment in any tenement or dwelling house for the manufacture of the articles therein specified, and prohibits further the hiring or employment of any person to work in any room or apartment or in any part or parts of buildings used for the purposes aforesaid, without first obtaining a written permit from the Factory Inspector, or one of his deputies, which permit must state the maximum number of persons allowed to be employed therein; and further, that the building, or part of building, to be used for such work or business is thoroughly clean, sanitary and fit for occupancy for such work or business.

The question, therefore, whether such room or apartment in any tenement or dwelling house is or is not used by the immediate members of a family does not arise, and I am of opinion, that before such room or apartment in any tenement or dwelling house can be used for the purpose of manufacturing the article designated, and before there can be any hiring or employment of any person to work in such room or apartment, there must be first obtained a written permit from you, as Factory Inspector, or from one of your deputies, specifically stating the matters already designated as necessary to be shown as to the number of persons allowed to be employed therein, and as to the sanitary condition and fitness of such apartment for occupancy for such work or business. In other words, under the act of 1897, permits must be granted to applicants, whether connected with the immediate family or not. The duty on the part of all persons engaged in such manufacture to obtain from you such permit, before either manufacturing themselves or hiring others to manufacture for them, must be complied with entirely irrespective of the question as to whether there are or are

not immediate members of the family living in such room or apartment. I instruct you, therefore, that, under the act of May 5, 1897, it is your duty, if requested, to issue permits for the uses designated in the act, entirely irrespective of the question as to whether the applicants are or are not immediate members of the family living in the apartment sought to be used. I add further, that there can be no use of any apartment for manufacturing purposes without a permit, and that inspection must precede the granting of a permit.

You ask further as to your powers and duties under section 13 of the act of 29th of May, 1901 (P. L. 322), entitled "An act to regulate the employment and provide for the health and safety of men, women and children in manufacturing establishments, mercantile industries, laundries, renovating works or printing offices; and provide for the safety of men, women and children in hotels, school buildings, seminaries, colleges, academies, hospitals, storehouses, public halls and places of amusement, by requiring proper fire-escapes; and to provide for the appointment of inspectors, office clerks and others to enforce the same."

Under the thirteenth section of this act, the Factory Inspector and his several deputies are charged with the duty of inspecting hotels, school buildings, seminaries, colleges, academies, manufacturing establishments, mercantile industries, laundries, renovating works, printing offices, hospitals, storehouses, public halls and places of amusement and workshops, all of which are required by law to provide and maintain fire escapes and appliances for the extinguishment of fire, and you have the power to compel the owners of all such buildings, who have not complied with the requirements of the existing laws, to comply therewith, and provide and maintain fire-escapes and appliances for the extinguishment of fire. The fire-escape is to be erected and located by order of the Factory Inspector or his deputy, regardless of the exemption granted by any board of county commissioners, fire marshals or other authorities.

Under this law, I am of opinion that the apartments in any tenement or dwelling house, used or proposed to be used for the manufacture of the articles designated in the act of 5th of May, 1897, are manufacturing establishments within the meaning of the act of May 29, 1901, and that it is your duty to compel the owners thereof, who have not already complied with the laws relating to fire escapes, to provide and maintain fire-escapes and appliances for the extinguishment of fire. For that purpose it is necessary for you to make an inspection in order to ascertain the uses to which such apartments are put or sought to be put. There is nothing in the act of

1901 which authorizes or requires inspectors to require fire-escapes on tenement houses which are not used or sought to be used for the manufacture of the articles designated.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

PUBLIC OFFICERS—CONSTITUTIONAL LAW—INCOMPATIBLE OFFICES—MEMBER OF STATE LEGISLATURE—ATTORNEY FOR FACTORY INSPECTOR—ART. II, SEC. 6, OF CONSTITUTION.

A member of the State Legislature may be employed by the Factory Inspector as an attorney for his department. Such an employment is not an "appointment" nor such a position an "office" within the meaning of Art. II, Sec. 6, of the Constitution.

Statutes—Inference from term "expenses incurred" in a general appropriation act—Factory Inspector—Attorneys.

The inclusion in a general appropriation act of an item "for the payment of the necessary costs and expenses incurred in the prosecution of offenders against the factory laws of the Commonwealth" is a recognition by the Legislature that the officer could not do the whole work of his office, *proprio manu*, and an authority to have a portion of it done at public expense, and plainly warrants the inference that counsel may be employed.

Office of the Attorney General,
Harrisburg, Pa., July 31, 1903.

Hon. J. C. Delaney, Factory Inspector:

Dear Sir: I have your letter of July 27, 1903, stating that you have in view the appointment of a present member of the Legislature of Pennsylvania as an attorney to your Department, and asking my opinion whether the two offices would be incompatible under the Constitution.

The doubt in your mind is suggested, if not entirely created, by the use of the technical words "appoint," "offices" and "incompatible." Had you said "May I employ, as my legal representative in the conduct of prosecutions instituted by me as Factory Inspector, an attorney-at-law who is also a member of the Legislature?" your doubts would vanish. There is nothing in the Constitution to prevent a member of the Legislature, who is also a lawyer, from practicing his profession, and his acting in a professional capacity is not the exercise of an "office." The word "appoint," in the sense in which it is used in the Constitution, has a well-settled technical meaning. It depends upon the exercise of the power or right to appoint, as in the case of the President or the Governor, and the power can only be properly exercised in relation to an

office in the technical sense, which is under the law to be filled by an appointment instead of by an election.

There is no provision in any of the acts relating to your Department authorizing the appointment of an attorney for the Department. There is much, however, from which the power to employ an attorney or attorneys to aid you in the performance of your duties may be fairly implied. The act of 3d of June, 1893 (P. L. 276), which created the office of Factory Inspector, by the fifth section, made it his duty to enforce the provisions of the act, and to prosecute all violations of the same before any magistrate or any court of competent jurisdiction in the State: all necessary expenses, not exceeding a certain amount in any one year, incurred by the inspector in the discharge of his duties, were to be paid from the funds of the State upon the presentation of proper vouchers. By the fourteenth section of the act of 29th of April, 1897, and the eighth section of the act of 27th of May, 1897, violations of the factory acts are declared misdemeanors, punishable by fine and imprisonment. It is manifest that in such matters you must have the aid of counsel to prepare the evidence and properly present and conduct the cases which are prosecuted.

The general appropriation act of 15th of May, 1903 (P. L. 517), appropriates for two years the sum of \$8,000, or so much thereof as may be necessary, "for the payment of the necessary costs and expenses incurred in the prosecution of offenders against the factory laws of the Commonwealth." Suitable compensation to counsel is a necessary expense, and the inclusion of such an item in the General Appropriation act is, as was said by the Supreme Court in the case of *Commonwealth ex rel Appellant v. Gregg*, 161 P. S., 588, in speaking of a clerk in the prothonotary's office, a recognition by the Legislature that the officer to be aided could not do the whole work of his office, *proprio manu*, and an authority to him to have a portion of it done at the public cost. By such recognition and authority it became a part of the ordinary expenses of his Department. The Legislature is the exclusive judge of the form in which its enactments shall be put, and its mandate in that respect cannot be questioned unless it transgresses a plain prohibition in the Constitution. There is no prohibition in the way of the employment of counsel; there is the plain inference that counsel may be employed. What work there is to be done, and what force is requisite to do it, are questions of detail which must be left to the head of the Department.

The question remains whether you can select a member of the Legislature to act as your counsel.

The sixth section of article II of the Constitution of Pennsylvania provides: "No Senator or Representative shall, during the time

for which he shall have been elected, be appointed to any civil office under this Commonwealth." Would the employment of counsel by you, as contemplated, be an appointment to a civil office under the Commonwealth? I am of opinion that it would not.

The matter may be considered from the point of view of the professional character of the duties which you wish your counsel to perform. In employing a lawyer to represent you in prosecutions for violation of law and in conducting cases for your Department, you are not exercising a power of appointment; you are simply asking him to act as your professional adviser and counsel in discharging a technical and legal duty for which he is specially trained professionally and which you yourself cannot perform. He will not act as Factory Inspector, but will act for the Factory Inspector, not as your *alter ego*, but as your legal representative; and in asking him to accept the position of legal adviser you are not imposing upon him the duties of any office.

A popular definition of the word "office" is to be found in the Century Dictionary: "A position of authority under a government; the right and duty conferred on an individual to perform any part of the functions of government, and to receive such compensation, if any, as the law may affix to the service; more specifically called 'public office.' It implies authority to exercise some part of the power of the State, a tenure of right therein, some continuous duration, and usually emoluments."

Anderson in his Dictionary of Law defines an office as "A public station or employment, conferred by the appointment of government, and embracing the ideas of tenure, duration, emolument and duties."

These characteristics are amply sustained by authority: *United States v. Hartwell*, 6 Wallace, 383; *Bowers v. Bowers*, 26 P. S., 77 and *Commonwealth v. Gamble*, 62 P. S., 349. The features of duration of term, fixity of tenure, and right on the part of the incumbent to exercise the duties and take the emoluments of the office, unless properly removed, are all lacking in the matter of the employment of counsel by you, inasmuch as you can employ counsel either for one case or for several, for a month or for a year; and, moreover you can change your counsel at pleasure, without raising a question on his part as to his right to retain the post against your wishes, except so far as his individual right to a suitable compensation may be concerned, which, however, is no more in this instance than in any other case of the employment of counsel by a private citizen.

Moreover, the vocation of a lawyer does not take on the character of an office, either federal, State or municipal. No attorney is ever spoken of as an officer unless it be as an officer of the courts. An attorney is not a civil, governmental or public officer. He is not

a holder of an office of public trust within the meaning of the Constitution. This view has been strongly stated in several important cases. The numerous "Test Oath Acts," which grew out of the Civil War, and which prohibited "public officers," "civil officers," "persons holding offices of trust," etc., from exercising the functions or receiving the emoluments of their offices, unless they should first take an oath, gave rise to grave and able discussions of constitutional points of view. In West Virginia, Maryland, Tennessee and other States the conclusion is definitely reached that an attorney-at-law was not a government officer, nor a civil officer, nor a public officer, nor a holder of a public office of trust or profit. The question finally reached the Supreme Court of the United States. In *ex parte* Garland, 4 Wallace, 332, and in *Cummings v. The State of Missouri*, 4 Wallace, 277, it was stated by Mr. Justice Field that the profession of an attorney or counsellor is not like an office created by an act of Congress or a Legislature, depending for its continuance, its powers and emoluments upon the will of the government, but attorneys-at-law are officers of the courts, admitted as such by their orders upon evidence of their possessing sufficient legal learning and fair private character. In California, New York, Alabama, Virginia, South Carolina and Massachusetts the same result was reached.

Chief Justice Gray, in *Robinson's Case*, 131 Mass., 378, while dwelling particularly on the requirements of fidelity to the courts and to the client, said: "An attorney-at-law is not, indeed, in the strictest sense, a public officer." The same view is taken by Mr. Weeks in his work on "Attorneys and Counsellors." The cases in this State, while numbered by the score, are confined to views of the relations of attorneys-at-law to their clients and to the courts, and never regard him as a public officer or as holding a public office.

It is manifest that no objection to your proposed employment of an attorney can arise because of the professional character of your employe, or because of the nature of the duties to be performed by him. His duties will call him before the inferior tribunals or before the courts having jurisdiction of prosecutions properly instituted. It is common knowledge that members of Congress, whether Senators or Representatives, and that members of the Legislature, whether of the Senate or of the House, constantly appear in the practice of their profession before the courts, and there is no constitutional prohibition against their doing so.

The best and most thorough discussion that I have found is contained in the case of *Olmsted v. The Mayor of New York*, 42 N. Y. Superior Court Reports, page 481. It was there ruled that an office consists of a right to exercise a public function or employment, and to take the fees and emoluments belonging to it. It involves

the idea of tenure, duration, fees, the emoluments and powers, as well as that of duty, and it implies an authority to exercise some portion of the sovereign power of the State either in making, administering or executing the laws. An officer is one who holds such an office. An employe is one who receives no certificate of appointment, takes no oath of office, has no term or tenure of office, discharges no duties and exercises no powers depending directly on the authority of law, but simply performs such duties as are required of him by the persons employing him, and whose responsibility is limited to them, and this, too, although the person so employing him is a public officer, and his employment is in and about a public work or business.

It is plain that the counsel to be employed by you will receive no certificate of appointment, will take no oath for the faithful performance of his duty—his oath being the professional one administered by the court at the time of his admission to practice—will have no term or tenure of office, will discharge no duties and exercise no powers depending directly upon authority as defined by the statute. He will be simply your representative, responsible to you and to the court for his proper discharge of professional duties. These features, in my judgment, do not constitute him an officer, nor will his selection be an appointment within the meaning of the Constitution. Article XII, section 2, of the Constitution of Pennsylvania has no application.

Very respectfully,
HAMPTON L. CARSON,
Attorney General.

FACTORY INSPECTOR—OFFICE OUTSIDE OF CAPITAL—DUTIES.

The Factory Inspector can rent a room, which is necessary for the convenient, expeditious and effective discharge of his duties, at the expense of the Commonwealth, in the city of Philadelphia. He is not limited to an office in the State Capital.

The legislation touching the duties of the Factory Inspector reviewed.

Office of the Attorney General,
Harrisburg, Pa., August 3, 1903.

Hon. J. C. Delaney, Factory Inspector:

Sir: You state that you have found it necessary to incur as an item of expense in your Department the rent of a room in the Pennsylvania Building at Fifteenth and Chestnut streets, Philadelphia, at a monthly rental of forty-three dollars, which has been demurred to by the Auditor General, but who agrees with you to submit the matter to my official judgment.

I understand that of your total force of thirty-nine deputies, you have thirteen in Philadelphia county, two in each of the counties of Bucks and Montgomery, one in Delaware and one in Lancaster counties—or, in five contiguous counties, you have within a small fraction of one-half of your entire staff. In this room you assemble for conference your nineteen deputies at a trifling cost, on half a days' notice, and you there have for distribution to the deputies and manufacturers supplies of blank forms, certificates, affidavits and reports. To compel them to come to Harrisburg would be to draw them from their fields of labor at increased cost, and for you to visit them separately at their respective homes would cost the State a considerable sum, and cost you much time whenever it becomes necessary to consult with them. As the deputies are by law clothed with most of the powers of the Chief Inspector, and can administer oaths, and are required to issue certificates for children as well as thousands of permits, it is necessary that they should have convenient access to a base of supplies.

I cannot doubt the propriety of the expenditure for room rent. Its purpose is necessary to the convenient, expeditious, and effective discharge of your duties. Those duties are varied and widely distributed. Without enumerating all of them, they may be stated generally as follows: To visit and inspect the factories, workshops, bakeshops, sweat-shops, and other establishments of labor in the State; to supervise the heating, lighting, ventilating and sanitary arrangements, as well as the fire escapes and means of egress in case of fire; to judge of the location of belting, shafting, gearing, drums and machinery, and the guarding of shafts and well-holes; to seize, condemn and destroy clothing made in unhealthy places or where there are contagious or infectious diseases; to supervise the employment of minors; to see that proper registers are kept by employers; to secure affidavits as to age, date and place of birth; to see that proper notices are posted as to the hours of work per day; to receive reports of accidents; to administer oaths and issue certificates and permits; to prosecute all violations of the acts; as well as to supervise the enforcement of the provisions of the act relating to navigation on inland lakes, and the superintendence of marine engines, boilers and machines.

These are the chief features of the acts of June 3, 1893 (P. L. 276); April 29, 1897 (P. L. 30); May 5, 1897, as amended by the act of April 28, 1899 (P. L. 71); May 29, 1901 (P. L. 322); March 20, 1903 (P. L. 48), and April 15, 1903 (P. L. 201).

At each session of the Legislature the jurisdiction of your Department has been added to; its duties have been enlarged, and your working staff has been trebled since 1893. The constantly increasing appropriations made by the general appropriation acts

indicate the legislative appreciation of the importance of guarding the lives, the safety and the health of labor.

It is evident that you must be frequently absent from the capital, and it seems but reasonable that you must have a place where you can meet your deputies. The objection which has been suggested, that, as the act of 1893, and the later one of 1901, provide that an office shall be furnished in the Capitol which shall be set aside for the use of the Factory Inspector, you can have an office nowhere else, is in my judgment without force. The use of the word "Capitol" would indicate the building now erecting, rather than the conclusion that you could not have an office outside of the Capital.

It must be borne in mind that the field of your labors is the Commonwealth, that your duties call you to all parts of the State; you cannot bring the factories to you. The fifteenth section of the act of 1893 expressly directs that the State shall be divided into districts; that deputies are to be assigned to districts and that they may be transferred from district to district; traveling expenses are expressly provided for.

I cannot, under this view of the facts and of the provisions of the law, regard your functions, which are necessarily to be performed at a distance from the Capital, as a transfer of the seat of government to places foreign to the scene of suitable performance. Your deputies are like troops in the field and must be visited and supplied at convenient stations. Your application of this principle to a single room in the great manufacturing city of Philadelphia, to which deputies can be summoned from neighboring counties, is, in my judgment, perfectly legal, if in your judgment it is necessary to effective work.

I advise you that the item of expense is proper, and may be allowed by the Auditor General, to whom I have sent a copy of this opinion.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

OPINIONS GIVEN TO SUPERINTENDENT OF PUBLIC INSTRUCTION.

SCHOOL LAW—TAXATION—EXPENSES OF ASSESSMENT.

The expenses* of the tax assessment, made for the purpose of raising the school tax, must be paid by the county and not by the school district for which the assessment is taken.

Office of the Attorney General,
Harrisburg, Pa., March 12, 1903.

Dr. N. C. Schaeffer, Superintendent of Public Instruction:

Sir: You have informed me that the county treasurer of Lancaster county has recently taken the ground that the assessment made by the assessors between April 1st and May 1st, which is entirely for the purpose of raising the school tax, should be paid by the school districts for whom the assessment is taken, and not by the county treasurer as claimed. The county hitherto has paid the assessors for making the assessment and the practice has been an unbroken one for many years. You have called my attention to the act of May 8, 1854, P. L. 617, entitled "An act for the regulation and continuance of a system of education by common schools."

I have carefully examined that act but find nothing in it which would lead, in my judgment, to any modification of the opinion given by Deputy Attorney General, John P. Elkin, to your Department on the 14th of April, 1896 (Report of the Attorney General for 1895-1896, page 147). That opinion is to the effect that the assessors, required under the Compulsory School Law of May 16, 1895, to make an enumeration of the children between the ages of eight and fifteen years, are entitled to be paid for such services out of the funds of the proper county, and it is stated in strong terms that "The county is certainly liable for the time spent by the assessor in making a valuation of property and registration of voters, and since the registration of school children is made at the same time, it would be very difficult to decide what portion of his time was spent in making the valuation of property and how much of it was left to be devoted to the registration of school children. If the county should be held not liable for the services of assessors under the Compulsory School Law, then would we have the anomalous situation of an assessor being paid by the county for part of a day spent in making a valuation of property for the purposes of taxation and the registration of voters, while part of the same day

spent in the enumeration of school children by the same officer could not be paid out of the county funds."

I perceive no reason for departing from this opinion and I advise you that there is nothing in the law of May 8, 1854 which would alter this conclusion.

Very respectfully yours,

HAMPTON L. CARSON,
Attorney General.

SCHOOL DIRECTORS—ELECTION—BOROUGH—ACT OF APRIL 23, 1903.

The act of April 23, 1903, P. L. 271, relating to the number and election of school directors in boroughs not divided into wards, does not apply to boroughs entitled to elect six directors at the time of its passage, and any election held in any such borough is invalid, and of the six directors so elected, only the two whose terms were designated as for three years are entitled to sit on the board or to take a part in its proceedings.

Office of the Attorney General,
Harrisburg, Pa., June 1, 1904.

Hon. Nathan C. Schaeffer, Superintendent of Public Instruction:

Sir: I am in receipt of your letter of even date, asking for an official construction of the act of Assembly approved the 23d day of April, A. D. 1903 (P. L. 271), and stating that it has caused some confusion in various boroughs of the Commonwealth.

The language of this act, while somewhat ambiguous, is not capable of more than one construction, particularly when viewed in the light of prior legislation upon the same subject. It is entitled "An act to designate the number of school directors to be elected in the several boroughs of the Commonwealth not divided into wards; to provide for their election, and for the filling of vacancies, and to fix the length of term for which they shall serve," and the first and second sections provide as follows:

"Section 1. That the number of members of any school board of boroughs not divided into wards shall be six.

"Section 2. That it shall be lawful for the qualified voters of the boroughs of this Commonwealth which are not divided into wards, and boroughs not now enjoying this right by special statutes, at the first election for borough officers next ensuing the passage of this act, to elect two school directors to serve for one year, two to serve for two years, and two to serve for three years; and annually thereafter to elect, for a term of three year's duration, as many school directors as may be necessary to fill the places of those whose terms of office are about to expire."

The act further provides that at the first election held under its terms in the boroughs to which it applies six school directors shall be elected by the voters who shall designate on their ballots for what length of time the persons named shall serve, whether for one, two or three years. In a subsequent section it provides that "the school directors now in office, under existing laws, shall act conjointly with those who are to be elected under the provisions hereof" until the expiration of the terms of the former.

This act is manifestly an effort to bring within the terms of the general law some borough or boroughs not before entitled to elect six directors, and has no application whatever to any borough not divided into wards, which at the time of the passage of the act was entitled to have that number of directors. The language of the second section "not now enjoying this right by special statute," refers plainly to the right of electing six directors, but its ambiguous character seems to have been misunderstood in some sections of the Commonwealth, and several boroughs which do not come within its terms proceeded to elect six directors at the last municipal election and now have more than their legal quota of those officials.

After a careful investigation of the laws which were in force prior to the enactment of this statute, as well as of the causes which led to its adoption, I am of opinion, and instruct you, that no borough entitled to elect six directors, and enjoying that privilege at the time of the passage of this act, comes within its provisions, and any election held in any such borough in accordance with the terms of this statute is invalid, and of the six directors so elected only the two whose terms were designated as for three years are entitled to sit on the board or to take a part in its proceedings.

Very respectfully,

FREDERIC W. FLEITZ,
Deputy Attorney General.

OPINIONS GIVEN TO THE DEPARTMENT OF MINES.

DEPARTMENT OF MINES.

The order of the court being that the Commonwealth should pay the costs of the investigation in the case of James Martin, mine inspector of the Seventh Anthracite district, the bill for stenographic services with the other papers should be forwarded by the Chief of the Department of Mines to the Auditor General for action under Section 19 of the act of June 8, 1901, P. L. 545.

Harrisburg, Pa., November 22, 1904.

Hon. James E. Roderick, Chief of the Department of Mines:

Sir: I have your letter of the 21st inst., enclosing bill for stenographic services rendered in the case of James Martin, Mine Inspector of the Seventh Anthracite District.

The action of the judge is based upon section 19 of the act of June 8, 1901 (P. L. 545), which says:

“The cost of said investigation shall be borne by the removed Inspector; but if the allegations in the petition are not sustained, the costs shall be paid by the Treasurer of this Commonwealth upon warrants of the Auditor General, or by the petitioners in case the court finds that there was no probable ground for said charge.”

The order of the court, while not finding that the petitioners were without probable cause for their charge, and therefore properly did not put the cost upon the petitioners, does distinctly order that the costs of the above entitled proceeding be paid by the Commonwealth, as provided by the section just referred to.

I think the proper course for you to pursue is to forward these papers to the Auditor General for his action under the law referred to. For that purpose I herewith return the papers.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

DEPARTMENT OF MINES.

There is no authority of law for the Chief of the Department of Mines to give a new certificate in place of the one given by the examining board of 1892, to J. R. Jones, Jones having since that time changed his name to J. R. Farrell.

Office of the Attorney General,
Harrisburg, Pa., April 21, 1904.

Hon. James E. Roderick, Chief Department of Mines:

Sir: I have examined the enclosed petition of John R. Farrell together with the accompanying papers and certificates.

I know of no authority, either at common law or by statute, which would authorize you to issue a new certificate in place of the one given by the Examining Board in 1892 to J. R. Jones. You certainly cannot undertake in the year 1904 to strike out the name of J. R. Jones from the certificate given in 1892, and substitute the name of J. R. Farrell; nor do I see that you are required to issue a new certificate. The act of Mr. Jones in changing his name was a purely personal and voluntary act of his own, entirely within his individual discretion, and if any mistake in identity should ever arise as to whether the man now known as Farrell was formerly known as Jones, Mr. Farrell has it entirely within his power to establish his identity by witnesses who have knowledge of the facts. The affidavits which he submits would probably satisfy anybody whose duty it should be to inquire, if such inquiry should become important, but I do not find that you are required under the law to pass upon this question or to furnish him with a certificate to that effect. It is quite clear that the present Mr. Farrell did, under the name of Jones, obtain a certificate as mining boss from the Examining Board in 1892 under the name of Jones. His possession of the paper and his ability to establish the complete personal identity of himself under his present name with his former name is a matter which, should the occasion arise, be left entirely to his own counsel to suggest a proper method of determining. If you, officially, are called on to satisfy yourself of his identity, I do not see that this involves the giving of a new certificate.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

MINE INSPECTORS—ELECTION OF—TERM OF INCUMBENT EXPIRING
SEPT. 25, 1905—ACTS OF JUNE 2, 1891, AND JUNE 8, 1901.

No election of a mine inspector to take the place of an inspector appointed under the act of June 2, 1891, P. L. 176, whose term does not expire until September 25, 1905, can, under the act of June 8, 1901, P. L. 535, relating to the election of mine inspectors, be held until the general election of November, 1905.

Office of the Attorney General,
Harrisburg, Pa., April 13, 1904.

Hon. James E. Roderick, Chief of the Department of Mines:

Sir: I have before me your letter of to-day, stating that the term of William Stein as Mine Inspector in Schuylkill county expires on September 25, 1905, and asking whether or not his successor can or should be chosen at the general election to be held in November next.

Under the provisions of the act of 2d of June, 1891 (P. L. 176) the Mine Inspectors in the Anthracite Region were appointed by the Governor upon the recommendation of the Board of Examiners, from time to time as vacancies occurred, for a period of five years. The Legislature of 1901, by the passage of the act of June 8 (P. L. 535), changed this method of selection, and provided that the office of Mine Inspector should be filled by the votes of the qualified electors of the district at the general elections to be held in November. This act, however, provided for the retention of the inspectors then serving under the appointment by the proviso to section 7, which reads as follows:

"That the present mine inspectors in the several inspection districts shall continue in office until the expiration of the terms for which they have been appointed, and the number of inspectors to be elected at the coming election shall be reduced by the number of inspectors now regularly appointed and serving in said districts. When the terms of the present inspectors shall expire, their successors shall be elected in accordance with the provisions of this act."

It is clear from this language that no election can be held to select a successor to a present incumbent until the expiration of his term of office.

Section 11 of the later act fixes the length of the term, and provides when the same shall begin in the following language:

"Each of the said inspectors shall hold said office for a term of three years from the first Monday of January immediately succeeding his election to said office, and until his successor is duly elected and qualified."

An inspector elected in November, 1904, would, under this act assume the duties of his office on the first day of January, 1905, nine months before a vacancy would occur by the expiration of the term of William Stein. The uncertainty which prompts your inquiry no doubt arises from the fact that the term of Mr. Stein expires prior to the general election in November, 1905, which will cause a vacancy in the office until January 1, 1906, when the inspector regularly elected will assume his duties. Contingencies like this necessarily arise by reason of the fact that the terms of the various appointed inspectors expire at different times, but when the positions shall all be filled by election, then the terms will be uniform and this trouble will come to an end.

The act of 1901, however, makes ample provision for filling vacancies of this kind by appointment, as will be apparent by an examination of section 13, which reads as follows:

. "In case of death, resignation, removal from office, or other vacancies in the office of mine inspector before the expiration of said term of office, the judges of the court of common pleas of the county in which said vacancy occurs shall appoint a duly qualified person to fill the said vacancy for the unexpired term. Said appointment to be one of the persons having filed with the county commissioners of said county a certificate from the board of examiners, showing he passed a successful examination before the said board, and is duly qualified as hereinbefore mentioned."

After a thorough examination of the law and the facts in connection therewith, I am of the opinion and advise you that no election of a mine inspector can legally be held in Schuylkill county in November next to take the place of William Stein, as there will be no vacancy in the office now held by him until the expiration of his term on September-25, 1905, and his successor should be selected at the general election to be held in November of that year.

Very respectfully,

FREDERIC W. FLEITZ,
Deputy Attorney General.

DEPARTMENT OF MINES.

The act of 1903, P. L. 359 attempts to amend a law already repealed and in its attempt to amend the law does not quote the law in question. This is hopelessly defective.

Neither the act of 1885 which is dead, nor the act of 1893, which is not mentioned, is amended by the act of 1903.

Harrisburg, Pa., June 23, 1903.

James E. Roderick, Esq., Chief of the Department of Mines, Harrisburg, Pa.:

Sir: In reply to your letter, addressed to me by Frank Hall in your behalf, dated June 18, 1903, I find that the law of May 13, 1903 (P. L. 359), purports to amend the bituminous mine law of June 30, 1885 (P. L. 217), but the section quoted by number for amendment is the anthracite mine law of 1885, June 30 (P. L. 233). I also find that the bituminous mine law of 1885 was repealed by the act of May 15, 1893 (P. L. 76), at least so far as the employment of boys is concerned. Hence it is apparent that the law of 1903 (P. L. 359) attempted to amend a law already repealed, and in its attempt to amend that law does not quote the law in question, but quotes by mistake the first section of article IX of the anthracite mining law

of 1885. In my judgment this is hopelessly defective. Section 6 of article III of the Constitution provides:

“No law shall be revived, amended or the provisions thereof extended or confined by reference to its title only, but so much thereof as is revived, amended, extended or confined shall be re-enacted and published at length.”

In the act of 1903 (P. L. 359) this provision is violated in almost every possible way. The existing law, so far as the employment of boys in bituminous mines is concerned, is contained in the act of May 15, 1893 (P. L. 76), to which the act of 1903 makes no reference whatever. I am unable to see how the courts can rule that either the act of 1885, which is dead, or the act of 1893, which was not mentioned, is amended by the act of 1903.

I am,

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

COAL MINE INSPECTOR—ELECTION FOR SUCCEEDING TERM—RE-
EXAMINATION—ACT OF JUNE 8, 1901.

A mine inspector, under the act of June 8, 1901, P. L. 535, to succeed himself, must be elected at the November election preceding the expiration of his term, and must qualify for such election by again passing the examination required by that act.

Office of the Attorney General,
Harrisburg, Pa., February 13, 1903.

Michael J. Brennan, Esq., Inspector of Coal Mines, Eighth Anthracite
District, Pottsville, Pa.:

Sir: Your letter of the 12th inst. has been received, stating that your term of office expires April 19, 1904, and asking whether, in order to succeed yourself, you must again run for the office at the November election in 1903, and asking further whether you must again pass a successful examination with the Board of Examiners.

Both of these questions I answer in the affirmative. You were elected for a definite term, and the term expires by its own limitation. The examination by which you were qualified for your place relates solely to that term and to no other. The vacancy that will occur through the expiration of your term must be filled by election as prescribed in the act of 8th June, 1901 (P. L. 535). A candidate must qualify in the manner prescribed by the act. The fact that you were qualified as a candidate for your present term does not dispense with the necessity of qualifying in like manner for a

new election. A successful examination does not qualify for all time or for as many times as the successful incumbent sees fit to announce himself as a candidate. The examination in each case is only for the term then to be filled, and its efficacy extends no further. If you do not run as a candidate at the November election, 1903, and no successor is chosen at that time, I am of opinion that, under section 11, you would hold over until your successor is duly elected and qualified. Of course you could be that successor, claiming by a new election. Section 13 relates only to vacancies in case of death, resignation, removal or other vacancies before the expiration of a term.

Very respectfully,

HAMPTON L. CARSON,

Attorney General.

OPINIONS GIVEN TO THE STATE HIGHWAY DEPARTMENT.

COUNTY COMMISSIONERS—STATE HIGHWAY DEPARTMENT—
MANDAMUS—ACT OF APRIL 15, 1903, SEC. 22.

The duty required by the act of April 15, 1903, Sec. 22, P. L. 188, of county commissioners, county engineers and officers of cities, boroughs and townships to furnish information to the State Highway Department can be enforced by mandamus.

State Highway Department—Cost and damages—Act of April 15, 1903, Sec. 3, Clause 2, and Sec. 20, Clause 1.

Clause 2, of section 3, and clause 1, of section 20, of the act of April 15, 1903, P. L. 188, are not in conflict. The term cost, as used in section 3, relates to the expense of surveys, grading, material, construction, relocation, changes of grade and expenses in connection with the improvement of highways. The term damages, as used in section 20, relates to such pecuniary measure of compensation as can be properly applicable to injuries resulting from changes of grade, or the taking of land to alter the location of any highway which may be improved under the act.

Road law—Acts of June 26, 1895, and April 15, 1903.

All that is left of the act of June 26, 1895, P. L. 336, is the authority of the county commissioners to take any township road over as a county road and pay the local part of the expense of so doing. If the county makes an application under the act of April 15, 1903, to build or improve a road, so taken under the act of June 26, 1895, P. L. 336, the provisions of the act of 1903 have to be complied with.

Office of the Attorney General,
Harrisburg, Pa., September 17, 1903.

Hon. Joseph W. Hunter, State Highway Commissioner:

Sir: You ask me how the county commissioners of any county can be compelled to furnish the State Highway Department with the number of miles of township roads by townships in said county.

Section 22 of the act "Providing for the Establishment of a State Highway Department," approved the 15th day of April, 1903 (P. L. 188), reads as follows:

"County commissioners or county engineers of the several counties of this State, and the officers of all cities, boroughs and townships in the State, who now have, or may hereafter have by law, authority over the public highways and bridges, shall, upon the written request of the State Highway Department, furnish said Department with any information relative to the mileage, cost of building, and maintenance, condition and character of the highways under their jurisdiction, and with any other needful information relating to the said highways."

This language is sufficiently explicit and mandatory and scarcely needs construction. Under its provisions it becomes the duty of the county commissioners and county engineers, as well as other officers of cities, boroughs and townships in the State, to obtain and furnish, at the earliest possible moment, upon request of the State Highway Commissioner, an accurate statement of the number of miles of roads in each township of their respective counties, and a failure to do so after such request will render them liable to proceedings in mandamus.

You ask also "How is proviso second of the third section of the act of 1903 to be construed?" and further ask whether there is any antagonism or inconsistency between the second clause of the third section and the first clause of section 20 of the act of 1903.

Without quoting the language of these clauses, which is familiar to you, I am of opinion that there is no inconsistency or antagonism between them whatever, because there is a substantial difference between "the cost of the same" and "damages arising from." The term "Cost," as used in section 3, relates to the expense of surveys, grading, material, construction, relocation, changes of grade, and expenses in connection with the improvement of highways. These are to be borne by the State, the county and the townships in the proportions mentioned in the act. The term "Damages," as used in section 20, has no relation whatever to the costs just described, but relates to such pecuniary measure of compensation as can be properly applicable to injuries resulting to persons or corporations from changes in grade or by the taking of land to alter the location of any highway which may be improved under the act. The law provides for a method by which such damages can be ascertained upon proper proceedings in court, in case the injured parties and the county commissioners cannot agree on the amount of damages sustained. Inasmuch as the two sections of the act relate to two legally distinct and separate subjects, there is and can be no conflict or antagonism between them.

You ask further as to the effect of the proviso in section 3 of the act of 15th of April, 1903, upon the act of June 26, 1895 (P. L. 336).

In my judgment, all that is left of the act of 1895 is the authority of the county commissioners to take any township road over as a county road, and pay the local part of the expense of so doing. If the county makes an application under the act of 1903 to build or improve a road, so taken under the act of June 26, 1895, all officers will have to comply with the provisions of the act of 1903 in regard to the method of application and all subsequent steps.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

NORTHAMPTON COUNTY ROAD—COUNTY ROADS—ACTS OF JUNE 26, 1895, AND APRIL 15, 1903.

Where county commissioners take charge of, reconstruct and operate a road as a county road under the act of June 26, 1895, P. L. 336, and some 4,000 feet thereof are swept away by an extraordinary flood, the county is entitled to receive from the State its proportionate share of the expense of rebuilding the road and putting it in proper condition, under the act of April 15, 1903, P. L. 188, in the same manner and subject to the same conditions and restrictions as if the same were an original undertaking.

Office of the Attorney General,
Harrisburg, Pa., November 25, 1903.

Hon. George Statler, Assistant Highway Commissioner, Harrisburg, Pa.:

Sir: In reply to your letter, asking whether State aid can be given to the construction of a road which was taken over by a county under the act of 1895, and which has since been washed out by a flood, I advise you that the act of 1903, page 190, provides that any county constructing county roads under the provisions of the act of June 26, 1895, and supplements and amendments thereto, shall be entitled to receive the same amount of State aid as if said roads were constructed under the provisions of this act. I think this language is entirely clear, and answer you that State aid may be given a road constructed under the act of 1895.

You ask further whether portions of such road, which do not equal in standard that set by your Department, can be reconstructed by State aid.

As to this question, the act of 1903 is also clear.

Section four of said act provides that all highways improved under the provisions of this act shall conform to the standard of construction established by the State Highway Department. Therefore, roads that are not equal in standard to that established by the Highway Department may not be reconstructed by State aid.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

NATIONAL ROAD—HIGHWAY COMMISSIONER.

The act of April 15, 1903, does not authorize the use of any unexpended balance of the maintenance fund upon the improvement and reconstruction of the national road through Fayette and Washington counties.

Office of the Attorney General,
Harrisburg, Pa., May 26, 1904.

Hon. Joseph W. Hunter, State Highway Commissioner:

Sir: Replying to your letter of April 28th, in relation to the improvement and reconstruction of the National road through the counties of Fayette and Washington, I have examined with care the provisions of the act of 15th of April, 1903, and can find nothing which would authorize the use of any unexpended balance of the maintenance fund upon this road. The act is silent as to cases of this character, and the omission, which is a serious one, must be supplied by future legislation. However grave the situation, and however interesting or important the road may be, these are circumstances with which you cannot deal in the absence of the proper authority.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

STATE HIGHWAY COMMISSIONER.

The cost of the bonds given by the Highway Commissioner and Assistant Highway Commissioner is not properly payable out of the contingent fund of the Highway Department, but should be met by the officers named.

Office of the Attorney General,
Harrisburg, Pa., September 17, 1903.

Hon. Joseph W. Hunter, State Highway Commissioner, Harrisburg, Pa.:

Sir: You ask me whether the cost of the bond that you require of the Assistant Commissioner and chief Clerk can be made a proper item of charge to be paid out of the contingent fund, appropriated to the State Highway Department.

I am clear that the cost of the bond required by you as Commissioner of Highways, from your assistant and chief clerk is not a proper charge to be paid for out of the contingent fund, appropriated to the State Highway Department, and am of opinion that these bonds should be at the proper cost and expense of the officers named. I am unable to find anything in the law or custom which will warrant their being paid for out of the contingent fund of the Department.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

OPINIONS GIVEN TO THE COMMISSIONER OF FISHERIES.

COMMISSIONER OF FISHERIES—ACT OF MAY 29, 1901.

The Attorney General's Department does not decide questions as to the constitutionality of acts of Assembly—the best way is to rigorously enforce the acts, and let others raise the question before the courts.

It is impossible to prevent committing magistrates exercising their discretion in a certain way, but where offenders have been discharged where a clear case has been made out, there is nothing to prevent a re-arrest before another magistrate.

Office of the Attorney General,
Harrisburg, Pa., April 30, 1903.

Mr. W. E. Meehan, Corresponding Secretary, Pennsylvania Commissioners of Fisheries.

Sir: Your letter of recent date, to this Department asking for an opinion on several questions relating to the act of May 29, 1901, entitled "An act to declare the species of fish which are game fish and those which are food fish," &c., received, and contents carefully noted. I have also carefully read the letters which you enclosed therewith.

In reply to your inquiries, which are mainly directed to the constitutionality of the act, I desire to say that it is not the custom of this Department, neither is it within its province, to decide this question. Every law must be presumed to be constitutional until the courts decide otherwise, and the best way to secure a speedy determination of this question is by insisting upon its strict enforcement in all cases, and to instruct your wardens to bring the cases of violation of its terms before justices of the peace or other magistrates who are fearless and honest enough to impose the penalties which it provides for such violations. It is impossible to compel committing magistrates to exercise their discretion in a particular way, or to prevent their discharging offenders against whom a clear case is made out, but of course such discharge will not shield the offender from re-arrest and another hearing before a different magistrate.

From the information contained in the letters which you enclosed I am of the opinion that the case in Green county is a very clear one, and it ought to be prosecuted vigorously.

I return herewith the letters which you enclose.

Very respectfully yours,

FREDERIC W. FLEITZ,
Deputy Attorney General.

COMMISSIONER OF FISHERIES—ACT OF MAY 29, 1901.

Gigging and spearing of fish not authorized. The Commissioner should return the bonds to those who gave them, the act requiring bonds having been repealed.

The Department of Fisheries may authorize the removal of carp by persons who act as its representatives, and name the kind of net to be used; it may also receive a sum of money in lieu of selling the fish, said moneys to be used for the purpose of fish propagation and protection.

The act of May 8, 1876, P. L. 146 is the only law the Department can employ to prevent the pollution of streams.

The right to cancel lease of the Allentown Hatchery site not decided, because copy of lease not furnished.

Harrisburg, Pa., June 23, 1903.

Hon. W. E. Meehan, Commissioner of Fisheries, Harrisburg, Pa.:

Sir: In reply to your inquiries contained in your letter of the 11th instant, I answer that sections 2, 7 and 8 of the act of May 29, 1901, prescribe the lawful methods of taking fish in this State.

1. Gigging and spearing are not authorized.

2. In my judgment the Commissioner of Fisheries should return the bonds to those who gave them, the act requiring those bonds having been repealed by the act of March 20, 1903.

3. The Department of Fisheries can authorize persons to remove carp from the waters of this Commonwealth as its representatives, and name the kind of net to be used by such representatives. There is nothing to prevent the acceptance of a sum of money by the Department in lieu of selling the fish, said moneys to go to the Department of Fisheries for the purpose of fish protection and propagation.

4. The act of May 8, 1876 (P. L. 146), is the only law covering the subject of pollution of streams which your Department can employ.

5. I am unable to answer the question whether you have the legal right to cancel the lease of the site of the Allentown Hatchery on giving three months' notice, inasmuch as I have not the lease before me for examination. If you desire my opinion upon this point, be kind enough to send me a copy of the instrument.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

COMMISSIONER OF FISHERIES.

Held that the course of E. C. Staggers, district attorney of Greene county in applying to the court for a rule on Samuel Montgomery, justice of the peace to show cause why he should not impose sentence on George Mitchell and Walter McClellan in accordance with the law, is the proper mode of procedure.

Office of the Attorney General,
Harrisburg, Pa., September 9, 1903.

Hon. W. E. Meehan, Commissioner of Fisheries, Harrisburg, Pa.:

Sir: In relation to the letter of H. C. Staggers, district attorney of Green county, sent to me for my consideration, let me reply that I approve of the course taken by Mr. Staggers by which an application will be made to the court for a rule on Samuel Montgomery, justice of the peace, to show cause why he should not impose sentence upon George Mitchell and Walter McClellan in accordance with the law. He must certainly answer this rule and the court can then deal with the matter as it sees fit. I know of no other method of proceeding.

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

FISH COMMISSIONER.

Fishing with a line through a hole in the ice by a "tip up" is a legal means of taking fish, provided it be confined to one line with not more than three hooks.

A series of holes through which hand lines are used amounts to a set device, which is not permitted by law.

Office of the Attorney General,
Harrisburg, Pa., December 11, 1903.

Hon. W. E. Meehan, Fish Commissioner:

Sir: Replying to your request for an opinion, I reply that, in my judgment, fishing with a line through a hole in the ice, attached to a short stick spanning the hole, popularly known as a "tip up," is a legal means of taking fish, provided it be confined to one line with not more than three hooks. It may be fairly construed as a hand line, but a series of holes, through which hand lines are used, connected as they are by the solid mass of ice, and multiplying the hands of the owner in taking fish, amounts in effect to a set device, which is not permitted by existing acts.

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

OPINIONS GIVEN TO BOARD OF PUBLIC GROUNDS AND BUILDINGS.

SUPERINTENDENT OF CONSTRUCTION.

Under the act of 2d of July, 1895, P. L. 422, the Board of Public Grounds and Buildings has the right to appoint a Superintendent of Construction for the State building to be erected at Allentown as a homeopathic hospital; but has no such right to appoint a Superintendent of Construction for the Pennsylvania Building at the St. Louis Exposition or for the State Capitol Building at Harrisburg.

Office of the Attorney General,
Harrisburg, Pa., June 1, 1903.

Mr. John E. Stott, Secretary Board of Public Grounds and Buildings:

Sir: I have considered the questions involved in the resolution passed by your board, requesting me to furnish it with an opinion as to whether or not the said board has the authority, under the act approved the 2d day of July, 1895 (P. L. 422), to appoint a superintendent of construction to superintend the erection and construction of the Pennsylvania Building at the St. Louis Exposition; also the State building to be erected at Allentown as a homoeopathic hospital for the insane; and also a superintendent of construction to superintend the State Capitol Building now being erected at Harrisburg.

I am of opinion, after a careful consideration of the matter, that the Board has no such power in the first and third instances, but can act in the second.

The act of 1895 makes it the duty of the Board, in connection with the expenditure of each and every fund appropriated by legislative act for the building of State institutions to employ for each separate construction a capable superintendent of construction, under whose personal supervision such fund shall be expended. It is made the duty of the superintendent so appointed to give his time and personal supervision to the work. In the case of new buildings it is made his duty to see that the plans and specifications of the architect, prepared and adopted for such new buildings, additions and repairs, shall be faithfully carried out by the contractor. It is further made his duty to define, determine and decide all questions of the proper interpretation of the plans and specifications which may be raised by the contractor or architect during the progress of the work; and it is further declared that the superintendent of con-

struction shall be the direct representative of the State, and shall be responsible to and be required to report to the Board of Commissioners of Public Grounds and Buildings at such times and in such manner as may be prescribed by the Board as to the progress of and condition of the work under his charge.

I am satisfied that the jurisdiction and authority of the Board do not extend to the superintendence of the erection and construction of the Pennsylvania State Building at the St. Louis Exposition. By joint resolution of the 4th of February, 1903, a commission of thirty-two members was created, and that commission, after organization, was empowered to make the necessary arrangements for the proper representation of the Commonwealth, "including the erection of a suitable State building, and aiding exhibitors as in their judgment shall be proper and meet, in order to secure a proper exhibit on the part of this Commonwealth," and it was further provided that when the Exposition shall be closed all property belonging to the Commission shall be sold and the proceeds thereof paid into the general fund of the State Treasury.

It is clear to me that it never was intended that the Board of Public Grounds and Buildings should have any such control or share in the control as is specifically stated in the act of July 2d, 1895; nor can the two acts be read together. They are inconsistent. The act of July 2d, 1895, looked to a permanent system for the control of the expenditure of funds appropriated by legislative act for the building of State institutions. It cannot be said that the Pennsylvania Building at the St. Louis Exposition constitutes, in the sense of the act of July 2d, 1895, a State institution. Nor can it be that the authority and responsibility conferred upon the St. Louis Commission by the joint resolution was intended to be subject to the superintendence or control of a superintendent of construction, as designated in the act of July 2d, 1895. If such were the case, it is clear that upon final analysis the St. Louis Commission would be obliged to submit itself to the action of the Board of Commissioners of Public Grounds and Buildings, whose jurisdiction, as I read it, does not extend outside of the State and was not intended to extend to a temporary structure or a temporary occasion, even though it be one in which the State should participate.

The same line of reasoning applies to the case of the State Capitol Commission. That Commission was created under the act of 18th of July, 1901, and clearly vests the entire responsibility for the erection of the State Capitol Building in the Commission, as therein constituted. The Commission is specifically authorized and empowered to construct, build and complete the State Capitol, and to employ an architect to make such modifications in the construction of the buildings already erected, and in the plans and specifications

for the contemplated additions as it might deem advisable. The Commission is to let contracts to the lowest, best and most responsible bidder, and has the right to reject any and all bids, and is required to make contractors give bonds satisfactory to the Commission. The aggregate cost for the construction of said Capitol Building is fixed, and the manner of payment, upon warrants drawn by the Auditor General upon the State Treasurer upon the presentation to him of specially itemized vouchers, approved by the proper officers of said Commission, is also specifically fixed by the act. All other acts or parts of acts inconsistent therewith are repealed.

It is clear that the provisions of this act are inconsistent with those of the act of July 2, 1895. It would be impossible for the superintendent of construction, as appointed by the Board of Public Grounds and Buildings, to superintend the plans and specifications of the architect, to see that the work of the contractor shall be faithfully carried out, and define, determine and decide all questions of the proper interpretation of the plans and specifications which might be raised by the contractor or architect during the progress of the work, without coming in conflict with the Capitol Building Commission at many points. In my judgment there is such an inconsistency between the two acts that, even if they were to be read together, the later act must prevail. I find in the Capitol Building Commission act no limitation of authority, nor any expression of an intention to subject it to the jurisdiction or superintendence, either direct or indirect, of the Board of Public Grounds and Buildings. Such, however, is not the case with regard to the State building to be erected at Allentown for a homoeopathic hospital for the insane. That case is entirely within the terms, meaning and spirit of the act of July 2, 1895.

Very truly yours,

HAMPTON L. CARSON,

Attorney General.

OWNERSHIP OF MATERIAL IN OLD BUILDINGS TO BE REMOVED.

Where a contract for the removal of the old buildings on the site of the new Capitol was silent as to the ownership of the structural iron work, washstands, plumbing, radiators, &c., the question as to the ownership of such property is not clear, but unless clear and indubitable proof can be shown that by custom such property belongs to the owner of the buildings, suit should not be brought to recover the property from the contractor who tore them down.

Office of the Attorney General,
Harrisburg, Pa., June 1, 1903.

Hon. J. M. Shumaker, Superintendent of Public Grounds and
Buildings:

Sir: You have asked me to advise you to whom the woodwork, structural ironwork, washstands, nickel and brass plumbing, radiators, valves and steam heating apparatus, large electric arc lights and electrical fixtures, ventilating system and machinery, doors, windows and other hardware, already removed and being removed from the new Capitol Building, belong; that is to say whether these articles, or any of them, still belong to the State or have become the property of the contractors of the new building.

This is a question of difficulty, and I have taken time to consider it. It is one upon which there is a surprising dearth of authority, but such authority as there is points in favor of the ownership of the contractor, except as to the items of personal property which constitute no part of the real estate removed or torn down. The contract itself is entirely silent, and the only reference to the subject of the demolition and removal of the old buildings is to be found in the following clause in the specifications:

"The two brick buildings now occupied by the Secretary of Internal Affairs and other Departments of the State Government, and the Secretary of Agriculture and other departments of the State Government, now located on the site of the capitol building, shall be carefully taken down and removed from the premises by the contractor. Any old, good, sound hard brick and building stone, which is approved by the architect, after being thoroughly cleaned of all mortar, may be used in the new work."

In "The Law of Building and Buildings," by Lloyd, which was published in 1894, it is declared "Where a building contract makes no reference to the old structure standing upon the land, the materials therein belong to the builder and the owner is not entitled to an allowance therefor."

In Wait's "Engineering and Architectural Jurisprudence," published in 1901, section 265, it is said:

"There is a popular belief among contractors and builders that when they have undertaken works by contract which require the razing, demolition and removal of old structures, or the removal of materials from the ground, or old ruins, that those structures or materials belong to the contractor or builder. The source of this belief is probably that it is to their interest and profit to make such claim, and their chief argument is that nothing being said or agreed to the contrary, it will be taken for granted that the contractor was to have the materials. The ownership of materials under such a contract is one of intention, to be gathered from the contract as a whole, and from the customs and usages in vogue in the locality. It has been held that a contract to excavate for the erection of a building does not imply a transfer to the contractor of the title to materials of value removed in the performance of the contract."

This was the result reached in the case of *Jones vs. Wick*, 30 N. Y. Supplement, 924, but this case is in conflict with that of *Cooper vs. Kane*, 19 Wendell, 386. There it was held that, where there was a contract for the excavation of lots in a city so as to make them conform to a general profile or plan of the corporation, and the contract was silent as to the person to whom should belong the sand and other material taken from the lots, and a custom existed, long established and well known, that the sand, earth or other material removed in making the excavation belonged to the excavators and not to the owner of the lots, the custom might be shown as evidence of the contract of the parties.

In the case of *Morgan vs. Stevens*, 6 Abbott's New Cases (N. Y.), 356, it was ruled by a referee that if the owner of land, covered by houses, entered into a contract for the erection of other buildings upon the same land, and did not provide for the use of the materials of the old buildings in the new, or did not remove them before the contractor took possession under his contract, he waived his right to them and they belonged to the contractor.

This case, it will be observed, is based upon the special feature of the contract, that there was nothing contained therein as to the old structure standing on the land and no reference was made to the materials of such structures. Mr. Wait, after a consideration of the matter, concludes that it must be a matter of intention, to be gathered from the contract and the circumstances and conduct of the parties; and he suggests that to remove any doubts as to the intention of the parties, it is good practice to insert in the contract saving clauses by a stipulation enabling the contractor to estimate the value of the materials which the job will certainly supply, and if

by the contract he be permitted to use them in the new structure, he could reduce his price for the work by so much as they are reasonably worth.

In the case of *Agate vs. Lowenbein*, 58 N. Y. Reports, 605, where a tenant under a clause in his lease was authorized to make such inside alterations as he might think proper, provided that he did not injure the premises, it was held that the right to make alterations conferred by said clause did not confer upon the tenant the ownership of the materials severed by him, and for the appropriation thereof he would be liable, even when he was unimpeachable for waste. This case, however, involves the relation of landlord and tenant and not that of owner and contractor.

In the case of *Bonnet vs. Glattfeldt*, 120 Ill., 166, it was held that where a contract for the taking down of defective walls of a building and rebuilding the same, provided inter alia that all the old brick on the premises should become the property of the contractor, which might be used in rebuilding the walls, all the old brick, including that not used in the rebuilding of the walls, became the property of the contractor.

This case is quite similar in its facts, so far as this clause in the contract is concerned, to the one now under consideration, inasmuch as the specifications in the present instance provided that "any, old, good, sound, hard brick and building stone, which is approved by the architect after being cleaned of all mortar, may be used in the new work." In the Illinois case the language was: "All the old brick on the premises will become the property of the brick contractor, which may be used in rebuilding the walls," and it was contended that the construction of that clause of the contract should be as if it read thus: "All the old brick on the premises, which may be used in rebuilding the walls, shall be the property of the brick contractor. If any are left, they shall be the property of the owners of the building." The court said: "This may have been what the parties intended, but it is not what they expressed in the contract. The plain reading of that seems to be that all the old brick on the premises should be the property of the brick contractor. We are not at liberty to adopt a conjectural meaning, but must take the meaning of the parties as it is expressed by the language they have used."

These are the only authorities which I have been able to find bearing upon the point. So far as I know, they constitute the only authorities, and they leave the matter in much doubt. So far as the language of the contract itself is concerned, there is complete silence upon the subject, the only reference being, as heretofore pointed out, in the specifications themselves, and so far as the language of the specifications is concerned, they would seem to follow the Illinois case.

I have made inquiries of many competent builders and contractors in the city of Philadelphia, and I find that there is a very general impression prevailing among them that there is a custom by which the material of the old structure removed belongs to the man who removes it, unless there be an express reservation of ownership on the part of the owner. They claim that the contract to remove involves largely the destruction of the existing building; that when destroyed it becomes waste; that they have never failed to claim ownership of the material removed, and have even gone so far as to dispose of certain parts of it by sale; and that, if the contract to build includes also a contract to remove, performance of the contract to remove is necessarily a condition precedent to the performance of the contract to build; and that this is particularly so where there is no provision in the contract stating how the removal should take place or to what spot. In other words, they claim that, inasmuch as the burden of removing the material and of finding a place for it is placed upon the contractor, it necessarily follows that he must dispose of it in order to enable him to comply with the further terms of the contract to build.

Under such a state of the law and such uncertainty with regard to custom, I am strongly inclined to the opinion that the case in Wendell's Reports is the one which should govern; to the effect that where a contract is silent as to the person to whom the material removed shall belong, and a custom exists, long established and well known, that the material removed belongs to the party removing it, and not to the owner of the lot, that that custom may be shown in evidence as the contract of the parties. I therefore conclude that, unless the State can show that there is a prevailing custom under which the material removed belongs to the owner of the lot and not to the contractor, any attempt on the part of the State to claim ownership in the materials removed would be met by evidence of the custom prevailing among contractors and builders to which I have referred, which, coupled with the silence of the contract itself, and the clause in the specifications relating to the use by the contractor of old material approved by the architect, would, under the authority of Lloyd, relying upon the referee's report in 6 Abbott's New Cases, make it so doubtful as to the chances of the success of the Commonwealth in a litigation, that I could not advise such a claim to be made, unless I were furnished, in the first place, with the most clear and indubitable proof of the existence of a custom under which the owner had claimed and always received the old material removed. Of course, proof of a custom requires that it shall be certain, continuous and uniform, and such proof, if met by proof such as the contractors and builders generally contend for, would be fatal to the success of the claim.

I am further informed that the old material has been distributed so widely among so many people, under a claim of right on the part of the contractor, that it would be a difficult task on the part of the Commonwealth to reclaim it without engaging in a multitude of suits at great expense, and, in my view, with very doubtful chances of success.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

BOARD OF PUBLIC GROUNDS AND BUILDINGS—STATE BRIDGE.

Where a petition for a State bridge has been duly filed, and viewers have been appointed and made a favorable report, which report has been confirmed by the court, and the bridge ordered to be rebuilt in accordance with the report of the viewers, and no discontinuance of the proceedings has been filed, it is the duty of the Board of Public Grounds and Buildings to proceed with its duty in the premises.

Harrisburg, Pa., June 18, 1903.

John E. Stott, Esq., Secretary Board of Public Grounds and Buildings, Harrisburg, Pa.:

Sir: I have examined the papers in the matter of the petition for the rebuilding of a county bridge over the Schuylkill river, in the county of Schuylkill, at or near a point called Schollenberger's Crossing, now pending in the court of common pleas of Dauphin county, No. 239, Commonwealth Docket, 1902.

I find that the petition was filed on November 12, 1902; that the viewers were appointed and duly filed their report, which was confirmed by the court through Judge Simonton, on the 12th of January, 1903; and it was ordered and decreed that the said bridge be rebuilt in conformance with the findings of the report of the viewers. An examination of the record discloses the fact that there has been no discontinuance of these proceedings, and I am informed that the prothonotary has no recollection of writing a letter to the Commissioners that there has been a discontinuance. It is unimportant, however, whether or not such a letter was written. The record fails to disclose any discontinuance or any application for permission to discontinue. The decree of the court is, in my judgment, operative and binding, and there is nothing therefore to restrain the Board of Public Grounds and Buildings from proceeding with its duty in the premises.

I return herewith the papers.

Very sincerely yours,

HAMPTON L. CARSON,
Attorney General.

SUPERINTENDENT OF PUBLIC GROUNDS AND BUILDINGS.

The Office of the Superintendent of Public Grounds and Buildings in the matter of supplying furniture, supplies, &c., is purely executive and ministerial and not discretionary. The responsibility is upon the Board of Public Grounds and Buildings.

As to requisitions for articles that are not on the schedule these should be submitted to the Board, and should be paid for out of the contingent fund provided by the appropriation act of 1903.

Office of the Attorney General,
Harrisburg, Pa., December 31, 1904.

Hon. J. M. Shumaker, Superintendent Public Grounds and Buildings:

Sir: I have carefully considered your request for an opinion as to your duties and powers in the matter of furnishing supplies of furniture and the making of repairs for the several Departments of the State government under the act of the 26th of March, 1895 (P. L. 22).

Your duties are purely executive and your powers are ministerial and not discretionary. The approval of the lists and schedules, referred to in the fifth section, rests with the Board. The responsibility is solely theirs.

Under the eighth section the responsibility rests upon the heads of the Departments making requisitions for articles contained in the original lists. As to these, the lists having been approved by the Board, it is not necessary to submit for approval the requisitions as made. It is your duty to comply as promptly as practicable.

Under the sixteenth section, where requisitions are made for articles not contained in the original lists, it is necessary to submit them to the Board before supplying them. When the Board has approved, it is your duty to furnish the articles called for upon the responsibility of the head of the Department making the requisition.

I perceive nothing in the act which authorizes you to exercise a discretion as to the amounts of supplies or repairs called for. That must rest upon the officer making the requisition. Being without discretion, you are free from responsibility.

As to requisitions for articles or repairs named in the original lists, but not included in the schedules, I am of opinion that they must be submitted to the Board.

In my judgment they should be paid for out of the contingent fund provided for by the appropriation act of the 15th of May, 1903, (P. L. 502), which I read as an enlargement of the sixteenth section of the act of the 26th of March, 1895.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

BRIDGE MATERIAL—WRECKED BRIDGES—ACT OF JUNE 3, 1895.

Bridges rebuilt by the State under the act of June 3, 1895, P. L. 130, are donated to, and become the property of, the county, and hence the material of those subsequently wrecked belongs to the county.

Office of the Attorney General,
Harrisburg, Pa., April 21, 1904.

Hon. James M. Shumaker, Superintendent of Public Grounds and
Buildings:

Sir: You ask me to advise you whether the wrecked bridges belong to the State or to the counties upon whose petition they were erected, and you state that a number of the bridges rebuilt by the State under the act of 3d of June, 1895 (P. L. 130) have been destroyed by the recent floods, and that the structural iron thereof is now lying unprotected in and along the various streams of this Commonwealth.

I answer that the same question was raised under the administration of Governor Stone, and, after consultation with the Attorney General, it was decided that, inasmuch as the bridge which was destroyed was the property of the county, through the donation of the State, all of the material resulting from the wreck belonged also to the county. It was also held that, although the State built these bridges, they became immediately the property of the county and must be kept in repair by the county.

I concur in this interpretation of the law. I also point out that it is important to observe the distinction between a wrecked bridge and one that is destroyed. I shall maintain the position taken by my predecessor, that the Commonwealth is not obliged to rebuild a bridge unless it be destroyed and that means a total destruction.

The Dauphin county court of common pleas, speaking through Judge Simonton in a recent opinion, held, in the case of the bridge across Towanda creek in Bradford county, at Monroeton, where exceptions were filed by the Attorney General, that the bridge alleged to be destroyed was not entirely carried away by the flood within the meaning of the act, a portion of the bridge remaining, and therefore the Commonwealth was under no obligation to rebuild. A similar position was taken by Judge Jacobs upon exceptions filed to the bridge over the Lehigh river at Allentown, and, although the two cases may be distinguished from each other, yet the line of judicial reasoning is similar.

It is quite clear that the business of bridge-building during the coming years, so far as the superintending and providing for their construction is concerned, will not only prove a great burden to the

Commonwealth but also prove a serious draft upon the State Treasury. It is important, therefore, that strict compliance with the terms of the act of Assembly shall be insisted upon, and, in my judgment, it would be unwise for you to commit any act in the way of reclaiming material or wreck, inasmuch as that act might be interpreted to mean the assumption of an obligation on the part of the Commonwealth to rebuild in cases where such liability does not clearly exist; or perhaps a waiver of the right of the Commonwealth to maintain the position herein indicated. Besides this, it might lead to a doubt on the part of the counties upon whom the obligation of maintenance and repair rests, as to whether or not they had been relieved by the act of the Commonwealth from the performance of the necessary duty, either through the deprivation of material which might be used for purposes of repair or through the assumption of an obligation to remove wrecked material which might cause damage to the traveler, or constitute a trespass upon property of some riparian owner.

In my judgment, therefore, you should abstain from the collection of any of this material, whether a bridge be destroyed wholly or in part. Moreover, inasmuch as the material, once paid for by the State, had, through the action of the State, been donated to the county, and therefore become a gift to the county, and title vested in the county, it would be difficult to see on what principle of law the Commonwealth could claim title to the material in revocation of its prior gift.

I am,

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

BOARD OF PUBLIC GROUNDS AND BUILDINGS—STATE BRIDGES.

The Board of Public Grounds and Buildings have authority to accept the proposition of the Delaware and Hudson Railroad Company in re, the rebuilding of the highway bridge at Seelyville, Wayne county, on account of the great benefit to the traveling public and the small additional cost to the State.

Office of the Attorney General,
Harrisburg, Pa., June 15, 1904.

John E. Stott, Secretary Board of Public Grounds and Buildings,
Harrisburg, Pa.:

Sir: I have carefully examined the papers you left with me relative to the proposition made by the Delaware and Hudson Railway Company in connection with the rebuilding of the highway

bridge at Seelyville, Wayne county, Pa., and am of the opinion that the Board of Public Grounds and Buildings have the power under the act to accept this proposition and to make the change requested. An investigation of the facts leads me to the belief that the Board would be justified in doing this on account of the great benefit to the traveling public and the very small additional cost to the State.

Very respectfully yours,

FREDERIC W. FLEITZ,
Deputy Attorney General.

OPINIONS GIVEN TO SUPERINTENDENT OF PUBLIC PRINTING.

PUBLIC PRINTING—DEALER—ACT OF MAY 1, 1876.

Under the act of May 1, 1876, Sec. 17, P. L. 73, there must be satisfactory evidence furnished to the Superintendent of Public Printing by the person making a proposal to furnish paper that he is a dealer in the description of paper which he proposes to furnish.

A dealer within the meaning of the act is one who buys and sells and is constantly engaged in the business of buying and selling the article in which he deals.

Office of the Attorney General,
Harrisburg, Pa., June 12, 1903.

Hon. A. Nevin Pomeroy, Superintendent of Public Printing:

Sir: In accordance with your request for my opinion in regard to your duties in considering the proposals for paper to be furnished according to your advertisement, I state that the whole matter is comprised within section 17 of the act of 1st of May, 1876 (P. L. 73), entitled "An act to carry out the provisions of section 12 of article III of the Constitution in relation to the public printing and binding and the supply of paper therefor." The section reads as follows:

"No proposal will be considered, unless accompanied by bond, in conformity with the provisions of this act, nor unless accompanied by satisfactory evidence that the person or persons making such proposals are manufacturers or dealers in the description of paper and other supplies which he or they propose to furnish."

The terms of this section require that the proposal must be made by one who is a manufacturer or dealer in the description of paper which he proposes to furnish. I understand that no difficulty arises as to the meaning of the word "Manufacturer," but the sole question is as to the proper interpretation to be placed upon the word "Dealer."

In *Berks County v. Bertolet*, 13 P. S., page 524, Mr. Justice Rogers defines a "dealer" as one who "trades, buys or sells." This definition was modified, however, by Mr. Justice Black in the case of *Norris Brothers v. The Commonwealth*, 27 P. S., 494, who defined a "Dealer" as follows:

"A dealer, in the popular, and therefore in the statutory, sense of the word, is not one who buys to keep or makes to sell, but one who buys to sell again. He stands intermediately between the producer and the consumer, and depends for his profit, not upon the labor he bestows upon his commodity, but upon the skill and foresight with which he watches the markets."

The American and English Encyclopedia of Law, title "Dealer," states: "A dealer is, therefore, one who makes a business of buying and selling; he is the middleman between the producer and consumer of a commodity." In a note in support of this text it is said: "To constitute one a dealer, buying and selling must be his business; a single instance of buying and selling is not sufficient; or a dealer is one who makes successive sales as a business."

The Century Dictionary defines a dealer as follows:

"One who deals; specifically a trader, one whose business is to buy and sell, as a merchant, shopkeeper or broker. In law, a dealer is one who buys and sells the same articles in the same condition; thus, a butcher is not a dealer, because he buys animals whole and sells them in a different state."

A consideration of the foregoing definitions and authorities, as well as an examination of various statutes, leads me to the conclusion that the proper definition of a dealer is one who buys and sells, and who is constantly engaged in the business of buying and selling the article in which he deals.

I have had filed with me various affidavits, which I herewith send you for your consideration. Under the act there must be satisfactory evidence furnished by the person making the proposal that he is a dealer in the description of paper which he proposes to furnish. This is a matter of which you yourself, and no one else, can judge. You will discriminate between those which are positive and those which are negative, and you will also consider as to whether they are sufficiently definite as to the character of the article dealt in.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

PUBLIC PRINTING—MEDICAL COUNCIL.

There is no express legislative authority for the ordering of Public Printing by the Medical Council, yet where the Commonwealth creates a commission, and imposes duties upon its members serving without compensation, it is imperative that there be supplied it by the State the material absolutely necessary for it to discharge its functions, hence the right to order printing falls within the implied authority of the commission.

Office of the Attorney General,
Harrisburg, Pa., July 23, 1903.

Hon. A. Nevin Pomeroy, Superintendent Public Printing and Binding:

Sir: I am in receipt of a communication from the Medical Council of Pennsylvania, stating that it will require the following printed matter from the State Printer:

Licenses—about 500 a year.

Books—paged numerically in which to record licenses.

Cash Book—showing fees received and disposition made of annual expense appropriation.

Blanks—applications for examination.

Certificates of medical education.

Certificates of character.

Preliminary certificates to be furnished after applicants are examined by State Examiner, or presentation or credentials exempting them from examination.

Rules governing examinations.

Notices of examination to accompany blank application sets.

Instructions to applicants.

Slips for furnishing candidates their averages obtained in examinations.

Blank application envelopes.

Blank express labels.

Letter paper and envelopes.

Questions for preliminary examinations.

Blanks for reports of preliminary examinations.

Blank report sheets.

Paper and envelopes for Examining Boards.

While there is no express legislative authority, yet I am of opinion that, where the Commonwealth creates a commission, and imposes duties upon its members, and those members are serving without compensation, it is absolutely necessary that there should be supplied to it, at the expense of the State, the material absolutely necessary

to enable it to discharge its functions. I have carefully examined the foregoing list and I believe that it contains such items as fairly fall within the implied authority heretofore indicated.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

PUBLIC PRINTING.

The Superintendent of Public Printing and Binding should add to the order of the heads of State Departments 200 copies, so that 200 copies of each document published by the State may be furnished the State Library. "Documents" refers to bulletins, reports, or papers which fall within the definition of the word "document," but does not refer to circulars, blanks or books containing items of information or headings to enable purely ministerial officers to easily perform their duties.

Office of the Attorney General,
Harrisburg, Pa., July 23, 1903.

Hon. A. Nevin Pomeroy, Superintendent of Public Printing and
Binding, Harrisburg, Pa.:

Sir: I have your letter of the 3d inst., asking me to advise you whether or not, under the act of April 15, 1903 (P. L. 210), your Department is authorized to supply the State Library with two hundred copies of each document published by the State, and, if so, in what sense the word "document" is to be understood. You state that heretofore none of the Departments have included the two hundred copies for the Library in their orders, and you ask whether your Department is given authority to increase the order to cover the extra two hundred copies, and, if so, to what is that increase to be confined.

The act of 15th of April, 1903, expressly provides that the State Library shall receive, in lieu of the number of copies now granted thereto by law, two hundred copies of each document published by the State, and sixty copies each of the Supreme and Superior Court Reports. The act of 24th of June, 1895 (P. L. 244), provides:

"Of all documents or books printed at the expense of the Commonwealth, two hundred copies shall be allotted and delivered to the State Librarian for the purpose of exchange with the states and territories of the United States, and such foreign countries with whom an international exchange can be secured, as well as for the distribution to such other libraries as under the system may be of reciprocal advantage, less any number otherwise provided for; and that the Superintendent of Public Printing and Binding, in ordering the printing of any such documents or books, shall add to the same, if necessary, the number to be furnished the State Librarian."

In these two acts you will find authority to add to the order for the printing of all documents or books printed at the expense of the Commonwealth the number to be furnished the State Librarian.

As to the meaning of the word "Document," the Standard Dictionary defines "Document" as

"A manuscript or piece of printed matter of record regarded as conveying information or evidence; as political or legal documents."

The Century Dictionary defines "documents" as follows:

"A written or printed paper containing an authority, record or statement of any kind; more generally any writing or publication that may be used as a source of evidence or information upon a particular subject or class of subjects."

Webster's Dictionary defines it as follows:

"An original or official paper relied upon as proof or support of anything else—in its most extended sense, including any writing book or other instrument conveying information in the case."

Worcester in his dictionary defines "documents" as follows:

"A writing or paper containing some information, evidence or directions; a written statement adduced for the purpose of showing or proving a claim or title."

I am of opinion that the purpose of the act of 15th of April, 1903, requiring that the State Library shall receive, in lieu of the number of copies now granted thereto by law, two hundred copies of each document published by the State, was to supply the absence of copies. Whenever the number of copies hitherto granted has been short of two hundred you have authority to add thereto in order to bring the number up to the full number of copies mentioned in the act. The copies so furnished can be reasonably said to be the two hundred copies of bulletins, reports or papers which fairly fall within the definition of documents heretofore given. Of course, "document" does not relate to circulars or blanks or books containing simply items of information or headings such as are necessary to enable purely ministerial officers to easily and intelligently perform their duties. If you are in doubt as to the distinction, you can submit to me specimens of the various kinds of publications as to which you hesitate.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

FREE LIBRARY COMMISSION.

While the Free Library Commission is not in strictness a department of the State Government within the meaning of Section 20, of the act of 1876, providing for State printing, yet the power to order printing may be inferred. Implied authority exists sufficient to authorize and sustain reasonable orders for work to be done by the Public Printer and Binder.

Office of the Attorney General,
Harrisburg, Pa., September 18, 1903.

Hon. A. Nevin Pomeroy, Superintendent of Public Printing and
Binding:

Sir: You have sent me for examination an order upon you, expressed in these terms:

"Furnish the following for the use of this Department: Binding 31 volumes one-half calf."

I am of opinion that the order is not specific and is not properly signed. It is signed by the Secretary of the Free Library Commission, who, in my judgment, has no authority in the law for the giving of such an order. The order should be the act of the Commission, attested by the Secretary, and signed by the head of the Commission.

The act of 5th of May, 1899 (P. L. 247) establishes a Free Library Commission and defines its powers and duties. The State Librarian is made *ex-officio* Secretary of the Commission. The duty is enjoined on the Commission to give advice and counsel to all free libraries in the State and to all communities which may propose to establish them, as to the best means of establishing and administering said libraries, the selection of books, cataloguing and other details of library management. The Commission is clothed with the powers of general supervision and inspection of libraries in the several school districts of the Commonwealth, except in cities of the first and second classes. The right of requiring reports, which was formerly vested in the State Librarian by section 5 of the act of June 28, 1895 (P. L. 411), is now vested in the Commission. The Commission is also directed to establish and maintain, out of such sums as shall come into its hands by appropriation or otherwise, a system of travelling libraries as far as possible throughout the Commonwealth. Does the power to order such work as is called for by the order exist? If there be no express power, is there an implied power? There is but one general statute on the subject—that of 1st of May, 1876. There is no special statute applying to the Free Library Commission, except the one already alluded to, and that is silent upon the subject of printing and binding.

Section 20 of the act of May 1, 1876 (P. L. 69) requires that no work in the shape of public printing or binding shall be performed

or furnished to any Department or officers of the State Government unless ordered by the Superintendent, with the proviso that the Executive and heads of the several Departments of government be permitted to exercise such a reasonable discretion as in their judgment shall best subserve the public service and interest; and provided also that the Superintendent of Public Printing and Binding shall receive no order for the printing of any papers, documents, blanks or miscellaneous work unless the same be in writing, signed by the Executive or head of the proper department, and that the order shall contain a particular description of the work and material required.

It is unfortunate that the laws relating to public printing and binding, which are intended to carry out the provisions of section 12, article III of the Constitution, are antiquated, and that the provisions of the act of 1876 are inadequate to the requirements of new Commissions established since that date, and charged with important and varied public duties. It is difficult to reconcile the actual needs and proper requirements of existing Commissions with the existing provisions of the law. I am bound to take the statutes as I find them, and, being without legislative authority, I am not at liberty to supply omissions. I shall not attempt to stretch the language of the statute. The Free Library Commission is not in strictness a department of the State Government within the meaning of section 20 of the act of 1876, and if the power may not be inferred by necessary implication, then the hardship must be submitted to until legislative relief can be obtained. Can the power be inferred?

It is manifest that, in order to properly discharge its duties, the Commission must enter into correspondence with many and distant parts of the State. It is also clear that if all the correspondence must be conducted in writing, it would require a large clerical force, as well as consume much time on the part of the State Librarian. It is equally clear that if the information can be put into printed form, distribution becomes simpler and more easily accomplished. Much of the information useful to libraries and librarians in different parts of the State must be similar in form and substance. The futility of communicating all this information in the shape of written correspondence is apparent; hence it is reasonable to conclude that the information so furnished may properly be in printed form, such as pamphlets, circulars, bulletins, or leaflets chosen by the Commission as proper vehicles of instruction of information. The power to order such printing is indispensable to the efficient discharge of the duties of the Commission. It is also necessary that there should be a certain amount of binding done for the preservation of the literature of the Commission. I conclude that implied authority exists sufficient to authorize and sustain rea-

sonable orders for work to be done by the Public Printer and Binder. I emphasize the word reasonable. Whatever is strictly necessary to the discharge of the duties of the Commission is reasonable. But this cannot be extended to unlimited amounts, or to what the Commission would like to do if it could exercise a broad discretion. Hence it is necessary that the orders should specify what they are for, with particularity and exactness.

The form in which such orders for printing or binding are given should adhere as closely as possible to the provisions of section 20 of the act of 1876. It is clear that in these respects the order which you have submitted to me is insufficient. The order is signed by the Secretary of the Free Library Commission, who has no authority as such to give such an order or to sign it in his official capacity; nor does the order sufficiently describe the work and material required. In these respects it is defective. An order given by the authority of the Free Library Commission and attested by the Secretary under the authority of the Commission duly recited, and signed by the President or head of the Commission, would be proper. It should also specify what the volumes are for which binding is required.

I return the order.

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

PUBLIC PRINTING.

The General Printing Act of 1876 contains ample authority for the ordering by the heads of State Departments the printing and binding in pamphlet form of the laws bearing directly upon the respective departments, and the Superintendent of Public Printing and Binding should execute such orders.

Office of the Attorney General,
Harrisburg, Pa., February 24, 1904.

Hon. A. Nevin Pomeroy, Superintendent of Public Printing:

Sir: I have considered your favor of the 9th inst., in which you state that you are in receipt of orders from the various Departments requesting the printing and binding of such laws in pamphlet form as bear directly upon the work of the respective Departments, and requesting my opinion as to your authority in the matter.

I am of opinion that authority for having this class of work done is contained in the general printing act of 1876, one of the provisions of the act being as follows:

"It shall be the duty of said Superintendent to receive orders for all blanks, blank books, miscellaneous

printing and binding that may be needed by the Legislature or either branch thereof or any of the Departments of the Commonwealth, have them executed, etc.”

A further section of said act provides that the Executive heads of Departments be permitted to exercise a reasonable discretion in ordering printing and binding and miscellaneous work, as to the kind and quality of the paper to be used, and as to the style and execution thereof, as in their judgment shall best subserve the public interest.

This language means that such work as may be needed by the different departments, when ordered by the head thereof, shall be printed at the public expense, and the form of the printing and binding is within the discretion of the head of the Department ordering the work to be done.

Believing that it is useful, if not necessary, to have the laws affecting a department of the State Government collated and printed in a concise form, and that these laws, when so fully collected and consecutively printed, are of the utmost service and aid to the Department, I conclude that the authority of the statute, as hereinbefore quoted is ample and justifies you in executing the order.

Very truly yours,

HAMPTON L. CARSON,

Attorney General.

PUBLIC PRINTING.

The contract for public printing and binding expires on January 15, 1905. The act of May 1, 1876, P. L. 68 provides that the contract for public printing shall be let on the fourth Tuesday of January, 1877, and on the fourth Tuesday of January every fourth year thereafter. This act is mandatory and must be followed until either amended or repealed.

Office of the Attorney General,
Harrisburg, Pa., September 22, 1904.

Hon. A. Nevin Pomeroy, Superintendent of Public Printing, Harrisburg, Pa.:

Sir: I have taken time to consider the question propounded by you in your letter of July 12. You state that the contract now in operation for printing and binding expires on the 15th of January, 1905, before a new law could possibly be passed by the next Legislature, and you ask whether, in my opinion, there is any way by which the letting of the next contract can be postponed until a new law is passed. You state further that a new act would probably not become operative under the term of the next contractor, or until 1909.

I answer that the act of May 1, 1876 (P. L. 68) provides that the

Secretary of the Commonwealth shall receive proposals for the public printing and binding on the fourth Tuesday of January, 1877, and on the fourth Tuesday of January of every fourth year thereafter for the term of four years from the first day of July following, and that he shall open said proposals at twelve o'clock M., of said day in the presence of bidders, and shall publicly allot the contract to the lowest bidder, the allotment, however, to be approved by the Governor, Auditor General and State Treasurer, and to be of no effect unless approved by them.

It is clear that, unless this act of Assembly, which is the one that now governs your action, is repealed before the fourth Tuesday of next January, it will be obligatory upon the Secretary of the Commonwealth to act under its terms. The Secretary of the Commonwealth having received bids and allotted the contract, the Governor, Auditor General and State Treasurer might possibly refuse to approve the same on the ground that there was an act of Assembly in course of passage that would change the procedure; if, in point of fact, such a new act were actually in contemplation and before the Legislature for action, but such a course would scarcely be in strict accordance with fair dealing to the bidders who had made their bids in accordance with existing law.

I see no method of securing the introduction of a new system under a new act of Assembly so as to prevent the operation of the present law upon the contract which expires on the 15th of January, 1905. The most that could be done would be to present for legislative consideration a carefully drawn act which would cover all of the omissions and deficiencies of the present law, and place the matter of public printing upon a new, advanced and up-to-date basis, but the act could not become operative until the year 1909; for it is clear that no law would be constitutional which would in any way impair the obligation of the contract entered into between the State and the bidders upon the faith of an act of Assembly unrepealed, and which, by its terms, invited bids to be made for a term of four years. Hence, whatever suggestions occur to you in the way of an improved act must necessarily be practical contributions on your part to the improvement of the legislation of the State, the benefit of which, however, could not be reaped until after the contract to be entered into next January has expired.

Very truly yours,

HAMPTON L. CARSON,

Attorney General.

LEGAL ADVERTISEMENTS—GERMAN NEWSPAPER—ACT OF APRIL 30, 1901.

Under the act of April 30, 1901, P. L. 109, legal advertisements required to be published in counties containing a population of 40,000 who are immigrants from Germany must be published in one German newspaper in addition to the two English newspapers previously required. Hence, advertisements for bids for supplying paper, &c., to the various branches of the State government must be inserted in two English and one German newspaper, both in Philadelphia and Pittsburg.

Office of the Attorney General,
Harrisburg, Pa., May 8, 1903.

Hon. A. Nevin Pomeroy, Superintendent Public Printing:

Sir: I am in receipt of your favor of May 1, stating that you will be obliged, under the act of May 1, 1876 (P. L. 68), governing your office, to advertise for bids for supplying paper, envelopes, etc., to be printed for the Senate, Legislature and various branches of the State Government for the next two years; that act requiring advertisement for proposals to be published in two daily newspapers in the cities of Philadelphia, Pittsburg and Harrisburg; and asking me whether, under the act of April 30, 1901 (P. L. 109), you are compelled to publish said advertisement also in a German paper in the cities of Philadelphia and Pittsburg.

The act of 30th of April, 1901, is difficult of interpretation, because of its oddities of construction and its inaccurate use of the singular and plural numbers in referring to a newspaper or newspapers. It has never been judicially construed so far as I know. A prior act of somewhat similar character was declared to be unconstitutional; this act was drawn to meet that decision, and in the absence of judicial determination to the contrary, I am bound to assume its constitutionality. It provides, in substance, that in counties containing, according to the last census taken by the United States Government, a population of over forty thousand persons, who emigrated from Germany, in addition to the publication of legal advertisements required by law to be published in a newspaper printed in the English language, there shall also be published an advertisement in one German daily newspaper of general circulation printed in such county in the German language.

I cannot give effect to the words "in addition to" and to the word "also" as contained in the act, unless I construe the act to mean that there shall be a publication in a German paper in addition to the publications already required by law to be made in newspapers printed in English. In other words, I do not read the act to mean that the German advertisement is to be substituted for one of the English publications. I, therefore, instruct you that your duty is

to advertise in two English papers in both Philadelphia and Pittsburgh, and in one German paper published both in Philadelphia and Pittsburgh.

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

PUBLIC PRINTING.

There is no express authority lodged in law with the Superintendent of State Printing, whereby he shall be required to order printing for the State Medical Council, Valley Forge Commission, State Board of Undertakers, Board of Game Commissioners, Dental Council or Free Library Commission, since they are not departments of the State government. The act of May 1, 1876 controls the matter.

Office of the Attorney General,
Harrisburg, Pa., June 12, 1903.

Hon. A. Nevin Pomeroy, Superintendent of Public Printing and Binding, Harrisburg, Pa.:

Sir: I have examined the acts of Assembly, creating the State Medical Council (P. L. 1893, page 94); the Valley Forge Commission (P. L. 1893, page 183; P. L. 1893, page 508); the State Board of Undertakers (P. L. 1895, page 167); the Board of Game Commissioners (P. L. 1895, page 273); the Dental Council (P. L. 1897, page 206); and the Free Library Commission (P. L. 1899, page 247).

I find no provision made therein with regard to printing or the State Printer. The act of May 1, 1876 (P. L. 73); also found in Brightly's Purdon's Digest, Vol. 2, page 1757, contains the general provisions of the law with respect to public printing. Section 20 provided:

"No public printing or binding shall be performed for, or supplies furnished to, any department or officers of the State Government, or for or to any person acting on behalf of the same by the public printer or printers, unless previously ordered or authorized in writing by the Superintendent of Public Printing, except only the laws, journals of the two houses of the Legislature, the volumes of the legislative and executive documents, and the reports of the several heads of executive departments * * * Provided, also, That the Superintendent of public printing and binding shall receive no order for the printing and binding of any papers, documents, blanks or miscellaneous work, unless the same be in writing, signed by the executive or head of the proper department."

There does not appear to be any express authority lodged by law with the Superintendent of Public Printing, whereby he shall be re-

quired to order printing for the Commissions named, since they are not, in my judgment, Departments of the State Government.

I have also examined the acts of Assembly relating to public printing passed subsequent to the act of May 1, 1876. The acts of April 16, 1887 (P. L. 54), and May 2, 1889 (P. L. 178), relate to the printing, binding and distribution of public documents, and there are several other acts which relate to the printing and distribution of certain works, such as the Pennsylvania Archives; but, in none of them can I find any provision which can be made to cover the reports of State Boards or Commissions. In my judgment, the act of May 1, 1876, controls the matter concerning which you seek information.

In regard to the act of 5th of May, 1899 (P. L. 247), entitled "An act to provide for the appointment of a free library commission, and to define its powers and duties," let me add a word.

The second section provides:

"The commission shall give advice and counsel to all free libraries in the State, and to all communities which may propose to establish them, as to the best means of establishing and administering such libraries, the selection of books, cataloguing, and other details of library management. The commission shall have the powers of general supervision and inspection, and the right of requiring reports which is vested in the State Librarian by section five of an act, entitled 'An act for the establishment of free libraries in the several school districts of the Commonwealth, except in cities of the first and second classes,' approved the twenty-eighth day of June, one thousand eight hundred and ninety-five. The commission shall also establish and maintain, out of such sums as shall come into their hands by appropriation or otherwise, a system of traveling libraries as far as possible throughout the Commonwealth."

I cannot find in this act, even when read in connection with the act of 1876, any authority which would require you to direct printing to be done for the Free Library Commission. The Commission has no technical or legal connection with the State Library. The State Librarian is but one member of the Commission. The work of the Commission forms no part of the work of the State Library, as provided for by the act of the 13th of May, 1889 (P. L. 209).

The acts establishing free libraries in cities of the first, second and third classes, while subjecting them to the supervision of the State Librarian, do not require you to have printing done for them through the State Printer. There is a fund raised specially by taxation, in the instance of free libraries, but this fund must bear its own expenses, and so far as the expenditures of the State Librarian are concerned they must all be made under the direction of the trus-

tees of the State Library. On the whole question I am of opinion that there is not sufficient authority in law to justify the Superintendent in ordering the State Printer to do this printing for the Commission.

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

OPINIONS GIVEN TO DAIRY AND FOOD COMMISSIONER.

OLEOMARGARINE LICENSES—CONSTRUCTION OF SECTION 2 OF THE ACT OF MAY 29, 1901.

The holders of oleomargarine licenses must confine their business to the place of business designated on the face of the license. In order to sell oleomargarine in stalls of markets, a license must be obtained for each place where it will be offered for sale.

Office of the Attorney General,
Harrisburg, Pa., January 29, 1903.

Jesse K. Cope, Esq., Dairy and Food Commissioner, Department of
Agriculture:

Sir: I have your letter of January 28th, stating that it has been the policy of your Department in issuing oleomargarine licenses, under the provisions of section two of the act of May 29th, 1901, to compel holders of licenses to confine their business strictly to one place of business, which place is designated upon the face of the license, and further stating that you now have an application from parties who have established places of business in the city of Harrisburg, but who wish to sell from stalls in two different and distinct markets in the city, embodying the proposition to sell from the stall of one upon one day of the week, and from the stall of the other upon another day of the week, transferring their license to and fro with their business, and asking me for a legal opinion upon the question.

I find that on the 25th of July, 1900, Attorney General Elkin gave you an opinion that the granting of a license to a person to sell oleomargarine at a particular place did not give him the right to transact business at any other place; that the license is in terms granted to the licensee to do business at a particular place, the law requiring certain signs to be put up at that place where the business is to be transacted. Both the place as well as the man are, in contemplation of the act of Assembly, within the authority given you to grant a license; and, when you have exercised that authority by the issuing of a license, for a specific purpose, to transact business at a specific place, the authority ends. If the same person desires to transact a similar business at another place, either in the same or another city, he must take out a new license to do so.

I am of opinion, after due consideration, that this is a sound exposition of the law, and I can see no warrant for the thought that the license could be made to operate as a roving commission. As it would disturb the practice of your department as well as the interpretation placed upon the act by my predecessor, I advise you that the request should be refused.

Very respectfully,

HAMPTON L. CARSON,
Attorney General.

PUBLIC OFFICERS—SUSPENSION FROM OFFICE—SALARY DURING
SUSPENSION AND EXPENSES OF DEFENCE.

An officer of the Commonwealth, whose conduct was such as to invite an investigation and suspension from office ad interim, is not entitled to his expenses in defending himself, nor to his salary or wages during the period of suspension, although acquitted and reinstated.

Office of the Attorney General,
Harrisburg, February 13, 1903.

Jesse K. Cope, Esq., Dairy and Food Commissioner:

Sir: I find in this Department a letter from you, requesting an opinion under the following circumstances:

Robert M. Simmers, an agent of your Department, was on account of alleged irregularities, discharged by Major Wells, in May, 1900. After the resignation of Major Wells, Secretary of Agriculture Hamilton was made temporary Dairy and Food Commissioner and reinstated Mr. Simmers, but suspended him pending an investigation of the alleged charges. The matter was referred to a committee, which, after full hearing, decided that, while all the charges had not been proved, yet Mr. Simmers was guilty of one of them, but as Major Wells had made a formal request to the Governor for his suspension, and had afterwards withdrawn his request and had retained Mr. Simmers, he could not at this time ask for his removal on those grounds; but the committee was of opinion that his suspension was sufficient punishment for the act and recommended his reinstatement. Mr. Simmers was reinstated about October 1, 1900. As Mr. Simmers was suspended by Professor Hamilton, he requested him to close up his cases and render his bill for services. He has received certain amounts and now makes a demand for the balance, which he claims to be due him, of three hundred and thirty-four dollars, and attorneys fees at investigation of seventy-five dollars.

Upon the foregoing facts you request an opinion whether there is any warrant of law by which this amount can be collected.

I am of opinion that the view expressed May 17, 1901, by Attorney General Elkin upon the case of Ambrose Little was a correct exposition of the law and covers this case. In the Little case a claim was presented for salary during suspension, and the Attorney General wrote you:

“The law authorizes payment only for services actually rendered, and as the agent, while he was suspended, did not render any service at all, I do not see how you could pay him under authority of law.”

The present claim is for wages or salary, and for moneys expended for attorneys fees in defending against the charges which led to the suspension. The claim wears two aspects, and these shall be dealt with separately.

1. As to the claim for salary.

The words “wages” and “salary” are synonymous. The most approved lexicographers so regard them, and such is the view taken by the Supreme Court of Pennsylvania in the case of *Commonwealth ex rel. Wolfe vs. Butler*, 99 P. S. 535. Salary is a sum of money periodically paid as compensation for services rendered. Such is the opinion of Chief Justice Sharswood, who points out that if there is any difference in the popular sense between salary and wages, it is only in the application of them to more or less honorable services, but that there is no legal distinction. The same view is taken in New York. In the case of *Sniffin vs. New York*, 4 Sanford, 163, it was held that the term “salary” of itself imports a compensation for personal services.

Inasmuch as suspension prevents the rendering of the services, it is clear that there is nothing earned during the period of suspension. If it were otherwise suspension would be ineffectual, for it would give the pecuniary benefit to the suspended officer, while exacting no equivalent in service in return. The entire loss would then fall upon the public and not upon the officer. Reinstatement, while restoring the status of the individual, and giving him the right to earn in future the salary attached to the post, gives him no claim for salary or wages during the period of suspension. There was and could be no opportunity during suspension to render the services for which the salary constitutes the compensation. This is necessarily involved in the very idea of suspension, which is not simply a moral but a legal discipline, involving a double loss—a loss to the suspended officer and a loss to the public; for the services of the officer are irrecoverably lost and can never be made up to the Commonwealth. If a substitute be employed, the expense is at the

cost of the public; if there be no substitute, the crippling of the service is still a loss to the State. Hence it is clear that the suspended officer cannot point to the hardship of his own position and assert that the hardship falls upon him alone. I find no authority, either in the general principles of law or in the statutes, which would authorize the payment of salary or wages to a man under such circumstances, even though he be reinstated.

There are several instances in the federal service where such a thing has been done, but it was under a special state of facts not found in the present case, and also under the authority of law. Such was the case in *Collins vs. United States*, 15 Court of Claims Reports, page 23; *Kilburn's case*, same volume, page 41; and *Collins' case*, 16 Opinions of Attorneys General of the United States, 624. These cases differ materially from the one *sub judice*. In the present case the feature of legislative authority covering the point is entirely lacking.

2. As to the claim for expense and attorney's fees.

A man whose conduct is such as to invite an investigation, followed by a suspension from office *ad interim*, and who, during the time of suspension renders no service and cannot render service to the State, can have no legal claim for the payment of the expenses he is put to in defending himself; nor does the fact that he is subsequently acquitted of the charge and reinstated entitle him to present such a claim.

In the case of *Godman vs. Meixwell*, 65 Indiana, 32, it was held that there could be no reimbursement for expenses caused by the officer's own default or negligence or violation of duty. There is no warrant of law for the payment of attorney's fees for legal services rendered to himself at his request during the investigation, even though such services result in the establishment of his innocence. Nor can he recover from the State the amount of his mileage or witness fees. In this regard he is in no worse position than anyone who, though innocent, is charged with an offense in the criminal courts, and is subsequently acquitted. He cannot expect the Commonwealth to pay his attorney's or his witness fees, and I know of no instance in practice or under the authorities which would justify such a conclusion. If it were a civil suit, he could not claim, even though successful in its prosecution or in its defense, that the losing party should pay his fees or traveling expenses, in a case affecting himself; he is bound to be present either in person or by attorney, and this means at his own expense. Whatever costs are allowed in civil cases to the successful litigant are taxed by the courts and allowed because of express statutory provisions or by rules of court and long-established practice. None such existing in the present

case, I am of opinion that there is no authority of law for the claim, and that it must be disallowed.

Very respectfully yours,

HAMPTON L. CARSON,
Attorney General.

OLEOMARGARINE IN CHARITABLE OR PENAL INSTITUTIONS—DAIRY AND FOOD COMMISSIONER—ACTS OF MAY 21, 1885; MAY 23, 1893; MAY 26, 1893; JUNE 26, 1895; MAY 5, 1899, AND MAY 29, 1901.

Under the acts of May 21, 1885, P. L. 22, May 23, 1893, P. L. 112, and May 26, 1893, P. L. 152, the Dairy and Food Commissioner can prosecute the directors of the Jefferson county almshouse for furnishing oleomargarine to the inmates of that institution.

The act of May 23, 1893, P. L. 112, forbidding the use of oleaginous substances in charitable or penal institutions, is not repealed by the acts of June 26, 1895, P. L. 318, May 5, 1899, P. L. 241, and May 29, 1901, P. L. 327, which permit their manufacture and sale provided they are properly marked.

Office of the Attorney General,
Harrisburg, Pa., July 23, 1903.

Hon. B. H. Warren, Dairy and Food Commissioner:

Sir: In regard to the matter of the prosecution instituted against the directors of the Jefferson County Almshouse for using oleomargarine, I am of opinion that you have ample grounds, provided you can prove the facts by which you expect to sustain the prosecution.

The act of 21st of May, 1885 (P. L. 22), entitled "An act for the protection of the public health and to prevent adulteration of dairy products and fraud in the sale thereof," specifically prohibited the manufacture and sale of any oleaginous substance or any compound of the same other than that produced from unadulterated milk or the cream from the same, or of any article designed to take the place of butter or cheese produced from pure, unadulterated milk or cream from the same, or of any imitation or adulterated butter or cheese.

The act of 23d of May, 1893 (P. L. 112), specifically declared that it should not be lawful for any charitable or penal institution in the State of Pennsylvania to use or furnish to its inmates any substance, the manufacture and sale of which are prohibited by section one of the act entitled "An act for the protection of the public health, and to prevent adulteration of dairy products and fraud in the sale thereof," approved May 21st, 1885.

To sustain the prosecution, you will be obliged to prove, as a matter of fact, that the article or articles described in the first

section of the act of 21st of May, 1885, were used or furnished to the inmates of a charitable or penal institution in the State of Pennsylvania. Assuming that the testimony will bear out the charge, and keeping in mind that it is incumbent upon you to specifically prove the offense alleged, and that the description of the article so furnished must exactly conform to the description given in the first section of the act of 1885, I am of opinion that you can sustain a prosecution under section two of the act of 23d of May, 1893, inasmuch as the act of 26th of May, 1893, authorizes and empowers the Dairy and Food Commissioner to enforce all laws theretofore or thereafter enacted in relation to the adulteration or imitation of dairy products, particularly as the first section of the act of 26th of May, 1893, which created the office of Dairy and Food Commissioner, charged the State Board of Agriculture with the enforcement of the provisions of the act of May 21, 1885.

I reserve for future consideration the question as to whether you can prosecute the seller and manufacturer of oleomargarine under section three of the act of 1893.

I have examined the act of 26th of June, 1895 (P. L. 318); the act of 5th of May, 1899 (P. L. 241); and the act of 29th of May, 1901, (P. L. 327), and am of opinion that, while they certainly modify the provisions of the law with regard to the manufacture and sale of oleomargarine, and in many particulars are inconsistent with the provisions of the earliest act, yet they do not repeal the act of 23d of May, 1893 (P. L. 112).

In my judgment, the laws above referred to relate to two totally different acts committed or liable to be committed by two distinct sets of persons. There is a manifest distinction between an offense committed by a manufacturer or a seller and an offense committed by the managers of a penal institution. The act of 1885, which in terms prohibited the sale of oleomargarine or any similar substance, was modified by the later acts so far as the manufacture and sale of the article was concerned, by permitting the manufacture and sale to take place, provided the product were properly marked. This was for the information of the purchaser, and it rested entirely with the purchaser to say whether or not he should become a purchaser or a consumer. Notice of the character of the article so bought or consumed by him was to be given in the manner designated in the act, and a neglect to mark the packages in the manner described in the act is to be visited by the penalties and punishment prescribed in the act, and to be visited upon the manufacturer or seller. This, however, is a totally different legal provision in its character from that covered by the terms of the act of Assembly of the 23d of May, 1893, which prohibits the use in any charitable or penal institution in the State of Pennsylvania, or the furnishing

to its inmates, of the substance described in the act of May 21, 1885, and it can be well seen that there is a reason for the distinction.

The inmates of such charitable or penal institution have no option in the matter, either in the purchase or in the consumption of the article. They are not clothed with the discretion vested in all other citizens of the Commonwealth as to whether or not they shall buy or use the article so manufactured and sold after receiving, through the marking of the package, full notice of its contents. They are obliged to take exactly what is furnished to them, and, inasmuch as it is prescribed by the act of 23d of May, 1893, as a part of the management of charitable and penal institutions that the inmates shall not be furnished or compelled to use the substance described in the act of May 21, 1895, I view this as a regulation, not of the manufacture and sale of oleomargarine, but as a part of the regulation and discipline of a penal and charitable institution.

I find nothing in the act of May 5, 1899 (P. L. 241), or the act of May 29, 1901 (P. L. 327), which indicates any intention on the part of the Legislature to repeal the act prohibiting the use of the articles described in the act of 21st of May, 1885.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

PUBLIC OFFICERS—CONSTITUTIONAL LAW—INCOMPATIBLE OFFICES—UNITED STATES DISTRICT ATTORNEY—ATTORNEY FOR DAIRY AND FOOD COMMISSIONER.

A United States District Attorney may be employed by the Dairy and Food Commissioner as an attorney for his department. Such an employment is not an "appointment" within the meaning of Article II, Section 6 of the Constitution.

Office of the Attorney General,
Harrisburg, Pa., July 31, 1903.

Hon. B. H. Warren, Dairy and Food Commissioner:

Sir: You have stated to me that your attention has been called to the suggestion that the Hon. S. J. M. McCarrell, being a United States District Attorney, is disqualified from acting as an attorney for your division of the Department of Agriculture, and you have asked for my official opinion upon this matter.

Article II, section 6 of the Constitution of Pennsylvania has no application to the case. The matter must be determined by a proper

interpretation of section 2 of article XII. That section provides as follows:

“No member of Congress from this State, nor any person holding or exercising any office or appointment of trust or profit under the United States, shall, at the same time, hold or exercise any office in this State, to which a salary, fees or perquisites shall be attached. The General Assembly may by law declare what offices are incompatible.”

There can be no doubt that Mr. McCarrell is holding and exercising an office of trust and profit under the United States, but the question is whether his acting as an attorney-at-law or counsel in aiding the Dairy and Food Commissioner in the discharge of his duties by conducting prosecutions or preparing evidence is holding or exercising “any office in this State to which a salary, fees or perquisites shall be attached.”

It is observable that the Constitution expressly provides that the General Assembly may by law declare what offices are incompatible. The only legislative declaration upon this subject is to be found in the provisions of the act of 15th of May, 1874 (P. L. 186), which, after enumerating the State and federal offices which are incompatible, does not include in that enumeration a declaration that a United States District Attorney shall not practice his profession. There is a declaration that no district attorney shall be eligible to a seat in the Legislature or to any other office under the laws and Constitution of the State during his continuance in the office, and there is a further declaration that no alderman or practicing attorney shall be eligible to the office of an inspector of the county prison, but neither of these provisions cover the case in question.

The act of 18th of May, 1876 (P. L. 179), has no application. The act of 15th of May, 1874, before referred to, is substantially a re-enactment of the act of February 12, 1802, which was supplemented by the act of 1812. Neither of these acts, nor the act which borrowed sections from them, is as broad in its scope as the constitutional provision. In fact, they are much narrower than the Constitution by reason of their enumerating only a few offices in the State as incompatible with federal offices and appointments. The constitutional provision excludes all federal officials and appointees holding places of trust or profit from holding or exercising, at the same time, any office in the State to which a salary, fees or perquisites are attached, while the act of the Legislature limits its provision to a few local or municipal offices.

In the case of *Commonwealth ex rel. Bates v. Binns*, 17 Sergeant & Rawle, 219, a majority of the Supreme Court held that John Binns, an alderman of the city of Philadelphia, who had been appointed to print the laws of the United States, was not exercising an office,

appointment or employment incompatible with his office of alderman, under the eighth section of Article II of the Constitution of 1790, and the act of Assembly of February, 1802, above cited. Mr. Justice Todd, in delivering the opinion of the majority, said:

“The question of incompatibility is no new one. The established rule is to give the strictest possible construction to every part of a Constitution, and to every act of Assembly declaring State offices incompatible with offices or appointments under the Federal Government, or declaring different State offices incompatible with each other, and never to hold anything to be within the prohibition unless expressed and named, and to take in no possible case by construction.”

It may, therefore, be fairly contended that the act of the Legislature, being passed under an express constitutional provision that the General Assembly may by law declare what offices are incompatible, was a legislative declaration upon the subject sufficiently broad to cover the present case, and that, until the Legislature exercised more liberally its reserved power, a question of incompatibility would not arise, but, aside from this view of the question, which might be considered a narrow one, and because of the fact that the decision of the Supreme Court in the Binns case was not unanimous, and because of some criticisms of that decision since expressed by Mr. Buckalew in his work upon the Constitution of Pennsylvania, page 321, the larger question remains whether the duties at present discharged by Mr. McCarrell, in acting as an attorney-at-law and as professionally representing you in the matter of prosecutions and the conduct of causes, constitute the holding or exercise of an office in this State, to which a salary, fees or perquisites shall be attached.

I am of opinion that Mr. McCarrell, in representing your Department in the conduct and prosecution of causes, is acting simply in a professional capacity, and does not hold an office. The term “office,” as defined by Anderson in his Law Dictionary, is “A public station or employment conferred by the appointment of government, and embracing the ideas of tenure, duration, emolument and duties.” In no sense of the term can Mr. McCarrell’s appointment by you be considered an appointment, and in no sense can his discharge of professional duties be considered as the exercise of an office.

I have dwelt upon these features of the question in an opinion this day rendered at the request of the Factory Inspector, and it becomes unnecessary for me to enter into any further discussion. I herewith enclose a copy of that opinion, which you must read as a part of this.

My conclusion is that Mr. McCarrell is not exercising under you an office incompatible with that held by him under the government of the United States. His employment by you is a matter of your

own discretion, terminable at your own will, inasmuch as he holds no commission, has taken no oath, has no fixed term of service, and there are no emoluments, fees or perquisites attached by legislative act to the discharge of his duties. His compensation for the services rendered you is a matter depending entirely upon your agreement with him. You have the right, unquestionably, under the statutes relating to your office, to employ an attorney or attorneys. The act of 26th of May, 1893 (P. L. 152), by the second section, authorizes and empowers the president of the State Board of Agriculture to appoint an agent of the Board, who shall be known by the name and title of the Dairy and Food Commissioner, which agent is charged under the direction of the Board with the execution and enforcement of all laws, now enacted or hereafter to be enacted, in relation to the adulteration or imitation of dairy products. The third section authorizes the Dairy and Food Commissioner, subject to the approval of the State Board of Agriculture, to appoint and fix the compensation of such assistants, agents, experts, chemists, detectives and counsel as may be deemed by him necessary for the proper discharge of the duties of his office, and for the discovery and prosecution of violations of the said laws, provided that the entire expenses of the said agent and of all his assistants, agents, experts, chemists, detectives and counsel, salaries included, shall not exceed the sum appropriated for the purposes of this act.

These provisions are not affected by the act of March 13, 1895 (P. L. 17), establishing a Department of Agriculture, nor are they affected by the acts relating to the manufacture and sale of oleo-margarine, butterine and other similar products, with the enforcement of which you are specially charged as Dairy and Food Commissioner. The general appropriation act of 15th of May, 1903, page 515, apart from a provision for the payment of your salary and the salaries of other officers, expressly appropriates the sum of \$50,000, or so much thereof as may be necessary, for the payment of the necessary expenses of the Dairy and Food Commission for a period of two years. Under this appropriation, and under the express terms of the act of 1893, as well as under the provisions of the act of 29th of May, 1901 (P. L. 327 et seq.), as well as under the principle of the case of *Commonwealth ex rel. Appellant v. Gregg*, 161 P. S., 588, you are undoubtedly fully empowered to employ such counsel as you find necessary to represent you in the conduct of the prosecutions and the enforcement of the laws, at such compensation as you and they may agree upon, of course within the limitations of the appropriation heretofore mentioned as covering all the necessary expenses of your office during the next two years.

Very respectfully,

HAMPTON L. CARSON,

Attorney General.

DAIRY AND FOOD COMMISSIONER.

The Dairy and Food Commissioner is in honor bound to pay the costs on suits brought by his predecessor in office.

Office of the Attorney General,
Harrisburg, Pa., December 31, 1903.

Dr. B. H. Warren, Dairy and Food Commissioner:

Sir: Replying to your letter of the 22d instant, enclosing a copy of one from Q. A. Gordon, I would say that the acts of May 26, 1893 (P. L. 152, section 6), and of July 5, 1895 (P. L. 605, section 5), provide for the payment of the charge, accounts and expenses of the Dairy and Food Commissioner and his assistants by the State Treasurer in the same manner as other accounts and expenses of the Board of Agriculture are now paid as provided by law.

There is a special fund for the purpose provided by law, and the question whether you shall pay the costs on suits brought by your predecessor in office is not so much a matter of law as it is one of honor. If, after examination of the facts and the records, your counsel should have no reason to doubt the correctness or honesty of the claim, then I believe that the claim should be paid, even though it was contracted during the term of your predecessor in office. I do not think that the amount of the claim or even the aggregate amount of such claims have anything to do with the case. Should your counsel, on examination of the law, discover anything which would lead him to doubt whether your fund should be taxed with the costs of the prosecutions brought by your predecessor, be good enough to request him to communicate with me. I have found no limitation in the law, so far as by examination has gone, but I do not believe that it would be wise or reputable policy to allow the costs of prosecutions brought by the Department to remain unpaid merely because the head of the Department changes from time to time.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

RENOVATED BUTTER—LICENSES—DAIRY AND FOOD COMMISSIONER
—EXTENDING TIME OF PAYMENT.

Under the act of May 29, 1901, P. L. 327, the Dairy and Food Commissioner is without power to extend the time of payment of the fee for a license to sell renovated butter at wholesale.

Office of the Attorney General,
Harrisburg, Pa., December 31, 1903.

B. H. Warren, M. D., Dairy and Food Commissioner:

Sir: I have received, through Mr. Shock, the Assistant Commissioner, a copy of the communication received from a Philadel-

phia firm holding a license to sell renovated butter at wholesale. The firm is also an applicant for a license from the first day of January next, and requests to be informed whether you will extend the time for the payment of the license fee for 1904 for a month or two months.

Having examined the act, I am of opinion that you have no discretion whatever in the matter and that payment of the license fee must be made at the time of the issuance of the license. I perceive no authority for granting the concession asked for.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

STATE LABORATORY AT HARRISBURG.

There is no authority of law for the purchase of land and the erection of a State Laboratory for the purpose of making analyses for the Secretary of Agriculture and the Dairy and Food Commissioner.

There is no objection to the fitting up a room connected with the Department with laboratory appliances, nor to renting a room for that purpose.

Office of the Attorney General,
Harrisburg, Pa., March 21, 1904.

Hon. B. H. Warren, Commissioner of Dairy and Food Division, Department of Agriculture:

Sir: I can find no proper authority in the acts of Assembly for the establishment of a State laboratory at Harrisburg for the purpose of making analyses for the Secretary of Agriculture and the Dairy and Food Commissioner. If such a proposition involves the purchase of land, the erection of a suitable building and the equipment of the building with the proper appliances, it will be necessary to seek legislative authority sufficient to cover the purpose and also making an appropriation specifically for that purpose.

If, on the other hand, the proposition involves simply the utilization of a room already connected with the Department and the installation of the laboratory therein, the purchase of a suitable amount of appliances and the employment there of your chemists, I can see no objection, nor can I see any objection to the renting of a room for such purpose; meaning thereby that, if you find the work of the Department can be more conveniently and economically administered by having such an establishment at the State Capital, it would seem to fall fairly within your implied powers.

I am very truly yours,

HAMPTON L. CARSON,
Attorney General.

BULLETINS OF THE DAIRY AND FOOD COMMISSIONER.

Instructions to the Dairy and Food Commissioner as to the issuing of monthly and semi-annual bulletins.

Office of the Attorney General,
Harrisburg, June 8, 1904.

O. D. Schock, Esq., Assistant Dairy and Food Commissioner:

Sir: Replying to your letter in relation to the publication of semi-annual bulletins of the Dairy and Food Commissioner, in which you state that the Monthly Bulletins hitherto printed and distributed contain all the information required to be contained in a semi-annual bulletin, as well as complete lists of licensed dealers, and much other matter relating to the enforcement of the laws placed under the administration of the Dairy and Food Commissioner, and asking whether it is mandatory for the Dairy and Food Commissioner to reprint or republish the report semi-annually of matter already distributed in the shape of monthly bulletins, I answer, upon consideration, that I see no necessity for reprinting all this matter, entailing not only a large expenditure of time and money, but the preparation of copy and the printing of bulky pamphlets, for which there would be but little demand because of the fact that the information has already been more speedily supplied.

I suggest that you take such copies of the Monthly Bulletins as you have on hand and bind six of them together, so that if a demand be made for distribution you can supply, in concrete form, the exact matter which has already been distributed and which in character exactly answers the requirement of a semi-annual bulletin. In view of the fact that most of those who would require the information, and who would otherwise be likely to call for semi-annual bulletins have already been supplied with the information and are in possession of the pamphlets, I can see nothing which would imperatively call for the reprinting of this matter.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

OPINIONS GIVEN TO THE GAME COMMISSION.

GAME LAWS—CRIMINAL LAWS—JUSTICE OF THE PEACE—CHILDREN
—JUVENILE COURT ACT OF APRIL 23, 1903.

Children under sixteen years of age are not privileged to violate the game laws, and it is the duty of the justice of the peace to commit a child who does violate them.

The juvenile court act of April 23, 1903, P. L. 274, does not exempt juvenile offenders from arrest and commitment, although the further disposition of the case depends upon the provisions of the act.

Office of the Attorney General,
Harrisburg, Pa., September 23, 1903.

Hon. Joseph Kalbfus, Secretary of the Game Commission:

Sir: In your letter of September 20th you state that you have been informed that one of the game protectors of the State arrested a boy in Centre county on the 4th of August last for killing a deer out of season. The lad, while hunting ground hogs, saw a deer in a corn field and shot it to death, after chasing it. It was claimed by the child's attorney that no punishment could be imposed because the boy was but twelve years old, which was under the age limit fixed by the act of 23d of April, 1903 (P. L. 374), generally known as the juvenile court act. The justice of the peace who acted in the matter, believing this to be the law, discharged the prisoner.

You state further that you are constantly in receipt of letters complaining of violations of the game laws by boys under the age of sixteen, especially in the matter of killing song and insectivorous birds. You ask whether the magistrate acted correctly in the first instance and whether boys, offending against the game laws, are subject to arrest and punishment.

I answer emphatically that the magistrate did not understand his duty. He was strangely imposed upon by the argument of counsel. It should be distinctly understood by all magistrates, as well as by all children, whether boys or girls, and by parents and guardians, that children under the age of sixteen are not privileged to violate the game laws or any other laws of the State. If such notions should prevail generally, there would soon be a large and constantly increasing class of juvenile law-breakers. The laws must be respected and observed by children as well as adults.

The juvenile court act was intended to cover just such cases. Children are classified as "dependent," "neglected," "incorrigible" and

"delinquent." The statute expressly says "The words 'delinquent child' shall mean any child, including such as have heretofore been designated 'incorrigible children,' who may be charged with the violation of any law of this Commonwealth, or the ordinance of any city, borough or township." The powers of the court of quarter sessions of the peace, as provided in the act, may be exercised (section 2, paragraph 2):

"Whenever any magistrate or justice of the peace, in committing a child arrested for an indictable offence, shall certify that, in his opinion, the good of the child and the interests of the State do not require a prosecution upon an indictment, under the criminal laws of the Commonwealth."

"Section 3. Whenever, after return made by a magistrate of the proceedings, upon the arrest of such delinquent child for an indictable offence, the district attorney of the county, either before or after the indictment, shall certify that, in his opinion, the good of the child and the interests of the State do not require a prosecution upon an indictment, under the criminal laws of this Commonwealth."

"(4) Whenever, upon the trial of any indictment of such delinquent child, the judge trying the cause is of opinion that the good of the child and the interests of the State do not require a conviction under the criminal laws of this Commonwealth."

Nowhere in the act is any authority given to a justice of the peace to discharge a delinquent because of his age. On the contrary, it is expressly declared by section 11 that "Nothing herein contained shall be in derogation of the powers of the courts of quarter sessions and oyer and terminer to try, upon an indictment, any delinquent child who, in due course, may be brought to trial." It was the plain duty of the magistrate to commit the child, and to set the machinery of the court in motion by a proper certificate under section 2, clause 2 of the act. The burden would then have been thrown upon the court, whose action is regulated by the statute. You are at liberty to pursue the ordinary course of making an arrest, no matter what the age of the offender, provided the evidence be such as to satisfy you that it is your duty to act. The further disposition of the case must then conform to the provisions of the statute.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

SECRETARY OF THE BOARD OF GAME COMMISSION.

The Sunday law against fishing being before the court, the fish wardens have been instructed to make no more arrests for Sunday fishing until the courts have finally passed upon the question.

The law will not support an absurdity—taking a carp out of the stream and immediately replacing it could not be held to be a misdemeanor.

All questions submitted to the secretary of the Board of Game Commission about fish should be referred by him to the Fish Commissioner.

Office of the Attorney General,
Harrisburg, Pa., June 21, 1904.

Dr. Joseph Kalbfus, Secretary of the Game Commission, Harrisburg, Pa.:

My Dear Doctor: I had a long talk with Mr. Meehan, Commissioner of Fisheries, relative to the matters which you submitted to me in your letter of June 8th.

In reference to the Sunday law against fishing Mr. Meehan informs me that this question is now before the courts, having been raised in the Wyoming county case, and that he has instructed all of his wardens to refrain from making any arrests on this score until the courts have definitely and finally fixed the law in this matter.

On the question of the right to take fish other than game or food fish, the position that Mr. Meehan holds in this matter seems to me to be tenable. While the title of the act is somewhat ambiguous, it must be held to be broad enough to cover all species of fish in this State. While I agree with you as to the worthlessness of the carp, the sucker, the catfish and the eel, I can readily understand how a permission to take them in a manner not permitted by the act would prove a great handicap in the way of protecting the game and food fish which would certainly suffer along with their less favored brethren. Of course, the inconsistency you mention in the law, especially in section 27, which prohibits the introduction of carp in any of the waters of the State, and the question you raise as to the peculiar position of the man who finds he has taken a carp in an illegal way, subjecting him to a penalty for keeping it and a much larger penalty for releasing it, is absurd; but there is a well-defined rule that the law will not support an absurdity and taking a fish out of a stream and immediately replacing it could not be held to be a misdemeanor.

I also talked at some length with Mr. Meehan relative to the division of authority over the constables who are both game and fish wardens, and I have suggested that in the case of inquiries from them to him the matters affecting game be referred to you, which he

assures me is being done, and I suggest that all inquiries coming to you about fish had better be referred to Mr. Meehan in order that there may be no clashing between the heads of Departments relative to an enforcement of the laws.

Very truly yours,

FREDERIC W. FLEITZ,
Deputy Attorney General.

OPINIONS GIVEN TO STATE BOARD OF HEALTH.

SECRETARY STATE BOARD OF HEALTH—POWERS OF.

Secretary of State Board of Health referred to the decision of the Supreme Court in the case of *Commonwealth v. Yost*, 197 P. S. 177.

Office of the Attorney General,
Harrisburg, Pa., July 23, 1903.

Dr. Benjamin Lee, Secretary State Board of Health, Philadelphia,
Penna.:

Sir: I have carefully considered your letter of the 29th of June, 1903. I fully appreciate the practical difficulties in your way, but I can see no escape from them except in the early meeting of the Board. The matter is settled by a decision of the Supreme Court in the case of *Commonwealth v. Yost*, 197 P. S., 177. The meat of the matter is contained in the following extract from the opinion by Mr. Justice Brown, delivered on the 11th of July, 1900.

“We feel, however, that as we cannot concur with the Superior Court in its view, as expressed by the learned judge speaking for it, as to the power and authority of the Secretary of the State Board of Health, we ought to refer to what he says, lest our failure to do so be misconstrued as approving it. The statute authorizes the board to act, and the learned trial judge in the court below correctly held that there could be no conviction on these two counts, because nothing had been shown except some action by the Secretary. He very properly said: ‘We have ruled in that matter that there was no action of the State Board of Health in this case such as would warrant the conviction of the defendant on these two counts. * * * The State Board of Health should have a regular organized meeting of its board, decide upon a complaint, and then the secretary give notice.’ Without formal action by the board, directing a nuisance or the cause of any special disease or mortality to be abated and removed, its secretary can neither speak nor act for it in ordering the abatement and removal of the nuisance; and the disregard of any order so given is not indictable. In the absence of any action by the board as to a particular nuisance complained of, we cannot agree with the Superior Court, that because the duties of the secretary are defined by the by-laws and regulations, the

speaks for, acts for, and virtually is the board itself,' in ordering the abatement and removal of the nuisance, even if, as in the case before us, he does so in the name of the board."

This fully covers the subject-matter of your letter.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

SECRETARY STATE BOARD OF HEALTH—STATE HOSPITAL FOR THE
INSANE AT DANVILLE.

The purposes of the appropriation to the State Hospital for the Insane at Danville are clearly stated in the act, and it is improper to dispense with any of the provisions. To discharge the asylum filth in the river in its crude condition is improper and the matter should be referred to the State Board of Charities to prevent their approval of such a condition.

Harrisburg, Pa., July 9, 1903.

Benjamin Lee, M. D., Secretary State Board of Health, Philadelphia, Pa.:

Sir: I have your letter in relation to the appropriation made to the State Hospital for the Insane at Danville.

The purposes to which the appropriation can be applied are specifically stated in the act, \$95,000, being appropriated for "erecting additions and extensions to the main building of said hospital in order to provide wash rooms, bath rooms, water closets, etc., and the necessary fixtures therefor."

Fifteen thousand dollars for "a plant and the piping necessary in connection therewith for the proper disposal of the sewage from the said hospital."

Eleven thousand dollars for "a filtration plant and the proper increase of boilers, stacks, and the apparatus made necessary by the same and for the enlargement of buildings to accommodate the same."

It is expressly provided that the plans and specifications of the said buildings, extensions and additions shall be drawn under the supervision of the Board of Trustees of the said Hospital and approved by the State Board of Public Charities. Such being the provisions of the act, I do not understand how it would be proper to dispense with any of these provisions, and it would be quite improper to discharge the asylum filth into the river in its crude condition. I would advise your bringing the matter to the attention of the Board of Charities, so that the approval which that Board is

required to give shall be properly exercised, and thus guard against the consequences which you dread. Should the matter be brought to my consideration in any way I certainly shall examine into the whole question with care.

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

STATE BOARD OF HEALTH.

The act of April 22, 1903 (P. L. 259) does not apply to the preparation known as "Vin Mariani," there being but a trace of cocaine in that preparation.

Office of the Attorney General,
Harrisburg, Pa., July 23, 1903.

Benjamin Lee, M. D., Secretary State Board of Health, Philadelphia, Pa.:

Sir: You have asked me whether the act of April 22, 1903 (P. L. 259), entitled "An act regulating the sale or prescription of cocaine, or of any patent or proprietary remedy containing cocaine, and prescribing penalties for the violation thereof," applies to the preparation known as "Vin Mariani."

You have sent me two reports—one by Prof. Samuel P. Sadtler; the other by Dr. F. A. Genth, both chemists of the first standing in Philadelphia—of the results of an analysis of Vin Mariani made by them at your request, with the object of determining whether or not the preparation contains cocaine.

I observe that Prof. Sadtler made several assays, with the result of finding in one specimen, by one process, .013 of one per cent. and by another process, .012 of one per cent. of cocaine contained, with certain cocoa alkaloids which could not be separated from it. This, it is stated, would diminish somewhat the percentage of cocaine. From another sample Prof. Sadtler obtained, by a somewhat different process, .0096 of one per cent. of cocaine.

Dr. Genth found "traces" of cocaine, the amount of which is indefinitely determined, but which, he stated, would not exceed fifteen one-thousandths of one per cent.

These analyses, I observe, are in harmony with the result reached by a leading pharmacist consulted by you some years ago, whose tests failed to disclose more than a slight trace of cocaine, and agree essentially with those of the chemist of the Ohio Pure Food Commission, who made an examination of the preparation in order to determine whether or not it was in conflict with the pure food laws of that State. The latter found that .001 of one per cent. of cocaine

could be recovered. This, you state, is much less than the percentage of caffeine which could be recovered from an ordinary cup of coffee, and would be less injurious. The French analyses substantiate these results.

It is also stated that Vin Mariani is a preparation which has been in the market for nearly forty years and is well known to physicians. It is made of a pure French Bordeaux wine, representing in addition the aromatic and desirable properties of two ounces of fresh cocoa leaves, carefully selected with reference to their minimum alkaloid properties.

Upon these analyses and reports you state that you have concluded professionally that the presence of cocaine in the preparation known as "Vin Mariani" is incidental to its manufacture and not intentional, the amount being variable, and the amount, even if the largest estimate be taken as a standard, is too small to lead to the suspicion of cocaine, as such, having been added to obtain its medicinal effects. You state further that the average dose of cocaine, when prescribed medicinally, is one grain.

Upon these facts you request my opinion whether the preparation "Vin Mariani" is covered by the recent act.

The language of the act of Assembly is as follows:

"That no person shall sell, furnish or give away any cocaine, or any patent or proprietary remedy containing cocaine, except upon the prescription of a registered practicing physician, or of a dentist, or of a veterinarian; nor shall any such prescription be refilled; nor shall any physician, dentist or veterinarian prescribe cocaine, or any patent or proprietary medicine containing cocaine, for any person known to such physician, dentist or veterinarian to be an habitual user of cocaine: Provided, That the provisions of this act shall not apply to persons engaged in the wholesale drug trade, regularly selling cocaine to persons engaged in the retail drug trade."

I am of opinion, assuming all the facts to be as stated, that the law was intended to apply to such preparations or proprietary or patent medicines as contain cocaine introduced bodily and intentionally into the preparation as an ingredient, in such quantities as to produce medicinal effects, and does not apply to preparations in which a mere trace of its presence can be detected, such trace being a mere incident of its preparation and not an intentional result.

I herewith return the original reports of Prof. Sadtler and Dr. Genth.

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

MISCELLANEOUS OPINIONS.

VICKSBURG BATTLEFIELD COMMISSION.

The act providing for an appropriation for the Vicksburg Battlefield Commission contemplates the expenditure of the amount appropriated before June 1, 1905, otherwise the amount appropriated will merge in the general fund, and it will be necessary to ask for a new appropriation.

Harrisburg, Pa., December 29, 1904.

Hon. Samuel K. Schwenk, Chairman Vicksburg Battlefield Commission of Pennsylvania, New York City:

Sir: You inform me that the Vicksburg Battlefield Commission of Pennsylvania has purchased ground on which to erect certain monuments but has not yet awarded a contract for construction, and that the question arises whether it would be necessary to enter into such contracts before the ensuing meeting of the General Assembly of Pennsylvania in January next, in order to prevent the merging of the appropriation made under the act of May 15, 1903 (P. L. 415), and in reply thereto I answer that the case falls under the general rule with reference to the unexpended balance of the appropriation. I have no hesitancy in declaring that such unexpended balance of the amount appropriated by the Legislature under the act of May 15, 1903, will merge into the general fund in the State Treasury on June 1, 1905. Action must be taken therefore prior to that date, and in order to receive the benefit of the present appropriation, the Commission should enter into contracts for construction and consume the appropriation before the date already mentioned as otherwise it will be necessary to apply to the incoming Legislature for a new appropriation.

I am,

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

VICKSBURG BATTLEFIELD COMMISSION.

Under the act of May 15, 1903, the Vicksburg Battlefield Commission may use the entire sum appropriated for the purchase of land and the erection of one monument.

Office of the Attorney General,
Harrisburg, Pa., February 24, 1904.

Hon. Samuel K. Schwenk, Chairman Vicksburg Battlefield Commission of Pennsylvania, 708 N. 42d St., Philadelphia, Pa.:

Sir: I have your letter of the 12th inst., stating that the Vicksburg Battlefield Commission of Pennsylvania was appointed under the provisions of an act of the General Assembly, approved May 15, 1903, and the sum of fifteen thousand dollars appropriated "for the purchase of ground and the erection of suitable monuments and memorial tablets to mark the position occupied in the line of entrenchments around the City of Vicksburg, Mississippi, by each of the commands of the Pennsylvania Volunteer soldiers which participated in the siege of that city during the Civil War."

You state further that, while it has been contemplated to erect five different monuments, yet it has been suggested that it might best serve the real object of the appropriation to apply the entire amount, or so much thereof as may be necessary, to erect one large handsome monument to represent the Keystone State and all the organizations engaged. You request my opinion as to whether the Commission appointed by the Governor to act in conjunction with the committees from the different commands has the authority in its discretion, under the provisions of this act, to erect either one monument or five monuments, the additional memorial tablets being necessary to mark the various positions occupied by said organizations, provided the Commission and different committees should be unanimous in their opinion.

In my opinion, this question is precisely similar to that raised in the Germantown battlefield monument, and I take pleasure in sending you a copy of that opinion. It appears to me that the various committees and Commission may, by unanimous consent, agree to the erection of a single monument with suitable tablets, without in any way violating the letter or spirit of the law.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

VICKSBURG BATTLEFIELD COMMISSION.

Under the act providing for the Vicksburg Battlefield Monument, and the conditions that have arisen, the Commission has the sum of \$12,500 available for the land and monument.

Office of the Attorney General,
Harrisburg, June 8, 1904.

Hon. Samuel K. Schwenk, Chairman Vicksburg Battlefield Commission, Philadelphia, Pa.:

Sir: Supplementing my opinion rendered February 24, 1904, I advise you that, in my judgment, the condition precedent to the Commission having \$12,500 available for the purchase of land and the building of a monument is "that, if it shall be necessary to purchase land for the erection of the monuments herein provided for, a sum not exceeding two thousand five hundred dollars shall be allowed for the land and monument for each of said commands." This would give the sum of \$12,500 for the land and monument. Inasmuch as it has been necessary to purchase land and the purchase has actually been made, the condition precedent has been fulfilled, and the Commission now has the sum of \$12,500 with which to buy the land and to erect a suitable monument.

I am,

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

ANTIETAM BATTLEFIELD MONUMENTS.

The Commission appointed by the Governor under the act of April 14, 1903, is clothed with the necessary power to contract for the purchase and erection of the monuments, and the Survivors' Association is recognized only for the purpose of consultation on the design, place of location and other preliminary matter.

Office of the Attorney General,
Harrisburg, Pa., April 21, 1904.

Mr. R. A. Reid, Secretary of the Survivors' Association of the Forty-eighth Regiment of Pennsylvania Veteran Volunteers, Pottsville, Pa.:

Sir: I reply to your letter I answer that the act of 14th of April, 1903 (P. L. 174), providing for the erection of memorial tablets or monuments on the field of Antietam, enacts in its second section as follows:

“That the Governor shall appoint three commissioners whose duty it shall be to act in conjunction with the representatives or committee from each of said commands for the purchase of ground when found necessary to do so, and in the selection of the site, design, material and inscription for the monument or tablet to mark the position of each command on the battlefield; that it shall be the further duty of the said commissioners to contract for the erection of each monument or tablet, etc.”

It is apparent from this language that the commissioners appointed by the Governor are clothed with the necessary power to make contracts for the purchase and erection of these monuments, and that the Survivors' Association is recognized only for the purpose of consultation on the design, place of location and other preliminary matter.

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

GERMANTOWN BATTLEFIELD COMMISSION.

The act of May 15, 1903, P. L. 453, providing for a monument on the battlefield of Germantown, contains no provision limiting the appropriation, so far as the time of payment is concerned, and there can be no question as to the availability of the appropriation on December 21, 1904, provided the other provisions of the act are complied with.

Office of the Attorney General,
Harrisburg, Pa., July 20, 1904.

Arthur H. Brockie, Esq., Secretary of the Commission to Erect a Monument on the Battlefield of Germantown:

Sir: Replying to your favor of the 6th inst., I answer that the act of May 15, 1903 (P. L. 453), provided for the erection of a monument on the Battlefield of Germantown. It contained no provision limiting the appropriation, so far as the time of payment is concerned. The monument provided for is to be completed on December 21, 1904. There can be no question as to whether the appropriation is available at that time, provided the other provisions of the act as to payment are complied with.

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

STATE PHARMACEUTICAL EXAMINING BOARD.

There is no authority of law for the State Pharmaceutical Examining Board to make rules requiring pharmacists from foreign countries to have two years' experience in the retail business in the United States and to become citizens of the United States before they are eligible for examination.

Office of the Attorney General,
Harrisburg, Pa., June 8, 1904.

Louis Emanuel, Esq., President State Pharmaceutical Examining Board, Pittsburg, Pa.:

Sir: In reply to your favor of May 16, I am of opinion that it is not competent for the Board to adopt the following rules:

"(1) That all pharmacists from foreign countries must have at least two years experience in the retail business in the United States before they are eligible for examination."

"(2) That all foreigners must be citizens of the United States before they are eligible for examination."

The act of the 24th of May, 1887 (P. L. 189) creating the State Pharmaceutical Examining Board defines its powers and duties. I find nowhere in this act nor in the subsequent acts of Assembly relating to this subject any enactment which specifically authorizes the Board to make rules similar to those just quoted. On the contrary, section IV of said act states that "It shall be the duty of said Board to and examine all persons who shall desire to carry on the business of retail apothecary."

In my judgment Rule No. 3, that "All examinations must be conducted in the English language" is a reasonable one and there is ample authority to sustain it.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

THE STATE PHARMACEUTICAL EXAMINING BOARD.

The act of May 25, 1897 (P. L. 85) authorizes the Pharmaceutical Examining Board upon complaint to employ an analyst or chemist expert to examine a drug for adulterants, and if his report justifies a criminal prosecution, the Board should place the matter in the hands of the district attorney of the proper county for prosecution.

Office of the Attorney General,
Harrisburg, Pa., September 22, 1904.

To the President and Officers of the State Pharmaceutical Examining Board:

Gentlemen: You have informed me that numerous manufacturers and dealers in this State are making and selling what are in reality inferior preparations of formulae that are present in the Pharma-

copoeia and National Formulary, but which are labeled in a manner different from that usually pursued by makers and vendors of standard preparations, and you give, as an instance, that instead of the Tincture of Ginger, U. S. P., which is usually labeled "Essence of Jamaica Ginger," there is a preparation made, consisting principally of Capsicum, Grains of Paradise, or other pungent or hot drug and water with just sufficient alcohol to keep it from souring, and a small quantity of ginger to impart certain of the characteristics of the genuine article, the product being then labeled "Climax Picnic Ginger," "Gilt Edge Ginger," this system of labelling being carried out with all the preparations made in the manner indicated.

You ask the question whether it would be proper for your Board to bring suit against the manufacturers and vendors in order to prevent the adulteration, alteration and substitution of drugs and medicinal preparations.

I answer that the whole matter is fully covered by the act of May 25, 1897 (P. L. 85), which is an act specifically providing that no person shall within this State manufacture for sale, offer for sale or sell any drug which is adulterated within the meaning of the act. The term "Drug" is defined to include any medicinal substance or any preparation authorized or known in the "Pharmacopoeia of the United States" or "The National Formulary," or the "American Homeopathic Pharmacopoeia" or the "American Homeopathic Dispensatory."

The act further declares that drugs shall be deemed adulterated if any substance or substances have been mixed with it so as to depreciate and weaken its strength, purity or quality, or if any quality, substance or ingredient be abstracted so as to deteriorate or affect injuriously the quality or potency of the said drug, or if any inferior or cheaper substance or substances have been substituted in whole or in part for it, or if it is an imitation or is sold under the name of another drug. It is further declared that if the drug shall be so altered that the nature, quality, substance, commercial value or medicinal value of it will not correspond to the recognized formulae or tests of the latest edition of the "National Formulary" or of the "Pharmacopoeia of the United States," or the "American Homeopathic Pharmacopoeia" or the "American Homeopathic Dispensatory" regarding quality or purity, then such drug shall be deemed to be adulterated.

Upon a complaint being entered, the State Pharmaceutical Examining Board is empowered to employ an analyst or chemist expert whose duty it shall be to examine into the so-called adulteration and report upon the result of his investigation, and if said report justifies such action, the Board shall duly cause the prosecution of the offender as provided in the act. The act further declares

that the violation of its terms constitutes a misdemeanor, and anyone so violating its terms, upon conviction shall be fined a sum not exceeding one hundred dollars, or undergo an imprisonment not exceeding ninety days or both.

I am of opinion, therefore, that if a proper complaint be made to you, it is your duty to employ the analyst or chemist expert to make the examination, and if his report justifies, in your judgment, a criminal prosecution, then your Board should place the matter before the district attorney of the proper county in order that a prosecution may be properly instituted to punish the offender.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

BOARD OF PUBLIC CHARITIES.

General Agent and Secretary Board of Public Charities instructed to give the certificate requested by the trustees of the Western Pennsylvania Hospital for the substitution of a fireproof wall for one that is not so.

Office of the Attorney General,
Harrisburg, Pa., April 26, 1904.

Cadwalader Biddle, Esq., General Agent and Secretary Board of
Public Charities:

Sir: I am in receipt of your letter of April 20, and have given it careful consideration. I do not think that the matter calls for a general official opinion inasmuch as the facts and circumstances are special in their nature and do not admit of a general application. An opinion might be misconstrued.

In this instance, however, I instruct you, without hesitation, in view of the exigencies of the case, the extreme danger of fire, the helpless condition of the inmates as bereft of reason, and the reasonable character of the contention that it is but the substitution of a fireproof wall for one which is not so, and not, therefore, strictly an improvement or enlargement of the building, amounting really to the safeguarding of the institution, which is a most vital part of maintenance, and, therefore, in a certain sense, a necessary repair, that you may give the certificate requested by the trustees of the Western Pennsylvania Hospital.

It occurs to me that it is like the substitution of furnaces or a steam heating plant for the antiquated method of heating by stoves; or the substitution of water closets and sanitary plumbing for the old-fashioned single chambers; or the laying of fireproof floor as a substitute for a wooden one. These might be viewed as improvements and changes, but they really constitute maintenance so as to secure to an existing institution an actual condition in accordance with approved modern methods of safety and of health. I

do not believe that the statute should be read so narrowly as to exclude so desirable a result.

I therefore instruct you that you can give the certificate requested by the trustees.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

PUBLIC INSTITUTIONS—SCHOOL STORE—SUPPLIES FROM MANAGER
—ACT OF APRIL 23, 1903.

The act of April 23, 1903, P. L. 285, renders it unlawful for a manager or trustee of a State Normal School to sell any supplies, whether in the nature of school badges, pins, class devices or otherwise, to a store maintained and conducted by the institution.

The purpose of the act is to forbid a manager from maintaining a pecuniary or business or creditor relation to the institution of which he is an officer. Whether he makes a profit, or whether the institution makes a profit, or whether the convenience of the students is promoted or the State directly gains or loses or is unaffected by the transaction, is not the question.

October 30, 1903.

Mr. E. O. Lyte, Principal, First Pennsylvania State Normal School,
Millersville, Pa.:

Sir: I have considered your request for an opinion upon the following facts:

You state that there is connected with the State Normal School at Millersville a store for which a license is paid to the county. In this store, in addition to books, a number of articles are kept to sell to students and others. Among the miscellaneous articles are school pins, alumni badges and literary society pins. These pins and badges are sold to students and others at a small profit, they having been purchased from a jeweler who is one of your trustees.

You ask whether the act of 23d of April, 1903, P. L. 285, prohibits him from selling these articles to the store in the future, and you state that it occurs to you that gold and silver pins can not properly be classed as school supplies, and you are anxious to make no mistake in the matter.

I appreciate the candor and spirit of your inquiry, and also the desire of the manager and trustees to do nothing which the law forbids.

The relation of the institution to the store is not stated with precision, but I take it that the institution maintains and conducts the store, purchasing the articles dealt in and selling them to the students. I do not perceive any authority for this, but as long as the institution conducts the store, I am satisfied that it belongs to the institution, and therefore constitutes a part of it. It can not be run as an individual enterprise. As long as it exists, it must be

regarded substantially as the institution itself. Hence the sale to the store of articles dealt in must be viewed as a sale to the institution itself.

The first section of the act of 23d of April, 1903, declares that "It shall not be lawful for any officer or member of the board of managers of an institution, at a time when said institution is receiving State moneys from Legislative appropriations, to furnish supplies to such institution, either by direct sale or sale through an agent or firm, or to act as an agent for another in so furnishing supplies."

A violation of the provisions of the act constitutes a misdemeanor, punishable by a fine or imprisonment or both, at the discretion of the court.

This is a penal statute and must be construed strictly. In the case of *Trainer vs. Wolfe*, 140th Pennsylvania, 279, a question arose under the sixty-sixth section of the act of March 31, 1860, P. L. 400, by which members, officers and agents of any corporation or public institution were forbidden to be interested "in any contract for the sale or furnishing of any supplies or materials" to be furnished to or for the use of such corporation or institution. It was held that as the act made no mention of the purchase of real estate and was a highly penal statute, it could not be extended by implication beyond its precise meaning so as to apply to the purchase by a school board of real estate in which one of the directors was interested.

Giving the act under consideration the strictest construction, I am of opinion that it is unlawful for the manager or trustee to sell anything—whether in the nature of badges, pins, class devices or otherwise—to the store. The sale is to the institution. The resale to the students does not change the character of the original act. The purpose of the law was to forbid a manager from maintaining a pecuniary or business or creditor relation to the institution of which he is an officer. Whether he makes a profit or not, is not the question; or whether the institution makes a profit or not is not the question; or whether the convenience of students is promoted or not is not the question; nor is it even a question whether the State directly or indirectly gains or loses or is unaffected by the transaction. The act is aimed at the suppression and extinction of the business relation of the manager to the institution.

The word "supplies," while generally supposed to mean sustenance, which is food, fuel, bedding, or articles of daily necessity, has a broader meaning. It may mean the act of supplying what is wanted, or that which is supplied; means of bringing relief; sufficient for use or need; a quantity of something supplied or on hand; a stock; a store. (*Century Dictionary*.)

If it be convenient to furnish class pins to students, it would be equally so to furnish bats, balls, tennis rackets, golf clubs, hats,

caps, trousers, knee caps, shoes, sneakers, sweaters, boxing gloves, foils, et cetera, until the list of articles dealt in comprised almost everything sought or likely to be sought by students of varied tastes and demands. The only safe course is to buy nothing from a manager or to close the store and thus compel the students to do their own purchasing direct.

Yours very truly,
HAMPTON L. CARSON,
Attorney General.

PUBLIC SCHOOLS.

There is no legal authority for treating or certifying a half day as a day in the matter of keeping open the public schools.

There is a discretion in the teacher to dismiss the school for the time being to protect the health of the pupils.

Office of the Attorney General,
Harrisburg, July 6, 1904.

David B. Oliver, Esq., President Board of School Controllers, Allegheny, Pa.:

Sir: I do not believe that there is legal authority to treat a half day as a day in the matter of keeping open the public schools nor do I think that there is any authority for certifying that a half day session is equivalent to a day. I do believe that, in the event of excessively hot weather, just as in excessively cold weather, if the health of pupils is in any way endangered, there is a discretion existing in the teacher to dismiss the school for the time being so as to protect the health of the pupils. This is a matter of delicate discretion, which must be dealt with wisely, but which cannot, under any circumstances, be carried to the length of making a declaration, either in form or substance, that a half day legally amounts to a day.

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

RIGHT OF A RAILROAD COMPANY TO MINE COAL.

The Attorney General will not advise a private individual as to the right of a transportation company to mine coal.

Office of the Attorney General,
Harrisburg, Pa., June 11, 1903.

James Walker, Esq., President The Philadelphia Coal Exchange,
The Bourse, Philadelphia, Pa.:

Sir: I have your letter, asking me whether the Philadelphia and Reading Railway Company, or any other transportation company, which is also a miner of coal, has a right, either directly or indirectly, to engage in the transportation over their lines of the coal mined by them or by mining companies owned or controlled by them.

This is a question which you must refer to your private counsel, and if they desire to make the matter a subject of communication to me, in order to test the question in a legal form, they can present it in the form of a petition in the usual way, giving notice to the railroad companies to be affected by a service upon them of a copy of the petition and the request to me to fix a time for a hearing. I cannot express my views except upon a proceeding properly instituted and regularly conducted.

I am,

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

QUO WARRANTOS.

Writs of quo warranto affecting local or county offices must be brought at the relation of the District Attorney.

Office of the Attorney General,
Harrisburg, Pa., April 23, 1903.

Mr. John L. Rouse, Attorney-at-law, York, Pa.:

Sir: Attorney General Carson directs me to reply to your letter of the 21st instant, which has just been received.

It is the practice of this Department to require that writs of quo warranto affecting county or local offices be brought at the relation of the district attorney; this can be done under authority of a decision printed in 41st Legal Intelligencer, page 320. I therefore return the papers with the suggestion that you proceed under the relation of the district attorney of York county.

Very respectfully yours,

GUY H. DAVIES,
Chief Clerk.

APPLICATION FOR A CHARTER.

The Governor refuses to approve an application for a charter in which the word "Company" is abbreviated by "Co."

Office of the Attorney General,
Harrisburg, Pa., May 8, 1903.

Ralph Longenecker, Esq., Attorney-at-law, St. Nicholas Building,
Pittsburg, Pa.:

Sir: In reply to your letter of the 4th instant, asking whether there had been a ruling made in regard to the use of the abbreviation "Co." instead of the word "Company" by corporations in an application for a charter, I beg to say that the Governor has refused to approve an application in which such an abbreviation appeared.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

ACT OF 7TH OF MAY, 1887, P. L. 94.

An applicant for a proceeding under the act of 7th of May, 1887, should file his petition with the Attorney General, serve same on the other side, and be present at the day fixed for the hearing ready to substantiate his petition.

The act of 1887 does not compel the Attorney General to place the whole power of the Commonwealth at the disposal of the complainant upon the mere affidavit of two reputable citizens.

Office of the Attorney General,
Harrisburg, Pa., October 8, 1903.

Charles Pearce Hewes, Esq., Attorney-at-law, Erie, Pa.:

Sir: It has been the practice of this Department adhered to by myself to require notice of an application under the act of 7th of May, 1887 (P. L. 94), to be given to the company to be affected. If, therefore, it is your desire to make application for proceedings on the part of the Commonwealth, be good enough to put the matter in the form of a petition, serve a copy upon the other side, and I will fix the day and time for hearing.

Such proceedings involve the Commonwealth in such intricate and expensive litigation that, while I do not sit to determine the merits of the controversy, yet I must be satisfied of the substantial character of the complaint. In a hearing which I had only a few weeks ago, involving a railroad company in the western part of the State, and incidentally involving millions of securities, notice was given by the counsel for the petitioners without hesitation to the respondents, and both sides appeared before me represented by counsel.

I do not read the act of 1887 as compelling me to place the whole power of the Commonwealth at the disposal of the complainants, upon the mere affidavits of two reputable citizens, residents in the region traversed by the line of the railroad. Such an interpretation would involve too absolute an abdication of all my official discretion as to justify it in my judgment, nor do I so read the decision of *Cheetham vs. McCormick*, 178 Pa. St. 192.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

EDITOR OF CITY AND STATE.

The Attorney General does not institute proceedings upon the basis of rumors or anonymous communications, but only in the regular and formal way by petition filed, and service upon the other side of same, with proof at the hearing of the facts contained in the petition.

Office of the Attorney General,
Harrisburg, Pa., September 17, 1903.

To the Editor of "City and State," 1305 Arch Street, Philadelphia, Pa.:

Sir: If your correspondent, whose identity is not revealed but whose letters appear in your issue of September 10, 1903, under date of September 5th, over the signature of "Citizen," has any facts and testimony to submit to me relating to the control of the Baltimore and Ohio Railroad by the Pennsylvania Railroad Company, he is at liberty to submit them to me in the shape of a sworn petition, embodying the facts and disclosing the sources of his knowledge or information. A copy of this petition must be served upon the Pennsylvania Railroad Company, and proof of service, accompanied by a request for a public hearing, must be presented to me with the petition. I will then name a day and hour at which both parties can be heard in person or by counsel. After consideration of the matter thus presented, I will determine whether it is my official duty to proceed.

It is not the practice of this Department to institute proceedings upon the basis of rumors or of anonymous communications. I must be advised fully of the facts and of the character of proof by which allegations of fact are to be supported before involving the Commonwealth in legal proceedings, which, if unsuccessful, would result in great expense to the State. I must also have an opportunity to judge of the sufficiency of proof. This is the universal practice in *quo warranto* proceedings and in all applications made for the use

of the name of the Commonwealth, as well as in proceedings against railroads for alleged violations of law. It is true also of informations filed *ex officio*.

It is the right of those having knowledge or information of facts concerning the public interest to bring those facts or information to the knowledge of the Attorney General, so that he may pass upon the question whether or not it is his duty to proceed. Having no personal knowledge of his own he cannot be charged with official knowledge unless it be brought to him officially. When that is done in a proper way it becomes his duty to consider it. Whether it be sufficient to induce him to proceed is a matter which concerns him under his oath of office. If the duty be plain, it must be performed; if it be doubtful, he is not obliged to proceed. The responsibility of determining this must rest with him. His duties cannot be usurped by others.

The whole matter is fully covered by the opinion of the Supreme Court in the case of Cheetham et al. vs. McCormick, 178 P. S., page 192. In that case the Supreme Court, speaking of proceedings sought to be instituted under the act of 1887, used the following language:

“The Attorney General is the law officer of the Commonwealth and represents her in all her litigation. In proceeding under the act of 1887 he must use the name of the Commonwealth, and the costs, if he is unsuccessful must fall on the Commonwealth. When a complaint reaches him an inquiry into the facts may satisfy him that the complainants have been misled, or that they really have no information on the subject, but are acting from malicious motives or for stock jobbing purposes. He may see very clearly that to proceed under the act would be unwise, would invite certain defeat, and fasten a bill of costs unnecessarily on the Commonwealth. Under such circumstances, it is the duty of the Attorney General, under his official oath, to say to the complainants ‘You have no case,’ and it is his right to decline to ask for the complainants relief he is satisfied they have no right to. If then the complainants have any proofs to submit in support of their complaint, they should present them.”

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

ATTORNEY GENERAL'S OPINION.

The Attorney General does not advise individuals, his duty is to give legal advice to the heads of the State Departments.

Office of the Attorney General,
Harrisburg, Pa., December 17, 1904.

Mr. F. B. Comstock, Secretary, North East, Pa.:

Sir: I have considered your letter of the 7th instant, stating that the councils of your borough are divided over the question of steel railway franchises. The statement of facts discloses no public question in which the Commonwealth is interested, and I am forbidden by the rules and practice of the Department from giving an official opinion to any except State officers. The matter should be referred to your private counsel.

There is another feature which makes it improper for me to express any official opinion, and that is the connection between the franchise granted by the borough of North East and the Erie Rapid Transit Street Railway Company. There is a proceeding pending in the courts to which the Commonwealth is a party and the matter is still undetermined. I cannot, therefore, embarrass the court or my own administration by the expression of opinions upon matters which may come before the courts. Were this a question which affected the interests of the Commonwealth at large, the case would be different.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

PAYMENT OF TEN PER CENT. OF CAPITAL STOCK IN CASH—CONSTRUCTION OF ACT OF APRIL 29, 1874 (P. L. 75).

The act of April 29, 1874 (P. L. 75) requires the payment of ten per cent. of the whole capital stock to the treasurer of the intended corporation in cash. This payment cannot be made in property.

Office of the Attorney General,
Harrisburg, February 26, 1903.

T. M. Daly, President Continental Title and Trust Company., Twelfth and Chestnut Streets, Philadelphia, Pa.:

Sir: I have examined the correspondence which you enclosed, relating to the incorporation of the Hall Yarn and Waste Manufacturing Company, and which I now herewith return.

I am of opinion that the position taken by the Secretary of the

Commonwealth is the correct one. The seventeenth section of the act of April 29, 1874 (P. L. 75), must be read in connection with the third section, which is mandatory. That section requires that the certificate shall set forth, inter alia, that "ten per centum of the capital stock thereof has been paid in cash to the treasurer of the intended corporation." While other property may be taken for stock, ten per centum must be paid in cash, and it must be on the whole capital. It may all be paid by one stockholder, or one-tenth paid by each. But the act requires that it shall be paid. These sections are consistent with each other, may both stand together and be made operative. Where this can be done the whole act must stand. The object of the act is to have a cash capital as a basis for business. Such has been the uniform ruling of this Department, and I see no reason for departing from it. See Report of the Attorney General for 1895-1896, Appendix, page 308; also page 325, the latter opinion being dated April 26, 1876.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

FRENCH'S PETITION—CITIES OF FIRST CLASS—COUNCILMEN—
QUALIFICATIONS OF—INCOMPATIBLE OFFICES—ACT OF FEBRUARY
2, 1854.

Under the 35th section of the act of February 2, 1854, P. L. 21, the select and common councils of the city of Philadelphia are the sole judges of the qualifications of their own members. The courts can neither pass on the qualifications of members nor declare a forfeiture for an alleged ineligibility by reason of a violation of the proviso to the 4th section of the act, "that no member of said legislature, nor any one holding office or employment from or under the State at the time of said election, shall be eligible as a member of said councils;" and this, whether the alleged ineligibility is caused by the acceptance of a State office while a member of councils or by an election as a councilman while holding a State office.

Hence, a petition for a writ of quo warranto to test the right of the same person to hold the office of mercantile appraiser and select councilman was refused.

Office of the Attorney General,
Harrisburg, Pa., October 26, 1903.

In re petition of French for writs of quo warranto against Ransley et al.

This was an application for the use of the name of the Commonwealth in writs of quo warranto to test the separate right of Henry C. Ransley, Harry J. Trainer and Joseph H. Klemmer to hold the offices of select councilmen in the city of Philadelphia while serving as mercantile appraisers.

My attention has been directed to the fact that in a petition to my predecessor asking for the use of the name of the Commonwealth in a writ of quo warranto against Samuel G. Maloney, to determine by what right he held the office of select councilman while serving as harbor master for the port of Philadelphia, the prayer of the petition was granted; and the said Maloney subsequently, while the case of quo warranto was pending in the common pleas of Philadelphia, resigned as select councilman. No information is given of the causes of Maloney's resignation, nor of the reasons upon which his action was based, nor am I informed of the basis of the conclusion reached by my distinguished predecessor; nor do I know whether the question of jurisdiction was argued before him.

The case before him was that of harbor master; the cases before me are those of mercantile appraisers. The facts are undisputed. The respondents were elected at the February election in 1903, to serve as select councilmen of the city of Philadelphia for a term of three years from the first Monday of April following. At the time of their election, they were serving as mercantile appraisers, appointed the preceding December, but not commissioned, for a term of three years, by the Auditor General of the Commonwealth and the city treasurer of the city and county of Philadelphia, acting as the fiscal agent of the State. It was their duty to collect and pay over mercantile taxes into the hands of the city treasurer of the city and county of Philadelphia, as the agent of the State. They receive their compensation out of the taxes so collected upon orders approved by the Auditor General, and their accounts are audited by the Auditor General, being forwarded to him by the city treasurer.

It is alleged by the petitioner that at the time of the election of the respondents as select councilmen they were ineligible because of their positions as mercantile appraisers, on the ground that they were State officers within the meaning of the terms of the well-known Consolidation act, dated the 2d of February, 1854 (P. L. 21), which provides, *inter alia*, as follows: "That no member of said Legislature, nor any one holding office or employment from or under the State at the time of said election, shall be eligible as a member of said councils * * *"

In fit and orderly discussion, before attempting to consider whether mercantile appraisers are themselves State officers, or whether they are merely employes, agents or deputies of the Auditor General and the city treasurer,—the first undoubtedly a State officer, and the latter undoubtedly a State agent,—it is necessary to determine the question of jurisdiction, for it is plain that if the courts cannot determine the controversy, it is idle to request them to do so. If the lack of jurisdiction be plain, the Attorney General will

not institute a proceeding against his judgment and discretion. If the question be doubtful, the application should be allowed.

The question involved is one of eligibility, which involves capability of being legally chosen and of legally holding, the word embracing both ideas. It is important to observe that the prohibition of the act of the 2d of February, 1854, "that no member of the State Legislature, nor any one holding office or employment from or under the State, at the time of said election, shall be eligible as a member of said councils," appears in the shape of a *proviso* to section four. Therefore, it cannot be read as an independent provision, but is to be considered with the body of the section. It can only operate as a limitation of the main thought. The body of the section, after providing that the legislative powers of the city of Philadelphia shall be vested in two chambers, to be called the select and the common councils, contains an express provision that the members of select council "shall have the same qualifications as is required by the Constitution of the Commonwealth for the members of the Senate," and that the members of common councils "shall have the same qualifications as are required for members of the House of Representatives." This refers to the constitutional requirements as to age, citizenship and residence. It is clear from this that the proviso, containing a restriction upon eligibility, relates to the qualifications of the members of councils as prescribed in the body of the section, and operates as a disqualification of persons holding certain specified positions. The main thought relates to qualifications. It is important also to observe that in the thirty-fifth section of the same act it is expressly provided that: "The returns of all municipal elections in the city of Philadelphia, except of members of the select and common councils, shall be subject to the inquiry and determination of the court of common pleas of the county of Philadelphia," and that in the same section it is provided: "That the select and common councils respectively shall, in like manner as each branch of the Legislature of this Commonwealth, judge and determine upon the qualifications of their members."

There is no sanction expressed in the statute, there is no penalty prescribed in case of a violation of its terms; there is no forfeiture of office imposed as a consequence. There is no condition established to invite the intervention of a court. Everything is left to the action of councils. The statute is silent in other respects. The questions then arise whether the power to determine the qualifications of its members rests in councils alone, or whether, the select council not having passed as a matter of fact upon the qualifications of the respondents, but having admitted them to membership, has, because of its neglect to pass upon the question of qualification, left it open

to the courts to determine the question of forfeiture of the office of councilman, because of a lack of capability to hold.

Dealing with these questions separately and taking them in turn, I proceed to the consideration of the exclusive character of the jurisdiction of councils.

The point has been expressly ruled by Chief Justice Lowrie in two cases which are directly pertinent. The first is that of Commonwealth ex rel. Duffield vs. Loughlin et al., 20th Legal Intelligencer, p. 100; the second is that of Commonwealth ex rel. Field vs. Barger, Ibid, p. 101.

In the first case it was held that the common council of the city of Philadelphia alone has power to judge of the qualification of its members, and that the Supreme Court would not interfere by mandamus to restore a member removed by councils from his office because of the acceptance by him of another office which was, in the judgment of councils, incompatible with the office of councilman. Chief Justice Lowrie used the following language:

"The Common Councils removed the relator because during his term as Councilman he had accepted an office under the United States and because they supposed that he had thereby become disqualified to exercise the office of Councilman * * * We have no difficulty in defining the function which the Council was exercising when it removed the relator. It was judging of the qualifications of one of its members. The question of holding an incompatible office, as well as those of age, residence and citizenship, is always a question of qualification and is everywhere so spoken of, and this question may be raised at any time, and as well after the person elected has been sworn into office as before. Very often the incompatible office is accepted during the continuance of the one in relation to which the qualification arises. The case is therefore quite distinct from a case of contested election or of expulsion for misbehavior in office or for the commission of some infamous crime * * * What then is the tribunal that is to decide whether a Councilman has become disqualified by the acceptance of an incompatible office? The answer to this question is found in the Charter Act of 1854, section 35, which declares that the respective Councils shall "In like manner as each branch of the Legislature, judge and determine upon the qualifications of their members."

The application for the mandamus was refused.

In the case of Commonwealth ex rel. Field vs. Barger, Chief Justice Lowrie used these words:

"This is a motion for a writ of quo warranto to try the title of Mr. Barger to a seat in the Common Coun-

cils of Philadelphia. The allegation is that during his term as Councilman, he was elected a member of the Legislature, and has accepted that office, which is incompatible with the other, and that thereby his seat as Councilman is vacated. The law applying to the case is in the Charter Act of 1854, section 4, which declares that 'No member of the State Legislature shall be eligible as a member of Council.' The law is express that one who is a member of the Legislature cannot be elected to Councils, but it does not say that a Councilman on becoming a member of the Legislature loses his seat in Councils. Whether it means this or not, we do not know, for it is not our duty to decide it. It is a question of the qualification of the members of Councils and the law commits the determination of such questions to the respective Councils and not at all to us, as we have shown in the case of Mr. Duffield. The two cases are very different, but the same authority tries them. The motion is overruled."

These cases are expressly upon the point and have never been overruled or departed from. They are determinative of the first question and are adverse to the prayer of the petitioner. It is true that these were cases of ineligibility in the sense of incapability to hold the office because of a cause arising after a legal election to council; while those before me are cases of original ineligibility or lack of capability of being legally chosen. But the decisions draw no distinctions between the two phases of eligibility. On the contrary, the learned Chief Justice expressly says in the one case:

"The question of holding an incompatible office, as well as those of age, residence and citizenship, is always a question of qualification, and is everywhere so spoken of, and this question may be raised at any time, and as well after the person elected has been sworn into office as before," while in the other case he says: "The law is express that one who is a member of the Legislature cannot be elected to councils, but it does not say that a councilman on becoming a member of the Legislature loses his seat in councils. Whether it means this or not, we do not know, for it is not our duty to decide it."

The statute draws no distinction between the two phases of eligibility, but vests the power of decision upon the qualifications of their members, in the broadest sense, in councils alone. I cannot read into the statute a distinction which the Legislature has not seen fit to make; nor can I conclude that the statute meant to oust councils of jurisdiction in the very class of cases which it would be most natural and proper for them to decide—that of original qualification. This would be to state a palpable absurdity, by saying that councils could not pass on questions of original qualifica-

tion when their members came to be sworn, or, if sworn, that they could not thereafter be ousted by the action of the body, but that the whole power of passing upon the qualifications of members was to be confined to cases arising subsequent to legal membership. The statute does not say so, and I perceive no reason for such a strained construction. There is nothing which limits the jurisdiction of councils to the one class of cases, and deprives them of their jurisdiction in the other; nor is there any clause, sentence or line which makes a partition of jurisdiction between councils and the courts. In my judgment the jurisdiction of councils is exclusive.

I take up the second question, which is more serious, whether, in view of the fact that the select council of the city of Philadelphia has not passed upon the qualifications of the respondents before admitting them to membership, nor since, can the courts enforce a forfeiture? Or, to state it in the exact language of counsel: "The real issue then becomes, the select council having admitted the respondents to membership, can the courts, nevertheless, enforce a forfeiture?"

Exactly whence the idea of forfeiture is derived, it is difficult to determine. The statute does not suggest it, and in the absence of a statutory provision it does not follow as a necessary consequence of law. Forfeiture of what? Why select the office of councilman? Why not the office of mercantile appraiser, if it be an office, or why not both? What warrant in the law is there for any of these conjectures, and how are they to be settled, if indulged in? I am led again to quote Chief Justice Lowrie:

"The law is express that one who is a member of the Legislature cannot be elected to councils, but it does not say that a councilman on becoming a member of the Legislature loses his seat in councils. Whether it means this or not, we do not know, for it is not our duty to decide it." If in place of the words "member of the Legislature" we read the words "mercantile appraisers," and assume for the sake of the argument that a mercantile appraiser is a State officer, the language of the Chief Justice applies with exactness. Doubtless the idea of forfeiture was suggested by the case of the Commonwealth vs. Allen, 70th P. S. Reports, 465.

It was urged by counsel that the question had been ruled by the Supreme Court in that case, in which Mr. Justice Agnew declared that there was no true analogy between the State Legislature and the councils of the city, their essential relations being wholly different, and that, as the councils were in no sense a Legislature, all those decisions which evince the unwillingness of courts to interfere with the membership of the Legislature have no place in the argument.

It is observable that the decisions of Chief Justice Lowrie above

quoted make no express reference whatever to judicial unwillingness to interfere with the powers of the Legislature, but were expressive of a distinct refusal to usurp authority in the matter of passing upon the qualifications of members of city councils. Moreover, by the terms of the act of 1854, which constitutes an amendment to the act incorporating the city of Philadelphia, and thereby forms a part of the charter, it is expressly declared that city councils "shall in like manner, as each branch of the Legislature of this Commonwealth, judge and determine upon the qualifications of their members."

The case of Commonwealth vs. Allen is clearly distinguishable from those before me. In the cases before me, the proviso to section four, while declaring "that no member of the State Legislature, nor any one holding office or employment from or under the State at the time of said election, shall be eligible as a member of said councils," does not in terms prescribe a forfeiture of the office so held, and imposes no penalty; whereas, in the case of Commonwealth vs. Allen, the liability to forfeiture arose out of the terms of the act of Assembly of March 31, 1860, which declared:

"It shall not be lawful for any councilman * * * to be at the same time treasurer, secretary, or other officer of any corporation, municipality or public institution, or be surety for such officer," and further provided that "any person violating these provisions or either of them shall forfeit his membership in such corporation, municipality or institution, and his office or appointment thereunder, and shall be held guilty of a misdemeanor, and, on conviction thereof, be sentenced to pay a fine not exceeding five hundred dollars." Here was distinct ground for judicial interposition.

The question before the court in the Allen case was not one of qualification, but of the right of a court to issue a writ of quo warranto to determine a forfeiture of office, because of an express statutory provision that forfeiture should follow as a consequence of the commission of an act prohibited, and expressly made a misdemeanor, punishable, upon conviction, by a fine. No such consequences have been prescribed by the act of 1854, as the proviso contains no sanction which a court can enforce. A careful examination of the opinion of Mr. Justice Agnew satisfies me that the *ratio decidendi* was the presence of a statutory declaration of forfeiture as a penalty for the commission of an illegal act. There is nothing in the case of Commonwealth ex rel. Horr vs. the Common council of Philadelphia, 9th District Reports, p. 257, which militates against this view, and there is nothing in the opinion of that most careful judge—the late Michael Arnold—which would give a court of equity power to declare a forfeiture in the absence of a statutory provision.

I determine the second question in the negative.

The books are full of instances of refusal on the part of courts to interfere in matters where they have no jurisdiction. In the case of *Commonwealth ex rel. vs. Leech*, 44th Pennsylvania, p. 332, an application for a writ of quo warranto was refused by the Chief Justice in the matter of a contested election, the mode of trying such contested elections having been specially provided for in the city charter of 1854. The court declined to take jurisdiction, stating that:

“Where the whole duty of judging of any matter is committed to others, it would be sheer usurpation of office to take the decision out of their hands. Plain morality forbids it. The evil complained of can be only transient, but it is not so with the decisions of this Court; they live after us. They stand recorded as examples to be followed in the future, and we desire it to stand as an example that we judge no man in matters wherein we are not authorized to judge him; that we assume no authority not given to us by the Constitution and laws, even to effect a purpose that may appear greatly beneficial. We do good when we exercise a vested authority in the correction of wrong, though we may sometime perform our duties erroneously; we do evil when we usurp authority, even in order to do good. If the election law is defective, the Legislature is competent to amend it; we cannot do it. If we set aside the law of the land in order to effect a purpose, we become merely arbitrary.”

To the same effect was the decision of the Supreme Court in the case of *Commonwealth vs. Baxter*, 35th Pennsylvania, p. 263; and also in *Commonwealth vs. Garrigues*, 28th Pennsylvania, p. 10. The principle underlying both of these decisions is that when a statute prescribes a mode for inquiring into and determining the regularity and legality of a municipal election and the returns made thereof, the remedy by the statute must be followed, to the exclusion of the common law mode of redress, and that the provisions of the act of 2d of February, 1854, incorporating the city of Philadelphia, prescribing the manner and form of inquiring into and determining elections for municipal office, excluded all other remedies for matters which might have been investigated in the mode prescribed by that act.

There is nothing in the case of *Commonwealth vs. Allen* which modifies the principle of these decisions, because in the *Allen* case the statute contained the express sanction of a forfeiture; nor is there anything in the case of *Commonwealth vs. Meeser*, 44th Pa., p. 343. In that case the question was one of vacancy, involving the existence of the office itself, and the court decided that its duty must be confined to the decision of the question whether there was an office or vacancy to be filled. The courts had no authority to judge

whether the election was regularly conducted or not, for that duty was assigned by law to the councils.

Following directly in the line of these decisions was the case of Commonwealth vs. Henszy, 81½ Pa. S. Rep., p. 101. Chief Justice Read upheld the thirty-fifth section of the consolidation act of February 2, 1854, and refused to follow the case of Commonwealth vs. Allen, declaring that as it was a case of forfeiture, it had no application to the case before the court, and held distinctly that quo warranto would not lie to remedy an undue election.

The decisions, therefore, are all in harmony with the language of Chief Justice Lowrie in the Duffield case, when he declared that the question of holding an incompatible office, as well as those of age, residence and citizenship, is always a question of qualification, and everywhere so spoken of.

In my judgment, based upon the language of Chief Justice Read in the Henszy case, the cases before me are equally distinct from one of forfeiture. In the still later case of Auchenbach vs. Seibert, Chief Justice Gordon declared: "It is very clear that the court of quarter sessions acted *ultra vires* in entering judgment of ouster against the respondents in this case. It had no jurisdiction to pronounce upon the qualifications of Daniel Auchenbach as a councilman. The act of Assembly vests that power not in the court, but in that branch of the municipal council to which the member may be elected." It is true that this case related to the qualifications of a member of councils in the city of Reading, arising under a different statute from that of 1854, but the principle of the decision is precisely the same, and is to the effect that where a determination of the question of qualification is by statute expressly vested in councils, the courts have no jurisdiction to determine the question.

Having reached this conclusion it is unnecessary to discuss the broad question of incompatibility of office, which was well and learnedly argued on both sides. I cannot read into the statute a declaration of forfeiture which does not there exist, nor can I create by construction a consequence which is not even intimated. Nor can I invite a court to take jurisdiction of a case which the Supreme Court has time and again refused to entertain and has denounced as an act looking toward the usurpation of power.

Upon consideration of the whole case, the prayer of the petitioner for the use of the name of the Commonwealth is refused.

HAMPTON L. CARSON,
Attorney General.

Office of the Attorney General,
Harrisburg, Pa.

In re Petition of French for Writs of Quo Warranto
vs.
Ransley et al.

Since the last hearing I have been informed that in the Maloney case my learned predecessor did not consider the question of jurisdiction, as it was neither raised nor argued before him. Therefore, I do not find myself in conflict with any deliberate conclusion of his.

A re-argument was had in the present cases because of the importance of the question involved as well as of the desire of counsel to add oral argument to the written briefs which had been submitted, to which I was willing to accede. I have re-examined the conclusions previously reached and the authorities upon which they were based. It is unnecessary to restate them. I find nothing in the additional cases which were called to my attention to cause a change in the ruling which I made after a careful examination of the law.

In *Commonwealth vs. DeCamp* (177 Pa. State, 112), as in the *Allen* case (70 P. S., 465), the decision rested upon an express statutory penalty, which is not to be found in the act of February 2, 1854. Chief Justice Sterrett, in passing upon precisely the same provision imposing a penalty which was considered in the *Allen* case, concisely said:

"The illegal relation, which, among other things, is forbidden by the second clause of the section, began the moment he assumed to act as Councilman and it continued until he was ousted from the office. Whether such relation should have been declared illegal or not was purely a legislative question. It is enough for us to know that the Legislature more than thirty-six years ago declared that and similar relations illegal and punishable by removal from office, indictment, etc."

As there is no penalty imposed by the act of February 2, 1854, I cannot read it into the statute. The statute dealt with in *Commonwealth vs. Allen*, and in *Commonwealth vs. DeCamp*, was the act of March 31, 1860, section 66, forming a part of the general criminal code as revised. The features of distinction between these cases and the cases now under consideration are too palpable, substantial and manifest to be disregarded.

In *Commonwealth ex rel. Hawkins* (76 P. S., p. 1), the question of jurisdiction was not raised, the case turned wholly upon the validity of a special statute, which statute was upheld by the Supreme Court. No such feature exists in the present cases.

In *Commonwealth vs. Pyle* (18th P. S., p. 519), there was no question of councilmanic holding involved. The case related to a notary public holding stock in a bank and there was no statutory gift of a special jurisdiction which would exclude the jurisdiction of the courts. The text of Dillon on "Municipal Corporations," section 202, fourth edition, is based on language different in important particulars from that of our consolidation act. The language of the twenty-fifth section of our act is in these words:

"The select and common councils respectively shall in like manner as each branch of the Legislature of this Commonwealth, judge and determine upon the qualifications of their members."

These words constitute a grant of power and the word "determine" expresses the idea of finality of action. The only prescription of a method of procedure is limited to the case of a contested election, and the limitation does not affect the general grant of power. The text of Dillon is inapplicable to the Pennsylvania authorities which I have reviewed in my main opinion, and which it is unnecessary to repeat. I observe, however, that Dillon, without noticing that there was a special statute to explain the *Allen* case, remarks that that case was against the judgment of the profession. He thus confirms my view on the main question.

I find no basis in the consolidation act for a distinction between qualification and disqualification, the latter being but a negative way of stating the former. The qualifications and disqualifications in the act of February 2, 1854, appear, as to the former, in the body of the fourth section, and as to the latter in a proviso to the same section, which must be read as a part of the section. The disqualifications stated in the nineteenth section of article first of the Constitution of 1838 relate to the great State offices or those created by act of Assembly, and not to municipal positions.

In ascertaining the Legislative meaning, as expressed in the act of February 2, 1854, as to the disqualifications of members of councils, as stated in the proviso of the fourth section, it is important to observe that the nineteenth section of the Constitution relates entirely to offices created during the term of any civil officer. The language is as follows:

"No Senator or Representative shall during the time for which he shall have been elected, be appointed to any civil office under this Commonwealth which shall have been created or the emoluments of which shall have been increased during such time."

This presents a case totally different in its facts from those now under consideration. I find that our Supreme Court, through Chief

Justice Lowry, has decided that the holding of an incompatible office is a question of qualification, and that councils are the sole judges of the qualifications of their members. The cases confirmatory of this are discussed at large in my main opinion.

This position is not shaken by the Allen case or the DeCamp case, where jurisdiction was taken by the courts because of a special statutory penalty imposed by the criminal code of the State, which is entirely lacking in the present cases.

I do not decide that mercantile appraisers are State officers, nor do I decide that there are dual office holdings in the present instances; nor do I decide that there are not dual office holdings. None of these questions are before me. Nor am I determining whether or not there are other remedies. I am deciding simply the question of jurisdiction in an application to me for a suggestion that a writ of quo warranto be asked for, and I find that jurisdiction to be lacking. It would be easy to cast the entire burden upon the court by granting the prayer of the petition without discussion. Such an act, however, would involve a loss of self respect by avoiding a responsibility which is clearly mine.

An application to the Attorney General for the use of the name of the Commonwealth is in the nature of a hearing for a rule to show cause. The granting of it is not a matter of right. It must be controlled by the discretion and judgment of that officer. He should not abdicate his office and surrender its powers to all those who would like to wield them. That would be to place in the hands of the petitioners in all cases the administration of the Attorney General's Department. That cannot be permitted. It must be the official judgment and the discretion of the Attorney General which governs his acts, after having patiently heard the parties and their counsel.

If there be defects in the law, I am powerless to remedy them. The change must be made by the Legislature. In my judgment it is idle to ask the courts to say over again what they have already said many times. Moreover, to ask the courts to set aside an alleged improper exercise of power by usurping a power in order to reach alleged offenders, would be to ask them to commit the very kind of act which they are called on to punish. I am unwilling to ask them to do any such thing.

The prayer of the petition is refused.

HAMPTON L. CARSON,
Attorney General.

IN RE THE QUEMAHONING VALLEY COAL COMPANY—CHARTERS—
TITLES—NAME OF LOCAL DISTRICT—EXCLUSIVE APPROPRIATION—
INTERFERENCE WITH PRIOR CORPORATION.

For the purposes of a corporate title, the name of a district in a locality is incapable of exclusive appropriation when the article to which it is applied is a product of the place named.

The name "The Quemahoning Valley Mining Company" does not conflict with the name "The Quemahoning Coal Company," and a charter was allowed to a new corporation under the former title.

The title "The Quemahoning Valley Coal Company" not allowed.

In considering the allowance of the charter title of a new corporation, interference with the business of an older existing corporation, having the same or a similar title, should be considered.

Similarity of corporation names, 12 District Reps. 373, and In re Pennsylvania Correspondence School, 13 District Reps. 445, distinguished.

Office of the Attorney General,
Harrisburg, Pa., December 3, 1903.

In re application for a charter by the Quemahoning Valley Coal Company.

This is an application for a charter under the title of "The Quemahoning Valley Coal Company." It is protested against by the Quemahoning Coal Company, an existing corporation, on the ground of similarity of name. After unsuccessful efforts to find a name agreeable to both applicant and protestant, the matter was referred to me and was argued by counsel. It had been heard previously by the State Department, and, while it was suggested that the application would be granted if the name "Quemahoning Valley Mining Company" were adopted, yet later it was determined to approve of no title in which the word "Quemahoning" appeared. This was because of a supposed modification of my opinion in West End companies, 27 County Court Reports, 641, by my ruling, not yet reported, that the names "Pennsylvania Correspondence Institute" and "Pennsylvania Correspondence School" conflicted. I intended no such modification and I perceive none. I adhere to the views expressed in West End companies. I ruled there that the words "West End" were no more capable of individual and exclusive appropriation than the words "Pittsburg" or "Philadelphia," and that, as the remaining words of the proposed titles related to corporations as distinct in legal character as banks, savings funds and trust companies, no confusion could arise between the titles "West End Savings and Trust Company," "The West End Trust Company of Pittsburg," and "The West End Savings bank." The companies were distinguished from each other, however, by their distinctive legal characteristics, and in one of them the words "of Pittsburg" were introduced as a part of the corporate title.

In the Correspondence case I was not of opinion that it was the

word "Pennsylvania" which caused the conflict. Of course the word "Pennsylvania" would be incapable of exclusive appropriation, but, considering the titles as a whole, I was of opinion that "Pennsylvania Correspondence School" and "Pennsylvania Correspondence Institute" were too similar, particularly as the method of conducting the business by both was by correspondence, and both were to operate from the same territory. The vital word was "Correspondence." This was intensified by the fact that "Pennsylvania Correspondence" appeared in both as a similar collocation of words, and the distinction between "School" and "Institute," where both were educational establishments and not corporations dealing in articles of commerce, was deemed too slight to differentiate them.

In the case now before me the word "Quemahoning" is the name of a district, of a locality, and is incapable of exclusive appropriation. Moreover, both the applicant and protestant are trading corporations, dealing in the same article of commerce, the product of the same district. As to these a distinct principle applies, the principle stated by the Supreme Court in *Laughman's Appeal*, 128 P. S., 1, where it was said of an effort to appropriate exclusively the word "Sonman:"

"We do not say that a geographical name may not, in some cases or under some circumstances, be applied as a trade name; but we do say, that when the article to which it is applied is a product of the place named, the term cannot be used as a trade name by one to the exclusion of others, owners of like products of the same place * * * But 'Sonman' is not the name of a private estate in this sense; it is the name of a large boundary of land containing a number of separate private estates, owned by a number of different persons, all of whom are engaged in the same business of mining and shipping coal; and we hold that no one of these can assume and adopt, as a trade name, the name by which the place is generally known in the geography of the country, to the exclusion of others."

This case rules the use of the word "Quemahoning," and leaves it open to the applicant. Both applicant and protestant, however, are coal companies, and the question remains whether the introduction of the word "Valley" is sufficient to distinguish between them. The words "Quemahoning Valley" are descriptive of the locality and do not protect the applicant against subsequent appropriation. Besides this, the protestant is entitled to consideration in the question of interference, within the spirit and letter of the opinion of Mr. Justice Mitchell in the recent case of *American Clay Manufacturing Company v. American Clay Manufacturing Company*, 198 P. S., 196, where, in speaking of the corporation act, he says:

"Part of the intent of the act has always been understood to be to prevent confusion of titles and to protect the first taker of the name which has assumed the responsibilities and paid for the privileges of incorporation. Accordingly it has been the practice both of the executive department and the courts to consider the question of interference with previous corporations having the same or similar names: First Presbyterian Church of Harrisburg, 2 Grant, 240; in re Dimes Savings Bank, 26 W. N. C., 77; in re Citizens' Trust, etc. Co., 27 W. N. C., 437; in re Carlin Mfg. Co., 29 W. N. C., 158; in re York Wall Paper Co., 35 W. N. C., 574; in re Columbia Security Order, 27 W. N. C., 36; in re Waverly Red Cross, etc., 30 W. N. C., 257."

I am of opinion that the application should be approved if the title adopted by the applicant shall be made to read "The Quemahoning Valley Mining Company."

HAMPTON L. CARSON,
Attorney General.

PITTSBURG, SHAWMUT AND NORTHERN RAILROAD COMPANY
ET AL.

Affidavit of two citizens held not sufficient to warrant a proceeding under the act of May 7, 1887 (P. L. 94). Duty of Attorney General discussed.

Office of the Attorney General,
February 18, 1904.

In the matter of the information of Lee P. Snyder and Patrick W.
Cashman

vs.

The Pittsburg, Shawmut and Northern Railroad Company, the Interior Construction and Improvement Company et al.

This is an application under section 4 of the act of May 7, 1887 (P. L. 94), upon complaint of two "reputable citizens resident in the region" traversed by the line of the railroad of the Pittsburg, Shawmut and Northern Railroad Company, for the institution of proceedings at law or in equity in the name of the Commonwealth to enforce the provisions of the act of 1887, and particularly that provision of section 3, which declares that "any stocks or bonds or certificates of indebtedness hereafter issued in violation of the terms of the act, shall be void," and also to restrain and prevent the company from continuing to issue, as it intends to do, both stocks and bonds without full and fair consideration, and in evasion of the terms and intendment of the act.

The application is of so serious a nature and involves consequences of such magnitude that it must be scrutinized with the utmost care.

I cannot bring myself to the belief that the vast powers of the Commonwealth are to be set in motion upon the mere requisition of two citizens however reputable, even though resident in the region traversed by the railroad. Reputation and residence, it is true, are the qualifications prescribed by the act, but conceding these, they are not enough, in my judgment, to induce me, as Attorney General, to set in motion an inquiry of such momentous consequences. I cannot believe that mere formal affidavits are sufficient for the purpose. My predecessors have viewed such applications with concern, and have invariably acted with caution. Their action and policy are sufficiently illustrated by the cases of *Funk vs. Cambria Iron Company*, 5th District Reports, 143; *Cheetam et al. vs. McCormick*, Appellant, 178 P. S., 187; and Report of Attorney General Hensel for 1895, page 18.

Besides this, the attitude of the courts towards such an application, where there has been delay amounting to laches, and where the rights of third persons are involved, is illustrated by the case of *Commonwealth ex rel., Appel'ant vs. Reading Traction Company*, 204 P. S., 151.

I am persuaded that the Attorney General is not to play the part of a mere automaton. He must be satisfied in the first place that the complainants have real information on the subject; that they have not been misled; that they are not acting from malicious motives; and, in the second place, that a proceeding under the act would be wise; that it is reasonably free from the danger of defeat; and that there is but little chance of the fastening of a bill of costs unnecessarily upon the Commonwealth. In short, proofs and not mere allegations are required to make it a *prima facie* case.

After hearing counsel and a careful consideration of the voluminous papers submitted by them, as well as of the records of the Commonwealth bearing upon the question, I now proceed to state my conclusion.

I am of opinion that the application must be refused. There are several material considerations which govern it:

1. The affidavits of the complainants—who are not stockholders, bondholders or general creditors of the respondent—do not disclose personal knowledge of the matters contained therein, and fail to satisfy me of the competency of the witnesses. Their positions, even when in the employ of one of the underlying companies, were not such as to enable them to speak of the affairs of the companies from personal knowledge, and they have not now, and at no time have had, such relations to the chief and real respondent, as would qualify them to speak.

2. Their former and present relations to Burr M. Cartright, a

former official of one of the underlying companies, shed light upon the source of their information and cast doubt upon its accuracy.

3. The value of the affidavit of Mr. Cartright dated September 10, 1903, presented to me and made a substantial part of the proofs offered, is largely, if not entirely, destroyed by its conflict in most material points with the affidavit made by the same gentleman as president of the Buffalo, St. Mary's and Southwestern Railroad Company, on the 15th of July, 1899, and filed in the office of the Secretary of the Commonwealth on the 1st of August, 1899.

4. The reports of capital stock and indebtedness of the various consolidated roads and companies, made for the purpose of adjusting taxes with the Commonwealth in the years 1894-1895-1896-1897-1898-1899-1900 and 1901, relate chiefly to valuations made as the basis of taxation of the companies concerned, and are not binding upon the Pittsburg, Shawmut and Northern Railroad Company.

5. They relate to transactions covering a period of nearly ten years inextricably interwoven, which have never hitherto been challenged.

6. Consolidation and merger was made under the act of the 13th of May, 1889 (P. L. 205) and the procedure prescribed by that act appears to have been followed. It is doubtful whether the act of 1887 applies to such railway consolidations and mergers.

7. It appears by the records of the Office of the Secretary of the Commonwealth that statements were filed by the Pittsburg, Shawmut and Northern Railroad Company under the act of May 7, 1887, on the 2d of March, 1900, the 1st of August, 1902, the 22d of January, 1903, and 31st of July, 1903; and that statements were also filed under said act in the case of St. Mary's and Southwestern Railroad Company on the 26th of September, 1894, by the Buffalo and St. Mary's and Southwestern Railroad Company on the 13th of July, 1899, by the Mill Creek Railroad Company on the 1st of August, 1899, by the Smethport and Olean Railroad Company on the 13th of July, 1899, by the Emporium and Mt. Jewett Railroad Company, on the 26th of May, 1897, and by the Mt. Jewett and Smethport Railroad Company on the 26th of May, 1897.

8. The application embraces a variety of matters, such as alleged ultra vires acts; the non payment of taxes; the prevention of the building of other roads; the non payment of bonus; the attempt to maintain a monopoly of the coal mining business, all of which would appear to be the appropriate subjects of other forms of proceedings than those contemplated by the act of 1887.

9. Because it is not clear what securities are sought to be assailed in this proceeding or what proper limits are to be placed upon the inquiry.

10. It is not made clear that rights of third parties may not be

involved and the case would seem to be covered by the action of the Supreme Court in Commonwealth ex rel., Appellant vs. Reading Traction Company, 204 P. S., page 151.

For the foregoing reasons the application is dismissed.

HAMPTON L. CARSON,
Attorney General.

INSURANCE COMPANIES RATES—FIRE INSURANCE—DISCRIMINATING RATES IN DIFFERENT GEOGRAPHICAL SECTIONS.

A discrimination in insurance rates for different geographical sections of the State, established by the Underwriters' Association, is not contrary to law. The Legislature could not compel the adoption of a level rate or compel a company to abandon the terms on which it is willing to underwrite risks in certain sections. The danger of any such attempt would be that it might leave that part of the State without insurance.

Office of the Attorney General,
Harrisburg, Pa., March 12, 1903.

Hon. L. O. McLane, House of Representatives:

Sir: I herewith return the rate slip issued by the underwriters' Association of the Middle Department. The question which you raise is purely a business question and not a legal one. I am of opinion that, however open the discrimination may be to criticism on the ground of a geographical distinction, yet it is one which is not forbidden by law, but being dictated by business considerations requires judicious treatment and cannot be interfered with by legal action. No one can be compelled to enter into a contract with another against his own consent or on terms which he is unwilling to adopt. The discrimination by railroad companies, which is governed by constitutional as well as statutory provisions, is based on the grounds of public policy concerning common carriers, and, equally with considerations of public policy against color discrimination, as found in the recent amendments to the Constitution of the United States, belongs to a different domain of jurisprudence from the field occupied by business corporations such as insurance companies in the transaction of their business within the limits of their charters.

I therefore do not think that you could by legislation compel the adoption of a level rate other than that adopted by the companies, or that you could compel the company to abandon the terms upon which it is willing to underwrite risks in certain sections of the State. The danger would be great that such a course would leave that part of the State without insurance, and thus expose farm properties in the counties in which you are interested to the still

greater hardship of being entirely without insurance, rather than its present hardship of being compelled to insure at rates higher than those prevailing elsewhere.

Very respectfully yours,

HAMPTON L. CARSON,
Attorney General.

SEAL OF JUSTICE OF THE PEACE.

A seal containing the arms of the State in the center, with the justice's name, followed by the words "justice of the peace," and then followed by the words "Osceola, Tioga county, Pa.," all in the margin or outer circle of the seal, would be proper.

Office of the Attorney General,
Harrisburg, Pa., June 2, 1903.

Mr. C. R. Taylor, Osceola, Pa.:

Sir: I return to you the papers which you enclosed me in your letter of May 31. It is quite clear that your seal is not in compliance with the terms of the act of 23d of April, 1903. A seal containing the arms of the State in the center, with your name, followed by the words "Justice of the Peace," and still further followed by the words "Osceola, Tioga County, Pa.," all in the margin or outer edge of the seal, would be proper. I enclose you the impression of a notary's seal which in my judgment is in proper form.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

JUSTICE OF THE PEACE.

A seal of a justice of the peace must be similar to that of a notary public, save that around the outer edge shall be the name of the justice, his county, and the words "justice of the peace."

Office of the Attorney General,
Harrisburg, Pa., May 13, 1903.

J. D. O'Neil, Recorder of Allegheny County, Pittsburg, Pa.:

Sir: Your letter of recent date to the Attorney General asking for information relative to the act of 23d of April, 1903, requiring justices of the peace to provide themselves with seals which shall be used on all affidavits, transcripts and all other official papers, received.

Section two of the act reads as follows:

"Said seal shall be similar to the one used by notaries public except that around the outer edge shall be the

name of the justice, his county, and the words 'Justice of the Peace.' ”

This requirement of law should be carried out, and it seems to me is a complete answer to your question.

Very truly yours,
FREDERIC W. FLEITZ,
Deputy Attorney General.

FINES COLLECTED BY A JUSTICE OF THE PEACE.

The State will proceed by the Fish Commissioner to collect the half of a fine imposed by a justice of the peace for the violation of the fish laws, but retained by him. In the half of the fine going to the informer, the State has no interest.

A justice of the peace who retains fines should be proceeded against for embezzlement or malfeasance in office.

Office of the Attorney General,
Harrisburg, Pa., December 28, 1904.

Messrs. Nelson & Maynard, Counselors-at-Law, Coudersport, Pa.:

Gentlemen: Your letter of the 24th inst., to this Department, has been received.

It appears that some time in the months of June, July or August of the present year there were several parties—among others one by the name of Gleason—arrested for dynamiting fish in the Genesee river, taken before Victor M. Allen, a justice of the peace in Genesee township, convicted and fined in the sum of \$200. Of this amount \$100 belonged to the State and should have been paid over by the justice of the peace to the county treasurer. The other \$100 belonged to the informer and the State has no interest or concern in the controversy as to whether the informer was the constable who made the arrest or Mr. Barlow. Of course, as an abstract proposition of law, the person giving the information is the common informer and is entitled to the money.

We note your desire that we take this matter upon and recover the \$200, to the end that your client, Mr. Barlow, may receive his just dues.

I have called the attention of the State Commissioner of Fisheries to the contents of your letter and he will at once proceed to collect the \$100 due the State Treasurer from the justice of the peace. The question of the ownership of the other \$100 will have to be threshed out up there.

I also note the other charges you bring against the same justice of the peace, alleging that he has retained other fines which properly belong to the Society for the Prevention of Cruelty to Animals.

If you are sure of your facts, you ought to be able to sustain a charge of embezzlement or malfeasance in office against the justice in the criminal courts.

I thank you for the information contained in your letter and will use my best endeavors to see that the money due the State is promptly paid over.

Very truly yours,
FREDERIC W. FLEITZ,
Deputy Attorney General.

JUSTICE OF THE PEACE.

The office of assistant district attorney and justice of the peace are incompatible.

Harrisburg, Pa., December 29, 1904.

Harry S. Schaeffer, Esq., 40 North Sixth Street, Reading, Pa.:

My Dear Mr. Schaeffer: I have considered your letter stating that you are at present serving as a justice of the peace in one of the boroughs of Berks county, and that you expect next year to be appointed to the office of assistant district attorney of Berks county. You ask whether I believe the two offices are not incompatible and whether the fact that you will be appointed and not elected to the office of assistant district attorney will affect my conclusion.

I reply that the act of May 15, 1874 (P. L. 186), declares certain offices to be incompatible. It does not in express terms enumerate the offices "justice of the peace" and "district attorney." The fourth section of the act declares the offices of "justice of the peace" and "prothonotary or clerk of any court" are incompatible, and the sixth section declares that "no district attorney shall be eligible to a seat in the Legislature or to any other office under the laws and Constitution of the State during his continuance in office."

To my mind it is a safe and sound conclusion that if the act of 1874 declares that the district attorney shall not be eligible to any other office under the laws and Constitution of the State, and that a justice of the peace shall not be eligible to the office of prothonotary or clerk of any court, it would be a manifest impropriety in the assistant district attorney, who takes the oath of office and acts as deputy for his chief, to hold two incompatible offices for which the district attorney would undoubtedly be ineligible.

One of the duties of a justice of the peace is to take informations for violations of the criminal laws of the State, and upon his return of said informations to the clerk of the criminal courts is based the indictment which the district attorney or his assistant prepares

for trial in court. Even though the assistant district attorney did not as a matter of fact receive any criminal information as justice of the peace, yet he would certainly violate the spirit of the law and offend against good taste and sound reason by attempting to exercise at one and the same time two offices, which, if not actually incompatible, are so from a practical standpoint.

In my judgment the fact that the assistant district attorney in Berks county is not an elective but an appointive office does not alter the situation. Furthermore the fact that the assistant district attorney must take an oath of office and act for the district attorney in the preparation and trial of criminal cases, and is qualified to appear for him and represent him in all criminal proceedings, constitutes a serious objection because the position so held by the assistant district attorney is undoubtedly an office in the legal sense.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

STATE HOSPITAL FOR THE INSANE AT DANVILLE, PA.

Where poor districts neglect to pay for patients in the State Hospital for the Insane, it is unnecessary to return the patients to the districts, but suits should be brought against the delinquent counties for the amounts unpaid, under the act of May 8, 1889 (P. L. 127).

Office of the Attorney General,
Harrisburg, Pa., December 31, 1903.

Dr. B. H. Detweiler, Williamsport, Pa.:

Sir: I am in receipt of your letter of the 25th inst., enclosing one from H. M. Hinkley, Esq., of Danville, showing that the Conyngham and Centralia poor districts of the county of Columbia, and Mount Carmel township, of the county of Northumberland, are delinquent in the payment of maintenance for the indigent insane, received by the State Hospital for the Insane at Danville, Pa.

You ask whether the asylum should return the patients whose maintenance now remains unpaid by the poor districts, to the county from which they came, or whether suits should be brought to collect the amounts due.

I do not deem it necessary at the present writing to determine whether or not you can legally return these patients. In my judgment it is unnecessary to resort to so harsh a measure, particularly as it would involve great suffering to the helpless and unfortunate beings who are now the subject of your care, and I advise that you continue to protect them and to instruct your counsel forthwith to

bring suits against the delinquent counties for the amounts unpaid, under the act of May 8, 1889 (P. L. 127).

I herewith return the statements enclosed which may be of service to you.

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

HARRISBURG HOSPITAL.

The Harrisburg Hospital may issue a certificate of proficiency to its graduated nurses, but may not under its charter issue a diploma, because no degree may be conferred.

Office of the Attorney General,
Harrisburg, Pa., December 1, 1904.

Mr. Henry B. McCormick, President Board of Managers of the Harrisburg Hospital, Harrisburg, Pa.:

Sir: I herewith reply to yours of the 30th ult., in the matter of the Harrisburg Hospital, in which you call my attention to the fact that the object of this corporation is "to establish, maintain and manage a hospital and dispensary in the city of Harrisburg for the reception, cure and medical or surgical treatment of the sick and injured, and it shall have the power to purchase land, erect or build or rent buildings, and perform such other acts as may be necessary to this object."

You further state that in the performance of its duty it is required to use trained nurses, and it desires to train persons in nursing, so that they may be competent to act as trained nurses, not only within its walls, but elsewhere. You state that it has been found impossible to have capable women submit themselves to a course of instruction to qualify them for the occupation of trained nurses, unless they receive, at the completion of the prescribed course, diplomas attesting their qualifications for that duty.

You also state that, inasmuch as the institution is partly supported by State aid, and in view of the relation that it thus sustains to the Commonwealth, you trust that I will feel myself at liberty to advise the institution whether it has the right to give such training and instruction to those desiring to become trained nurses as will qualify them for their work as such, and to give them diplomas when they have completed the necessary course of instruction for that purpose.

I reply that I do not find in the statement of the object or purpose of the corporation any features of an educational institution. The object is specifically stated as the establishment, maintenance

and management of a hospital and dispensary for the reception, cure and medical or surgical treatment of the sick and injured. In this the feature of the education or training of nurses does not appear. I can well understand that, incidental to the management of the hospital, there must necessarily be a course of training, more or less systematic, of the nurses who constitute a part of the hospital staff, and I can also well understand that it would be agreeable to the managers, as well as to the nurses untrained, but in the course of training, to receive, at the time they attain a satisfactory degree of proficiency, some certificate over the signatures of the managers, attested by the seal of the corporation, vouching for their efficiency. Such a certificate, couched in appropriate language, and properly engrossed, would not appear to be legally objectionable, but I am clearly of opinion that no diploma could be awarded because no degree can be conferred.

The word "Diploma" has a technical meaning, and it has been considered in a number of cases arising in the courts. In the case of *State v. Gregory*, 83 Missouri, 123, a diploma is said to be a document bearing the record of a degree conferred by a literary society or educational institution; in short, a statement in writing, under the seal of the institution, setting forth that the student therein named has attained a certain rank, grade or degree in the studies he has pursued. In *Halliday v. Butt*, 40 Ala., 178, a diploma is defined as an instrument, usually under seal, conferring some privilege, honor or authority; almost wholly restricted to certificates or degrees conferred by universities and colleges. This definition is found substantially in *Worcester's Dictionary*. In the case of *Brooks v. State*, 88 Ala. 122 the words "license, diploma or certificate of qualification" in a statute making it criminal to practice medicine without having first obtained a license or diploma or certificate of qualification, were carefully considered, and in the case of *Nelson v. State*, 97 Ala., 79, it was held that the words "license or certificate of qualification" did not refer to and mean the same thing as a "diploma."

In the *Century Dictionary* the following description appears: "Diploma: In modern use, a letter or writing, usually under seal, and signed by competent authority, conferring some honor, privilege or power, as that given by a college in evidence of a degree, or authorizing a physician to practice his profession, and the like."

In the ninth volume of Sir G. C. Lewis' "Authority in Matters of Opinion," page 17, it is said: "The granting of diplomas by universities or other learned bodies proceeds on the supposition that the public requires some assistance to their judgment in the choice of professional services, and that such official scrutiny into the quali-

fications of practitioners is a useful security against imposture or incompetency of mere pretenders to skill." •

It is evident from the foregoing authorities that the word "Diploma" has acquired a technical meaning of graver import and higher dignity than a mere certificate of efficiency, and that the word has been associated in popular, as well as legal, use with a university or educational institution whose primary purpose is to educate by a systematic course of study and instruction, and that the word "diploma" could not properly or accurately be used to represent a certificate issued solely in connection with an institution whose primary purpose was the care, cure and treatment of the sick and injured and not the training of nurses. The power to confer degrees and to issue diplomas belongs to those educational institutions empowered by their charters to grant them, or authorized by statutes to grant them. Colleges for the education and training of nurses exist; notably the Women's College situate in Philadelphia, where the nurses are lectured to by a corps of professors, where clinical lectures and clinical experience are also embraced in the course, where examinations are held, and where, after a successful examination, a degree is conferred and a diploma awarded. In such a case as this the main, if not the sole, purpose is the education of nurses and not the incidental training of nurses because they happen to be at the bedside of the sick.

In conclusion, my judgment is that diplomas cannot be granted; that a certificate of proficiency or efficiency could be properly delivered to a nurse if the managers of the hospital feel that her qualifications and character entitle her to receive it. I discover nothing in the charter nor in the law which would allow you to go beyond this.

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

STATE HOSPITAL FOR THE INSANE AT DANVILLE, PA.

The president of the State Hospital for the Insane at Danville, Pa., is referred to Dr. Detweiler of the Board of the Hospital for a copy of an opinion rendered by the Attorney General, and is advised that the action must be brought by the hospital's solicitor and not by the Commonwealth.

Office of the Attorney General,
Harrisburg, Pa., July 20, 1904.

Howard Lyon, Esq., President State Hospital for the Insane, Danville, Pa.:

Sir: The question which you addressed to me is substantially the same as one addressed by Doctor Detweiler, of Williams

port. If you call upon Dr. Detweiler, who, I am informed, is a member of your board, he will no doubt furnish you with a copy of the opinion which I rendered under date of December 31, 1903, and which appears to answer substantially the same question you propound.

Reference might also be made to the case of Commonwealth for the use of State Hospital for the Insane v. County of Philadelphia, 193 P. S., 236. You will perceive that the matter turns upon the fact that the Commonwealth has no direct interest and that the action must be brought in the name of the institution by its proper officers. It, therefore, is a question for the solicitor of your board. It is clear that the Commonwealth can take no action in the matter.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

PENNSYLVANIA STATE LUNATIC HOSPITAL—POOR LAWS—STATE
LUNATIC HOSPITAL—COURT COMMITMENTS.

The board of trustees of the Pennsylvania State Lunatic Hospital may not refuse to receive commitments of insane persons by the several courts on the ground that there are no vacancies; such commitments take precedence, and places must be provided by the trustees for persons so committed.

Office of the Attorney General,
Harrisburg, Pa., May 20, 1903.

Donald C. Haldeman, Esq., Harrisburg, Pa.:

Sir: I have given consideration to the question which you propounded regarding the right of the board of trustees of the Pennsylvania State Lunatic Hospital to refuse commitments of insane persons by the several courts of the Commonwealth until such times as there may occur vacancies, when said hospital is filled to its given or utmost capacity, and, in connection therewith, I have examined the brief which you filed with me.

The acts of Assembly of April 14, 1845 (P. L. 440); of April 11, 1848 (P. L. 535), and of April 27, 1874 (P. L. 113), read in conjunction with the provisions of the act of April 14, 1845, and of April 8, 1861 (P. L. 248), undoubtedly confer upon the trustees a right to fix the number of patients whom they may safely treat, and invest the trustees with a general discretion in the matter. Such discretion, however, must be exercised with regard to the fact that the courts have a right to commit, either at the termination of criminal proceedings, wherein the defendant shall have been adjudged insane,

or after proceedings *de lunatico inquirendo*. State hospitals must be regarded as institutions of the State and be considered not only as places for the treatment of the indigent insane but also as places to which the criminal insane, or those with homicidal tendencies, may be committed by the courts for safe keeping.

The case of *Commonwealth v. Bennett*, 15 Weekly Notes of Cases, 515, reported also in 18 Philadelphia, page 432, expressly rules that as to persons confined under an order of court, the discretion of the hospital authorities must be exercised at all times in subordination to the terms of the order. As Judge Mitchell, now the senior associate judge of the Supreme Court, there points out, the order of court has all the attributes of a judicial sentence. It is an order providing for the custody of the prisoner, based, under the authority of the statute, upon a verdict on an indictment for felony. It therefore carries with it, by its own inherent force, the obligation of obedience from those to whom it is directed, and a violation of its terms would not only be subject to the summary jurisdiction of the court for contempt, but, if wilful, would be within the penalty of the criminal law against jailors and other officers permitting an escape.

In view of this decision, which is express and positive in terms, I cannot safely advise you that the trustees can take a position which would bring them in conflict with an order of the court. The only way in which to harmonize the provisions of the law with judicial decisions is to hold that a commitment by the court shall take precedence, and that a place must be provided by the trustees for persons so committed. The trustees, therefore, in order to escape the possibility of a conflict with the court, and the further possibility of liability as jailors by reason of an escape, should, from such data as are within their knowledge, form some sort of judgment as to the amount of space probably required by insane prisoners committed or likely to be committed under an order of court, and keep these places vacant so as to meet the demands of the courts having a right to commit such prisoners to their care. In other words, the trustees of the Pennsylvania Lunatic Hospital should so control the matter of space and accommodation as to make it always possible to comply with the probable demands upon them for the accommodation of prisoners committed by the courts. It is easier and safer to refuse to take a few applicants not judicially committed than to come in conflict with the orders of the court.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

STATE HOSPITAL FOR THE INSANE, SOUTH-EASTERN DISTRICT.

Where a stack belonging to a State Hospital is so far out of repair as to be useless for the purpose of the institution and of insufficient size to do the required work and forms an indispensable part of the economy of the buildings, the reconstruction of the stack can properly be considered as "maintenance," and a special act of the Legislature making an appropriation for the rebuilding of the stack is unnecessary.

Office of the Attorney General,
Harrisburg, Pa., September 17, 1903.

George M. Stiles, M. D., Chairman State Hospital for the Insane,
South-eastern District of Pennsylvania, Norristown, Pa.:

Sir: You state that a committee, appointed at the last meeting of the board of trustees of the State Hospital for the Insane, South-eastern District, desires to consult me upon the legality of the construction of a new stack in place of one now existing, which must be immediately repaired, and which is of insufficient size to do the required work, the question having been raised by the State Board of Charities whether this can be done by being charged to the maintenance fund, or whether it will require an appropriation by the Legislature. You state that the State Board of Charities fully recognizes the fact that something must be done immediately.

Assuming, upon the foregoing statement, that the present stack is so far out of repair as to be useless for the purposes of the institution, and, further, that it is of insufficient size to do the required work; and that it forms an indispensable part of the economy of the buildings, I am of opinion that its reconstruction can be properly considered as "maintenance." It would be but a narrow reading of that term to confine it simply to food, supplies or the mere ministering to the physical and mental wants of the inmates. Whatever, in the judgment of the trustees, is essential to the proper equipment of the buildings comes, in my judgment, fairly within the term "maintenance," quite as much so as the repair of a roof, or supplying of the necessary utensils in the kitchen, or the necessary plumbing and sanitary arrangements about the building. If it be impossible to conduct the hospital without a proper stack, and its present condition seriously interferes with the successful administration of the buildings, and a neglect to change its present condition would result in discomfort and suffering, I am quite clear that the trustees, acting upon their responsibility as managers, and exercising intelligent judgment as business men upon the situation, would be justified in considering this as a necessary expenditure for the maintenance of the institution, and in no sense as a new construction,

or as involving that particular kind of addition which would stand in need of a specific legislative appropriation.

I am of opinion, therefore, that it will be quite legal for the trustees to construct a new stack in place of the one existing, provided the facts be such as are indicated in this opinion.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

EIGHT HOUR LAW AT PENNSYLVANIA INDUSTRIAL REFORMATORY
—CONSTRUCTION OF ACT OF MAY 20, 1891 (P. L. 100).

The Pennsylvania Industrial Reformatory at Huntingdon falls within the provisions of the act of May 20, 1891 (P. L. 100) known as the eight hour law, and the employes are entitled to its benefits. The proviso to said act applies only to institutions where all the employes are residents, and this is not the case at the Pennsylvania Industrial Reformatory.

Office of the Attorney General,
Harrisburg, Pa., January 28, 1903.

Mr. T. B. Patton, General Superintendent Pennsylvania Industrial
Reformatory, Huntingdon, Pa.:

Sir: Upon the facts stated in your letter of the 27th instant, in reply to inquiries contained in mine of the 26th, I am of the opinion that your institution falls within the provisions of the act of May 20, 1891 (P. L. 100), known as "the eight hour law." The interpretation of the proviso, as given to it by this Department, is, in brief, that the proviso can apply only to institutions where all the employes are resident. Inasmuch as this is not the case in the Pennsylvania Industrial Reformatory, I am of the opinion, and so advise you, that this institution comes within the general provisions of the act and its employes are entitled to its benefits.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

EMPLOYMENT OF PRISON INMATES—STATE PRISONS—MANUFACTURE OF GOODS—ARTICLES USED BY INMATES—ACTS OF JUNE 18, 1897, AND APRIL 28, 1899.

Under the act of April 28, 1899, P. L. 122, amending the act of June 18, 1897, P. L. 170, the warden of a State prison, penitentiary or reformatory can employ 35 per centum of the inmates in the manufacture of the three classes of goods enumerated therein. No part of either of these acts has any application to the manufacture of goods to be used exclusively within the institution or for the maintenance of the inmates.

Office of the Attorney General,
Harrisburg, Pa., July 28, 1903.

Mr. William McC. Johnston, Warden Western Penitentiary of Pennsylvania, Allegheny, Pa.:

Sir: Your letter of recent date, to this Department, asking for an opinion upon the construction of the act approved June 18, 1897 (P. L. 170), limiting the number of inmates of state prisons, &c., which may be employed in the manufacture of various articles, received.

The language of the act in question is as follows:

“That the officers of the various county prisons, work-houses and reformatory institutions within the Commonwealth of Pennsylvania shall not employ more than five per centum of the whole number of inmates in said institutions in the manufacture of brooms and brushes and hollow-ware, or ten per centum in the manufacture of any other kinds of goods, wares, articles or other things that are manufactured elsewhere in the State, except mats and matting, in the manufacture of which twenty per centum of the whole number of inmates may be employed.”

Former Attorney General McCormick rendered an opinion on this question to the superintendent of the Huntingdon Reformatory on December 30, 1897, in which he very properly held that the language of the section being in the disjunctive, not more than “five per centum may be employed in the manufacture of brooms, brushes and hollow-ware, or ten per centum in the manufacture of any other kind of goods, wares, articles or things that are manufactured elsewhere in the State, except mats and matting, in the manufacture of which twenty per centum of the whole number of inmates may be employed.” The proper and logical conclusion reached by Attorney General McCormick was that, if an institution employed five per centum of the first class, or ten per centum of the second class, or twenty per centum in the manufacture of mats and matting, the limitation was reached, and that the employment of the inmates would therefore be either five, ten or twenty per centum of the whole

number, according to the class of work adopted by the management of the institution.

The Legislature of 1899, however, passed an act which was approved by the Governor and became a law on the 28th day of April, 1899 (P. L. 122), amending the first and second sections of the act of 1897, eliminating the word "or" and substituting, in lieu thereof, the word "and," which entirely changed the limitations imposed by the former act.

The evident intention of the Legislature as expressed in the act of 1899 was to allow the employment of a larger number of inmates than was permitted under the provisions of the former act, and this is manifest from the language of the first section as it now stands.

"That from and after the passage of this act no warden, superintendent or other officer of any State prison, penitentiary or State reformatory, having control of the employment of the inmates of said institutions, shall employ more than five per centum of the whole number of inmates of said institutions in the manufacture of brooms and brushes and hollow ware, and ten per centum in the manufacture of any other kind of goods, wares, articles or things that are manufactured elsewhere in the State, except mats and matting, in the manufacture of which twenty per centum of the whole number of inmates may be employed."

So that the limitation at present applies only to the number of inmates which may be employed in any one particular branch of industry, and I am of opinion, and advise you, that you may employ five per centum of the whole number of inmates in the manufacture of brooms, brushes and hollow-ware, and ten per centum in the manufacture of any other kind of goods, wares, articles or things that are manufactured elsewhere in the State, except mats and matting, in the manufacture of which twenty per centum of the whole number of inmates may be employed; in other words, you may employ thirty-five per centum of the inmates in the manufacture of the three classes of goods above enumerated. No part of either the act of 1897 or the subsequent amendment of 1899 has any application whatever to the manufacture of goods to be used exclusively within the institution or for the maintenance of its inmates.

Very respectfully,

FREDERIC W. FLEITZ,
Deputy Attorney General.

SUMMARY CONVICTIONS—ACT OF 1901 (P. L. 311).

The act of 1901 (P. L. 311) is constitutional, the title being sufficient to cover the body of the act.

An acquittal before a magistrate without a jury is no bar to a subsequent prosecution before another magistrate.

Office of the Attorney General,
Harrisburg, Pa., December 31, 1903.

Hon. John E. Fox, Harrisburg, Pa.:

Sir: In reply to your request for my opinion as to the prosecutions brought under the twenty-sixth section of the act of 1901 (P. L. 311), and asking me whether, in my judgment, the act is unconstitutional with respect to the second offense, as provided in section 26, page 311, because the title makes no reference nor in any way calls attention to it; second, whether the Commonwealth should take out an appeal from the decision of the justice of the peace of Middletown, as provided in cases of summary convictions (P. L. 1876, page 29); and, third, not having done so, whether the alderman has jurisdiction in the matter, I answer:

1. On examining the title to the act of 1901, and observing that a part of the title is stated in these words: "To protect the waters within the State from improper and wasteful fishing," and examining also section 26 of said act, I find that, while provisions as to fishing with explosives or poisons are not specifically mentioned in the title, nor yet the clause requiring anyone using explosives for engineering purposes to first obtain a permit therefor; yet, still, in my judgment, the words of the title "to protect the waters within the State from improper and wasteful fishing" are sufficient to put anyone who intends using dynamite in the streams, with its sure resultant of destruction to fish, upon notice that the same is illegal. The decisions of the courts are numerous to the effect that the different provisions of an act of Assembly need not be specifically mentioned in the title, but that general words, sufficient to give notice, will suffice. At all events, I think it the duty of the Commonwealth's officers to act upon the theory of the constitutionality of the act, and a strong argument can be made that the act is constitutional.

The second and third queries may be answered together. This Department has held that an acquittal before a magistrate without a jury is no bar to a subsequent prosecution before another magistrate. For this position ample authorities may be cited. The act of 1876 (P. L. 29), gives the right of appeal, but contains no language to the effect that an appeal must be taken, and no words which would prevent another prosecution before another magistrate. The Commonwealth, it is true, did not use its right of appeal from the

Middletown magistrate, but she should not thereby be barred from a second prosecution. The decisions are to the effect that a trial before a magistrate without a jury does not put a prisoner in jeopardy, and therefore the rule of "Once in jeopardy" will not operate. I am,

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

FOREIGN REQUISITIONS.

There is no extradition between Canada and the State of Pennsylvania, it is a matter of extradition between Canada and the United States, and the application must go through the State Department.

Office of the Attorney General,
Harrisburg, Pa., September 9, 1903.

William Maxwell, Towanda, Pa.

Sir: There can be no requisition between the Canadian government and the State of Pennsylvania. It must necessarily be a matter of extradition between the Canadian government and the United States and the application for the extradition would have to go through the State Department. If the positions are reversed and one escaping into Canada is to be extradited at the request of this State, the matter would have to go through the State Department at Washington.

I send you the rules of practice and forms agreed upon between the Governors of the States named upon the second page of the smaller sheet. You will find useful suggestions as to extradition in John Bassett Moore's work upon extradition, published in two volumes.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

FORESTRY RESERVATION.

Lands purchased by the State are for the purpose of protecting the water sheds and to guard against the diminution of the water supply of the State, and it is contrary to the purpose of the law to permit the water on State lands to be diverted from its regular channel.

Office of Attorney General,
Harrisburg, Pa., December 28, 1904.

James P. Herdic, Esq., Williamsport, Pa.:

Sir: Your letter of the 24th instant to this Department received. In it you ask to be advised how to proceed in order to get

permission to use the water in a certain small stream running through State lands. You also speak of certain correspondence you have had with Hon. Robert S. Conklin, Commissioner of Forestry.

In reply I desire to say that the purchase of these lands by the State was primarily for the purpose of protecting the water sheds and guarding against a diminution of the water supply of the State. It is contrary to the purpose of the law to permit the water on State lands to be diverted from its regular channel, and in no instance will this be permitted except to relieve a case of dire necessity.

Very truly yours,

FREDERIC W. FLEITZ,
Deputy Attorney General,

PRESIDENTIAL ELECTORS.

Eligibility means freedom from objection at the time of the service as well as at the time of the election. Bank officers, retiring from their positions in order to qualify themselves, as presidential electors, cannot be re-chosen as officers of the bank until after they have fully performed their service as Presidential Electors. They ought not to be re-elected as officers of their respective banks until after the Electoral College has met and until after the counting of the vote by the President of the Senate of the United States.

Office of Attorney General,
Harrisburg, Pa., September 15, 1904.

Hon. W. R. Andrews, Secretary State Republican Committee, 1417
Locust Street, Philadelphia:

Sir: I have your letter, informing me that several persons nominated at the Republican State Convention in Harrisburg in April last, as Presidential Electors, are ineligible for the reason that they are officers of national banks; that these gentlemen propose to resign from their positions as directors or presidents of national banks before the filing of the list of electors with the Secretary of the Commonwealth. You state also that it is quite important in two or three cases that the persons who sever their connections with the banks should be re-elected as directors or presidents, as the case may be, as soon as possible after the election in November, and you ask me whether these men elected as electors in November can immediately thereafter be re-elected as directors or presidents of national banks, or must they wait until after the meeting of the Electoral College in January.

I answer that eligibility means freedom from objection at the time of the performance of the service as well as at the time of the election. It would be idle to declare that the people could not elect a man to an office because of an existing disability, if, at the time of the performance of the service which he is called upon to perform, the disability actually exists. The important matter is, of

course, the service to be performed. The election is but preliminary. To vote for a man under a disability is forbidden, for the Constitution of the United States declares that no Senator or Representative or person holding an office of trust or profit under the United States shall be appointed an elector. Freedom from disability must mean that the elector should not subsequently to the election disable himself by accepting a forbidden position. Any other construction would nullify the plain provision of the Constitution of the United States and endanger the electoral vote of the State.

In my judgment, the bank officers, retiring from their positions in order to qualify themselves as Presidential Electors, cannot be rechosen as officers of the banks until after they have fully performed the service which they were elected to perform. Hence, I conclude that they ought not to be re-elected as officers of their respective banks until after the Electoral College has met and until after the counting of the vote in the presence of the Senate and House by the President of the Senate of the United States. I am,

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

The Attorney General of Pennsylvania is prohibited by Sec. 2, of Art. 12 of the Constitution of Pennsylvania from holding or exercising any office or appointment of trust or profit under the United States. Therefore, it is impossible for the Attorney General of Pennsylvania to accept an appointment from the Attorney General of the United States.

Harrisburg, Pa., October 26, 1904.

Hon. W. H. Moody, Attorney General of the United States, Department of Justice, Washington, D. C.:

Sir: I am in receipt of your letter of October 18th, and have given the matter careful consideration.

I highly appreciate the confidence implied in this request, but I am of opinion that my position as Attorney General of the Commonwealth of Pennsylvania makes it impossible for me to accept the duty. It is not reluctance to serve the United States. The objection rests upon a provision in the Constitution of Pennsylvania, which, in section 2 of article XII, declares that "No person holding or exercising any office or appointment of trust or profit under the United States shall at the same time hold or exercise any office in this State, to which a salary, fees or perquisites shall be attached."

The acceptance of your appointment would make it impossible for me at the same time to hold my place as Attorney General.

With sincere appreciation and with high personal regard, I am,

Very cordially yours,

HAMPTON L. CARSON,
Attorney General.

BOARD OF PUBLIC ACCOUNTS.

There is no law authorizing an appeal to be taken from the action of the Board of Public Accounts, and the Attorney General refuses to file with the prothonotary such an appeal.

Office of the Attorney General,
Harrisburg, Pa., October 28, 1904.

P. F. Rothermel, Esq., 804 Land Title Building, Philadelphia:

Sir: I have yours of the 22d instant relating to the appeal of Wanamaker & Brown from the action of the Board of Public Accounts. I am unaware of any statute authorizing such an appeal, and I am unaware, after a careful examination of the records of my office, of any practice by which such an appeal can be sustained.

The appeals to which the Auditor General refers in his letter to you under date of October 5th, when he states that it is the practice of his office to hand them to my Department for filing in the court of common pleas of Dauphin county are appeals from settlements made by the Auditor General and approved by the State Treasurer. Such appeals must be made within sixty days after notice of settlement and such notice must be given within thirty days after settlement against a debtor to the Commonwealth. The action of the Board of Public Accounts is governed by the act of 8th of April, 1869 (P. L. 19). If you can point me to any statute which allows an appeal from their action, I shall be glad to consider it. I know of none.

I have returned all the papers, including your specifications of objections filed with the Auditor General, November 19, 1902, and sent to me by him on the 1st of October, 1904, with the statement that I decline to file the paper in the Dauphin county court of common pleas, because I am unaware of any statute or practice which makes it my duty to do so.

I regret that I cannot oblige you in this matter, but I cannot satisfy myself of the existence of any authority for instituting a practice of appealing to the courts from an action of the Board of Public Accounts. That board has acted in the matter, and so far as I am advised, the action is final.

The papers are now where you placed them.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

EASTERN BUILDING AND LOAN SOCIETY.

Facts held not to warrant an application for a receiver.

Office of the Attorney General,
Harrisburg, Pa., May —, 1904.

In the matter of the Eastern Building and Loan Society.

The Banking Commissioner and myself have given due consideration to the petition of Thomas Butler asking for the appointment of a receiver, the answer thereto, the testimony taken, and the arguments of counsel thereon.

We have examined all the evidence submitted, and find that the allegation of insolvency is not sustained.

The allegations that the society was being conducted in violation of law in the matter of unusual expenses, salaries, rent of offices, together with the insurance features, resulting in deductions from profits due to the method adopted which is a departure from the system of the building association as originally known, and the substitution of what is known as the national plan, present questions which cannot be inquired into collaterally, as they affect the powers of the corporation and are not determinable upon an application for a receiver.

The allegations that the business of the corporation is in an unsafe and unsound condition and that the manner of conducting the same is injurious and contrary to the public interests under the facts as disclosed by the testimony, does not present a financial question pure and simple, but depends upon the legal aspects of the case and the nature of the powers sought to be exercised. The matter is so blended with the question of legality that under existing legislation and the absence of direct judicial decision, it would be improper to determine the questions collaterally, for if the acts complained of should be held to be legal, it cannot be concluded on the evidence submitted that the society was in an unsafe and unsound condition.

The opinions of Attorney General Elkin to the Commissioner of Banking under dates of July 19, 1899, and September 21, 1899, (Report of the Attorney General, 1899-1900, page 20,) and of the court in Commonwealth ex rel. Attorney General vs. Industrial Building and Loan Association of Pittsburg, 10 District Reports, 263, and Commonwealth ex rel. Attorney General vs. Penn Germania Building and Loan Association, 24th Pa. County Court Rep., 392, furnish a guide for the conduct of the business of associations of this character.

The application for a receiver is refused.

HAMPTON L. CARSON,
Attorney General.

ATTORNEY GENERAL'S OPINION.

The Attorney General gives opinions to the heads of the State Departments, but does not give them to individuals.

Office of the Attorney General,
Harrisburg, Pa., April 29, 1903.

Horatio C. Wood, M. D., Department of Medicine, University of
Pennsylvania, Philadelphia, Pa.:

Sir: I herewith enclose you a copy of the bill passed at the last session of the Legislature for the protection of frogs and terrapin, in accordance with your request.

It would give me much pleasure to answer your questions were it within the province of my Department to do so. I am sure, however, you will understand my declination when I tell you that I am counsel only for the heads of the various departments of the State government, and can give opinions only when requested by them. It is not the practice of this Department to give opinions to individuals. The matter should be referred to counsel of your own selection.

Very sincerely yours,

HAMPTON L. CARSON,
Attorney General.

NOTARY PUBLIC.

An assistant title and trust officer of Philadelphia may not serve as a notary public.

Office of the Attorney General,
Harrisburg, Pa., January 26, 1903.

Mr. William R. Bricker, Assistant Trust Officer, Hamilton Trust
Company, Philadelphia, Pa.:

Sir: In reply to your letter of the 24th inst., stating that you are the assistant title and trust officer of the Hamilton Trust Company of Philadelphia, and asking whether, as such an official, you would be qualified as a notary public of the Commonwealth of Pennsylvania, permit me to say, that this Department has twice ruled that no such commission can issue to one holding such an official position. The first opinion was given by Attorney General McCormick on the 27th of April, 1895 (Report of Attorney General for 1895-96, page 62). The second opinion was rendered by Attorney General Elkin on August 14, 1895 (same volume, page 97). I see no reason to depart from the ruling.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

MEDICAL COUNCIL.

It is not within the power of the Medical Council to adopt as its own measure and recommend officially any form of approved legislation. Its duties are those of supervision of examinations of State Boards and the issuing of licenses.

Office of the Attorney General,
Harrisburg, Pa., February 20, 1903.

Henry Beates, Jr., M. D., President Board of Medical Examiners,
Philadelphia, Pa.:

Sir: I have yours of the 19th inst., calling my attention to the fact that I am a member of the Medical Council of Pennsylvania, and asking me to be present at a meeting of the council to be called by the president, Doctor Schaeffer, on Tuesday next, for the purpose of adopting as its own measure and recommending the passage of the bill containing amendments to the present act relating to the matter of medical registration and examination. You suggest a meeting by Tuesday next at noon.

I have two cases fixed for hearing on that day and would be unable to attend. I could attend a meeting on Wednesday before twelve o'clock, or on Thursday at any hour. I ought, however, to say that, in my judgment, it is not within the power of the Medical Council to adopt as its own measure and recommend officially any form of approved legislation. The powers of the Board are distinctly stated in section 5 of the act of 18th May, 1893. Its duties are those of supervision of examinations of State Boards, and the issuing of licenses, and in terms it is provided that the Medical Council shall have no power, duty or function except such powers, duties and functions as pertain to the supervision of the examinations of applicants for licenses to practice medicine and surgery, and to the issuing of licenses to such applicants as have successfully passed the examination of one of the State Boards of Medical Examiners, or have presented satisfactory or properly certified copies of licenses from Boards of Medical Examiners or Boards of Health of other States, as provided in section 13 of the act. The members of the council individually can assist in framing such legislation as approves itself to the judgment of the individual, but it cannot as a council act on the suggestion that it should adopt and officially recommend the proposed amendments.

Apart from the distinct provision of the law which I have quoted and which, in my judgment, makes it inadvisable for the council to attempt to do an act which it has no legal authority to do, the thought arises of the impropriety of my taking any part in the formulating or the pressing to a final vote of legislation which may subsequently come before me for an official opinion. There are con-

stitutional questions involved in this legislation which it may be my duty at some future time to consider, and I do not care to place myself in any position which would occasion a confusion of duty by a misunderstanding of my position.

I am,

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

OPINIONS OF ATTORNEY GENERAL.

The Attorney General is the official adviser of the heads of the State Departments, but cannot answer requests for opinions from outside sources, which should be referred to private counsel.

Office of the Attorney General,
Harrisburg, Pa., April 16, 1903.

H. S. Hossler, Esq., Manager Benton Cigar Company, Reading, Pa.:

Sir: I am in receipt of your letter of the 15th inst., stating that the house you represent is a wholesale and retail dealer in cigars and tobacco, and requesting my opinion as to the recent act forbidding the sale of cigarettes to persons under the act of twenty-one years.

It would give me pleasure to answer your inquiry were it within the scope of the duties of my Department. You have written me, no doubt, under a misapprehension as to their nature. The Attorney General is the legal adviser of the Governor, heads of Departments, of the various State Boards, heads of State institutions, mine inspectors and other State officials, and when requested, furnishes orally and in writing formal opinions on questions arising in the administration of the State government. He is not required, however, officially to give opinions upon questions such as you submit, and the matter should be referred to your own private counsel.

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

MANDAMUS.

Proceedings in mandamus against all local officers should be at the relation of the district attorney, and not the Attorney General.

Office of the Attorney General,
Harrisburg, Pa., April 1, 1903.

Col. Francis C. Hooton, West Chester, Pa.:

Sir: The petition which you filed in this Department recently, asking that the Attorney General permit the use of the name of the

Commonwealth as relator in the proceeding in the court of common pleas of Chester county, and asking said court to issue an alternative mandamus to compel certain officials of the borough of West Chester to perform the duties imposed upon them by law, has been referred to me.

In reply I desire to state that the construction placed by this Department upon the act of June 6, 1893 (P. L. 345), is that proceedings in mandamus against all local officers shall be on the relation of the district attorney. I therefore herewith return your petition in order that you may present the same to the district attorney of your county.

Very truly yours,

FREDERIC W. FLEITZ,

Deputy Attorney General.

COMMISSIONER OF DEEDS.

In Pennsylvania women have never held office unless specially allowed by constitutional or legislative enactment. There is no such authority for the appointment of a woman as Commissioner of Deeds.

Office of the Attorney General,
Harrisburg, Pa., February 20, 1903.

Joseph DeF. Junkin, Esq., Real Estate Trust Building, Philadelphia, Pa.:

Sir: I have examined into the question involved in the proposed appointment of Miss Lydia M. Fox as Commissioner of Pennsylvania in the District of Columbia, and I can find no present legal authority which would authorize the appointment. In 1887, Judge Kirkpatrick, then the Attorney General, gave a most elaborate opinion to Governor Beaver to the effect that the eligibility of a woman to the office of notary public is not so clear, in the absence of a statute authorizing it, as to warrant the Governor in appointing her to such office. (Report of the Attorney General, 1887, pages 7-13.) The opinion is remarkable for the careful and precise examination made into the common law, and is abundantly sustained by the authorities therein stated. The common law disqualified women from holding public office by reason of their sex. In Pennsylvania women have never held public office unless specially allowed by constitutional or legislative enactment. The constitutional provision is found in section 3, article X, which made women eligible as school officers. The act of 14th April, 1893 (P. L. 16) made women eligible to the office of notary public. It must be ob-

served that both of these provisions are enabling provisions. I can find no enabling act for women as commissioners of deeds. In as-much as the office entails duties of a peculiar nature, semi-judicial in character, and would relate to matters possibly affecting title, it has been deemed proper to avoid the complications, doubts and questions which might arise from the performance of an act, the legality of which was doubtful; hence the Executive Department has hitherto refused to commission women as commissioners of deeds. It will require an enabling act to authorize the appointment of Miss Fox or others in her position.

Whether the Legislature would pass such an act or not it is perhaps beyond my province to say. I can see no constitutional objection to their doing so, providing they see fit, as a matter of legislative discretion, to pass such an act. My examination of the matter convinces me that in Massachusetts, and several of the other States, the same view is taken as to the common law. In Colorado it required an enabling act, and, so far as New York is concerned, the conclusion in favor of the eligibility of women to the office of notary public was based upon the assumption that the performance of the duties of a notary public is ministerial and not judicial. I may say that my examination of the Pennsylvania authorities has led me to the opposite conclusion. But, however that may be, it is clear that in Pennsylvania the appointment of women as notaries public is fully authorized by act of Assembly. Inasmuch as the terms of this act do not extend to commissioners, I am of opinion that Miss Fox cannot be appointed as commissioner for the District of Columbia.

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

STATE BRIDGE.

The act of 24th of April, 1903, repeals the act of the 3d of June, 1895, so far as the casualty by fire is concerned, and any bridge destroyed by fire after the going into effect of the act of 1903, cannot be rebuilt by the State.

Office of the Attorney General,
Harrisburg, Pa., June 18, 1903.

Hon. John M. Reynolds, Bedford, Pa.:

Sir: I have examined the petition which you propose to file in the names of Samuel F. Baker et al., commissioners of the county of Bedford, for the rebuilding of the bridge destroyed by fire on the night of December 4, 1902, and have also examined the act of 24th of April, 1903. I am of opinion that the act of the 3d

of June, 1895, so far as the casualty by fire is concerned, was repealed by the later act, and that if you present this petition it would be my duty to appear in the Dauphin county court and object on behalf of the Commonwealth.

The later act repeals by implication the act of 3d of June, 1895, by excluding in the enumeration of causes of destruction "destruction by fire," and limits the jurisdiction of the Dauphin county court to cases of destruction by flood or wind storms.

I am,

Very sincerely yours,

HAMPTON L. CARSON,
Attorney General.

MASTER WARDEN PORT OF PHILADELPHIA.

The Master Warden of the Port of Philadelphia has no authority of law for removing from the Delaware river at the expense of the State a sunken vessel.

Office of Attorney General,
Harrisburg, Pa., June 23, 1903.

W. R. Tucker, Esq., Master Warden, Philadelphia, Pa.:

Sir: I have carefully examined the papers submitted in relation to the Bermuda, which sunk on August 15, 1900, in the dock on the south side, Pier 19 North, Delaware river.

It is unnecessary to recapitulate the facts, as they are already known to you. I can see no ground upon which you would be justified in taking action in behalf of the State, and I know of no fund out of which the expenses of the removal of this wreck could be defrayed. I agree entirely with the view expressed by my predecessor in advising caution upon your part in proceeding under the law, and with his warning that the State Government had not provided by an appropriation any amount to carry into effect the provisions of the act of 1859, under which, if at all, you would have to contract for the removal of the vessel.

I am,

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

REGISTRATION OF MEDICAL PRACTITIONERS.

A single registration under the act of 1893 by a medical practitioner carries with it the privilege of practicing anywhere in the State—it is not necessary for the registration to be duplicated in each county.

Office of Attorney General,
Harrisburg, Pa., June 23, 1903.

Mr. Frank Hall, Clerk to Medical Council:

Sir: In reply to your letter of June 19, stating that there is some uncertainty as to the legal requirements regarding registration of medical practitioners in Pennsylvania, and asking, in behalf of Major Isaac B. Brown, Secretary of the Medical Council, for an opinion in regard to the matter, I am of opinion, reading sections 13, 14 and 15 of the act of 18th of May, 1893 (P. L. 99 and 100), that a single registration, under the act of 1893, carries with it the privilege of practicing anywhere in the State, and that it is not necessary for the registration to be duplicated in each county.

Very truly yours,

HAMPTON L. CARSON,
Attorney General

FISH.

It is lawful from sunset to sunrise only to catch eels, catfish, carp, and suckers, in waters not inhabited by brook trout, by lay outlines, provided each outline shall have a tag attached with the name of the owner thereon; and in waters inhabited by trout it is lawful to use single lines having one hook only to each line for the capture of eels, catfish, carp and suckers.

It is unlawful to plant German carp in any of the waters of the Commonwealth, though the Fish Commissioner may use carp as food for other fish.

Office of Attorney General,
Harrisburg, Pa., July 23, 1903.

Mr. George W. Hayman, Wyalusing, Pa.:

Sir: In relation to your letter of the 20th inst. let me call your attention to the fact that the act of the 29th of May, 1901, declares that it shall be lawful from sunset to sunrise only to catch eels, catfish, carp and suckers, in waters of the Commonwealth not inhabited by brook trout, by means of what are known as lay outlines, provided that each such outline shall have attached thereto a tag with the name and address of the owner clearly marked thereon; and in waters inhabited by trout it shall be lawful to use single lines having one hook only to each line for the capture of eels, catfish, carp and suckers.

A later section of the same act provides that it shall be unlawful to plant or deposit in any water of this Commonwealth any of the

fish commonly known as German carp, provided that nothing shall prohibit the Fish Commissioners from using carp as food for other fish in the breeding ponds or State hatcheries.

I have sent your letter to Commissioner Meehan.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

STATE BOARD OF UNDERTAKERS.

The State Board of Undertakers may require an applicant for an examination to comply with the provisions of the act of 7th of June, 1895, and further may adopt rules outside of the language of the act of Assembly, which rules may under special circumstances be waived.

It cannot be required of one coming from another State who is a stranger to the county in which he desires to do business, to produce a voucher by two licensed undertakers supporting his application for examination. The voucher of two licensed embalmers from the State from which applicant comes, provided the voucher is genuine and the persons vouching respectable, should be sufficient.

Office of Attorney General,
Harrisburg, Pa., July 23, 1903.

In re application for a license of Joseph A. McGovern, of Horellsville, N. Y.

Mr. Charles L. Dykes, Secretary State Board of Undertakers, 4208
Ridge Avenue, Philadelphia, Pa.:

Sir: I do not perceive, in the sixth section of the act of 7th of June, 1895, any requirement that an applicant for an examination must be vouched for by two licensed undertakers in the city or county in which he resides. The section in question requires the Board to find upon due examination that the applicant or applicants are of good moral character, possessed of skill and knowledge of the said business of undertaking, and have a reasonable knowledge of sanitation, preservation of the dead, disinfecting the bodies of deceased persons, the apartments, clothing and bedding in cases of death from infectious or contagious diseases. If the Board be satisfied of the possession by the applicant of these qualifications, the applicant is entitled to a license, which license may be revoked for cause after a full hearing. Whatever rule the Board, in its discretion, may have seen fit to adopt outside of the language of the act of Assembly, it may, under special circumstances, be suspended or waived, and I do not perceive that it can be required of one coming from another State, and who is a stranger to the county in which he desires to do business, to produce a voucher by two licensed undertakers supporting his application for examination. In my judg-

ment, you can, in your discretion, accept the voucher of two licensed embalmers of the State of New York, provided you are satisfied of the genuineness of the voucher and the respectability of those vouching.

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

QUO WARRANTO.

In quo warranto proceedings involving local issues, it is not the practice for the Attorney General to proceed, but the writ should be issued at the relation of the district attorney.

Office of the Attorney General,
Harrisburg, Pa., September 2, 1903.

William A. McConnell, Esq., Beaver, Pa.:

Sir: Your letter of recent date to the Attorney General, relative to the use of the name of the Commonwealth in a proceeding by quo warranto against the Sharon Independent School District, received.

It is not the practice of this Department at present to allow the use of the name of the Attorney General in local proceedings, and under the law it is not necessary, as the district attorney can act as relator for the Commonwealth, and it prevents a multiplicity of actions on the records of this Department. Of course, in matters in which the district attorney may arbitrarily refuse to act on his personal concern, the Attorney General will intervene.

Very truly yours,
FREDERIC W. FLEITZ,
Deputy Attorney General.

COUNTY SOLICITOR.

Work done by a county solicitor in his official capacity cannot be paid for out of the State tax in the hands of the county treasurer.

Office of the Attorney General,
Harrisburg, Pa., September 10, 1903.

Hon. Charles A. Snyder, Pottsville, Pa.:

Sir: I have carefully considered your letter of July 28. I am of opinion that the Auditor General would not be justified in issuing an order to the treasurer of Schuylkill county to pay you

the sum of \$2,250 out of the State tax in his hands, in satisfaction of your claim, which is presented as county solicitor of Schuylkill county. The work was done by you in your official capacity as county solicitor; work which involved the ascertainment of the whereabouts of personal property which had been escaping taxation. The county commissioners and the county treasurers of the several counties act as the fiscal agents of the Commonwealth in this matter, and the county solicitors, being their paid attorneys, have no standing in my judgment for additional compensation for work done in the line of their official duties.

Very truly yours,

HAMPTON L. CARSON,
Attorney General.

ALIENS—THE NATURALIZATION OF ALIENS IS GOVERNED BY ACT OF CONGRESS.

The laws of Pennsylvania provide that the certificates of naturalization shall be printed on parchment, and it shall be unlawful for any officer or any member of any committee or organization of any political party, or any candidate for office nominated by any political party, or by nomination papers, etc., to pay for the fees and expenses incurred by any alien in becoming naturalized.

Office of the Attorney General,
Harrisburg, Pa., September 2, 1904.

Hon. Alvey A. Adee, Department of State, Washington, D. C.:

Sir: Your letter of August 26 has been referred by Governor Pennypacker to me for answer.

The naturalization of aliens is governed by act of Congress and there are in this State sixty-two courts of common pleas, which, under that act have jurisdiction to naturalize; not to mention the circuit and district courts of the United States, with which you are familiar.

The laws of Pennsylvania provide that the certificates of naturalization shall be printed on parchment, and it shall be unlawful for any officer or any member of any committee or organization of any political party, or any candidate for office nominated by any political party, or by nomination papers, or for any person in behalf of said committee, organization or candidates, to pay or furnish the money to pay, or in any way become responsible for the payment of the fees and expenses directly or indirectly incurred by an alien in attending upon any court for the purpose of obtaining his naturalization papers.

This comprises the legislation of Pennsylvania upon this subject.

Yours very truly,
HAMPTON L. CARSON,
Attorney General.

BOARD OF HEALTH, ALTOONA, PA.

The Attorney General does not render opinions in response to inquiries which involve no question of State Government.

The enforcement of the act of 18th of June, 1895, P. L. 203, involves criminal proceedings, and should be referred to the district attorney.

Office of the Attorney General,
Harrisburg, Pa., October 8, 1903.

Mr. J. S. James, Member of the Board of Health, Third District, Altoona, Pa.:

Sir: I would be happy to oblige you with an expression of my opinion in reply to your letter of Oct. 6th, were the matter within my province. There is, however, no question of State Government involved. The Board of Health in your district is the creature of municipal authority, and is regulated by the provisions of the act of the 23d of May, A. D. 1889 (P. L. 306).

The question you submit should be referred to the city solicitor.

The enforcement of the act of 18th of June, 1895 (P. L. 203), involves criminal proceedings, and should be referred to the district attorney.

Very truly yours,
HAMPTON L. CARSON,
Attorney General.

APPENDIX I.

Cherry Hill Township Water Company

vs.

Samuel W. Pennypacker, Governor et al.

BRIEF IN BEHALF OF THE COMMONWEALTH AGAINST
THE RIGHT OF THE COURT TO ISSUE AN INJUNCTION
AGAINST THE GOVERNOR, SECRETARY OF THE COMMON-
WEALTH AND THE RECORDER OF DEEDS OF INDIANA
COUNTY, PENNSYLVANIA.

A.

EFFECT OF THE DEMURRER.

The demurrer does not admit conclusions of law. There is no allegation in the petitions filed that the charters of the complainants in terms confer exclusive privileges. On the contrary, it is distinctly stated that the complainants were organized and exist under and by virtue of the corporation act of 1874 (P. L., 73), and the supplements and amendments thereto, letters-patent having been issued to them upon the 10th day of February, 1903, creating them bodies corporate, in deed and in law, to exist perpetually for the purpose of "supplying water to the public" in various townships in Indiana county, Pennsylvania.

It is further shown that the corporation act of 1874 and its supplements and amendments, particularly clause 3 of section 34 of said act, confer upon the complainants the exclusive right to supply water to the public within the districts or localities covered by their charters. This is a matter of construction and results in a conclusion of law. The demurrer does not admit this conclusion.

It is stated in Daniell's Chancery Practice, Fifth Edition, Vol. 1,* 546, that "although a demurrer confesses the matters stated in the bill to be true, such confession is confined to those matters which are well pleaded; i. e., matters of fact. It does not, therefore, admit any matters of law which are suggested in the bill, or inferred from the facts stated; for, strictly speaking, arguments, or inferences, or matters of law, ought not to be stated in pleadings, although there is sometimes occasion to make mention of them for the convenience or intelligibility of the matter of fact." Ford v. Peering, 1 Vesey, Jr., 72, 78; Commercial Bank v. Buckner, 20 Howard (U. S.), 108; Lea v. Robeson, 12 Gray, 280. Averments as to the meaning of the contract set out by the bill, or exhibited with it, are not admitted by

demurrer. *Dillon v. Barnard*, 21 Wall., 430; *Bonnell v. Griswold*, 68 N. Y., 294.

The rule as to the effect of a demurrer as to the matters which are admitted thereby to be true is well stated in a recent decision of the court of appeals for the District of Columbia in the case of *Maese v. Herrman*, 17 Appeals D. C., 52, 59, where it is said:

"It is a well-settled principle in the law of demurrer that, while the demurrer admits as true, for the purposes of the decision invoked by it, all facts well and sufficiently pleaded, yet it does not admit as true mere matters of law which the pleader may think proper to state in his pleadings, nor the conclusions drawn from the facts stated therein. That is for the court exclusively. Nor does the demurrer in any manner admit the correctness of an allegation as to the construction of a statute, or of a grant or other document, or official act that may be insisted upon by the pleader as the foundation of his claim and title, or that may be set up in opposition thereto. That is matter of law for determination by the court. These propositions are too clear to require citations of authority for their support."

An examination of the petitions discloses a contention on the part of the complainants that the privileges conferred by their charters are exclusive. This contention is, and can be, but an attempted construction of the act of 1874 and its supplements. The purposes for which charters can be granted are stated in acts of Assembly, and it requires a comparison of the acts to ascertain whether or not the construction contended for is sound. The very fact that the demurrers admit that the Governor intends to grant the charters sought to be restrained is sufficient to negative the idea that it is admitted that the charters of complainants confer exclusive privileges, for no presumption can be drawn that the Governor contemplates the perpetration of an illegal act, or that it is his purpose, by granting the charters applied for, to destroy the powers previously bestowed upon the complainants under their charters.

B.

GENERAL PRINCIPLES INVOLVED.

1. Proceedings by mandamus and injunction are similar in character and effect.
2. The real nature of proceedings by mandamus.

1. Proceedings by mandamus and injunction are similar in character and effect.

It is well at the outset to have distinctly in mind certain general

principles which can be appealed to as a test and standard by which to measure the merit of the various points involved in the discussion. This is an application to continue the preliminary injunctions granted against the Governor, the Secretary of the Commonwealth and the recorder of deeds of Indiana county, to restrain them from the performance of official acts, the approval of certain applications for charters, and the subsequent formal allowance of them and the recording of the evidence of such action.

The case has been presented by the counsel for the complainants upon principles relating to mandamus. With this we have no quarrel, for, as was said by Mr. Justice Miller in the case of *Gaines v. Thompson*, 7 Wallace, U. S., 352, in likening mandamus to injunction with respect to the propriety of its issuance against an executive officer:

“In the one case the officer is required to abandon his right to exercise his personal judgment, and to substitute that of the court, by performing the act as it commands. In the other he is forbidden to do the act which his judgment and discretion tell him should be done. There can be no difference in the principle which forbids interference with the duties of these officers, whether it be by writ of mandamus or injunction.”

The same view was entertained in the case of the State of Mississippi v. Johnson, 4 Wallace (U. S.), 475, which was an writ of injunction and the exercise of its original jurisdiction. There the court said that it was unable to perceive that the fact that the relief asked was by injunction took the case out of the general principles which forbid judicial interference with the exercise of executive discretion.

To the same effect is the language of Judge Caldwell in the case of *Bates v. Taylor*, 87 Tenn., 326:

“If the Governor cannot be compelled by mandamus to deliver a certificate of election to one person, it follows that he cannot be restrained by injunction from delivering it to another person, for the nature of the act to be performed by him is precisely the same in one case as in the other, and the same considerations operate to defeat the jurisdiction of the courts in both instances.”

2. The real nature of proceedings by mandamus.

It is also well to bear in mind the real nature of proceedings by mandamus. Originally, mandamus involved the exercise of the royal prerogative. The writ was employed by the King through the medium of the King's own court (the Court of the King's Bench) in superintendence of the police in maintaining public peace and order. It was substantially a command, in the name of the sover-

eign power, directed to persons, corporations or inferior courts of judicature within its jurisdiction, requiring them to do a certain specific act as being the legal duty of their office, character or situation. It was termed a prerogative writ in distinction from a writ of right issuing exclusively from and granted at the discretion of the Court of King's Bench. *Audley v. Joyce*, Popham, 176; *Rex v. Commissioners of Excise*, 2 Term Reps., 385; *Spelling on Extraordinary Relief*, Section 1362. Anciently the court of chancery exercised the power of issuing writs of mandamus to inferior courts, though not to the King's Bench. *Rioters' Case*, 1 Vernon, 175; 3 Blackstone's Commentaries. *110; *Anderson's Dictionary of Law*, title "Mandamus," cases cited in note.

In Bouvier's Law Dictionary, title "Mandamus," on the authority of Blackstone, and of 4 Bacon's Abridgement, 495, the writ of mandamus is defined as follows:

"This is a high prerogative writ, usually issuing out of the highest court of general jurisdiction in a State, in the name of the sovereignty, directed to any natural person, corporation or inferior court of judicature within its jurisdiction, requiring them to do some particular thing therein specified, and which appertains to their office or duty."

It is through inattention to the real nature of the writ of mandamus that confusion has arisen in some of the states of the Union, in applying the writ to cases to which it is not properly applicable. It is clear that the reason why the writ was never addressed by the court of chancery to the Court of King's Bench was because, in contemplation of law, the King was presumed to sit personally in the Court of King's Bench, and the writ, while issuing in his name, was never addressed to himself. The remedy of the subject, by way of petition to the King, must not, in any manner, be confounded with this statement. The King never commanded himself. The writ was never addressed to the sovereign, but always to the subject. The Governor is not a subject; he is the Supreme Executive, and as such embodies the power of the people.

MAIN POINTS.

I. DISCRETION CANNOT BE COERCED OR RESTRAINED.

A. The granting of charters a legislative act.

B. The Governor's participation in the granting of charters a part of a legislative act.

B1. On theory, as a component part of the Legislature.

- B2. Historically in Pennsylvania.
- B3. By interpretation of the act itself.
- B4. Not an unconstitutional delegation of authority.

II. THE GOVERNOR NOT SUBJECT TO MANDAMUS OR INJUNCTION.

- A. On authority.
- B. *Marbury v. Madison*.
- C. Because an independent and co-ordinate department of Government.
- D. By statute in Pennsylvania.

III. BECAUSE OF THE FUTILITY OF THE PROCEEDINGS.

I.

DISCRETION CANNOT BE COERCED OR RESTRAINED.

It is conceded by counsel for the complainants that mandamus or injunction will not lie against any officer to coerce or restrain duties which are political in their nature or which involve an element of discretion. The contention here made is that the duty of the Governor, in connection with the granting of charters, is a purely ministerial duty. The conflict which exists between the cases is due to the lack of discrimination on the part of some courts between writs addressed to a Governor and writs addressed to an executive officer of a lower grade. The substance of the matter is best summed up by Spelling in his work on "Injunction and Other Extraordinary Remedies," Volume II, Section 1452, Chapter XLIV, 2d Edition:

"No little conflict exists as to the power of the judiciary to control the chief executive officer of a State by mandamus. In no State has the claim of jurisdiction extended beyond an application of general principles to governors, with the usual discrimination between discretionary and ministerial duties; and in the majority of the States the jurisdiction, even with respect to the latter, is denied altogether. In those States where, with respect to purely ministerial duties, the power is asserted, the argument proceeds upon the ground that the mere fact that the duties are due by the chief executive should not deter the courts from compelling their performance in a proper case. The opposing argument is based upon the principle that under our forms of State government, separating all powers into three distinct branches—legislative, executive and judicial—each should be kept free from interference by either of the others, and that the executive department, as

regards the duties imposed upon it by law, is entirely independent of control in any degree whatever by the judiciary. While, as before stated, the views of courts in the various States radically differ, the doctrine denying the right of interference, even with respect to duties usually considered as ministerial, is supported by the clear weight of authority."

An examination of the decisions of the various States discloses the ruling that in Alabama, California, Colorado, Minnesota, Kansas, Maryland, Montana, Nevada, North Carolina and Ohio mandamus may lie against the Governor to compel the performance of duties not of a political nature and in which there is no element of discretion. In Arizona, Arkansas, Florida, Georgia, Indiana, Illinois, Louisiana, Maine, Michigan, Minnesota, Mississippi, Oregon, New York, New Jersey, Rhode Island and Tennessee it has been held that mandamus will not lie against the Governor, whether the duties are ministerial or are such as are known as executive.

A. The grant of charters is a legislative act.

It is stated as fundamental law in all of the text-books, notably Thompson on Corporations, Morawetz on Corporations, Clark on Corporations and Cook on Stockholders, as well as Angell & Ames, that the power to grant charters rests with the legislative authority in the United States and various states of the Union. This may be conceded as a general principle, but it is also fundamental that

B. The Governor's participation in the granting of charters is a part of a legislative act.

This is

B1. On theory, because the Governor is a component part of the Legislature,
and

B2. Because historically in Pennsylvania the Governor has always participated, in one form or another, in the act of granting charters.

B. A charter is a grant of sovereignty. It constitutes a contract between the State and the incorporators, and creates rights which are protected by the Constitution of the United States forbidding states to pass any laws impairing the obligation of contracts—a principle which was enforced and expounded in the celebrated Dartmouth College case. It follows that before it can be asserted that the State has parted with her sovereignty to the extent of conferring specific franchises upon corporators, her assent must be manifested by some public act, and, prior to the general corporation law of April 29, 1874, this was done in the vast majority of instances so far as corporations of the second class were concerned by special acts of Assembly. All of those acts were "approved" by the Governor.

B2. Historically in Pennsylvania it will be found, from a rapid

review of the various sources from which authority to confer charters was derived, that the Governor participated therein. By the charter for the province of Pennsylvania of 1681 ("Charters and Constitutions," Part II, compiled by Ben. Perley Poore, page 1510), absolute power was conferred upon Penn and his heirs, and his and their deputies and lieutenants "for the good and happy government of the said countrey, to ordeyne, make and enact, and under his and their Seales to publish any Laws whatsoever, for the raising of money for the publick use of the said Province, or for any other End, apperteyning either unto the publick State, peace, or safety of the said Countrey, or unto the private utility of perticular persons, according unto their best discretions, by and with the advice, assent, and approbation of the Freemen of the said Countrey, or the greater parte of them, or of their Delegates or Deputies, whom for the Enacting of the said Lawes, when, and as often as need shall require, Wee will that the said William Penn and his heires, shall assemble in such sort and forme, as to him and them shall seeme best, and the same Lawes duly to execute, unto and upon all People within the said Countrey and the Limitts thereof."

We find that in the frame of government of Pennsylvania of 1682 (same authority, page 1522, Section 15), "That the laws so prepared and proposed, as aforesaid, that are assented to by the General Assembly, shall be enrolled as laws of the Province, with this stile: By the Governor, with the assent and approbation of the freemen in provincial Council and General Assembly."

The style was observed in the frame of government of Pennsylvania of 1683. (Same authority, page 1529, Section 14). "By the Governor, with the assent and approbation of the freemen in provincial Council and Assembly met."

In the frame of government of Pennsylvania of 1696 the style was: "By the Governor, and with the assent and approbation of the freemen in General Assembly met." (Same authority, page 1535.)

In the charter of privileges for Pennsylvania of 1701, section 4, the style observed was: "By the Governor, with the Consent and Approbation of the Freemen in General Assembly met." (Same authority, p. 1538.)

Such was the style observed up to the time of the revolution, indicating that the Governor constituted a component part of the Legislature. Under the so-called Constitution of Pennsylvania of 1776, which was framed by a convention called in accordance with the express wish of the Continental Congress, which assembled at Philadelphia on July 15, 1776, and completed its labors on September 28, 1776, but which instrument was not submitted to the people for ratification, the plan or form of government vested the legislative power in a House of Representatives of the freemen of

the Commonwealth or State of Pennsylvania, and the supreme executive power in a president and council. (Same authority, page 1542.)

By section nine of the plan or form of government, the power was distinctly vested in the General Assembly of the representatives of the freemen of Pennsylvania to grant charters of incorporation (same authority, page 1543), and the style of the laws as enacted was as follows:

“Be it enacted, and it is hereby enacted by the representatives of the freemen of the Commonwealth of Pennsylvania in General Assembly met, and by the authority of the same.”

(Same authority, page 1544, Section 16.)

It was further provided that the General Assembly should affix their seal to every bill as soon as it was enacted into a law, which seal should be kept by the Assembly, to be called “The seal of the laws of Pennsylvania.”

This constitution of 1776, never having been adopted by the people and being defective in the lack of proper executive authority, was superseded and set aside by the Constitution of Pennsylvania of 1790. This Constitution was submitted to popular vote, and, in article I, relating to the legislative power, and vesting such power in a General Assembly consisting of a Senate and House of Representatives, by section 22 it was expressly provided:

“Every bill, which shall have passed both houses, shall be presented to the Governor. If he approve, he shall sign it; but if he shall not approve, he shall return it, with his objections, to the house in which it shall have originated, who shall enter the objections at large upon their journals and proceed to reconsider it * * *”

(Same authority, page 1550.)

Substantially, and in almost identical terms, the Constitution of 1838 provided in like manner, by section 23 of article I (same authority, page 1559); and the Constitution of 1873, which is now in force, repeated the same provisions, but transferred the same from the article upon legislative power to article IV, section 15, relating to the Executive.

Up to the time of the adoption of the Constitution of 1873 charters for corporations of the second class, as now known, were granted by special acts of Assembly, in which the Governor participated by affixing his formal approval to the act. Charters for corporations of the first class, or literary, charitable or religious associations, were incorporated under the act of 6th of April, 1791, by the Supreme Court in the manner therein indicated, the preamble reciting that a great portion of the time of the Legislature had been there-

tofore employed in enacting laws to incorporate private associations, and it was more advantageous to the public, as well as convenient to individuals, that the same might be lawfully effected without an immediate application in all cases to the General Assembly of the Commonwealth. This act was approved by the Governor, and the same may be said of the act relating to mutual savings fund, loan and building associations and the act relating to manufacturing companies of April 7, 1849, and 20th of April, 1853, all of which acts were approved by the Governor. In other words, whether the incorporation was by special act or by a general law, the approval of the Governor was affixed to the special act as well as to the general law, and in the latter case the source of authority to be and exercise the functions of a corporation was derived from a legislative act, participated in by the Governor. The matter of granting charters by general law became universal, except in the case of corporations of the first class, after the adoption of the Constitution of 1873, because of the special constitutional prohibition contained in section 7 of article III, relating to legislation prohibiting the passage of any local or special law creating corporations or amending, renewing or extending the charters thereof. Hence the origin and necessity for the corporation act of April 29, 1874 (P. L. 73).

B3. By interpretation of the act itself.

By practice under the act of 1874 the Governor's participation has been interpreted to be an act of discretion. It is provided by the general corporation act of April 29, 1874, that the application for a charter shall be produced to the Governor, who "shall examine the same, and if he finds it to be in proper form and within the purposes named in the second class, specified in the foregoing section, he shall approve thereof and endorse his approval thereon, and direct letters patent to issue in the usual form, incorporating the subscribers and their associates and successors into a body politic and corporate, in deed and in law, by the name chosen; and the said certificate shall be recorded in the office of the Secretary of the Commonwealth in a book to be kept by him for that purpose."

It is observable that the word "approve" is the same as that occurring in all of the constitutional provisions relating to the passage of a law, and exactly describes the Governor's function in participating in an act of legislation. It is manifest that the provision that the Governor shall examine the certificate and ascertain whether or not it is within the purposes allowed by law, requires the exercise of those faculties which lead to a nice and accurate judgment upon questions of law, involving the comparison of acts of Assembly, supplements and amendments, as well as the reconciling of apparently conflicting provisions, or the rejection of such

as have been repealed either expressly or by implication. This is certainly not a ministerial duty. It is one involving trained discretion, and by no means meets the definition of a ministerial power given by Mr. Chief Justice Chase in the case of *Mississippi v. Johnson*, 4 Wallace, 475, where he defined a ministerial duty as follows:

“A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under circumstances admitted or proved to exist and imposed by law.”

That something more than a mere ministerial duty was required of him is apparent from the language used by the present Governor of the Commonwealth in the case entitled *In re Application for a Charter of the Donora Light, Heat and Power Company*. Governor Pennypacker uses these words:

“The question turns upon the meaning of the words ‘in proper form’ and ‘approve.’ It is strenuously contended that they must be narrowly construed, that the function of the Governor is purely ministerial and that all he can do is to see that the purposes set forth in section 3 are followed in the certificate in the language of the act. The act does not say that he shall certify that the forms have been faithfully followed, but that he shall approve of the incorporation. The construction contended for is not the usual and customary meaning of the word ‘approve.’ If it were only intended that he should look at the formal part of the certificate, any clerk could do it as well, but the duty is imposed upon the Governor, the supreme executive power of the State, who is required by the Constitution to ‘take care that the laws be faithfully executed.’ At the time of the passage of the act of 1874 the word ‘approve’ had a certain precise historical meaning. Up to that time for a long series of years charters had been granted by special acts of Assembly, which only became laws by the assent of the Governor and that assent was shown by the use of the word ‘approved.’ When the Legislature used the word ‘approve’ they must have been aware of its special significance.”

B.4. This is not an unconstitutional delegation of authority. It was strenuously argued that, if the grant of a charter by the Governor, involved more than a ministerial part to be performed by him, it involved an unconstitutional delegation of power on the part of the Legislature upon the principle of the maxim *delegata potestas non potest delegari*. This is an untenable proposition, and it is fully met by the discussion of a similar point raised and dis-

posed of in the case entitled "In the Matter of the Petition of the New York Elevated R. R. Co., 70 N. Y. Reps., 327. In that case Judge Earl, of the New York Court of Appeals, on pages 343 and 344, uses these words:

"It is objected that the act is unconstitutional, because it delegates legislative power to the mayor's commissioners. The object of the act was to provide for the construction of elevated and underground railways. It confers upon the commissioners the power to determine upon the necessity of such railways to fix the routes upon which they may be constructed, to prescribe the plan of their construction, and to superintend the organization of companies for their construction. It provides for the personal liability of the stockholders in such companies, and confers upon them the right to take and hold real estate, and provides particularly how they may acquire the same; it specifies the powers which they shall possess, and the duties and obligations which shall rest upon them. The act rests upon the legislative will, and in no way depends for its vitality upon the action of the commissioners. Corporations organized under the act derive their franchises from the Legislature, and in no proper sense from the commissioners. The commissioners perform no legislative acts; they enact no laws; they simply perform administrative acts in carrying the law into effect and applying it. The Legislature is required by the Constitution to pass general laws for the formation of corporations (Article III., Section 18; Article VIII.), and it has passed general laws for the formation of all kinds of corporations. In such cases, it does not directly confer corporate franchises; it simply provides the mode in which such franchises may be acquired by those desiring them. Ordinarily, individuals desiring to incorporate under a general law determine for themselves the necessity of a corporation, their corporate name, what business they will carry on, where they will transact it, the amount of their capital and the duration of their corporation. In making such determinations, it was never supposed that they were engaged in acts of legislation, or that they conferred upon themselves corporate franchises. They simply act under, apply and carry into effect a law in reference to which legislative power has been properly evoked. But suppose, instead of leaving the determination of these matters to individuals, the law provides a tribunal to make the determination for the individuals, is there any more delegation of legislative power to the tribunal than to the individuals, under the general laws as they are now usually framed? Cannot the Legislature confer upon a commission the power upon the application of individuals, to make the same determination for the individuals which they could

make for themselves? The proper answers to these questions are not doubtful. The arguments made to show that the Legislature was not competent to devolve upon these commissioners the powers given to them in this act, if sound and logically applied, would nullify every general law found upon our statute books for the formation of corporations, and thus nullify the Constitution itself, which commands the passage of such general laws.

"The Legislature could not in a general law determine the necessity of a railway in any particular locality, nor the routes upon which it was to be constructed, nor the amount of capital or the name which it was to assume, and there is nothing in any constitutional requirement which imposes upon it the duty in a general law to provide the place of construction for any railroad. It may provide the machinery for the determination of these matters, and what that machinery shall be must depend upon its will. It may authorize these determinations to be made by the individuals who desire to incorporate, by the people resident in the locality to be affected, or by the municipal or county government, and it does not thereby abdicate in any proper sense any part of its legislative power."

II.

THE GOVERNOR IS NOT THE SUBJECT OF MANDAMUS OR INJUNCTION.

The overwhelming weight of authority is against the position contended for by the complainants. We have already quoted in this brief Spelling on "Extraordinary Remedies," Section 1452. In section 1453 the same writer declares:

"In Arizona Territory, Arkansas, Florida, Georgia, Illinois, Maine, Michigan, Minnesota, Mississippi, New Jersey, Pennsylvania, Rhode Island and Tennessee it is settled by decisions of the highest courts that the Chief Executive is so far independent of all control of the courts with respect to all official duties, whether purely ministerial or such as are known as executive, that mandamus will not lie in any case."

The cases cited in support of this statement of the law are numerous, and are referred to in a note to pages 1271-72 of the second edition, Volume II, of Spelling on Injunction. It is not necessary to do more than to refer to a few of them. It may, however, be observed that Wood, in his work on Mandamus, second edition, page 88, uses the following language:

"If the courts may interfere with the discharge of any ministerial duties of the Executive Department of

the Government, they may interfere with all, and we should have the singular spectacle of a government run by the courts instead of the officers provided by the Constitution. Each department of the government is essentially and necessarily distinct from the others, and neither can lawfully trench upon or interfere with the powers of the other; and our safety, both as to National and State Governments, is largely dependent upon the preservation of the distribution of power and authority made by the Constitution, and the laws made in pursuance thereof."

The following are leading cases in support of this position:

Hawkins v. The Governor, 1 Arkansas, page 570. In this case Judge Lacey, after a most elaborate examination of the question, and particularly of the decision of *Marbury v. Madison*, concludes that, even in the matter of the issuing of a commission, the Governor must exercise a political discretion, for the use of which he is alone answerable to his country in the manner pointed out by the Constitution, through the medium of impeachment. He asks:

"Why then is his discretion taken away or destroyed when his duty concerns the issuing of a commission? It certainly is not. His duty is as clearly political in that case as in any of the other enumerations; and if the courts have jurisdiction in that instance to prescribe the rule of his conduct, by a parity of reasoning they certainly possess it in regard to all the other cases. This would make the judges the interpreters, not only of the will of the Executive but of his conscience and reason; and his oath of office, upon such a supposition, would then be both a mockery and a delusion * * The Court can no more interfere with Executive discretion, than the Legislature or Executive can with judicial discretion. The Constitution marks the boundaries between the respective powers of the several departments, and to obliterate its limits would produce such a conflict of jurisdiction as would inevitably destroy our whole political fabric, and with it the principles of civil liberty itself. It would be an express violation of the Constitution * * *"

The leading case, and one which has been many times approved by other courts, is that of *Sutherland v. The Governor*, 29 Michigan, 320. It is particularly valuable, not only because of the ability of the discussion but because of the high reputation of the judge who delivered the opinion—no less a man than Thomas M. Cooley, the great constitutional lawyer and text-book writer. Upon page 322 he says:

"The duty we are asked to compel the Governor to perform is one imposed upon him by statute, and it con-

sists in the issue of a certain certificate when he shall be satisfied that certain work has been done in conformity with the law. The purpose of the certificate is to furnish to the beneficiaries under the land grant the evidence of their right to the land, to which the certificate, if granted, is understood to entitle them; so that the question involved in the controversy is, so far as the relators are concerned, one of private right and private property. The Governor, as we understand it, concedes that the canal and harbor are constructed in proper manner, but he insists that the spirit and intent of the Federal and State statutes have not been complied with, inasmuch as the canal has been constructed upon private property, so that the public are not assured the benefits anticipated and meant to be secured in making the grant; and for this reason he refuses his certificate. The relators thereupon insist that this presents for our consideration the simple question whether the Governor construes correctly the statutes involved, and if not, they claim to be entitled to the proper remedy from the courts. In other words, they insist that the question involved has become, by the concession of the Governor that the work has been done, purely a judicial question, involving nothing but a proper construction of the law.

"It is not claimed on the part of the relators that this court or any other has jurisdiction to require and compel the performance by the Governor of his political duties, or the duties devolved upon him as a component part of the Legislature. It is conceded that these, under the Constitution and laws, are to be exercised according to his own judgment, and on his own sense of official responsibility, and that from his decision to act or decline to act there can be no appeal to the courts. Nor is it pretended that where any Executive act whatsoever is manifestly submitted to the Governor's judgment or discretion, such judgment or discretion can be coerced by judicial writ. What is claimed is, that where the act is purely ministerial, and the right of the citizen to have it performed is absolute, the Governor, no more than any other officer, is above the laws, and the obligation of the courts, on a proper application, to require him to obey the laws, is the same that exists in any other case where an official ministerial duty is disregarded.

"It may be doubted if this concession would not require us to dismiss the present application, if not to deny our jurisdiction in all cases where the Governor is respondent and his executive action or duties are involved. There is no very clear and palpable line of distinction between those duties of the Governor which are political, and those which are to be considered ministerial merely; and if we should undertake to draw one,

and to declare that in all cases falling on one side the line the Governor was subject to judicial process, and in all falling on the other he was independent of it, we should open the doors to an endless train of litigation, and the cases would be numerous in which neither the Governor nor the parties would be able to determine whether his conclusion was, under the law, to be final, and the courts would be appealed to by every dissatisfied party to subject a co-ordinate department of the government to their jurisdiction. However desirable a power in the judiciary to interfere in such cases might seem from the standpoint of interested parties, it is manifest that harmony of action between the Executive and Judicial Departments would be directly threatened, and that the exercise of such power could only be justified on most imperative reasons. Moreover, it is not customary in our republican government to confer upon the Governor duties merely ministerial, and in the performance of which he is to be left to no discretion whatever; and the presumption in all cases must be, where a duty is devolved upon the Chief Executive of the State rather than upon an inferior officer, that it is so because his superior judgment, discretion and sense of responsibility were confided in for a more accurate, faithful and discreet performance than could be relied upon if the duty were developed upon an officer chosen for inferior duties. And if we concede that cases may be pointed out in which it is manifest that the Governor is left to no discretion, the present is certainly not among them, for here, by the law, he is required to judge, on a personal inspection of the work, and must give his certificate on his own judgment, and not on that of any other person, officer or department."

The reasoning of Judge Cooley was distinctly approved by the Supreme Court of the State of Indiana in *Hovey, Governor v. State*, 127 Indiana, page 588. This case is a thorough discussion of the authorities upon both sides of the question, and rejects the reasoning upon which the contention of the complainants is based, concluding with these words:

"Such attempt would be usurpation, more dangerous to free government than the evils sought to be corrected. Should we attempt to control the Governor in the matter of the discharge of any of the duties pertaining to his office as Governor, we would be taking one step in the direction of absorbing the functions of the Executive Department of the State."

The same result was reached in the case of *Bates v. Taylor*, 87 Tenn., 319. On page 322, Judge Caldwell said:

"The issuance of such commission or certificate, whether called a ministerial or an executive duty, is

an official action, whose performance can be neither coerced nor restrained by the courts."

The judge quotes with approval the following language of Judge McFarland in the case of *Turnpike Co. v. Brown*, 8 Baxter, 490, as follows:

"The Governor holds but one office—that is, the office of Chief Executive. Any duty which he performs under authority of law is an executive duty; otherwise we would have him acting in separate and distinct capacities. In some respects he would be the Chief Executive, an independent department of the government; as to others he would be a mere ministerial officer, subject to the mandate of any judge of the State; and we must assume also that the judge would have the power to imprison the Governor if he refused to obey the order; for if the court had this jurisdiction the power to enforce the judgment must follow.

"The jurisdiction was denied upon the ground that the courts had no right to interfere with the Governor, who was the head of another department of the government, in the discharge of a duty by law devolved upon him * * * We have no hesitation in holding that the courts have no jurisdiction to compel the Governor to deliver to complainant the certificate claimed by him. No more have they the power to restrain him from issuing a certificate to the other applicant. If the Governor cannot be compelled by mandamus to deliver a certificate of election to one person, it follows that he cannot be restrained by injunction from delivering it to another person, for the nature of the act to be performed by him is precisely the same in one case as in the other, and the same considerations operate to defeat the jurisdiction of the courts in both instances."

In the case of *Low v. Downs, Governor*, 8 Georgia, page 372, Judge Warner said:

"We are satisfied that for political reasons alone, the remedy by mandamus ought not to be enforced against the chief executive officer of the State. The ultimate effect of this remedy, in case of refusal by the Governor to obey the laws of the land, would be to deprive the people of the State of the head of one of the departments of the government. This ministerial act required by the law is to be performed by the same officer who is, by the Constitution, placed at the head of one of the departments of the government, and is required, by the Constitution, to perform certain other duties, of which the people may not be deprived. Whatever right to the office the relator may have, and whatever remedy he may be entitled to by the law for the enforcement of that right, is a general proposition; yet,

for the political reasons just stated, it cannot be enforced against the Chief Magistrate of a State by mandamus."

The most recent discussion of the matter occurs in the case of the People of the State of New York ex. rel. Broderick v. Morton, 156 N. Y. Reps., 136, in which the New York Court of Appeals, through Judge Haight, distinctly approving of all the cases hitherto reviewed, as well as many others, and after a review of the nature of the writ of mandamus, reached the conclusion that the courts have no power to issue a mandamus to the Governor to compel his performance of a duty imposed upon him by virtue of his office; and this inability extends to ministerial duties as well as to those involving executive judgment and discretion, and to action by the Governor as an *ex officio* member of the board of public officers.

Without adding to this list of authorities cases from other States, it is sufficient to call attention to the position taken by our own Supreme Court in Hartranft's Appeal, 85 P. S., 433, in which it was held that the Governor is exempt from the process of the courts whenever engaged in any duty pertaining to his office, and his immunity extends to his subordinates and agents when acting in their official capacity. In that case Mr. Justice Gordon uses these words:

"We had better at the outstart recognize the fact, that the Executive Department is a co-ordinate branch of the government, with power to judge what should or should not be done within his own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere than has the Executive, under like conditions, to interfere with the courts. In the case of Oliver v. Warmouth, 22 Louisiana, page 1, it was held that under the division of powers, as laid down in the Federal and State Constitutions, the Judiciary Department has no jurisdiction over or right to interfere with the independent action of the Chief Executive in the functions of his office, even though the act he is required to perform be purely ministerial. This is putting the matter on very high grounds, for in such case no other officer would be exempt from the mandatory power of the judiciary. No case could more forcibly exhibit the extreme reluctance of courts to interfere with the functions of the supreme executive, for the hypothesis put is the refusal of the Governor to perform a duty cast upon him by law, of a character strictly ministerial."

It was contended that the case of Mott et. al. v. Pennsylvania R. R. Co., et. al., 30 P. S., 10, was in conflict with this position

because of the language used by Chief Justice Lewis, on page 33. An examination of that case, however, discloses, first, that the injunction asked for against the Governor was not granted in the entry of the decree; second, that the view of the learned Chief Justice was based upon the case of *Marbury v. Madison* and the three cases against Cochran, reported in 5 Binney, 6 Binney, and 1 Sergeant & Rawle. An examination of the three last named cases shows that the officer sought to be mandamusd was not the Governor, but the Secretary of the Land Office—a circumstance of such moment as to utterly destroy the value of the authority as a basis for the contention in the present case. And, third, that an examination of the doctrine of *Marbury v. Madison* does not sustain the view taken by Chief Justice Lewis.

B. *Marbury v. Madison*.

This brings us to an examination of the case of *Marbury v. Madison*, which has been misunderstood by the judges of other courts who have attempted to use it as authority for the position contended for by the complainants. The history of this case need not be repeated, as it is well known to this court, but an examination of what Chief Justice Marshall said would indicate that his remark was not applicable to the President, but only to the head of a department, and that, too, where the head of the department was acting in a case involving no executive discretion. In 1 Cranch, page 169, Chief Justice Marshall said:

“Still, to render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.”

Again on pages 170 and 171, the Chief Justice continues:

“Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.”

The latter part of this paragraph repeats the words “Head of a Department.” No case can be found where the President was ever mandamusd, and in the case of *Mississippi v. Johnson*, in 4 Wallace, 475, an injunction against the President was distinctly refused.

A most elaborate note to the case of *Marbury v. Madison* is to be found in the first volume of *Notes on United States Reports*, by W. M. Rose, pages 118 to 161, inclusive, and it is noticeable that,

after a full and complete list of the authorities, between which a conflict exists, and the statement that the citations show that *Marbury v. Madison* has been cited as authority upon both sides of the controversy, the learned author of the note says, on page 142:

“Certainly the specific question of the right to mandamus a State Governor was not at all in the mind of Chief Justice Marshall in the leading case. An examination of the facts of the case conclusively establishes the truth of this remark.”

C. Because an independent and co-ordinate department of the government.

The reason why the Governor is not the subject of mandamus or injunction results from the independent and co-ordinate character of the departments of government. Enough appears in the quotations already given from the opinions of Judge Lacey, in the *Arkansas* case; Judge Cooley, in the *Michigan* case; Judge Haight, in the *New York* case, and Judge Warner, in the *Georgia* case, so that repetition is here unnecessary.

D. The Governor not the subject of mandamus under the statutes of Pennsylvania.

It was held in the case of *Commonwealth v. Wickersham*, 90 P. S., 311, that the Court of Common Pleas of Dauphin County had no power to issue writs of mandamus to State officers. The opinion was a learned one, delivered by President Judge Pearson. This gives an interesting review of the law of the Commonwealth, beginning with the act of 22d of May, 1722. By that act the Supreme Court was authorized to administer justice as fully and amply, to all intents and purposes, as the justices of the Court of King's Bench, Common Pleas and Exchequer at Westminster, or any of them might do, and it is shown by a historical review that the courts of common pleas in the State never were authorized to issue the high prerogative writ of mandamus until it was conferred in a very limited form by the eighteenth section of the act of June 14, 1836. That act authorized the issuing of writs of mandamus to all officers and magistrates elected or appointed in or for the respective county, or in or for any township, district or place within such county, and to all corporations being or having their chief place of business within such county. It was in those cases and over those persons and corporations alone that the courts of common pleas had jurisdiction. It was held, therefore, that a writ of mandamus could not issue to the Superintendent of Public Instruction, an officer not elected or appointed in or for the respective county, or for any township, district or place within such county. He was a State officer, appointed by the Governor, under the eighth section

of article IV of the Constitution, by and with the advice and consent of two-thirds of the Senators, for a general State purpose, and the jurisdiction of his office extended throughout the Commonwealth. The Legislature never intended, and never did intend, to give any such power to the inferior courts over the State departments. "If this is thought necessary," said the judge, "in order to bring the cases before the Appellate Court, it must be done by direct legislation. Original jurisdiction cannot be conferred upon the Supreme Court in such cases."

The narrowness of this jurisdiction was made the subject of judicial lament, but it remained without correction until the passage of the act of 24th of June, 1885, by which the act of 1836 was amended so as to give enlarged powers to courts of common pleas at the seat of government in regard to State officers, and the words of the enactment were as follows:

"The Court of Common Pleas of the county in which the seat of government is, or may be located, shall have the power, and it shall be required, to issue the writ of mandamus to the Lieutenant Governor, Secretary of the Commonwealth, Attorney General, Secretary of Internal Affairs, Superintendent of Public Instruction, State Treasurer, Auditor General, Insurance Commissioner and Commissioners of the Sinking Fund, which may be served by the sheriff or his deputy in any county of the Commonwealth * * *" (P. L. 1885, pp. 150, 151).

This act of 1885 was superseded by the act of 8th of June, 1893 (P. L. 345), by which it is provided that "the several courts of common pleas shall, within their respective counties, have the power to issue writs of mandamus to all officers and magistrates elected or appointed in or for the respective county * * * and the courts of common pleas of the county in which the seat of government is or may be located, shall have the power, and it shall be required, to issue the writ of mandamus to the Lieutenant Governor, Secretary of the Commonwealth, Attorney General," etc.

It is observable that the Governor was never the subject of mandamus under any jurisdiction, and that the two statutes of 1885 and 1893, which were intended to enlarge the jurisdiction of the courts, and particularly of the court of common pleas at the seat of the State government, omitted all reference to the Governor.

III.

THE INJUNCTION SHOULD NOT BE GRANTED BECAUSE OF THE FUTILITY OF THE PROCEEDING.

No court of equity will ever attempt to do that which it has not the power to enforce. To do so would be to place itself in a posi-

tion of self-confessed impotency. Such a position is one which should not be taken wherever it would provoke collision between the departments. The words used by Chief Justice Marshall as to the nature of the thing to be done, furnishing the true test, and not the nature of the office of the person to whom the writ is directed, have been much misunderstood, and judges, quoting from memory, have imagined that Chief Justice Marshall indulged in some such language as that no officer is above the law or too high to be reached. The Chief Justice never used such language and never had such an intention. On the contrary, he distinctly disclaims all professions to any jurisdiction which could not be enforced. In *Marbury v. Madison*, page 169, he says:

“With respect to the officer to whom it should be directed. The intimate political relation subsisting between the President of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received, without much reflection or examination, and it is not wonderful that, in such a case as this, the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the Executive. It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment.”

The paragraphs of the opinion of the chief justice which follow, clearly indicate that he had in mind, not the President, but the head of a department acting in a peculiarly ministerial capacity, and not as the representative or the organ of any executive discretion.

Judge Warner, of the Supreme Court of Georgia, in the case of *Low v. Towns*, Governor, 8 Georgia, 372, declared:

“We are satisfied that, for political reasons alone, the remedy by mandamus ought not to be enforced against the Chief Executive officer of the State. The ultimate effect of this remedy, in case of refusal by the Governor to obey the laws of the land, would be to deprive the people of the State of the head of one of the departments of the government. This ministerial act required by the law is to be performed by the same officer who is, by the Constitution, placed at the head of one of the

departments of the government, and is required, by the Constitution, to perform certain other duties of which the people may not be deprived."

These words save the dignity of the court by putting the refusal of the court to grant the writ upon the theory that the people have a right to the free action of the Governor, untrammelled by imprisonment, but do not deal with the possible difficulty as to how the process of the court can be enforced in case of the refusal on the part of the Governor to obey. That feature of the case, however, is dealt with by Chief Justice Chase, in the case of *Mississippi v. Johnson*, 4 Wallace, 475, where, in speaking of the difficulty of perceiving upon what principle the application for the injunction could be allowed, he said:

"The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

"Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and Legislative Departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public of an attempt by this court to arrest proceedings in that court? These questions answer themselves * * * A bill, praying an injunction against the execution of an act of Congress by the incumbent of the presidential office, cannot be received, whether it describes him as President or as a citizen of the State. The motion for leave to file the bill is therefore denied."

In the case of *People v. Bissell*, Governor of Illinois, 19 Ill., 232. Chief Justice Caton said:

"We have no power to compel either of the other departments of the government to perform any duty which the Constitution or the law may impose upon them, no matter how palpable such duty may be, any more than either of those departments may compel us to perform our duty. The Governor is and must be as independent of us as is the Legislature or as we are of either of them."

It is quite clear, from the multiplicity and variety of acts which the Governor is called upon to perform, that the public service would be utterly destroyed by such a collision between the departments, even if the judiciary should undertake the task of attempting to coerce the Governor into compliance with its decree. Bear in mind, that the Supreme Court, speaking through Mr. Justice Gordon (Hartranft's Appeal, 85 P. S., 450), said:

"If the courts can, in any one instance, or at any one time, control or direct the Executive in the performance of his duties, they may do so in every instance and at all times, and time need not be wasted in the attempt to prove that that proposition is not allowable, because the Governor could not thus be placed under the guardianship and tutelage of the courts."

It is only necessary to observe that Governor Stone granted during his administration 5,030 charters and signed 14,000 commissions, and that Governor Pennypacker, within the last three months, has signed between 2,500 and 2,600 commissions, about 200 military commissions, and granted more than 200 charters, with about 500 pending commissions. If the complainants in this case have a right to restrain his action by injunction, every other dissatisfied litigant, with a similar grievance, might do the same, and the proposition in this case reduces itself to the preposterous condition that if the basis of the complainants' contention is sound, to wit: that the act of the Governor in connection with the granting of charters is a purely ministerial act and therefore can be mandamused, yet at the same time this court can issue an injunction to restrain him from doing that which he could be mandamused to perform. The argument is thus reduced to a palpable absurdity.

The same argument which has been relied upon in this brief to sustain the Governor's position against judicial interference, is applicable, under the circumstances of these cases, to the Secretary of the Commonwealth and to the recorder of deeds of Indiana county. It is unnecessary to do anything more than to quote the language of Chief Justice Marshall in the case of *Marbury v. Madison*. He says:

"It is not by the office or the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing the mandamus is to be determined. Where the head of a department acts in a case in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated that any application to the court to control, in any respect, his conduct would be rejected without hesitation."

It is clear that, on principle, the same protection which is extended to an officer, such as the President or the Governor of a State, should be extended to the subordinate officer, where that subordinate is but the agent of the executive will, which will, as has been shown, cannot be coerced or restrained. It would be idle to declare that the principal is free from coercion or restraint if his subordinate could be restrained in the executive act which the principal directed him to perform. It is quite clear, under the language of the act of 1874, that the acts of the Secretary of the Commonwealth and of the recorder of deeds are not ministerial acts, disassociated from the act of the Governor in the approval of a charter. The language of section 3 of the clause relating to certificates for the second class (P. L. of 1874, p. 76), is as follows:

“The said certificate, accompanied with proof of publication of notice, as hereinbefore provided, shall then be produced to the Governor of this Commonwealth, who shall examine the same, and if he find it to be in proper form and within the purposes named in the second class, specified in the foregoing section, he shall approve thereof and endorse his approval thereon, and direct letters patent to issue in the usual form, incorporating the subscribers and their associates and successors into a body politic and corporate, in deed and in law, by the name chosen, and the said certificate shall be recorded in the office of the Secretary of the Commonwealth, in a book to be by him kept for that purpose, and he shall forthwith furnish to the Auditor General an abstract therefrom, showing the name, location, amount of capital stock, and the name and address of the treasurer of such corporation. The said original certificate with all of its endorsements, shall then be recorded in the office for the recording of deeds, in and for the county where the chief operations are to be carried on, and from thenceforth the subscribers thereto, and their associates and successors shall be a corporation, for the purposes and upon the terms named in said charter.”

It is clear, therefore, that the acts of the secretary and of the recorder of deeds are so closely connected with the approval of the charter by the Governor that any attempt to restrain the secretary from the performance of his duties, or to restrain the recorder of deeds of the proper county from the performance of his, in relation to the charters approved by the Governor, would be in effect to destroy the conclusiveness of the Governor's approval, and would, by indirection, accomplish the very purpose which it has been the object of this argument to show cannot be done in relation to the

office of Governor. The acts are so closely connected with each other as to form parts of each other. The secretary and the recorder are, in the words of Chief Justice Marshall, "organs of the executive will," and any application to the court to control them, in any respect in relation thereto, is such conduct as would be rejected without hesitation.

THE CASE OF COMMONWEALTH V. SHORTALL—OPINION OF MR. JUSTICE MITCHELL—MARTIAL LAW.

A somewhat full statement of the facts will be conducive to the proper understanding of the case.

During the summer of 1902 a strike, beginning with a labor union known as the United Mine Workers of America, spread through nearly the whole of the anthracite coal region in Pennsylvania. As time progressed it was accompanied with increasing disorder and violence on the part of the strikers and their sympathizers, so that threats and intimidation not only of men but of their women and children, rioting, bridge burning, stoning and interference with railroad trains, destruction of property and killing of non-union workmen became of frequent occurrence. The communities affected were either in secret sympathy with these acts or lacked the courage to put an end to them.

Among the places where the disorder was greatest was Shenandoah in Schuylkill county. There the police and the sheriff in attempting to preserve the peace were overpowered and beaten by mobs of strikers, and several citizens killed. The sheriff having called upon the Governor, the latter first ordered out a portion of the militia and subsequently on further call, the entire division of the National Guard, on October 6, 1902, by General Order No. 39.

The text of this order which is important is as follows: "In certain portions of the counties of Luzerne, Schuylkill, Carbon, Lackawanna, Susquehanna, Northumberland and Columbia, tumult and riot frequently occur and mob law reigns. Men who desire to work have been beaten and driven away and their families threatened. Railroad trains have been delayed and stoned, and tracks torn up. The civil authorities are unable to maintain order and have called upon the Governor and Commander-in-Chief of the National Guard for troops. The situation grows more serious each day. The territory involved is so extensive that the troops now on duty are insufficient to prevent all disorder. The presence of the entire Division, National Guard of Pennsylvania, is necessary in these counties to maintain the public peace. The Major General commanding will place the entire Division on duty, distributing them in such locali-

ties as will render them most effective for preserving the public peace. As tumults, riots, mobs and disorder usually occur when men attempt to work in and about the coal mines, he will see that all men who desire to work, and their families, have ample protection. He will protect all trains and other property from unlawful interference, will arrest all persons engaging in acts of violence and intimidation, and hold them under guard until their release will not endanger the public peace, and will see that threats, intimidations, assaults and all acts of violence cease at once. The public peace and good order will be preserved upon all occasions and throughout the several counties, and no interference whatsoever will be permitted with officers and men in the discharge of their duties under this order. The dignity and authority of the State must be maintained, and her power to suppress all lawlessness within her borders be asserted."

Under this order the 18th Regiment, being part of the troops under command of Brigadier General Gobin, was stationed in and near Shenandoah. Several houses occupied by non-union men had been dynamited and attempts made upon others. On October 8, therefore, General Gobin issued the following order: "At 5.30 P. M. a detail of one corporal and six men should be put at the house of Barney Bucklavage, No. 1118 West Coal street; this house was dynamited on the night of October 6 and is occupied by a woman and four small children, and for the present I deem it best to guard it; my instructions to the guard have been that they shall keep a sentry at the front door sitting inside the house with the door ajar, and one sentry sitting just outside the rear door under the porch, and if any attempt is made to dynamite them, or they are shot at, or stoned, or any suspicious characters prowl around, particularly in the rear of the house, who fail to halt when directed by the guard, the guard shall shoot, and shoot to kill."

The relator, Arthur Wadsworth, was a private in company A, of the 18th Regiment, in service there, and in the evening of October 8 was posted as sentry in the front yard of the Bucklavage house, just outside the door, with orders to halt all persons prowling around or approaching the house, and if the persons so challenged failed to respond to the challenge after due warning "to shoot, and shoot to kill," About 11.30 o'clock he discovered a man approaching along the side of the road nearest the house and called "Halt." The man continued to advance toward the gate. Wadsworth called again "Halt." The man continued to advance. Wadsworth then touched the door and said "Corporal of the guard." He then called "Halt" and again "Halt." The man by this time had opened the gate and was coming into the yard, when Wadsworth,

in accordance with his orders, fired and the man, whose name was afterwards found to be Durham, fell to the ground dead.

A coroner's inquest was held and the jury found that "the shooting was hasty and unjustifiable" and recommended that the matter be placed in the hands of the district attorney for investigation. In the meantime on complaint before a justice of the peace, a warrant had been issued for the arrest of Wadsworth, and after the return of the regiment from service he was arrested at his home in Pittsburg by the respondent, a constable of the borough of Shendoah. A writ of habeas corpus was allowed by the presiding justice of this court, and the Commonwealth not making any charge higher than manslaughter, the relator was admitted to bail, pending the argument of the case.

These are all the material facts and they are undisputed. The only appearance of question is in the testimony of some of the witnesses at the inquest that the deceased was outside the gate when they saw him after he had fallen. The relator and some others of the guard testified that the deceased had opened the gate and entered but staggered back several steps after the shot was fired.

The issue of General Order No. 39 by the Governor was a declaration of qualified martial law, in the affected districts. In so characterizing it we are not unmindful of the eminent authorities who have declared that martial law cannot exist in England or the United States at all, or at least, according to the more moderate advocates of that view, not in time of peace. Thus in *Ex parte Milligan*, 71 U. S. 2, 127, it is said in the opinion of the majority of the court, "martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction." But in the dissenting opinion in the same case, Chief Justice Chase convincingly distinguished three classes of military rule, which are thus summarized by Judge Hare in his lectures on American Constitutional Law (p. 930): "Military law, then, consists of the rules prescribed legislatively for the government of the land and naval forces, which, operating both in war and peace, and defined by Congress, are an offshoot of the civil or municipal law. Military government is the dominion exercised by a general over a conquered State or province. It is therefore a mere application or extension of the force by which the conquest was effected, to the end of keeping the vanquished in subjection; and being a right derived from war, is hardly compatible with a state of peace. Martial law is the right of a general in command of a town or district menaced with a siege or insurrection to take the requisite measures to repel the enemy, and depends, for its extent, existence, and operation, on the imminence of the peril and the obligation to provide for the

general safety. As the offspring of necessity, it transcends the ordinary course of law, and may be exercised alike over friends and enemies, citizens and aliens."

Many other authorities of equal rank hold that martial law exists wherever the military arm of the government is called into service to suppress disorder and restore the public peace. So far as any of the questions in the present case are concerned the difference is one of terms rather than of substance and is material chiefly in regard first to the jurisdiction of courts martial or military commissions over citizens not in the military or naval service, nor engaged in recognized war, or secondly, to the responsibility of officers or soldiers giving or acting under military orders, when not in actual war, to be called to account in the civil or criminal courts. With the first of these matters we are not now concerned, and the second will be discussed in its due order.

Order No. 39 was as said a declaration of qualified martial law. Qualified in that it was put in force only as to the preservation of the public peace and order, not for the ascertainment or vindication of private rights, or the other ordinary functions of government. For these the courts and other agencies of the law were still open and no exigency required interference with their functions. But within its necessary field, and for the accomplishment of its intended purpose it was martial law with all its powers. The government has and must have this power or perish. And it must be real power, sufficient and effective for its ends, the enforcement of law, the peace and security of the community as to life and property.

It is not unfrequently said that the community must be either in a state of peace or of war, as there is no intermediate state. But from the point of view now under consideration this is an error. There may be peace for all the ordinary purposes of life and yet a state of disorder, violence and danger in special directions, which though not technically war, has in its limited field the same effect, and if important enough to call for martial law for suppression, is not distinguishable, so far as the powers of the commanding officer are concerned, from actual war. The condition in fact exists, and the law must recognize it, no matter how opinions may differ as to what it should be most correctly called. When the civil authority, though in existence and operation for some purposes, is yet unable to preserve the public order and resorts to military aid, this necessarily means the supremacy of actual force, the demonstration of the strong hand usually held in reserve and operating only by its moral influence, but now brought into active exercise, just as the ordinary criminal tendency in the community is held in check by the knowledge and fear of the law, but the overt law breaker must be taken into actual custody.

When the mayor or burgess of a municipality finds himself un-

able to preserve the public order and security and calls upon the sheriff with the posse comitatus, the latter becomes the responsible officer and therefore the higher authority. So if in turn the sheriff finds his power inadequate, he calls upon the larger power of the State to aid with the military. The sheriff may retain the command, for he is the highest executive officer of the county, and if he does so, ordinarily the military must act in subordination to him. But if the situation goes beyond county control, and requires the full power of the State, the Governor intervenes as the supreme executive and he or his military representative becomes the superior and commanding officer. So too if the sheriff relinquishes the command to the military, the latter has all the sheriff's authority added to his own powers as to military methods.

The resort to the military arm of the government therefore means that the ordinary civil officers to preserve order are subordinated, and the rule of force under military methods is substituted to whatever extent may be necessary in the discretion of the military commander. To call out the military and then have them stand quiet and helpless while mob law overrides the civil authorities, would be to make the government contemptible and destroy the purpose of its existence.

The effect of martial law, therefore, is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and property are concerned, there is no limit but the necessities and exigency of the situation. And in this respect there is no difference between a public war and domestic insurrection. What has been called the paramount law of self-defense, common to all countries, has established the rule that whatever force is necessary is also lawful.

“Whatever force is necessary for self-defense is also lawful. This law, applied nationally, is the martial law, which is an off-shoot of the common law, and although ordinarily dormant in peace, may be called forth by insurrection or invasion. War has exigencies, that cannot readily be enumerated or described, which may render it necessary for a commanding officer to subject loyal citizens, or persons who though believed to be disloyal have not acted overtly against the government, to deprivations that would under ordinary circumstances be illegal; and he must then depend for his justification, not on the laws of war, but on the necessity which, as has been here seen, may warrant the taking of life, and will therefore excuse any minor deprivation.” Hare, *Am. Constitutional Law*, lect. xlii, p. 924.

“When a riot assumes such proportions that it cannot

be quelled by ordinary means, and threatens irreparable injury to life or property, the sheriff may call forth the posse comitatus and exercise an authority as their chief which can hardly be distinguished from that of a general engaged in repelling a foreign enemy or subduing a revolt. Arms may be used as in battle to bear down resistance; and if loss of life ensues, the circumstances will be a justification. The measure does not, however, cease to be civil, or fall beyond the rules which apply when a house is entered in the night by burglars, or a traveler shoots a highwayman who demands his money. Nor will it change its character because the military are called in and the sheriff delegates his authority to the commanding officer. As Lord Mansfield showed in the debate on the Lord George Gordon riots in 1780, soldiers are subject to the duties and liabilities of citizens, although they wear a uniform, and may, like other individuals, act as special constables or of their own motion for the suppression of a mob, and if the staff does not suffice employ the sword. The intervention of the military does not introduce martial law in the sense in which the term is understood under despotic governments, and even by some distinguished jurists, because, agreeably to the same great magistrate and the settled practice in England and the United States, they are liable to be tried and punished for any excess or abuse of power, not by the martial code, but under the common and statute law." Hare, *Am. Const. Law*, lect. xli, p. 906.

This last quotation illustrates and explains the difference in the application of the term martial law which has given so much apparent trouble to some of the text writers. There is no real difference in the commander's powers in a public war and in domestic insurrection. In both he has whatever powers may be needed for the accomplishment of the end but his use of them is followed by different consequences. In war he is answerable only to his military superiors, but for acts done in domestic territory, even in the suppression of public disorder, he is accountable, after the exigency has passed, to the laws of the land, both by prosecution in the criminal courts, and by civil action at the instance of parties aggrieved. On this all the authorities agree, and the result flows from the view that martial law in this sense is merely an extension of the police power of the State, and therefore, as expressed by Judge Hare in the quotation *supra*, an "offshoot of the common law which though ordinarily dormant in peace, may be called forth by insurrection or invasion." See *Sparhawk v. Respublica*, 1 Dallas, 357 *Mitchell v. Harmony*, 13 How. (U. S.) 115, *Ford v. Surget*, 97 U. S. 594, and English cases cited in 2 Hare on *Const. Law*, ch. xli.

In determining the responsibility for such acts, the courts pro-

ceed upon the principle of the common law as applied in issues of false imprisonment, self-defense, etc., that the acts must be judged by the appearance of things at the time. "It is not less clear that although the justification must be based on necessity, and cannot stand on any other ground, it will be enough if the circumstances induce and justify the belief that an imminent peril exists, and cannot be averted without transcending the usual rules of conduct. For when the exigency does not admit of delay, and there is a reasonable and probable cause for believing that a particular method is the only one that can avert the danger, it will be morally necessary, even if the event shows that a different and less extreme course might have been pursued with safety." Hare, Const. Law, p. 917.

"It is the emergency that gives the right, and the emergency must be shown before the taking can be justified. In deciding upon this necessity, the state of the facts as they appear to the officer at the time he acted will govern the decision, for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing or the necessity urgent, he is justified in acting upon it, and the discovery afterwards that it was false or erroneous will not make him a trespasser:" *Taney, C. J., Mitchell v. Harmony*, 13 How. 115.

And while the military are in active service for the suppression of disorder and violence, their rights and obligations as soldiers must be judged by the standard of actual war. No other standard is possible, for the first and overruling duty is to repress disorder, whatever the cost, and all means which are necessary to that end are lawful. The situation of troops in a riotous and insurrectionary district approximates that of troops in an enemy's country, and in proportion to the extent and violence of the overt acts of hostility shown is the degree of severity justified in the means of repression. The requirements of the situation in either case, therefore, shift with the circumstances, and the same standard of justification must apply to both. The only difference is the one already adverted to, the liability to subsequent investigation in the courts of the land after the restoration of order.

Coming now to the position of the relator, in regard to responsibility, we find the law well settled. "A subordinate stands as regards the application of these principles, in a different position from the superior whom he obeys, and may be absolved from liability for executing an order which it was criminal to give. The question is, as we have seen, had the accused reasonable cause for believing in the necessity of the act which is impugned, and in determining this point, a soldier or member of the posse comitatus may obviously

take the orders of the person in command into view as proceeding from one who is better able to judge and well informed; and if the circumstances are such that the command may be justifiable, he should not be held guilty for declining to decide that it is wrong with the responsibility incident to disobedience, unless the case is so plain as not to admit of a reasonable doubt. A soldier, consequently, runs little risk in obeying any order which a man of common sense so placed would regard as warranted by the circumstances:" Hare, Const. Law, p. 920.

The cases in this country have usually arisen in the army and been determined in the United States courts. But by the Articles of War (art. 59) under the acts of congress, officers or soldiers charged with offenses punishable by the laws of the land, are required (except in time of war) to be delivered over to the civil (i. e. in distinction from military) authorities; and the courts proceed upon the principles of the common (and statute) law: 31 Fed. Repr. 711. The decisions therefore are precedents applicable here.

A leading case is *U. S. v. Clark*, 31 Fed. Repr. 710. A soldier on the military reservation at Fort Wayne had been convicted by court martial and when brought out of the guardhouse with other prisoners at "retreat," broke from the ranks and was in the act of escaping when Clark, who was the sergeant of the guard, fired and killed him. Clark was charged with homicide and brought before the United States district judge, sitting as a committing magistrate. Judge Brown, now of the Supreme Court of the United States, delivered an elaborate and well considered opinion, which has ever since been quoted as authoritative. In it he said, "The case reduces itself to the naked legal proposition whether the prisoner is excused in law in killing the deceased." Then after referring to the common-law principle that an officer having custody of a prisoner charged with felony may take his life if it becomes absolutely necessary to do so to prevent his escape, and pointing out the peculiarities of the military code which practically abolish the distinction between felonies and misdemeanors, he continued, "I have no doubt the same principle would apply to the acts of a subordinate officer, performed in compliance with his supposed duty as a soldier; and unless the act were manifestly beyond the scope of his authority, or were such that a man of ordinary sense and understanding would know that it was illegal, that it would be a protection to him, if he acted in good faith and without malice."

In *McCall v. McDowell*, 1 Abb. (U. S.) 212, where an action was brought by plaintiff against Gen. McDowell and Capt. Douglas for false imprisonment under a general order of the former for the arrest of persons publicly exulting over the assassination of President Lincoln, the court said, "Except in a plain case of excess of au-

thority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law will excuse a military subordinate, when acting in obedience to the order of his commander, otherwise he is placed in a dangerous dilemma of being liable to damages to third persons, for obedience to the order, or for the loss of his commission and disgrace for disobedience thereto. * * * * Between an order plainly legal and one palpably otherwise there is a wide middle ground where the ultimate legality and propriety of orders depends or may depend upon circumstances and conditions, of which it cannot be expected that the inferior is informed or advised. In such cases justice to the subordinate demands, and the necessities and efficiency of the public service require that the order of the superior should protect the inferior, leaving the responsibility to rest where it properly belongs, upon the officer who gave the command." The court sitting without a jury accordingly gave judgment for Capt. Douglas, though finding damages against Gen. McDowell.

In *U. S. v. Carr*, 1 Woods, 480, which was a case of the shooting of a soldier in Fort Pulaski by the prisoner who was sergeant of the guard, Woods, J., afterwards of the Supreme Court of the United States, charged the jury: "Place yourselves in the position of the prisoner at the time of the homicide. Inquire whether at the moment he fired his piece at the deceased, with his surroundings at the time, he had reasonable ground to believe, and did believe, that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny then and there existing, or of a disorder which threatened to ripen into mutiny. If he had reasonable ground so to believe, then the killing was not unlawful. But if on the other hand the mutinous conduct of the soldiers, if there was any such, had ceased, and it so appeared to the prisoner, or if he could reasonably have suppressed the disorder without the resort to such violent means as the taking of the life of the deceased, and it would so have appeared to a reasonable man under like circumstances, then the killing was unlawful. But it must be understood that the law will not require an officer charged with the order and discipline of a camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required."

In *Riggs v. State*, 4 Cald. 85, the Supreme Court of Tennessee held to be correct an instruction to the jury that "any order given by an officer to his private which does not expressly and clearly show on its face, or in the body thereof, its own illegality, the soldier would be bound to obey, and such order would be a protection to him."

These are the principal American cases and they are in entire accord with the long line of established authorities in England.

Applying these principles to the act of the relator, it is clear that he was not guilty of any crime. The situation as already shown was one of martial law, in which the commanding general was authorized to use as forcible military means for the repression of violence as his judgment dictated to be necessary. The house had been dynamited at night and threatened again. With an agent so destructive, in hands so lawless, the duty of precaution was correspondingly great. There was no ground therefore for doubt as to the legality of the order to shoot. The relator was a private soldier and his first duty was obedience. His orders were clear and specific, and the evidence does not show that he went beyond them in his action. There was no malice for it appears affirmatively that he did not know the deceased, and acted only on his orders when the situation appeared to call for action under them. The unfortunate man who was killed was not shown to have been one of the mob gathered in the vicinity, though why he should have turned into the gate is not known. The occurrence, deplorable as it was, was an illustration of the dangers of the lawless condition of the community, or of the minority who were allowed to control it, and must be classed with the numerous instances in riots and mobs, where mere spectators and even distant non-combatants get hurt without apparent fault of their own.

Whenever a homicide occurs it is not only proper but obligatory that an official inquiry should be made by the legal authorities. Such an inquiry was had here at the coroner's inquest, and if there were any doubt about the facts we should remand the relator to the custody of the constable under his warrant, for a further hearing before the justice of the peace. But there was no conflict in the evidence before the coroner, and the Commonwealth's officer makes no claim here that anything further can be shown. The facts therefore are not in dispute, and the question of relator's liability depends on whether he had reasonable cause to believe in the necessity of action under his orders. As said by Judge Hare, citing Lord Mansfield in *Mostyn v. Fabrigas*, 1 Cowper, 161, "The question of probable cause in this as in most other instances, is one of law for the court. The facts are for the jury; but it is for the judges to say whether, if found, they amount to probable cause." Hare's Const. Law, 919.

In *U. S. v. Clark*, 31 Fed. Repr. 710, already cited, Mr. Justice Brown said "it may be said that it is a question for the jury in each case whether the prisoner was justified by the circumstances in making use of his musket, and if this were a jury trial I should submit that question to them. * * * * but as I would, acting in (that) capacity, set aside a conviction if a verdict of guilty were

rendered, I shall assume the responsibility of directing his discharge."

This court, either sitting as a committing magistrate or by virtue of its supervisory jurisdiction over the proceedings of all subordinate tribunals (*Gosline v. Place*, 32 Pa. 520) has the authority and the duty on habeas corpus in favor of a prisoner held on a criminal charge, to see that at least a *prima facie* case of guilt is supported by the evidence against him. In the relator's case the facts presented by the evidence are undisputed and on them the law is clear and settled. If the case was before a jury we should be bound to direct a verdict of not guilty and to set aside a contrary verdict if rendered. It is therefore our duty now to say that there is no legal ground for subjecting him to trial and he is accordingly discharged.

The relator, Arthur Wadsworth, is discharged from further custody under the warrant held by respondent.

APPENDIX II.

SCHEDULE A.

FORMAL HEARINGS BEFORE THE ATTORNEY GENERAL.

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| Correspondence Institute of America, Clark Company, proprietor. | Quo warranto, | Allowed. |
| Lackawanna Valley Rapid Transit Company, | Quo warranto, | Allowed. |
| S. J. Harris, John A. Cox and William R. Johnston, | Quo warranto, | Allowed. |
| Interior Construction and Improvement Company—with notice to D. F. Maroney, trustee. | Quo warranto, | Allowed. |
| L. F. Duanne et al., and New Brighton, Beaver Falls and Morado Electric Street Railway Company. | Quo warranto, | Allowed. |
| L. F. Duanne et al., and Rochester, Beaver Falls and Van Port Electric Street Railway Company. | Quo warranto, | Allowed. |
| Horam Run Railroad Company, | Quo warranto, | Allowed. |
| Alba Dentist Company, | Quo warranto, | Allowed. |
| Mifflin Bridge Company, | Quo warranto, | Allowed. |
| McKeesport and West Elizabeth Street Railway Company, .. | Quo warranto, | Allowed. |
| Wilkinsburg, Frankstown Avenue and Verona Street Railway Company. | Quo warranto, | Allowed. |
| Braddock and Duquesne Bridge Company, | Quo warranto, | Allowed. |
| Belleverson and East Side Railway Company, | Quo warranto, | Allowed. |
| Braddock and North Homestead Street Railway Company, .. | Quo warranto, | Allowed. |
| Castle Shannon Railway Company, | Quo warranto, | Allowed. |
| Duquesne and Dravosburg Street Railway Company, | Quo warranto, | Allowed. |
| North Branch Steel Company, | Quo warranto, | Allowed. |
| Point Bridge Company, | Quo warranto, | Allowed. |
| Northumberland Water Supply Company, | Quo warranto, | Allowed. |
| Paxton Flouring Mill Company, | Quo warranto, | Allowed. |
| Easton and Belvidere Street Railway Company, | Quo warranto, | Allowed. |
| Alliance, Bath and Nazareth Street Railway Company, | Quo warranto, | Allowed. |
| Cement Belt Street Railway Company, | Quo warranto, | Allowed. |
| Nazareth and Bath Street Railway Company, | Quo warranto, | Allowed. |
| Bethlehem and Bath Street Railway Company, | Quo warranto, | Allowed. |
| Bethlehem and Siegfried Street Railway Company, | Quo warranto, | Allowed. |
| William H. Middleton, | Quo warranto, | Allowed. |
| C. M. Miller, Amos H. Smith and H. M. Nissley, | Quo warranto, | Allowed. |
| Spangler and Hastings Electric Railway Company, | Quo warranto, | Allowed. |
| Berks Electric Light, Heat and Power Company of Reading, .. | Quo warranto, | Allowed. |
| Schuylkill Valley Electric Company of Reading, | Quo warranto, | Allowed. |
| Womelsdorf and Myerstown Street Railway Company, | Quo warranto, | Allowed. |

FORMAL HEARINGS BEFORE THE ATTORNEY GENERAL—Continued.

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|---|---------------------|------------------------|
| South End Street Railway Company, | Quo warranto, | Allowed. |
| Kutztown Street Railway Company, | Quo warranto, | Allowed. |
| Chester and Rose Valley Street Railway Company, | Quo warranto, | Allowed. |
| Arch and Green Street Electric Railway Company, | Quo warranto, | Allowed. |
| East Side Street Railway Company, | Quo warranto, | Allowed. |
| Colwyn and Ridley Park Street Railway Company, | Quo warranto, | Allowed. |
| Reading and Lancaster Electric Railway Company, | Quo warranto, | Allowed. |
| Twelfth and Thirteenth Streets Railway Company, | Quo warranto, | Allowed. |
| Hamburg Street Railway Company, | Quo warranto, | Allowed. |
| Reading and Pottstown Electric Railway Company, | Quo warranto, | Allowed. |
| Reading and Millmont Street Railway Company, | Quo warranto, | Allowed. |
| Reading, Hamburg and Pottsville Street Railway Company, | Quo warranto, | Allowed. |
| Reading, Fleetwood and Kutztown Railroad Company, | Quo warranto, | Allowed. |
| Reading and Birdsboro Railway Company, | Quo warranto, | Allowed. |
| Lima, Gradyville and West Chester Street Railway Company, | Quo warranto, | Allowed. |
| West End Electric Street Railway Company, | Quo warranto, | Allowed. |
| Darby and Fernwood Street Railway Company, | Quo warranto, | Allowed. |
| West Side Street Railway Company, | Quo warranto, | Allowed. |
| Reading and Hamburg Railway Company, | Quo warranto, | Allowed. |
| Chester and Rockdale Street Railway Company, | Quo warranto, | Allowed. |
| Chester and Middletown Street Railway Company, | Quo warranto, | Allowed. |
| Standard Traction Company, | Quo warranto, | Allowed. |
| Consolidated Traction Company, | Quo warranto, | Allowed. |
| Clifton and Sharon Hill Street Railway Company, | Quo warranto, | Allowed. |
| Morrisville and Trenton Street Railway Company, | Quo warranto, | Allowed. |
| Black Bear Street Railway Company, | Quo warranto, | Allowed. |
| Allentown and East Allentown Bridge Company, | Quo warranto, | Allowed. |
| Pittsburg, Johnstown, Ebensburg and Eastern Railroad Company, | Quo warranto, | Allowed. |
| Altoona and Philipsburg Connecting Railroad Company, | Quo warranto, | Allowed. |
| Pittsburg, Virginia and Charleston Railway Company and Brownsville and State Line Railroad Company, | Quo warranto, | Allowed. |
| B. H. Warren, Dairy and Food Commissioner, | Quo warranto, | Proceedings abandoned. |
| National Council, Junior Order of United American Mechanics, | Quo warranto, | Refused. |
| Glenwood Railroad Company, | Quo warranto, | Refused. |
| Harrisburg, Carlisle and Chambersburg Turnpike Road Company, | Quo warranto, | Allowed. |
| Consumers' Gas Company of Scranton, | Quo warranto, | Refused. |

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| Frank G. McAnich, justice of the peace, Stowe township, Allegheny county. | Quo warranto, | Application withdrawn. |
| Blairsville and Derry Street Railway Company, | Quo warranto, | Proceedings abandoned. |
| Bankers' Street Railway Company, | Quo warranto, | Refused. |
| Iron City Street Railway Company, | Quo warranto, | Refused. |
| Union Railroad Company, | Quo warranto, | Refused. |
| Northern Boulevard Company, | Quo warranto, | Proceedings abandoned. |
| Glenwood Rapid Transit Street Railway Company, | Quo warranto, | Proceedings abandoned. |
| People's Railway Company, Schuylkill Electric Railway Company and Pottsville Union Traction Company. | Quo warranto, | Refused. |
| Broad Street Rapid Transit Railway Company, | Quo warranto, | Application withdrawn. |
| Harry J. Trainer, Harry C. Ransley and Joseph H. Klemmer, select councilmen, city of Philadelphia. | Quo warranto, | Refused. |
| Beaver Terrace Street Railway Company, | Quo warranto, | Refused. |
| Keystone Standard Watch Company, | Quo warranto, | Allowed. |
| Max D. Lieber, | Quo warranto, | Refused. |
| Eastern College of Painless Dentistry, | Quo warranto, | Proceedings abandoned. |
| Danville and Riverside Street Railway Company and Danville and Bloomsburg Street Railway Company. | Quo warranto, | Refused. |
| Union Railroad Company, | Quo warranto, | Refused. |
| Beaver Valley Railroad Company, | Quo warranto, | Refused. |
| Berwyn Social Club, | Quo warranto, | Refused. |
| Chemical Specialty Company, | Quo warranto, | Pending. |
| Smith Ferry Company, | Quo warranto, | Refused. |
| Munhall Water Company, | Quo warranto, | Allowed. |
| Frederic P. Hiller, Matthan Harbster, Edward Elbert and Solomon H. Close, water commissioners of city of Reading. | Quo warranto, | Allowed. |
| Philadelphia Rapid Transit Street Railway Company, | Quo warranto, | Allowed. |
| Samuel J. Harris, John A. Cox and William R. Johnstown, Erie Rapid Transit Company et al., | In equity, | Proceedings abandoned. |
| Norristown and Main Line Connecting Railroad Company, .. | In equity (act of May 7, 1887), .. | Application allowed. |
| Sewickley Academy, | In equity, | Use of name of Com'th allowed. |
| City of Erie, | In equity, | Use of name of Com'th allowed. |
| Phoenixville and Bridgeport Electric Railway Company, | In equity, | Proceedings discontinued. |
| Pittsburg, Shawmut and Northern Railroad Company, | In equity, | Use of name of Com'th refused. |
| Seventh Day Baptist Congregation of Snow Hill, Franklin county. | In equity, | Use of name of Com'th refused. |
| Consumers' Brewing Company, | In equity, | Use of name of Com'th allowed. |
| J. W. McKee et al., | In equity, | Petition filed. Pending. |
| Phoenixville and Bridgeport Electric Railway Company, | In equity, | Use of name of Com'th allowed. |
| Delaware Valley Railroad Company et al., | In equity (under act of May 7, 1887). | Use of name of Com'th allowed. |
| | | Application allowed. |

SCHEDULE B.

INSURANCE COMPANY AND BANK CHARTERS APPROVED.

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| Allegheny Fire Insurance Company, Allegheny, | February 6, 1903. |
| American Relief Assurance Company, Philadelphia, .. | September 9, 1903. |
| Eutler Patrons Mutual Fire Insurance Company, Prospect, | July 15, 1904. |
| Crescent Mutual Fire Insurance Company of Venango County, Big Bend, | August 26, 1903. |
| Creamery and Cheese Factory Mutual Fire Insurance Company, Honesdale, | June 15, 1904. |
| Dry Goods Mutual Fire Insurance Company, Philadelphia, | February 6, 1903. |
| Duquesne Mutual Fire Insurance Company, Pittsburg, .. | November 17, 1903. |
| Employers' Indemnity Company, Philadelphia, | March 18, 1903. |
| Exchange Mutual Fire Insurance Company, Philadelphia, | August 17, 1904. |
| Fort Pitt Mutual Fire Insurance Company, Pittsburg, .. | June 29, 1904. |
| Guardian Mutual Fire Insurance Company, Pittsburg, .. | October 5, 1904. |
| Johnstown Mutual Fire Insurance Company, Johnstown, | August 29, 1904. |
| Keystone Indemnity Company, Harrisburg, | April 7, 1904. |
| Lumbermen's and Merchants' Mutual Fire Insurance Company, Williamsport, | February 12, 1903. |
| Lafayette Mutual Fire Insurance Company, Pittsburg, .. | July 15, 1904. |
| Leatherman's Mutual Fire Insurance Company, Philadelphia, | June 16, 1903. |
| Mahanoy Mutual Fire Insurance Company, Ashland, .. | June 16, 1903. |
| Mt. Carmel Mutual Fire Insurance Company, Mt. Carmel, | June 15, 1904. |
| National Relief Assurance Company, Philadelphia, .. | August 26, 1903. |
| National Hardware Dealers' Mutual Fire Insurance Company, Huntingdon, | November 5, 1903. |
| North American Mutual Fire Insurance Company, Pittsburg, | May 3, 1904. |
| Philadelphia Fire Insurance Company, Philadelphia, .. | March 25, 1903. |
| Palmyra Mutual Fire Insurance Company, Palmyra, .. | August 5, 1903. |
| Penn Sick and Accident Benefit Company, Leechburg, .. | June 15, 1904. |
| Progressive Mutual Fire Insurance Company, York, .. | September 17, 1904. |
| Rural Valley Mutual Fire Insurance Company, Rural Valley, | March 17, 1904. |
| Reliance Life Insurance Company, Pittsburg, | March 31, 1903. |
| Retailers' Mutual Fire Insurance Company, Philadelphia, | May 27, 1903. |
| Republic Mutual Fire Insurance Company, Johnstown, .. | October 19, 1904. |
| Steelton Mutual Fire Insurance Company, Steelton, .. | March 23, 1903. |
| State Mutual Fire Insurance Company, Philadelphia, .. | April 16, 1903. |
| Shenandoah Mutual Fire Insurance Company, Shenandoah, | June 25, 1903. |
| Sobeinshi Mutual Fire Insurance Company, Mt. Carmel, | May 18, 1904. |
| Traders' Mutual Fire Insurance Company, Philadelphia, | August 26, 1903. |
| Theatres Mutual Fire Insurance Company, Philadelphia, | May 5, 1904. |
| Urban Mutual Fire Insurance Company, Bedford, | May 9, 1903. |
| United States Fire Insurance Company, Philadelphia, .. | December 28, 1903. |
| United States Mutual Live Stock Insurance Company, Johnstown, | July 15, 1904. |
| Alliance Insurance Company of Philadelphia, | December 5, 1904. |
| Altoona, Urban Mutual Fire Insurance Company, Altoona, | December 8, 1904. |
| Ferguson Valley Mutual Fire Insurance Company, Lewistown, | December 8, 1904. |
| Pomona No. 3 Mutual Fire Insurance Company, West Chester, | December 30, 1904. |

SCHEDULE B—Continued.

| | |
|--|---------------------|
| East End Bank, Harrisburg, | February 18, 1903. |
| Farmers' Bank of McSherrystown, | February 18, 1903. |
| Pioneer Dime Bank, Carbondale, | February 11, 1903. |
| Taylor Discount and Deposit Bank, Taylor, | April 16, 1903. |
| Liberty Discount and Savings Bank, Carbondale, | April 23, 1903. |
| Bank of Brushton, Pittsburg, | April 24, 1903. |
| Farmers' and Deposit Bank of Pittsburg, | February 18, 1903. |
| The Citizens' Bank, Braddock, | April 16, 1903. |
| Pennsylvania Savings Bank, Pittsburg, | June 9, 1903. |
| Citizens' Bank of Fayette City, | May 6, 1903. |
| Dollar Bank, New Castle, | June 9, 1903. |
| People's Bank, Steelton, | September 29, 1903. |
| Bank of Coal Center, Coal Center, | October 1, 1903. |
| Avonmore Bank, Avonmore, | February 23, 1904. |
| Citizens' Bank, St. Clair, | February 23, 1904. |
| The Keystone Bank, Scranton, | April 20, 1904. |
| Bank of Commerce, Philadelphia, | May 3, 1904. |
| The Park Bank, Pittsburg, | June 21, 1904. |
| Liberty Savings Bank, Pittsburg, | May 26, 1904. |
| Avalon Bank, Avalon, | December 21, 1904. |

SCHEDULE C.

LIST OF APPEALS FILED SINCE JANUARY 1, 1903.

| Name. | Amount. | Remarks. |
|---|------------|--|
| Phillips Company, Limited, | \$375 00 | C. S. 1900. Paid. |
| Phillips Company, Limited, | 375 00 | C. S. 1901. Paid. |
| Phillips Company, Limited, | 375 00 | C. S. 1902. Paid. |
| Fall Brook Coal Company, | 3,000 00 | C. S. 1901. Paid. |
| Chest Creek Coal and Coke Company, | 188 50 | C. S. 1901. Paid. |
| Mitchell Coal and Coke Company, .. | 134 03 | C. S. 1901. Paid. |
| Lebanon Valley Street Railway Company. | 1,841 00 | L. T. 1900. Paid. |
| Philadelphia and Chester Railway Company. | 1,029 20 | L. T. 1901. Paid. |
| Pennsylvania Central Brewing Company. | 68 85 | C. S. 1901. Paid. |
| Pennsylvania Central Brewing Company. | 5,876 21 | C. S. 1900. Paid. |
| State Insurance Company of Phila- delphia. | 199 21 | C. S. 1897-8. Verdict for Com- monwealth. |
| American Casting Machine Com- pany. | 1,666 67 | Bonus on charter. Discon- tinued. |
| New York, Lake Erie and Western Coal and Railroad Company. | 2,000 00 | C. S. 1902. Paid. |
| Wilkes-Barre and Eastern Railroad Company. | 4,950 00 | C. S. 1902. Paid. |
| Nypano Railroad Company, | 6,500 00 | C. S. 1902. Paid. |
| Erie Railroad Company, | 5,400 00 | C. S. 1902. Paid. |
| Jefferson Railroad Company, | 2,500 00 | C. S. 1902. Paid. |
| Northwestern Mining and Exchange Company. | 750 00 | C. S. 1902. Paid. |
| Hillside Coal and Iron Company, ... | 625 00 | C. S. 1902. Paid. |
| Blossburg Coal Company, | 625 00 | C. S. 1902. Paid. |
| Pennsylvania Coal Company, | 47,455 00 | C. S. 1902. Paid. |
| New York, Susquehanna and West- ern Coal Company. | 500 00 | C. S. 1902. Paid. |
| Buffalo, Bradford and Pittsburg Railway Company. | 625 00 | C. S. 1902. Paid. |
| Erie and Wyoming Valley Railroad Company. | 5,125 00 | C. S. 1902. Paid. |
| International Navigation Company, | 2,762 33 | C. S. 1902. Paid. |
| Robesonia Iron Company, Limited,... | 1,010 71 | C. S. 1902. Paid. |
| Follmer, Clogg & Co., | 2,434 33 | Bonus. Judg't for the def't. |
| United States Leather Company, ... | 150,321 08 | Bonus. Judg't for the def't. |
| The Pullman Company, | 1,168 48 | Bonus. Judg't for the def't. |
| The Pullman Company, | 57 01 | Bonus. Judg't for the def't. |
| Pennsylvania Electric Vehicle Com- pany. | 181 06 | Bonus. Judg't for the def't. |
| Carpenter Steel Company, | 174 40 | Bonus. Judg't for the def't. |
| Jessup and Moore Paper Company, .. | 100 00 | Bonus. Judg't for the def't. |
| Fairmount Park Transportation Company. | 3,333 34 | Bonus. Judg't for the def't. |
| Germantown Electric Light Com- pany. | 416 67 | Bonus. Judg't for the def't. |
| George B. Newton & Co., Incor- porated. | 1,000 00 | Bonus. Judg't for the def't. |
| Delaware and Hudson Company, ... | 16,735 13 | Bonus. Judg't for the def't. |
| Howard W. Middleton Company, ... | 249 79 | Bonus. Judg't for the def't. |
| Fairmount Park Transportation Company. | 3,333 34 | Bonus. Judg't for the Com'th. |
| Pencoyd and Philadelphia Railroad Company | 100 00 | C. S. 1902. Paid. |

SCHEDULE C—Continued.

LIST OF APPEALS FILED SINCE JANUARY 1, 1903.

| Name. | Amount. | Remarks. |
|--|-----------|----------------------------------|
| Pennsylvania Electric Vehicle Company. | 1,195 00 | C. S. 1902. Paid. |
| People's Electric Light, Heat and Power Company, Nanticoke. | 187 50 | C. S. 1902. Paid. |
| Pennsylvania Light, Heat and Power Company. | 10,991 14 | C. S. 1899. Paid. |
| Pennsylvania Light, Heat and Power Company. | 21,491 14 | C. S. 1900. Paid. |
| Pennsylvania Company for Insurances on Lives and Granting Annuities. | 63,000 00 | C. S. 1902. Paid. |
| Pocono Mountain Ice Company, | 375 00 | C. S. 1902. Verdict for def't. |
| Philadelphia Brewing Company, ... | 6,000 00 | C. S. 1902. Paid. |
| Philadelphia Mortgage and Trust Company. | 1,473 81 | C. S. 1902. Paid. |
| Philadelphia Securities Company, ... | 3,395 13 | C. S. 1899. Paid. |
| Philadelphia Securities Company, ... | 2,313 20 | C. S. 1900. Paid. |
| Philadelphia Securities Company, ... | 2,281 93 | C. S. 1899. Paid. |
| Philadelphia Securities Company, ... | 2,022 15 | C. S. 1901. Paid. |
| St. Marys Gas Company, | 750 00 | C. S. 1902. Paid. |
| South Bethlehem Supply Company, Limited. | 1,486 25 | C. S. 1901. Paid. |
| Germantown Trust Company, | 5,135 00 | C. S. 1902. Ver't for the def't. |
| George B. Newton & Co., Incorporated. | 4,125 00 | C. S. 1902. Paid. |
| Good Roads Machinery Company, .. | 123 00 | C. S. 1902. Ver't for the def't. |
| Fall Brook Railway Company, | 2,100 00 | C. S. 1902. Paid. |
| Enterprise Transit Company, | 2,650 00 | C. S. 1902. Paid. |
| Dickson Manufacturing Company, .. | 729 16 | C. S. 1901. Verdict for def't. |
| Delaware Division Canal Company of Pennsylvania. | 750 00 | C. S. 1901. Paid. |
| Delaware and Atlantic Telegraph and Telephone Company of Pennsylvania. | 3,808 50 | C. S. 1901. Paid. |
| Dunbar Furnace Company, | 996 62 | C. S. 1901. Paid. |
| Cranberry Improvement Company, .. | 2,420 00 | C. S. 1901. Paid. |
| Clarion River Gas Company, | 59 64 | L. T. 1902. Verdict for def't. |
| Coudersport and Port Allegheny Railroad Company. | 931 00 | L. T. 1902. Paid. |
| Bethlehem Steel Company, | 1,263 27 | |
| Clearfield Bituminous Coal Corporation. | 2,062 50 | C. S. 1902. Paid. |
| Clearfield Bituminous Coal Corporation. | 961 88 | L. T. 1902. Verdict for def't. |
| Tamaqua and Lansford Street Railway Company. | 1,000 00 | C. S. 1901. Paid. |
| Standard Steel Works Company, ... | 608 00 | L. T. 1902. Verdict for def't. |
| South Bethlehem Supply Company, Limited. | 1,000 00 | C. S. 1902. Paid. |
| Tresckow Railroad Company, | 325 00 | C. S. 1901. Paid. |
| Truman M. Dodson Coal Company, | 503 30 | C. S. 1902. Paid. |
| Union Improvement Company, | 9,960 65 | C. S. 1902. Paid. |
| Upper Lehigh Supply Company, Limited. | 250 00 | C. S. 1902. Paid. |
| Western Union Telegraph Company, | 11,246 10 | C. S. 1901. Paid. |
| Westinghouse Electric and Manufacturing Company. | 18,536 50 | C. S. 1902. Paid. |
| Westinghouse Air Brake Company, | 21,469 30 | C. S. 1902. Paid. |
| Wm. Cramp & Sons Ship and Engine Building Company. | 7,695 00 | C. S. 1902. Paid. |
| Buffalo and Susquehanna Coal and Coke Company. | 1,250 00 | L. T. 1902. Paid. |
| Buffalo and Susquehanna Railroad Company. | 14,236 21 | C. S. 1902. Paid. |
| Beech Creek Cannel Coal Company, | 250 00 | C. S. 1902. Paid. |

SCHEDULE C—Continued.

LIST OF APPEALS FILED SINCE JANUARY 1, 1903.

| Name. | Amount. | Remarks. |
|--|-----------|--------------------------------|
| Black Creek Improvement Company, | 3,500 00 | C. S. 1902. Paid. |
| Bethlehem Steel Company, | 1,450 46 | C. S. 1902. Paid. |
| Bethlehem Steel Company, | 32,331 28 | L. T. 1902. Paid. |
| Bethlehem Steel Company, | 11,345 68 | L. T. 1901. Paid. |
| Bedford Springs Company, Limited, .. | 375 00 | C. S. 1902. Paid. |
| Beech Creek Railroad Company, | 2,405 66 | L. T. 1902. Paid. |
| Atlas Portland Cement Company, .. | 1,550 00 | C. S. 1902. Paid. |
| Algonquin Coal Company, | 225 00 | C. S. 1902. Paid. |
| Angell Oil Company, | 200 00 | C. S. 1902. Verdict for def't. |
| American Dredging Company, | 5,715 78 | C. S. 1902. Paid. |
| Atlas Portland Cement Company, .. | 271 85 | L. T. 1902. Verdict for def't. |
| Allentown Gas Company, | 363 60 | L. T. 1902. Paid. |
| Lehigh Coal and Navigation Com- pany. | 96,403 37 | C. S. 1901. Paid. |
| Lehigh and Wilkes-Barre Coal Com- pany. | 46,062 50 | C. S. 1901. Paid. |
| Leechburg Land and Improvement Company. | 200 00 | C. S. 1902. Verdict for def't. |
| Lake Shore and Michigan Southern Railway Company. | 47,478 13 | C. S. 1902. Paid. |
| Kensington Shipyard Company, | 2,500 00 | C. S. 1902. Verdict for def't. |
| Lake Shore and Michigan Southern Railway Company. | 7,305 04 | L. T. 1902. Paid. |
| Johnsonburg Land and Improve- ment Company. | 125 00 | C. S. 1902. Verdict for def't. |
| J. Langdon & Co., Incorporated, | 1,125 00 | C. S. 1902. Paid. |
| Investment Trust Company, | 450 00 | C. S. 1902. Verdict for def't. |
| Investment Company of Pennsyl- vania. | 1,181 28 | L. T. 1902. Verdict for def't. |
| Scranton Gas and Water Company, | 15,000 00 | C. S. 1901. Paid. |
| North Branch Steel Company, | 2,634 50 | C. S. 1902. Paid. |
| Mortgage Trust Company of Penn- sylvania. | 10,971 00 | L. T. 1902. Paid. |
| Mount Sinai Cemetery Association of Pennsylvania. | 524 60 | C. S. 1902. Paid. |
| Hudson Coal Company, | 10,000 00 | C. S. 1902. Paid. |
| Hudson Coal Company, | 7,750 00 | C. S. 1901. Paid. |
| Hudson Coal Company, | 166 67 | L. T. 1901. Paid. |
| Hollenback Coal Company, | 3,000 00 | C. S. 1902. Paid. |
| Morris & Whitehead, Bankers, | 375 00 | C. S. 1902. Paid. |
| Lower Merion Gas Company, | 91 20 | L. T. 1902. Paid. |
| McKinley-Lanning Loan and Trust Company. | 971 25 | L. T. 1902. Ver't for Com'th. |
| Midvalley Supply Company, Limited, | 200 00 | C. S. 1902. Paid. |
| Lehigh and Lackawanna Railroad Company. | 370 50 | C. S. 1901. Paid. |
| Henry L. Wilson's Sons Company, .. | 150 00 | C. S. 1896. Verdict for def't. |
| Henry L. Wilson's Sons Company, .. | 150 00 | C. S. 1897. Verdict for def't. |
| Henry L. Wilson's Sons Company, .. | 150 00 | C. S. 1898. Verdict for def't. |
| Henry L. Wilson's Sons Company, .. | 150 00 | C. S. 1899. Verdict for def't. |
| Henry L. Wilson's Sons Company, .. | 150 00 | C. S. 1900. Verdict for def't. |
| Henry L. Wilson's Sons Company, .. | 150 00 | C. S. 1901. Verdict for def't. |
| Henry L. Wilson's Sons Company, .. | 150 00 | C. S. 1902. Verdict for def't. |
| Henry L. Wilson's Sons Company, .. | 100 00 | Bonus. Judg't for the def't. |
| Highland Coal Company, | 2,999 81 | C. S. 1902. Paid. |
| Jefferson Coal Company, | 1,350 00 | C. S. 1902. Paid. |
| Kingston Coal Company, | 8,500 00 | C. S. 1902. Paid. |
| Ketner and Kay Fork Railway Com- pany. | 100 00 | C. S. 1902. Paid. |
| Lehigh and Lackawanna Railroad Company. | 370 50 | C. S. 1902. Paid. |
| Lewisburg, Milton and Watsontown Passenger Railway Company. | 450 00 | C. S. 1902. Paid. |
| Lytle Coal Company, | 600 00 | C. S. 1902. Verdict for def't. |

SCHEDULE C—Continued.

LIST OF APPEALS FILED SINCE JANUARY 1, 1903.

| Name. | Amount. | Remarks. |
|---|------------|---------------------------------|
| Midland Mining Company, | 425 00 | C. S. 1902. Paid. |
| Montoursville Passenger Railway Company. | 262 50 | C. S. 1902. Paid. |
| Nescopee Coal Company, | 1,000 00 | C. S. 1902. Paid. |
| Parrish Coal Company, | 4,000 00 | C. S. 1902. Paid. |
| Philadelphia and West Chester Traction Company. | 1,935 34 | C. S. 1901. Paid. |
| Philadelphia and West Chester Traction Company. | 2,545 92 | C. S. 1902. Paid. |
| State Line and Sullivan Railroad Company. | 2,000 00 | C. S. 1902. Paid. |
| Sterling Coal Company, | 1,500 00 | C. S. 1902. Paid. |
| Stevens Coal Company, | 1,500 00 | C. S. 1902. Paid. |
| Tamaqua and Lansford Street Railway Company. | 1,500 00 | C. S. 1902. Paid. |
| Tionesta Valley Railway Company. | 2,625 00 | C. S. 1902. Paid. |
| Tresckow Railroad Company, | 325 00 | C. S. 1902. Paid. |
| The United Gas Improvement Company. | 215,023 44 | C. S. 1902. Paid. |
| W. K. Niver Coal Company, | 1,235 94 | C. S. 1902. Paid. |
| Wyandotte Gas Company, | 1,940 00 | L. T. 1902. Pending. |
| Bangor and Portland Railway Company. | 3,375 00 | C. S. 1902. Paid. |
| Beech Creek Railroad Company, ... | 37,358 33 | C. S. 1902. Paid. |
| Beech Creek Extension Railroad Company. | 13,960 00 | C. S. 1902. Paid. |
| Blubaker Coal Company, | 1,250 00 | C. S. 1902. Paid. |
| Buck Run Coal Company, | 1,020 00 | C. S. 1902. Paid. |
| Buck Run Coal Company, | 547 20 | L. T. 1902. Verdict for def't. |
| Cambria Steel Company, | 7,297 03 | C. S. 1902. Paid. |
| Chevington and Bunn Coal Company. | 225 00 | C. S. 1902. Paid. |
| Clear Springs Water Company, | 364 80 | L. T. 1902. Verdict for def't. |
| Coudersport and Port Allegheny Railroad Company. | 2,000 00 | C. S. 1902. Paid. |
| Cowanshannock Coal and Coke Company. | 76 00 | L. T. 1902. Verdict for def't. |
| Delaware Division Canal Company of Pennsylvania. | 751 34 | C. S. 1902. Paid. |
| Dunkirk, Allegheny Valley and Pittsburg Railroad Company. | 3,000 00 | C. S. 1902. Paid. |
| Economy Light, Heat and Power Company. | 740 25 | C. S. 1902. Paid. |
| Equitable Illuminating Gas Light Company of Philadelphia. | 312 50 | C. S. 1902. Verdict for def't. |
| Equitable Illuminating Gas Light Company of Philadelphia. | 27,372 20 | L. T. 1902. Paid. |
| Freeport Water Works Company, ... | 135 00 | C. S. 1902. Paid. |
| Gas Company of Luzerne County, ... | 1,916 24 | L. T. 1902. Paid. |
| Delaware, Lackawanna and Western Railroad Company. | 5,032 76 | L. T. 1902. Paid. |
| Delaware, Lackawanna and Western Railroad Company. | 342,880 00 | C. S. 1902. Paid. |
| Investment Company of Philadelphia. | 9,176 67 | C. S. 1901. Paid. |
| Jonathan Graham & Son Company, | 222 35 | C. S. 1899. Paid. |
| Leetonia Railway Company, | 164 85 | L. T. 1902. Verdict for def't. |
| Lehigh Coal and Navigation Company. | 56,506 14 | L. T. 1902. Verdict for Com'th. |
| Lehigh Coal and Navigation Company. | 102,720 96 | C. S. 1902. Paid. |
| New York, Chicago and St. Louis Railroad Company. | 10,634 51 | C. S. 1902. Verdict for def't. |
| Pennsylvania Coal and Coke Company. | 1,972 92 | C. S. 1902. Paid. |

SCHEDULE C—Continued.

LIST OF APPEALS FILED SINCE JANUARY 1, 1903.

| Name. | Amount. | Remarks. |
|---|-------------------------------|---|
| People's Light Company of Pittston, Scranton Gas and Water Company, Shenango Valley Railroad Company. | 486 40 34,375 00 375 00 | L. T. 1902. Paid. C. S. 1902. Paid. C. S. 1902. Paid. |
| Standard Ice Manufacturing Company. | 950 00 | L. T. 1899. Verdict for def't. |
| Susquehanna and New York Railroad Company. | 2,500 00 | C. S. 1902. Paid. |
| Webster Coal and Coke Company, .. | 3,372 80 | L. T. 1902. Paid. |
| Webster Coal and Coke Company, .. | 4,911 55 | C. S. 1902. Paid. |
| Westinghouse Traction Brake Company. | 133 33 | Bonus. Judgment for def't. |
| Whitehall Portland Cement Company. | 1,643 00 | L. T. 1902. Paid. |
| Windsor Hotel Company, | 500 00 | C. S. 1896. Verdict for Com'th. |
| Windsor Hotel Company, | 500 00 | C. S. 1897. Verdict for Com'th. |
| Windsor Hotel Company, | 750 00 | C. S. 1898. Verdict for Com'th. |
| Windsor Hotel Company, | 750 00 | C. S. 1899. Verdict for Com'th. |
| Windsor Hotel Company, | 750 00 | C. S. 1900. Verdict for Com'th. |
| Windsor Hotel Company, | 750 00 | C. S. 1901. Verdict for Com'th. |
| Windsor Hotel Company, | 750 00 | C. S. 1902. Verdict for Com'th. |
| Coaldale Mining Company, | 500 00 | C. S. 1899. Paid. |
| Coaldale Mining Company, | 500 00 | C. S. 1900. Verdict for def't. |
| Coaldale Mining Company, | 500 00 | C. S. 1901. Paid. |
| Coaldale Mining Company, | 500 00 | C. S. 1902. Verdict for def't. |
| Philadelphia Trust and Safe Deposit and Insurance Company. | 26,000 00 | C. S. 1902. Verdict for def't. |
| Erie Traction Company, | 1,000 00 | C. S. 1901. Pending. |
| Alden Coal Company, | 2,205 00 | C. S. 1902. Paid. |
| Hazard Manufacturing Company, .. | 275 00 | C. S. 1902. Paid. |
| Cambria Coal Mining Company, | 291 67 | C. S. 1892. Paid. |
| Cambria Coal Mining Company, | 500 00 | C. S. 1893. Paid. |
| Cambria Coal Mining Company, | 500 00 | C. S. 1894. Paid. |
| Cambria Coal Mining Company, | 500 00 | C. S. 1895. Paid. |
| Cambria Coal Mining Company, | 500 00 | C. S. 1896. Paid. |
| Cambria Coal Mining Company, | 500 00 | C. S. 1897. Paid. |
| Cambria Coal Mining Company, | 750 00 | C. S. 1898. Paid. |
| Cambria Coal Mining Company, | 750 00 | C. S. 1899. Paid. |
| Cambria Coal Mining Company, | 750 00 | C. S. 1900. Paid. |
| Cambria Coal Mining Company, | 750 00 | C. S. 1901. Paid. |
| Cambria Coal Mining Company, | 750 00 | C. S. 1902. Paid. |
| Middletown Car Works, | 96 90 | L. T. 1902. Pending. |
| Electric Traction Company, | 38,073 00 | C. S. 1902. Paid. |
| People's Traction Company, | 26,124 00 | C. S. 1902. Paid. |
| Philadelphia Rapid Transit Company. | 13,041 00 | C. S. 1902. Paid. |
| Philadelphia Traction Company, | 87,045 00 | C. S. 1902. Paid. |
| Union Traction Company, | 45,717 00 | C. S. 1902. Paid. |
| Diamond Coal Land Company, | 308 87 | C. S. 1902. Paid. |
| Buffalo, Rochester and Pittsburgh Railway Company. | 28,124 32 | C. S. 1902. Verdict for def't |
| E. P. Wilbur Trust Company, | 4,733 40 | C. S. 1902. Paid. |
| Guarantee Trust and Safe Deposit Company. | 8,383 79 | C. S. 1902. Paid. |
| Investment Company of Philadelphia. | 14,229 38 | C. S. 1902. Paid. |
| Lackawanna Iron and Steel Company. | 11,410 85 | C. S. 1902. Paid. |
| Jefferson and Clearfield Coal and Iron Company. | 17,027 27 | C. S. 1902. Paid. |
| Jefferson and Clearfield Coal and Iron Company. | 12,347 70 | L. T. 1902. Verdict for def't. |
| Lehigh and Wilkes-Barre Coal Company. | 46,062 50 | C. S. 1902. Paid. |
| Midvalley Coal Company, | 2,000 00 | C. S. 1902. Paid. |

SCHEDULE C—Continued.

LIST OF APPEALS FILED SINCE JANUARY 1, 1903.

| Name. | Amount. | Remarks. |
|---|-----------|---------------------------------|
| Olyphant Water Company, | 386 67 | C. S. 1902. Paid. |
| Olyphant Water Company, | 311 60 | L. T. 1902. Paid. |
| Penn Gas Coal Company, | 10,318 28 | C. S. 1902. Paid. |
| Provident Life and Trust Company, | 33,121 59 | C. S. 1902. Paid. |
| Reynoldsville and Falls Creek Rail- road Company. | 1,400 00 | C. S. 1902. Paid. |
| Rochester and Pittsburg Coal and Iron Company. | 4,298 25 | C. S. 1902. Paid. |
| Silver Brook Coal Company, | 1,673 38 | C. S. 1902. Verdict for def't. |
| Upper Lehigh Coal Company, | 2,872 57 | C. S. 1902. Paid. |
| Wyoming Valley Electric Light, Heat and Power Company. | 1,781 60 | L. T. 1902. Paid. |
| Wyoming Valley Electric Light, Heat and Power Company. | 2,200 04 | C. S. 1902. Paid. |
| Finance Company of Pennsylvania, | 3,930 91 | C. S. 1902. Paid. |
| Fairview Coal Mining Company, .. | 729 17 | C. S. 1902. Paid. |
| Mahoning Valley Railroad Com- pany. | 831 87 | L. T. 1902. Verdict for def't. |
| Silver Brook Coal Company, | 2,777 45 | C. S. 1901. Paid. |
| Bangor Water Company, | 370 81 | C. S. 1902. Paid. |
| Scranton Railway Company, | 5,551 85 | L. T. 1902. Pending. |
| People's Ice and Cold Storage Com- pany. | 843 75 | C. S. 1902. Verdict for Com'th. |
| Oliver McClintock Company, | 1,250 00 | C. S. 1902. Verdict for def't. |
| Logan-Gregg Hardware Company, .. | 27 08 | L. T. 1902. Paid. |
| Boothby Hotel Company, | 875 00 | C. S. 1902. Verdict for def't. |
| Sharon Tin Plate Company, | 127 20 | L. T. 1902. Paid. |
| People's Coal Company, | 3,800 00 | C. S. 1902. Verdict for def't. |
| Wilkes-Barre Hotel Company, | 811 30 | L. T. 1902. Verdict for def't. |
| Fire Insurance Company of the County of Philadelphia. | 918 21 | C. S. 1902. Paid. |
| American Steel and Wire Company of New Jersey. | 1,695 61 | Bonus. Pending. |
| National Malleable Castings Com- pany. | 505 00 | Bonus. Pending. |
| Gebbie & Co., | 906 67 | Bonus. Pending. |
| Lycoming Improvement Company, .. | 1,601 19 | L. T. 1902. Verdict for def't. |
| Lycoming Improvement Company, .. | 200 00 | C. S. 1902. Verdict for def't. |
| Shelby Steel Tube Company, | 66 31 | Bonus. Pending. |
| Central Railroad of New Jersey, .. | 91,386 00 | Bonus. Judgment for def't. |
| Beech Creek Coal and Coke Com- pany. | 1,016 79 | C. S. 1901. Paid. |
| Clearfield and Indiana Coal Com- pany. | 430 55 | C. S. 1900. Verdict for Com'th. |
| Clearfield and Indiana Coal Com- pany. | 370 15 | L. T. 1901. Paid. |
| Pennsylvania Coal Company, | 47,500 00 | C. S. 1903. Paid. |
| Blossburg Coal Company, | 500 00 | C. S. 1903. Paid. |
| New York, Lake Erie and Western Coal and Railroad Company. | 2,000 00 | C. S. 1903. Paid. |
| Hillside Coal and Iron Company, . | 625 00 | C. S. 1903. Paid. |
| Northwestern Mining and Exchange Company. | 750 00 | C. S. 1903. Paid. |
| Buffalo, Bradford and Pittsburg Railroad Company. | 625 00 | C. S. 1903. Paid. |
| C. Schmidt & Sons Brewing Com- pany. | 6,000 00 | C. S. 1903. Paid. |
| New York, Susquehanna and West- ern Coal Company. | 500 00 | C. S. 1903. Paid. |
| Erie and Wyoming Valley Railroad Company. | 5,125 00 | C. S. 1903. Paid. |
| Wilkes-Barre and Eastern Railroad Company. | 4,950 00 | C. S. 1903. Paid. |
| Erie Railroad Company, | 5,025 00 | C. S. 1903. Paid. |
| Nypano Railroad Company, | 6,500 00 | C. S. 1903. Paid. |

SCHEDULE C—Continued.

LIST OF APPEALS FILED SINCE JANUARY 1, 1903.

| Name. | Amount. | Remarks. |
|---|-----------|--|
| Jefferson Railroad Company, | 2,500 00 | C. S. 1903. Paid. |
| Butler Mine Company, Limited, ... | 1,000 00 | C. S. 1903. Paid. |
| Florence Coal Company, Limited, .. | 40 00 | C. S. 1903. Paid. |
| Erie Land and Improvement Com- pany. | 25 00 | C. S. 1903. Paid. |
| American Dredging Company, | 15,000 00 | C. S. 1903. Paid. |
| Arrott Steam Power Mills Company, | 825 00 | C. S. 1903. Verdict for def't. |
| Bethlehem Consolidated Water Company. | 746 50 | C. S. 1903. Paid. |
| J. Langdon & Co., Incorporated, | 1,625 00 | C. S. 1903. Paid. |
| Johnstown Light, Heat and Power Company. | 3,291 29 | C. S. 1903. Paid. |
| Kittanning Consolidated Natural Gas Company. | 1,400 00 | C. S. 1903. Paid. |
| National Biscuit Company, | 804 00 | C. S. 1899. Pending. |
| National Biscuit Company, | 1,209 33 | C. S. 1900. Pending. |
| National Biscuit Company, | 1,329 68 | C. S. 1901. Pending. |
| National Biscuit Company, | 1,602 93 | C. S. 1902. Pending. |
| National Biscuit Company, | 1,503 50 | C. S. 1903. Pending. |
| National Biscuit Company, | 1,002 33 | Bonus. Pending. |
| North Jersey and Pocono Mountain Ice Company. | 1,500 00 | C. S. 1901. Pending. |
| North Jersey and Pocono Mountain Ice Company. | 1,500 00 | C. S. 1902. Pending. |
| North Jersey and Pocono Mountain Ice Company. | 1,500 00 | C. S. 1903. Pending. |
| North Jersey and Pocono Mountain Ice Company. | 1,000 00 | Bonus. Pending. |
| St. Mary's Gas Company, | 144 10 | L. T. 1903. Paid. |
| Tamaqua and Lansford Street Rail- way Company. | 333 34 | Bonus. Verdict for def't. |
| James Smith & Co., Incorporated, .. | 166 67 | Bonus. Judgment for def't. |
| Thomas McNally Company, | 854 16 | C. S. 1903. Pending. |
| Fall Brook Coal Company, | 3,000 00 | C. S. 1902. Paid. |
| Fall Brook Coal Company, | 3,000 00 | C. S. 1903. Paid. |
| Pittsburg News Company, | 360 00 | C. S. 1889-90-91. Verdict for def't. |
| Pittsburg News Company, | 2,400 00 | C. S. 1892 to 1903, Inc. Ver- dict for def't. |
| Central News Company, | 833 34 | Bonus. Verdict for def't. |
| Central News Company, | 750 00 | C. S. 1886. Verdict for def't. |
| Central News Company, | 750 00 | C. S. 1887. Verdict for def't. |
| Central News Company, | 750 00 | C. S. 1888. Verdict for def't. |
| Central News Company, | 750 00 | C. S. 1889. Verdict for def't. |
| Central News Company, | 750 00 | C. S. 1890. Verdict for def't. |
| Central News Company, | 750 00 | C. S. 1891. Verdict for def't. |
| Central News Company, | 1,250 00 | C. S. 1892. Verdict for def't. |
| Central News Company, | 1,250 00 | C. S. 1893. Verdict for def't. |
| Central News Company, | 1,250 00 | C. S. 1894. Verdict for def't. |
| Central News Company, | 1,250 00 | C. S. 1895. Verdict for def't. |
| Central News Company, | 1,250 00 | C. S. 1896. Verdict for def't. |
| Central News Company, | 1,250 00 | C. S. 1897. Verdict for def't. |
| Central News Company, | 1,250 00 | C. S. 1898. Verdict for def't. |
| Central News Company, | 1,250 00 | C. S. 1899. Verdict for def't. |
| Central News Company, | 1,250 00 | C. S. 1900. Verdict for def't. |
| Central News Company, | 1,250 00 | C. S. 1901. Verdict for def't. |
| Central News Company, | 1,250 00 | C. S. 1902. Verdict for def't. |
| American News Company, | 1,200 00 | C. S. 1889. Paid. |
| American News Company, | 1,200 00 | C. S. 1890. Paid. |
| American News Company, | 1,200 00 | C. S. 1891. Paid. |
| American News Company, | 2,000 00 | C. S. 1892. Paid. |
| American News Company, | 2,000 00 | C. S. 1893. Paid. |
| American News Company, | 2,000 00 | C. S. 1894. Paid. |
| American News Company, | 2,000 00 | C. S. 1895. Paid. |
| American News Company, | 2,000 00 | C. S. 1896. Paid. |

SCHEDULE C—Continued.

LIST OF APPEALS FILED SINCE JANUARY 1, 1903.

| Name. | Amount. | Remarks. |
|-----------------------------------|----------|---------------------------------|
| American News Company, | 2,000 00 | C. S. 1897. Paid. |
| American News Company, | 2,000 00 | C. S. 1898. Paid. |
| American News Company, | 2,000 00 | C. S. 1899. Paid. |
| American News Company, | 2,000 00 | C. S. 1900. Paid. |
| American News Company, | 2,000 00 | C. S. 1901. Paid. |
| American News Company, | 2,000 00 | C. S. 1902. Paid. |
| American News Company, | 2,000 00 | C. S. 1903. Paid. |
| Union News Company, | 1,500 00 | C. S. 1878. Verdict for def't. |
| Union News Company, | 1,500 00 | C. S. 1879. Verdict for def't. |
| Union News Company, | 1,500 00 | C. S. 1880. Verdict for def't. |
| Union News Company, | 1,500 00 | C. S. 1881. Verdict for def't. |
| Union News Company, | 1,500 00 | C. S. 1882. Verdict for def't. |
| Union News Company, | 1,500 00 | C. S. 1883. Verdict for def't. |
| Union News Company, | 1,500 00 | C. S. 1884. Verdict for def't. |
| Union News Company, | 1,500 00 | C. S. 1885. Verdict for def't. |
| Union News Company, | 1,500 00 | C. S. 1886. Verdict for def't. |
| Union News Company, | 1,500 00 | C. S. 1887. Verdict for def't. |
| Union News Company, | 1,500 00 | C. S. 1888. Verdict for def't. |
| Union News Company, | 1,500 00 | C. S. 1889. Verdict for def't. |
| Union News Company, | 1,500 00 | C. S. 1890. Verdict for def't. |
| Union News Company, | 1,500 00 | C. S. 1891. Verdict for def't. |
| Union News Company, | 2,500 00 | C. S. 1892. Verdict for def't. |
| Union News Company, | 2,500 00 | C. S. 1893. Verdict for def't. |
| Union News Company, | 2,500 00 | C. S. 1894. Verdict for def't. |
| Union News Company, | 2,500 00 | C. S. 1895. Verdict for def't. |
| Union News Company, | 2,500 00 | C. S. 1896. Verdict for def't. |
| Union News Company, | 2,500 00 | C. S. 1897. Verdict for def't. |
| Union News Company, | 2,500 00 | C. S. 1898. Verdict for def't. |
| Union News Company, | 2,500 00 | C. S. 1899. Verdict for def't. |
| Union News Company, | 2,500 00 | C. S. 1900. Verdict for def't. |
| Union News Company, | 2,500 00 | C. S. 1901. Verdict for def't. |
| Union News Company, | 2,500 00 | C. S. 1902. Verdict for def't. |
| Union News Company, | 2,500 00 | C. S. 1903. Verdict for def't. |
| Central News Company, | 60 00 | C. S. 1870. Paid. |
| Central News Company, | 60 00 | C. S. 1871. Paid. |
| Pneumatic Transit Company, | 37 50 | C. S. 1902. Paid. |
| Pneumatic Transit Company, | 214 45 | C. S. 1903. Paid. |
| Singer Manufacturing Company, ... | 629 95 | C. S. 1873. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 944 93 | C. S. 1874. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 944 93 | C. S. 1875. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 944 93 | C. S. 1876. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 944 93 | C. S. 1877. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 944 93 | C. S. 1878. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 944 93 | C. S. 1879. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 944 93 | C. S. 1880. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 944 93 | C. S. 1881. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 944 93 | C. S. 1882. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 944 93 | C. S. 1883. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 944 93 | C. S. 1884. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 944 93 | C. S. 1885. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 944 93 | C. S. 1886. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 944 93 | C. S. 1887. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 944 93 | C. S. 1888. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 944 93 | C. S. 1889. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 944 93 | C. S. 1890. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 944 93 | C. S. 1891. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 1,574 88 | C. S. 1892. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 1,574 88 | C. S. 1893. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 1,574 88 | C. S. 1894. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 1,574 88 | C. S. 1895. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 1,574 88 | C. S. 1896. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 1,574 88 | C. S. 1897. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 1,574 88 | C. S. 1898. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 1,574 88 | C. S. 1899. Verdict for Com'th. |
| Singer Manufacturing Company, ... | 1,574 88 | C. S. 1900. Verdict for Com'th. |

SCHEDULE C—Continued.

LIST OF APPEALS FILED SINCE JANUARY 1, 1903.

| Name. | Amount. | Remarks. |
|--|-----------|--|
| Singer Manufacturing Company, | 1,574 88 | C. S. 1901. Verdict for Com'th. |
| Singer Manufacturing Company, | 1,574 88 | C. S. 1902. Verdict for Com'th. |
| Singer Manufacturing Company, | 1,574 88 | C. S. 1903. Verdict for Com'th. |
| Alden Supply Company, Limited, ... | 200 00 | C. S. 1903. Paid. |
| American Ice Company, | 2,966 67 | Bonus. Pending. |
| Atlas Portland Cement Company, ... | 264 83 | L. T. 1903. Verdict for def't. |
| Bear Creek Ice Company, | 550 00 | C. S. 1903. Paid. |
| Cambria Steel Company, | 5,619 09 | C. S. 1903. Paid. |
| Cranberry Improvement Company, | 4,053 66 | C. S. 1903. Paid. |
| E. P. Wilbur Trust Company, | 4,801 90 | C. S. 1902. Paid. |
| East Deer Township Water Com- pany. | 100 00 | L. T. 1903. Verdict for Com'th. |
| Gas Company of Luzerne County, .. | 2,509 14 | C. S. 1903. Verdict for def't. |
| Highspire Distillery Company, Limited. | 400 00 | C. S. 1903. Paid. |
| International Navigation Company, .. | 1,380 00 | C. S. 1903. Paid. |
| James Smith Woolen Machinery Company. | 482 60 | L. T. 1903. Pending. |
| Midland Mining Company, | 100 00 | C. S. 1903. Paid. |
| Olyphant Water Company, | 541 84 | C. S. 1903. Paid. |
| Olyphant Water Company, | 311 60 | L. T. 1903. Verdict for def't. |
| Paul Wuesthoff Company, | 284 50 | C. S. 1903. Verdict for Com'th. |
| Philadelphia Warehousing and Cold Storage Company. | 1,834 04 | C. S. 1903. Paid. |
| Rockhill Iron and Coal Company, .. | 258 97 | C. S. 1903. Paid. |
| Seranton Gas and Water Company, | 16,451 57 | C. S. 1903. Paid. |
| Silver Brook Supply Company, Limited. | 175 00 | C. S. 1903. Paid. |
| State Line and Sullivan Railroad Company. | 2,200 00 | C. S. 1903. Paid. |
| Tionesta Valley Railway Company, .. | 2,625 00 | C. S. 1903. Paid. |
| Upper Lehigh Supply Company, Limited. | 469 50 | C. S. 1903. Paid. |
| W. K. Niver Coal Company, | 2,779 00 | C. S. 1903. Paid. |
| West Branch Coal Company, | 225 00 | C. S. 1903. Verdict for Com'th. |
| Wyoming Valley Electric Light, Heat and Power Company. | 1,464 80 | L. T. 1903. Verdict for Com'th. |
| Harrison Brothers & Co., Incor- porated. | 508 53 | C. S. 1903. Pending. |
| Santo Domingo Mining Company, .. | 1,337 50 | C. S. 1867 to 1903, Inc. Paid. |
| Pennsylvania Bituminous Coal Cor- poration. | 375 00 | C. S. 1903. Verdict for Com'th. |
| People's Electric Light, Heat and Power Company, Nanticoke. | 71 50 | C. S. 1903. Paid. |
| People's Electric Light, Heat and Power Company, Nanticoke. | 294 50 | L. T. 1903. Paid. |
| Pine Creek Railway Company, | 5,000 00 | C. S. 1903. Verdict for Com'th. |
| Shenango Valley Railroad Company, | 438 00 | C. S. 1903. Paid. |
| Alden Coal Company, | 5,000 00 | C. S. 1903. Paid. |
| Acme Coal Mining Company, | 225 00 | C. S. 1903. Verdict for the Com'th. |
| Alliance Coal Mining Company, ... | 1,125 00 | C. S. 1903. Paid. |
| Atlantic Crushed Coke Company, ... | 1,250 00 | C. S. 1903. Paid. |
| Bangor Water Company, | 462 00 | C. S. 1903. Verdict for Com'th. |
| Beech Creek Extension Railroad Company. | 11,750 00 | C. S. 1903. Verdict for Com'th. |
| Bell Telephone Company of Phila- delphia. | 59,294 99 | C. S. 1903. Verdict for Com'th. |
| Black Creek Improvement Com- pany. | 3,308 00 | C. S. 1903. Paid. |
| Buffalo and Susquehanna Railroad Company. | 23,088 35 | C. S. 1903. Paid. |
| Carlisle Supply Company, Limited, .. | 250 00 | C. S. 1903. Verdict for Com'th. |
| Chevington and Bunn Coal Com- pany. | 190 00 | C. S. 1903. Paid. |

SCHEDULE C—Continued.

LIST OF APPEALS FILED SINCE JANUARY 1, 1903.

| Name. | Amount. | Remarks. |
|--|------------|---------------------------------|
| Clearfield Bituminous Coal Corporation. | 834 86 | L. T. 1903. Verdict for def't. |
| Clearfield Southern Railroad Company. | 345 00 | C. S. 1903. Verdict for Com'th. |
| Clear Springs Water Company, | 544 68 | C. S. 1903. Verdict for def't. |
| Coudersport and Port Allegany Railroad Company. | 931 00 | L. T. 1903. Verdict for Com'th. |
| Cowanshannock Coal and Coke Company. | 8,071 50 | C. S. 1903. Verdict for Com'th. |
| Diamond Coal Land Company, | 311 65 | C. S. 1903. Paid. |
| Dunbar Furnace Company, | 996 62 | C. S. 1903. Paid. |
| Dunkirk, Allegheny Valley and Pittsburgh Railroad Company. | 2,750 00 | C. S. 1903. Paid. |
| Empire Coal Mining Company, | 1,075 05 | C. S. 1903. Paid. |
| Enterprise Transit Company, | 2,915 00 | C. S. 1903. Paid. |
| Fall Brook Railway Company, | 19,250 00 | C. S. 1903. Verdict for Com'th. |
| Fairmount Park Transportation Company. | 5,100 00 | C. S. 1903. Paid. |
| Franklin and Clearfield Railroad Company. | 250 00 | C. S. 1903. Paid. |
| Goodyear Lumber Company, | 8,130 00 | C. S. 1903. Paid. |
| Highland Coal Company, | 2,800 00 | C. S. 1903. Paid. |
| Hollenback Coal Company, | 3,100 00 | C. S. 1903. Paid. |
| Lehigh and Wilkes-Barre Coal Company. | 52,056 72 | C. S. 1903. Paid. |
| Jamestown and Franklin Railroad Company. | 1,064 98 | C. S. 1903. Paid. |
| Jefferson Coal Company, | 925 00 | C. S. 1903. Paid. |
| Lackawanna Iron and Steel Company. | 11,659 05 | C. S. 1903. Paid. |
| Leetonia Railroad Company, | 580 28 | C. S. 1903. Paid. |
| Lewisburg, Milton and Watsonstown Passenger Railway Company. | 425 00 | C. S. 1903. Paid. |
| Midvalley Coal Company, | 9,000 00 | C. S. 1903. Paid. |
| Midvalley Supply Company, Limited. | 348 50 | C. S. 1903. Paid. |
| Milton Electric Light and Power Company. | 125 00 | C. S. 1903. Verdict for Com'th. |
| Montoursville Passenger Railway Company. | 188 00 | C. S. 1903. Verdict for Com'th. |
| Mortgage Trust Company of Pennsylvania. | 10,732 22 | C. S. 1903. Paid. |
| Nescopeck Coal Company, | 3,675 00 | C. S. 1903. Paid. |
| Nesquehoning Valley Railroad Company. | 7,447 65 | C. S. 1903. Verdict for Com'th. |
| Penn Gas Coal Company, | 8,250 00 | C. S. 1903. Paid. |
| Silver Brook Coal Company, | 4,400 00 | C. S. 1903. Paid. |
| Slate Belt Electric Street Railway Company. | 1,375 00 | C. S. 1903. Paid. |
| Somerset Colliery Company, | 250 00 | C. S. 1903. Verdict for def't. |
| Truman M. Dodson Coal Company, .. | 454 50 | C. S. 1903. Paid. |
| Union Improvement Company, | 7,637 30 | C. S. 1903. Paid. |
| The United Gas Improvement Company. | 217,176 63 | C. S. 1903. Paid. |
| Upper Lehigh Coal Company, | 7,250 00 | C. S. 1903. Paid. |
| Walnut Run Coal Company, | 425 00 | C. S. 1903. Verdict for def't. |
| Wyoming Valley Electric Light, Heat and Power Company. | 2,000 00 | C. S. 1903. Paid. |
| Delaware, Lackawanna and Western Railroad Company. | 5,076 53 | L. T. 1903. Verdict for Com'th. |
| Delaware, Lackawanna and Western Railroad Company. | 327,500 00 | C. S. 1903. Paid. |
| Lebanon Gas Company, | 506 01 | C. S. 1894. Verdict for def't. |
| Lebanon Gas Company, | 530 64 | C. S. 1895. Verdict for def't. |
| Lebanon Gas Company, | 800 64 | C. S. 1896. Verdict for def't. |
| Lebanon Gas Company, | 518 00 | C. S. 1897. Verdict for def't. |
| Lebanon Gas Company, | 554 40 | C. S. 1898. Verdict for def't. |

SCHEDULE C—Continued.

LIST OF APPEALS FILED SINCE JANUARY 1, 1903.

| Name. | Amount. | Remarks. |
|--------------------------------------|------------|---------------------------------|
| Lebanon Gas Company, | 554 40 | C. S. 1899. Verdict for def't. |
| Lebanon Gas Company, | 554 40 | C. S. 1900. Verdict for def't. |
| Lebanon Gas Company, | 633 60 | C. S. 1902. Verdict for def't. |
| Kingston Coal Company, | 25,000 00 | C. S. 1903. Paid. |
| Hudson Coal Company, | 15,575 00 | C. S. 1903. Paid. |
| Westinghouse Air Brake Company, | 24,213 54 | C. S. 1903. Paid. |
| Bangor and Portland Railway Com- | 3,324 94 | C. S. 1903. Paid. |
| pany. | | |
| Parrish Coal Company, | 12,646 84 | C. S. 1903. Paid. |
| Coudersport and Port Allegany Rail- | 2,050 00 | C. S. 1903. Paid. |
| road Company. | | |
| New York, Chicago and St. Louis | 2,870 41 | C. S. 1903. Verdict for Com'th. |
| Railroad Company. | | |
| Huntingdon and Broad Top Moun- | 19,949 63 | C. S. 1903. Paid. |
| tain Railroad and Coal Company. | | |
| Buck Run Coal Company, | 1,246 00 | C. S. 1903. Paid. |
| Sterling Coal Company, | 1,050 00 | C. S. 1903. Verdict for def't. |
| Clearfield Bituminous Coal Corpora- | 1,351 12 | C. S. 1903. Paid. |
| tion. | | |
| Beech Creek Cannel Coal Company, | 150 00 | C. S. 1903. Paid. |
| Beech Creek Railroad Company, ... | 38,250 00 | C. S. 1903. Verdict for Com'th. |
| Beech Creek Railroad Company, ... | 2,160 89 | L. T. 1903. Verdict for def't. |
| E. A. Bowker & Co., Incorporated, | 570 00 | C. S. 1903. Verdict for Com'th. |
| Scranton Railway Company, | 5,525 98 | L. T. 1903. Paid. |
| Scranton Railway Company, | 9,195 71 | C. S. 1903. Paid. |
| S. S. Fretz Manufacturing Company, | 1,000 00 | C. S. 1903. Pending. |
| Philadelphia and West Chester | 2,536 01 | C. S. 1903. Paid. |
| Traction Company. | | |
| Buffalo, Rochester and Pittsburgh | 39,441 28 | C. S. 1903. Paid. |
| Railway Company. | | |
| Rochester and Pittsburgh Coal and | 17,506 63 | C. S. 1903. Verdict for Com'th. |
| Iron Company. | | |
| Reynoldsville and Falls Creek Rail- | 1,865 92 | C. S. 1903. Verdict for Com'th. |
| road Company. | | |
| Tamaqua and Lansford Street Rail- | 1,750 00 | C. S. 1903. Paid. |
| way Company. | | |
| Hazleton Gas Light Company, | 418 00 | L. T. 1903. Paid. |
| Harrisburg Gas Company, | 2,998 68 | L. T. 1903. Pending. |
| Lehigh Coal and Navigation Com- | 58,618 29 | L. T. 1903. Pending. |
| pany. | | |
| Equitable Illuminating Gas Light | 26,237 90 | L. T. 1903. Paid. |
| Company of Philadelphia. | | |
| Finance Company of Pennsylvania, .. | 3,551 00 | C. S. 1903. Paid. |
| Pennsylvania Company for Insur- | 64,974 27 | C. S. 1903. Paid. |
| ances on Lives and Granting An- | | |
| nuities. | | |
| Electric Traction Company, | 35,018 43 | C. S. 1903. Verdict for Com'th. |
| Provident Life and Trust Company, | 29,712 26 | C. S. 1903. Paid. |
| Philadelphia Rapid Transit Com- | 25,310 13 | C. S. 1903. Verdict for Com'th. |
| pany. | | |
| People's Traction Company, | 29,292 58 | C. S. 1903. Verdict for Com'th. |
| Philadelphia Traction Company, ... | 84,374 26 | C. S. 1903. Verdict for Com'th. |
| Philadelphia and West Chester | 581 40 | L. T. 1903. Pending. |
| Traction Company. | | |
| Union Traction Company, | 50,917 21 | C. S. 1903. Verdict for Com'th. |
| Lycoming Electric Company, | 575 00 | C. S. 1903. Paid. |
| Investment Company of Philadel- | 12,531 95 | C. S. 1903. Verdict for Com'th. |
| phia. | | |
| Lehigh Coal and Navigation Com- | 110,861 13 | C. S. 1903. Paid. |
| pany. | | |
| Philadelphia Brewing Company, ... | 4,848 85 | C. S. 1903. Verdict for Com'th. |
| Altoona and Logan Valley Electric | 12,256 25 | C. S. 1903. Pending. |
| Railway Company. | | |
| Philadelphia Securities Company, ... | 250 00 | C. S. 1903. Pending. |
| Delaware and Hudson Company, ... | 46,439 99 | C. S. 1903. Pending. |

SCHEDULE C—Continued.

LIST OF APPEALS FILED SINCE JANUARY 1, 1903.

| Name. | Amount. | Remarks. |
|---|-----------|----------------------|
| Philadelphia Freezing Company, ... | 979 17 | C. S. 1903. Pending. |
| United Ice and Coal Company, | 1,725 00 | C. S. 1903. Pending. |
| Guarantee Trust and Safe Deposit Company. | 8,472 77 | C. S. 1903. Pending. |
| Beech Creek Coal and Coke Company. | 2,800 00 | C. S. 1902. Pending. |
| City Passenger Railway Company of Altoona. | 1,250 00 | C. S. 1903. Pending. |
| Saxman Coal and Coke Company, .. | 1,250 00 | C. S. 1903. Pending. |
| Agents' and Insurers' General Investment Company. | 33 46 | Bonus. Pending. |
| Commercial Trust Company, | 17,064 83 | C. S. 1903. Pending. |
| Potter Gas Company, | 2,176 59 | C. S. 1902. Pending. |
| Potter Gas Company, | 1,529 89 | C. S. 1901. Pending. |
| Potter Gas Company, | 1,350 00 | C. S. 1900. Pending. |
| Potter Gas Company, | 1,350 00 | C. S. 1899. Pending. |
| Olean, Rock City and Bradford Railway Company. | 1,205 00 | C. S. 1903. Pending. |
| Olean, Rock City and Bradford Railway Company. | 1,500 00 | C. S. 1902. Pending. |
| Olean, Rock City and Bradford Railway Company. | 885 00 | C. S. 1901. Pending. |
| Olean, Rock City and Bradford Railway Company. | 865 00 | C. S. 1900. Pending. |
| Robeson Iron Company, Limited, . | 705 40 | C. S. 1903. Pending. |
| Medix Run Railroad Company, | 175 00 | C. S. 1903. Pending. |
| Medix Run Railroad Company, | 175 00 | C. S. 1904. Pending. |

SCHEDULE D.

LIST OF CASES ARGUED IN THE SUPREME COURT OF PENNSYLVANIA DURING THE YEARS 1903 AND 1904.

| | |
|--|---------------|
| Commonwealth ex rel., Arthur Wadsworth vs. William A. Shortall, Constable. Original application for original writ of habeas corpus ad subjiciendum, | Granted. |
| Commonwealth vs. Delaware Lackawanna and Western Railroad Company, appellant, | Affirmed. |
| Commonwealth vs. Pennsylvania Coal Company, appellant. Ordered for re-argument, | Discontinued. |
| Commonwealth vs. Pennsylvania Coal Company, appellant. Ordered for re-argument, | Discontinued. |
| Commonwealth, appellant vs. National Tube Works Company, | Affirmed. |
| Commonwealth, appellant vs. Lehigh Coal and Navigation Company, | Affirmed. |
| Commonwealth, appellant vs. Horace B. Reighter, Recorder, Montgomery county, | Non prosd. |
| Commonwealth, appellant vs. Buffalo and Susquehanna Railroad Company, | Affirmed. |
| Commonwealth, appellant vs. Danville Bessemer Company, .. | Affirmed. |
| Commonwealth, appellant vs. Crucible Steel Company of America, | Affirmed. |
| Commonwealth, appellant vs. D. B. Martin Company, | Non prosd. |
| Commonwealth, appellant vs. Buffalo, Rochester and Pittsburgh Railway Company, | Affirmed. |
| Commonwealth, appellant vs. American Steel and Wire Company of New Jersey, | Affirmed. |
| Commonwealth vs. James Russ, appellant, | Reversed. |
| James W. M. Newlin, appellant vs. Frank G. Harris, State Treasurer; Hampton L. Carson, Attorney General, et al., .. | Affirmed. |
| Commonwealth ex rel., Hampton L. Carson, Attorney General, for the use of Craig Biddle et al. vs. William L. Mathues, Treasurer of Commonwealth of Pennsylvania, appellant, | Affirmed. |
| Commonwealth, appellant vs. Real Estate Trust Company of Philadelphia, | Pending. |
| Provident Life and Trust Company vs. J. Wesley Durham and H. Gilbert Cassidy, assessors, and Simon Gratz, Rinaldo A. Lukens and Isaac H. Shields, members of the board of revision of taxes, appellants, | Pending. |

LIST OF CASES ARGUED IN THE CIRCUIT COURT OF THE UNITED STATES DURING THE YEARS 1903 AND 1904.

| | |
|--|-----------------|
| Henry F. Michell Company, a corporation created by and existing under the laws of the State of Delaware, and a citizen of and resident thereunder, vs. William L. Mathues, Treasurer of the State of Pennsylvania, a citizen of the State of Pennsylvania and resident thereunder, | Bill dismissed. |
|--|-----------------|

SCHEDULE E.

LIST OF CASES NOW PENDING IN THE SUPREME COURT OF PENNSYLVANIA.

| | |
|--|---------|
| Commonwealth ex rel., Hampton L. Carson, Attorney General, appellant vs. Isaac B. Brown, Secretary of Internal Affairs of the Commonwealth of Pennsylvania, | |
| Commonwealth, appellant vs. Real Estate Trust Company of Philadelphia, | Argued. |
| Provident Life and Trust Company vs. J. Wesley Durham and H. Gilbert Cassidy, assessors, and Simon Gratz, Rinaldo A. Lukens and Isaac H. Shields, members of the board of revision of taxes, | Argued. |

LIST OF CASES NOW PENDING IN SUPREME COURT OF THE UNITED STATES.

Commonwealth vs. Delaware, Lackawanna and Western Railroad Company, Appellant.

SCHEDULE F.

QUO WARRANTO PROCEEDINGS.

| Name of Party. | Action Taken. |
|---|---|
| Correspondence Institute of America, Clark Company, propr. | Allowed. Proceedings discontinued. |
| Lackawanna Valley Rapid Transit Company. | Allowed. Judgment of ouster. |
| S. J. Harris, John A. Cox and William R. Johnston. | Allowed. Proceedings abandoned. |
| Interior Construction and Improvement Company, with notice to D. F. Maroney, trustee. | Allowed. Pending. |
| L. F. Duanne, Elias H. Palmer, A. O. Gangerre, J. S. Edwards, James D. White, John Warren, W. A. Park and J. H. Park and New Brighton, Beaver Falls and Morada Electric Street Railway Company. | Allowed. Pending. |
| L. F. Duanne, Elias H. Palmer, A. O. Gangerre, J. S. Edwards, James D. White, John Warren, W. A. Park and J. H. Park and Rochester, Beaver Falls and Van Port Electric Street Railway Company. | Allowed. Pending. |
| Horam Run Railroad Company, | Allowed. Pending. |
| Alba Dentists Company, | Allowed. Judgment of ouster. |
| Mifflin Bridge Company, | Allowed. Judgment of ouster. |
| McKeesport and West Elizabeth Street Railway Company. | Allowed. Judgment of ouster. |
| Wilkinsburg, Frankstown Avenue and Verona Street Railway Company. | Allowed. Judgment of ouster. |
| Braddock and Duquesne Bridge Company. | Allowed. Judgment of ouster. |
| Bellevernon and East Side Street Railway Company. | Allowed. Judgment of ouster. |
| Braddock and North Homestead Street Railway Company. | Allowed. Judgment of ouster. |
| Castle Shannon Railway Company, ... | Allowed. Judgment of ouster. |
| Duquesne and Dravosburg Street Railway Company. | Allowed. Judgment of ouster. |
| North Branch Steel Company, | Allowed. Judgment of ouster. |
| Point Bridge Company, | Allowed. Pending. |
| Northumberland Water Supply Company. | Allowed. Judgment of ouster. |
| Paxton Flouring Mill Company, | Allowed. Judgment of ouster. |
| Easton and Belvidere Street Railway Company. | Allowed. Pending. |
| Alliance, Bath and Nazareth Street Railway Company. | Allowed. Pending. |
| Cement Belt Street Railway Company. | Allowed. Pending. |
| Nazareth and Bath Street Railway Company. | Allowed. Pending. |
| Bethlehem and Bath Street Railway Company. | Allowed. Pending. |
| Bethlehem and Siegfried Street Railway Company. | Allowed. Pending. |
| William H. Middleton, | Allowed. Judgment in favor of def't. |
| C. M. Miller, Amos H. Smith and H. M. Nissley. | Allowed. Judgment in favor of the Com'th. |
| Spangler and Hastings Electric Railway Company. | Allowed. Judgment of ouster. |
| Berks Electric Light, Heat and Power Company of Reading. | Allowed. Judgment of ouster. |
| Schuylkill Valley Electric Company of Reading. | Allowed. Judgment of ouster. |
| Womelsdorf and Myerstown Street Railway Company. | Allowed. Judgment of ouster. |

SCHEDULE F—Continued.

QUO WARRANTO PROCEEDINGS.

| Name of Party. | Action Taken. |
|---|--|
| South End Street Railway Company, .. | Allowed. Judgment of ouster. |
| Kutztown Street Railway Company, .. | Allowed. Judgment of ouster. |
| Chester and Rose Valley Street Railway Company. | Allowed. Judgment of ouster. |
| Arch and Green Street Electric Railway Company. | Allowed. Judgment of ouster. |
| East Side Street Railway Company, .. | Allowed. Judgment of ouster. |
| Colwyn and Ridley Park Street Railway Company. | Allowed. Judgment of ouster. |
| Reading and Lancaster Electric Railway Company. | Allowed. Judgment of ouster. |
| Twelfth and Thirteenth Street Railway Company. | Allowed. Judgment of ouster. |
| Hamburg Street Railway Company, .. | Allowed. Judgment of ouster. |
| Reading and Pottstown Electric Railway Company. | Allowed. Judgment of ouster. |
| Reading and Millmont Street Railway Company. | Allowed. Judgment of ouster. |
| Reading, Hamburg and Pottsville Street Railway Company. | Allowed. Judgment of ouster. |
| Reading, Fleetwood and Kutztown Railroad Company. | Allowed. Judgment of ouster. |
| Reading and Birdsboro Railway Company. | Allowed. Judgment of ouster. |
| Lima, Gradyville and West Chester Street Railway Company. | Allowed. Judgment of ouster. |
| West End Electric Street Railway Company. | Allowed. Judgment of ouster. |
| Darby and Fernwood Street Railway Company. | Allowed. Judgment of ouster. |
| West Side Street Railway Company, .. | Allowed. Judgment of ouster. |
| Reading and Hamburg Railway Company. | Allowed. Judgment of ouster. |
| Chester and Rockdale Street Railway Company. | Allowed. Judgment of ouster. |
| Chester and Middletown Street Railway Company. | Allowed. Judgment of ouster. |
| Standard Traction Company, | Allowed. Judgment of ouster. |
| Consolidated Traction Company of Reading. | Allowed. Judgment of ouster. |
| Clifton and Sharon Hill Street Railway Company. | Allowed. Judgment of ouster. |
| Morrisville and Trenton Street Railway Company. | Allowed. Judgment of ouster. |
| Black Bear Street Railway Company. | Allowed. Judgment of ouster. |
| Allentown and East Allentown Bridge Company. | Allowed. Judgment of ouster. |
| Pittsburg, Johnstown, Ebensburg and Eastern Railroad Company. | Allowed. Pending. |
| Altoona and Philipsburg Connecting Railroad Company. | Allowed. Pending. |
| Pittsburg, Virginia and Charleston Railway Company and Brownsville and State Line Railroad Company. | Allowed. Suggestion filed in Allegheny county. |
| National Council Junior Order of United American Mechanics. | Refused. |
| Glenwood Railroad Company, | Refused. |
| B. H. Warren, Dairy and Food Commissioner. | Proceedings abandoned. |
| Harrisburg, Carlisle and Chambersburg Turnpike Road Company. | Allowed. Proceedings abandoned. |
| Consumers' Gas Company of Scranton, | Refused. |
| Frank G. McAnich, justice of the peace, Stowe township, Allegheny county. | Application withdrawn. |

SCHEDULE F—Continued.

QUO WARRANTO PROCEEDINGS.

| Name of Party. | Action Taken. |
|---|--|
| Blairsville and Derry Street Railway Company. | Proceedings abandoned. |
| Bankers' Street Railway Company, ... | Refused. |
| Iron City Street Railway Company, .. | Refused. |
| Union Railroad Company, | Refused. |
| Northern Boulevard Company, | Proceedings abandoned. |
| Glenwood Rapid Transit Street Railway Company. | Heard. Proceedings abandoned. |
| People's Railway Company, Schuylkill Electric Railway Company and Pottsville Union Traction Company. | Refused. |
| Harry J. Trainer, Harry C. Ransley and Joseph H. Klemmer, select councilmen of city of Philadelphia. | Refused. |
| Beaver Terrace Street Railway Company. | Refused. |
| Keystone Standard Watch Company,... | Allowed. Suggestion filed in Lancaster county. |
| Max D. Lieber, | Refused. |
| Eastern College of Painless Dentistry, .. | Proceedings abandoned. |
| Danville and Riverside Street Railway Company and Danville and Bloomsburg Street Railway Company. | Refused. |
| Union Railroad Company, | Refused. |
| Beaver Valley Railroad Company, ... | Refused. Reargument allowed. |
| Berwyn Social Club, | Refused. |
| Chemical Specialty Company, | Pending. |
| Broad Street Rapid Transit Railway Company. | Application withdrawn. |
| Smith Ferry Company, | Refused. |
| Munhall Water Company, | Allowed. Judgment of ouster. |
| Frederic P. Heller, Matthan Harbster, Edward Elbert and Solomon H. Close, water commissioners of city of Reading. | Allowed. Pending. |
| Philadelphia Rapid Transit Street Railway Company. | Allowed. Pending in Philadelphia county. |

SCHEDULE G.

LIST OF EQUITY CASES.

| Name of Party. | Action Taken. |
|---|--|
| Commonwealth, vs. Delaware Valley Railroad Company, Delaware Valley Construction Company and the Franklin National Bank. | Injunction dissolved and bill dismissed. |
| Commonwealth of Pennsylvania, vs. | Bill filed. Proceedings abandoned. |
| Samuel J. Harris, John A. Cox and Wm. R. Johnston. | |
| Grant Township Water Company, vs. | Bill filed. Preliminary injunction dissolved. |
| Saml. W. Pennypacker, Governor; Frank M. Fuller, Secretary of the Commonwealth, and H. M. Lowry, recorder of deeds of Indiana county. | |
| Yellow Creek Water Company, vs. | Bill filed. Preliminary injunction dissolved. |
| Saml. W. Pennypacker, Governor; Frank M. Fuller, Secretary of the Commonwealth, and H. M. Lowry, recorder of deeds of Indiana county. | |
| Colfax Water Company, vs. | Bill filed. Preliminary injunction dissolved. |
| Saml. W. Pennypacker, Governor; Frank M. Fuller, Secretary of the Commonwealth, and H. M. Lowry, recorder of deeds of Indiana county. | |
| Two Lick Creek Water Company, vs. | Bill filed. Preliminary injunction dissolved. |
| Saml. W. Pennypacker, Governor; Frank M. Fuller, Secretary of the Commonwealth, and H. M. Lowry, recorder of deeds of Indiana county. | |
| Cherry Hill Township Water Company, vs. | Bill filed. Preliminary injunction dissolved. |
| Saml. W. Pennypacker, Governor; Frank M. Fuller, Secretary of the Commonwealth, and H. M. Lowry, recorder of deeds of Indiana county. | |
| James W. M. Newlin, vs. | Bill dismissed. Affirmed on appeal to Supreme Court. |
| Frank G. Harris, State Treasurer; Hampton L. Carson, Attorney General; Martin Bell, president judge of the court of common pleas of Blair county, and Robert Von Moschzisker, associate law judge of the court of common pleas No. 3 of Philadelphia. | |
| Arlington Water Company, vs. | |
| Samuel W. Pennypacker, Governor; Frank M. Fuller, Secretary of the Commonwealth of Pennsylvania, and J. Denny O'Neill, recorder of deeds of Allegheny county. | Preliminary injunction granted. Proceedings abandoned. |

SCHEDULE G—Continued.

LIST OF EQUITY CASES.

| Name of Party. | Action Taken. |
|--|--|
| Castle Shannon Water Company, vs. Samuel W. Pennypacker, Governor; Frank M. Fuller, Secretary of the Commonwealth of Pennsylvania, and J. Denny O'Neill, recorder of deeds of Allegheny county. Commonwealth of Pennsylvania, | Preliminary injunction granted. Pro- ceedings abandoned. |
| vs. Erie Rapid Transit Company, a cor- poration in the hands of a receiver, William Pearson et al., First Na- tional Bank, Colonial Trust Com- pany, Vandergrift Construction Company. | Bill filed. Pending. |
| Deer Creek Water Company, vs. Saml. W. Pennypacker, Governor; Frank M. Fuller, Secretary of the Commonwealth, and Edward T. Bentz, recorder of deeds of York county. | Bill filed. Preliminary injunction dis- solved. |
| Borough of Norristown, et al., vs. Norristown and Main Line Connecting Railroad Company. | Use of name of Commonwealth al- lowed. |
| J. C. Kunzman, vs. Sewickley Academy. People's Market Company, vs. | Use of name of Commonwealth al- lowed. |
| City of Erie. Valley Forge Park Commission, vs. | Proceedings discontinued. |
| Phoenixville and Bridgeport Electric Railway Company. | Use of name of Commonwealth re- fused. |
| L. P. Snyder, et al., vs. Pittsburg, Shawmut and Northern Railroad Company. | Use of name of Commonwealth re- fused. |
| John Walker, et al., vs. Seventh Day Baptist Congregation of Snow Hill, Franklin county. | Use of name of Commonwealth al- lowed. |
| Citizens of Erie, vs. Consumers' Brewing Company. | Petition filed. Pending. |
| Butler Water Company, vs. J. W. McKee, et al., Valley Forge Park Commission, vs. | Use of name of Commonwealth al- lowed. |
| Phoenixville and Bridgeport Electric Railway Company. | Use of name of Commonwealth al- lowed. Pending in Montgomery county. |

SCHEDULE H.

MANDAMUS PROCEEDINGS.

| Name of Party. | Action Taken. |
|---|---|
| Commonwealth, ex rel., Herbert W. Cummings, district attorney of Northumberland county; David L. Glover, district attorney of Union county; Geo. W. Raudenbush, John H. Beck and A. H. Cooner, county commissioners of Northumberland county; S. E. Benner, W. D. Williams and Amos Fauver, county commissioners of Union county, vs. | Peremptory mandamus refused. |
| Hampton L. Carson, Attorney General; Frank M. Fuller, Secretary of the Commonwealth and Isaac B. Brown, Secretary of Internal Affairs, composing the Board of Property of Pennsylvania. | Peremptory mandamus awarded. Pending in Supreme Court. |
| Commonwealth, ex rel., Hampton L. Carson, Attorney General of the Commonwealth of Pennsylvania for the use of Craig Biddle, et al., judges learned in the law of the courts of common pleas and of orphans' courts in the Commonwealth of Pennsylvania, and of all other judges learned in the law in the said Commonwealth, similarly situated, vs. | Peremptory mandamus awarded. Pending in Supreme Court. |
| Frank G. Harris, State Treasurer of the Commonwealth of Pennsylvania. Commonwealth, ex rel., Hampton L. Carson, Attorney General, vs. | Peremptory mandamus refused. Pending in Supreme Court. |
| Isaac B. Brown, Secretary of Internal Affairs of the Commonwealth of Pennsylvania. | Alternative mandamus awarded. Pending. |
| Commonwealth, ex rel., Albert Millar, district attorney of Dauphin county, vs. | Alternative mandamus awarded. Pending. |
| John Stephenson and Harry Stauffer, supervisors of the township of Swatara, Dauphin county. | Alternative mandamus awarded. |
| Commonwealth, ex rel., E. J. Fithian, vs. | Alternative mandamus awarded. |
| Frank M. Fuller, Secretary of the Commonwealth. | Alternative mandamus awarded. |
| Commonwealth, ex rel., E. J. Fithian, vs. | Alternative mandamus awarded. |
| Frank M. Fuller, Secretary of the Commonwealth. | Alternative mandamus awarded. |
| Commonwealth, ex rel., E. J. Fithian, vs. | Alternative mandamus awarded. |
| Frank M. Fuller, Secretary of the Commonwealth. | Alternative mandamus awarded. |
| Commonwealth, ex rel., E. J. Fithian, vs. | Peremptory mandamus awarded. |
| Frank M. Fuller, Secretary of the Commonwealth. | Peremptory mandamus awarded. |
| Commonwealth, ex rel., H. S. Montford, vs. | Proceedings discontinued by complainant. |
| Frank M. Fuller, Secretary of the Commonwealth. | Proceedings discontinued by complainant. |
| Benjamin L. Faust, vs. | Proceedings discontinued by complainant. |
| W. C. Roth, tax collector. | |

SCHEDULE I.

PROCEEDINGS HAVE BEEN INSTITUTED BY THIS DEPARTMENT
AGAINST THE FOLLOWING INSURANCE COMPANIES AND BUILDING
AND LOAN ASSOCIATIONS.

| Name. | Result. |
|---|----------------------|
| State Bank of Pittsburg, | Dissolved. Receiver. |
| Union Surety and Guaranty Company, | Dissolved. Receiver. |
| Standard Trust Company of Butler, .. | Dissolved. Receiver. |
| United States Mutual Fire Insurance Company of Philadelphia. | Pending. |
| Perpetual Fire Insurance Company, .. | Dissolved. Receiver. |
| State Mutual Fire Insurance, | Dissolved. Receiver. |

SCHEDULE J.

LIST OF CLAIMS RECEIVED FROM THE SECRETARY OF INTERNAL AFFAIRS AND OTHERS IN 1903 AND 1904.

| Name of Party. | Nature of Claim. | Amount. | Remarks. |
|---|-------------------------------------|------------|----------|
| South Penn Telephone and Telegraph Company. | Penalty, | \$5,000 00 | Pending. |
| Seneca Street Railway Company. | Penalty, | 5,000 00 | Pending. |
| Delaware and Northampton Railroad Company. | Penalty, | 5,000 00 | Pending. |
| Ligonier Valley Railroad Company. | Penalty, | 5,000 00 | Pending. |
| New York, Pocono and Western Railroad Company. | Penalty, | 5,000 00 | Pending. |
| Allen Electric Street Railway Company. | Penalty, | 5,000 00 | Pending. |
| Alliance, Bath and Nazareth Street Railway Company. | Penalty, | 5,000 00 | Pending. |
| Bethlehem and Bath Street Railway Company. | Penalty, | 5,000 00 | Pending. |
| Bethlehem and Seigfried Street Railway Company. | Penalty, | 5,000 00 | Pending. |
| Boiling Springs and Mt. Holly Street Railway Company. | Penalty, | 5,000 00 | Pending. |
| Cement Belt Street Railway Company. | Penalty, | 5,000 00 | Pending. |
| Delaware Street Railway Company. | Penalty, | 5,000 00 | Pending. |
| Easton and Belvidere Street Railway Company. | Penalty, | 5,000 00 | Pending. |
| Grove City Street Railway Company. | Penalty, | 5,000 00 | Pending. |
| Minsi Valley Street Railway Company. | Penalty, | 5,000 00 | Pending. |
| Nazareth and Bath Street Railway Company. | Penalty, | 5,000 00 | Pending. |
| Northampton and Lehigh Street Railway Company. | Penalty, | 5,000 00 | Pending. |
| Phoenixville and Bridgeport Electric Railway Company. | Penalty, | 5,000 00 | Pending. |
| People's Street Railway of Chester. | Penalty, | 5,000 00 | Pending. |
| State Line Electric Railway Company. | Penalty, | 5,000 00 | Pending. |
| Anthracite Telephone Company. | Penalty, | 5,000 00 | Pending. |
| Eastern Telephone Company. | Penalty, | 5,000 00 | Pending. |
| Montour Telephone Company. | Penalty, | 5,000 00 | Pending. |
| New Jersey and Pennsylvania Telephone Company. | Penalty, | 5,000 00 | Pending. |
| United States Long Distance Telephone Company. | Penalty, | 5,000 00 | Pending. |
| Anthracite Land and Improvement Company. | Tax on capital stock, 1897 to 1903. | 700 00 | Paid. |
| Anthracite Land and Improvement Company. | Tax on loans, 1898, ... | 110 32 | Paid. |

SCHEDULE J—Continued.

LIST OF CLAIMS RECEIVED FROM THE SECRETARY OF INTERNAL
AFFAIRS AND OTHERS IN 1903 AND 1904.

| Name of Party. | Nature of Claim. | Amount. | Remarks. |
|--|--|----------|---------------------------|
| Barr Pumping Engine Com- pany. | Tax on loans, 1896-7- 8-9-1900. | 3,048 39 | Paid. |
| Mohn Brothers Electric Laundry Company. | Tax on loans, 1900-01, | 111 20 | Paid. |
| Mohn Brothers Electric Laundry Company. | Tax on capital stock, 1899-1900-01. | 2,080 94 | Paid. |
| Platt-Barber Company, | Tax on capital stock, 1898-9, 1900-01. | 2,535 00 | Paid. |
| Platt-Barber Company, | Tax on capital stock, 1902 (estimated). | 750 00 | Withdrawn by Aud. Gen. |

SCHEDULE K.

SCHEDULE OF COLLECTIONS.

| Year. | Name. | Amount. |
|---------|--|------------|
| 1903. | | |
| Jan. 2, | Penn Incline Plane Company: | |
| | Capital stock, 1900, | \$5 00 |
| | Capital stock, 1901, | 5 00 |
| | | \$10 00 |
| 5, | Webster Coal and Coke Company, capital stock, 1901,... | 2,000 00 |
| 5, | Finance Company of Pennsylvania: | |
| | Capital stock, 1901, | \$3,125 00 |
| | Capital stock, 1900, | 4,000 00 |
| | | 7,125 00 |
| 5, | Lackawanna Iron and Steel Company: | |
| | Capital stock, 1900, | \$669 56 |
| | Capital stock, 1901, | 2,223 93 |
| | | 2,893 49 |
| 5, | American Dredging Company, capital stock, 1901, | 637 50 |
| 5, | Barclay Railroad Company, capital stock, 1901, | 175 00 |
| 5, | Scranton Gas and Water Company, bonus, | 312 50 |
| 5, | Hazleton Electric Light and Power Company, capital stock, 1901, | 287 50 |
| 5, | Lower Merion Gas Company, loans tax, 1901, | 45 60 |
| 5, | Allentown Gas Company, loans tax, 1901, | 180 50 |
| 5, | Dunkirk, Allegheny Valley and Pittsburg Railroad Company, capital stock, 1901, | 500 00 |
| 5, | New York and Middle Coal Field Railroad and Coal Company, capital stock, 1901, | 25 92 |
| 5, | Locust Mountain Coal and Iron Company, capital stock, 1901, | 35 50 |
| 5, | Lebanon Valley Street Railway Company, loans tax, 1901, | 218 00 |
| 5, | Bellevernon Bridge Company: | |
| | Capital stock, 1900, | \$50 00 |
| | Capital stock, 1901, | 50 00 |
| | | 100 00 |
| 6, | Central District and Printing Company, capital stock, 1901, | 1,375 00 |
| 7, | Buffalo, Susquehanna Coal and Coke Company, capital stock, 1901, | 10 00 |
| 7, | Fall Brook Railway Company, capital stock, 1901, | 250 00 |
| 8, | Midland Mining Company, loans tax, 1901, | 63 33 |
| 8, | Enterprise Transit Company, capital stock, 1901, | 275 00 |
| 8, | Jefferson and Clearfield Coal and Iron Company, capital stock, 1901, | 4,000 00 |
| 8, | Rochester and Pittsburg Coal and Iron Company, capital stock, 1901, | 3,450 00 |
| 9, | New York, Chicago and St. Louis Railroad Company, capital stock, 1901, | 500 00 |
| 9, | Lehigh Valley Coal Company, capital stock, 1901, | 1,935 00 |
| 12, | McCormick Harvesting Machine Company: | |
| | Capital stock, 1898, | \$47 56 |
| | Capital stock, 1899, | 82 44 |
| | Capital stock, 1900, | 140 38 |
| | Capital stock, 1901, | 106 00 |
| | | 376 38 |
| 12, | E. P. Wilbur Trust Company, capital stock, 1901, | 2,541 62 |
| 12, | Buffalo and Susquehanna Railroad Company, loans tax, 1901, | 251 50 |
| 12, | Philadelphia Warehousing and Cold Storage Company, capital stock, 1901, | 37 50 |
| 12, | Consumers' Brewing Company, capital stock, 1901, | 250 00 |
| 12, | Wyoming Valley Electric Light, Heat and Power Company, capital stock, 1901, | 525 00 |
| 12, | Schuykill and Lehigh Valley Railroad Company, capital stock, 1901, | 1,700 00 |

SCHEDULE K—Continued.

SCHEDULE OF COLLECTIONS.

| Year. | Name. | Amount. |
|----------|--|--------------|
| 1903. | | |
| Jan. 12, | Hazleton Coal Company, capital stock, 1901,..... | 350 00 |
| 12, | Pennsylvania, New York Canal and Railroad Company, loans tax, 1901, | 585 18 |
| 13, | Fall Brook Coal Company, capital stock, 1901, | 3,000 00 |
| 13, | Doylestown and Willow Grove Railway Company, loans tax, 1901, | 950 00 |
| 14, | Philadelphia and West Chester Traction Company, loans tax, 1901, | 144 04 |
| 14, | Chest Creek Coal and Coke Company, capital stock, 1901, | 62 83 |
| 14, | Mitchell Coal and Coke Company, capital stock, 1901,... | 67 02 |
| 16, | Delaware, Lackawanna and Western Railroad Com- pany, capital stock, 1901, | 25,000 00 |
| 16, | Lehigh Valley Railroad Company, capital stock, 1901,... | 51,250 00 |
| 16, | Pennsylvania, New York Canal and Railroad Com- pany, capital stock, 1901, | 5,000 00 |
| 19, | H. W. Johns Manufacturing Company, capital stock, 1901, | 152 00 |
| 19, | Phillips Company, Limited: | |
| | Capital stock, 1900, | \$375 00 |
| | Capital stock, 1901, | 375 00 |
| | Capital stock, 1902, | 375 00 |
| | | 1,125 00 |
| 19, | Pennsylvania Coal Company: | |
| | Capital stock, 1898, | \$1,733 34 |
| | Capital stock, 1899, | 1,396 17 |
| | Capital stock, 1900, | 1,754 64 |
| | Capital stock, 1901, | 696 22 |
| | | 5,580 37 |
| 19, | Allison Manufacturing Company, capital stock, 1899, .. | 25 00 |
| | | \$125,528 28 |
| | Note.—The above amount was collected during the first nineteen days of the quarter which concluded the term of my predecessor in office. | |
| 23, | Gettysburg Transit Company, capital stock, 1898, | 50 00 |
| 27, | Pennsylvania Central Brewing Company: | |
| | Capital stock, 1901, | \$2,938 10 |
| | Capital stock, 1900, | 1,116 10 |
| | | 4,056 20 |
| 29, | Doylestown and Willow Grove Railroad Company, capi- tal stock, 1901, | 250 00 |
| Feb. 5, | Lake Shore and Michigan Southern Railway Company, capital stock, 1900, | 6,230 67 |
| 5, | Lebanon Valley Street Railway Company, loans tax, 1900, | 1,148 00 |
| 5, | Philadelphia and Chester Railway Company, loans tax, 1901, | 615 60 |
| 6, | Scranton Railway Company: | |
| | Capital stock, 1899, | \$5,803 39 |
| | Capital stock, 1900, | 6,300 00 |
| | Capital stock, 1901, | 6,500 00 |
| | | 18,603 39 |
| 6, | Scranton and Pittston Traction Company: | |
| | Capital stock, 1897, | \$250 00 |
| | Capital stock, 1898, | 250 00 |
| | | 500 00 |
| 6, | Scranton and Pittston Traction Company: | |
| | Loans tax, 1898, | \$561 45 |
| | Loans tax, 1896, | 559 55 |
| | Loans tax, 1897, | 559 55 |
| | Loans tax, 1895, | 430 35 |
| | Loans tax, 1894, | 244 15 |
| 20, | Clearfield Bituminous Coal Corporation, loans tax, 1901, | 2,355 05 |
| | | 19 72 |

SCHEDULE K—Continued.

SCHEDULE OF COLLECTIONS.

| Year. | Name. | Amount. |
|----------|--|------------|
| 1903. | | |
| Mar. 2, | Clearfield Bituminous Coal Corporation, loans tax, 1898, | 81 44 |
| May 5, | People's Light Company of Pittston, loans tax, 1900, | 256 50 |
| 6, | Thouren Coal Land Company, capital stock, 1897, | 93 85 |
| 6, | Bangor and Portland Railway Company, capital stock, 1901, | 500 00 |
| 6, | Westinghouse Electric and Manufacturing Company, capital stock, 1901, | 3,750 00 |
| 12, | General Trading Company, Limited, capital stock, 1901, | 50 00 |
| 13, | Platt-Barber Company: | |
| | Capital stock, 1898, | \$600 00 |
| | Capital stock, 1899, | 630 00 |
| | Capital stock, 1900, | 675 00 |
| | Capital stock, 1901, | 630 00 |
| | | 2,535 00 |
| 22, | Atlas Portland Cement Company: | |
| | Capital stock, 1899, | \$1,600 00 |
| | Capital stock, 1900 and 1901, | 2,600 00 |
| | | 4,200 00 |
| 28, | Mohn Bros. Electric Laundry Company: | |
| | Loans tax, 1900, | \$51 30 |
| | Loans tax, 1901, | 59 90 |
| | | 111 20 |
| 28, | Mohn Bros. Electric Laundry Company: | |
| | Capital stock, 1899, | \$330 94 |
| | Capital stock, 1900, | 882 50 |
| | Capital stock, 1901, | 867 50 |
| | | 2,080 94 |
| June 24, | Provident Life and Trust Company, bonus, | 1,250 00 |
| Sept. 9, | Dunbar Furnace Company, capital stock, 1901, | 220 00 |
| 28, | Judson Coal Company: | |
| | Capital stock, 1902, | \$500 00 |
| | Capital stock, 1901, | 500 00 |
| | Loans tax, 1901, | 55 41 |
| | | 1,055 41 |
| 28, | Algonquin Coal Company, capital stock, 1902, | 5 00 |
| 28, | Hollenback Coal Company, capital stock, 1902, | 875 00 |
| 28, | Beech Creek Cannel Coal Company, capital stock, 1902, | 25 00 |
| 28, | J. Langdon & Co., Incorporated, capital stock, 1902, | 918 75 |
| 28, | Mount Sinai Cemetery Association of Pennsylvania, capital stock, 1902, | 5 00 |
| 28, | Scranton Gas and Water Company, capital stock, 1901, | 2,625 00 |
| 28, | Cranberry Improvement Company, capital stock, 1902, | 225 00 |
| 28, | Union Improvement Company, capital stock, 1902, | 800 00 |
| 28, | George B. Newton & Co., Incorporated, capital stock, 1902, | 100 00 |
| 28, | The United Gas Improvement Company, capital stock, 1902, | 18,000 00 |
| 28, | Midvalley Supply Company, Limited, capital stock, 1902, | 25 70 |
| 28, | Pennsylvania Company for Insurance on Lives and Granting Annuities, capital stock, 1902, | 296 00 |
| 28, | Upper Lehigh Supply Company, Limited, capital stock, 1902, | 30 00 |
| 28, | Black Creek Improvement Company, capital stock, 1902, | 56 50 |
| 28, | Truman M. Dodson Coal Company, capital stock, 1902, | 75 00 |
| 28, | Philadelphia Mortgage and Trust Company, capital stock, 1902, | 83 77 |
| 28, | Enterprise Transit Company, capital stock, 1902, | 775 00 |
| 28, | International Navigation Company, capital stock, 1902, | 25 00 |
| 28, | Allentown Gas Company, loans tax, 1902, | 184 30 |
| 28, | Clearfield Bituminous Coal Corporation, capital stock, 1902, | 475 00 |

SCHEDULE K—Continued.

SCHEDULE OF COLLECTIONS.

| Year. | Name. | Amount. |
|-----------|--|----------|
| 1903. | | |
| Sept. 28, | Sterling Coal Company, capital stock, 1902, | 25 00 |
| 29, | Delaware and Atlantic Telegraph and Telephone Company, capital stock, 1902, | 100 00 |
| 29, | Jefferson Coal Company, capital stock, 1902, | 175 00 |
| 29, | Nescopee Coal Company, capital stock, 1902, | 220 00 |
| 29, | North Branch Steel Company, capital stock, 1902, | 2 50 |
| 29, | Lake Shore and Michigan Southern Railway Company, loans tax, 1902, | 58 90 |
| 29, | Tamaqua and Lansford Street Railway Company, capital stock, 1901, | 525 00 |
| 29, | Parrish Coal Company, capital stock, 1902, | 475 00 |
| 29, | Mortgage Trust Company of Pennsylvania, loans tax, 1902, | 276 82 |
| 29, | Stevens Coal Company, capital stock, 1902, | 112 50 |
| 29, | Tresckow Railroad Company, capital stock, 1902, | 250 00 |
| 29, | Lehigh and Lackawanna Railroad Company, capital stock, 1901, | 225 00 |
| 29, | Delaware Division Canal Company of Pennsylvania, capital stock, 1901, | 625 00 |
| 30, | Tionesta Valley Railway Company, capital stock, 1902, | 650 00 |
| 30, | Lower Merion Gas Company, loans tax, 1902, | 45 60 |
| 30, | Pennsylvania Electric Vehicle Company, capital stock, 1902, | 125 00 |
| 30, | Highland Coal Company, capital stock, 1902, | 300 00 |
| 30, | Robeson Iron Company, Limited, capital stock, 1902, | 25 00 |
| Oct. 2, | State Line and Sullivan Railroad Company, capital stock, 1902, | 675 00 |
| 2, | Pencoyd and Philadelphia Railroad Company, capital stock, 1902, | 5 00 |
| 2, | Tresckow Railroad Company, capital stock, 1902, | 50 00 |
| 2, | Delaware Division Canal Company of Pennsylvania, capital stock, 1902, | 125 00 |
| 5, | Bedford Springs Company, Limited, capital stock, 1902, | 125 00 |
| 5, | Coudersport and Port Allegany Railroad Company: Loans tax, 1902, \$27 00 Capital stock, 1902, 50 00 | 77 00 |
| 5, | Lehigh and Lackawanna Railroad Company, capital stock, 1902, | 225 00 |
| 5, | Kingston Coal Company, capital stock, 1902, | 1,000 00 |
| 5, | Tamaqua and Lansford Street Railway Company, capital stock, 1902, | 10 00 |
| 5, | Edison Electric Light Company of Philadelphia, gross receipts (6 mos.), 1901, | 925 32 |
| 5, | Brush Electric Light Company of Philadelphia: Gross receipts (6 mos.), 1900, \$59 46 Gross receipts (6 mos.), 1900, 49 64 Gross receipts (6 mos.), 1901, 192 68 | 301 78 |
| 5, | Pennsylvania Heat, Light and Power Company: Capital stock, 1899, \$842 32 Capital stock, 1900, 842 32 | 1,684 64 |
| 5, | Dunkirk, Allegheny Valley and Pittsburg Railway Company, capital stock, 1902, | 1,937 50 |
| 6, | W. K. Niver Coal Company, capital stock, 1902, | 200 00 |
| 6, | South Bethlehem Supply Company, Limited: Capital stock, 1901, \$136 25 Capital stock, 1902, 100 00 | 236 25 |
| 6, | Equitable Illuminating Gas Light Company of Philadelphia, loans tax, 1902, | 1,227 20 |
| 6, | Beech Creek Extension Railroad Company, capital stock, 1902, | 400 00 |

SCHEDULE K—Continued.

SCHEDULE OF COLLECTIONS.

| Year. | Name. | Amount. |
|------------------|--|----------|
| 1903. Oct. 6, | Beech Creek Railroad Company: Loans tax, 1902, \$119 60 Capital stock, 1902, 2,000 00 | 2,119 60 |
| 6, | Fall Brook Railway Company, capital stock, 1902, | 625 00 |
| 9, | Bangor and Portland Railway Company, capital stock, 1902, | 375 00 |
| 12, | St. Mary's Gas Company, capital stock, 1901, | 150 00 |
| 19, | Bethlehem Steel Company: Capital stock, 1901, \$418 70 Capital stock, 1902, 362 50 Loans tax, 1902, 428 22 Loans tax, 1901, 200 00 | 1,409 42 |
| 19, | Philadelphia Brewing Company, capital stock, 1902, .. | 250 00 |
| 19, | Buffalo and Susquehanna Railroad Company, loans tax, 1902, | 836 00 |
| 19, | Buffalo and Susquehanna Coal and Coke Company, capital stock, 1902, | 25 00 |
| 22, | Westinghouse Air Brake Company, capital stock, 1902, .. | 6,430 80 |
| Nov. 10, | Guarantee Trust and Safe Deposit Company, capital stock, 1902, | 483 79 |
| 10, | Lackawanna Iron and Steel Company, capital stock, 1902, | 1,188 85 |
| 11, | Whitehall Portland Cement Company, loans tax, 1902, .. | 1,076 72 |
| 12, | American Dredging Company, capital stock, 1902, | 725 00 |
| 16, | Upper Lehigh Coal Company, capital stock, 1902, | 862 50 |
| 16, | Investment Company of Philadelphia: Capital stock, 1901, \$125 00 Capital stock, 1902, 326 38 | 451 38 |
| 16, | Lehigh Coal and Navigation Company, capital stock, 1902, | 1,150 00 |
| 16, | Hazard Manufacturing Company, capital stock, 1902, .. | 25 00 |
| 16, | Philadelphia and West Chester Traction Company: Capital stock, 1901, \$2 90 Capital stock, 1902, 145 92 | 148 82 |
| 16, | Shenango Valley Railroad Company, capital stock, 1902, | 114 50 |
| 16, | Delaware, Lackawanna and Western Railroad Com- pany, loans tax, 1902, | 555 08 |
| 18, | Jonathan Graham and Son Company, capital stock, 1899, | 14 31 |
| 19, | Ketner and Kay Fork Railway Company, capital stock, 1902, | 10 00 |
| 19, | Susquehanna and New York Railroad Company, capital stock, 1902, | 25 00 |
| 20, | Alden Coal Company, capital stock, 1902, | 55 00 |
| 20, | Finance Company of Pennsylvania, capital stock, 1902, | 250 00 |
| 23, | Chevington and Bunn Coal Company, capital stock, 1902, | 62 50 |
| 23, | Jefferson Railroad Company, capital stock, 1902, | 25 00 |
| 23, | Erie Railroad Company, capital stock, 1902, | 25 00 |
| 23, | Wilkes-Barre and Eastern Railroad Company, capital stock, 1902, | 25 00 |
| 23, | Erie and Wyoming Valley Railroad Company, capital stock, 1902, | 25 00 |
| 23, | Nypano Railroad Company, capital stock, 1902, | 25 00 |
| 23, | Buffalo, Bradford and Pittsburg Railroad Company, capital stock, 1902, | 25 00 |
| 23, | New York, Lake Erie and Western Railroad Company, capital stock, 1902, | 25 00 |
| 23, | Blossburg Coal Company, capital stock, 1902, | 25 00 |
| 23, | Northwestern Mining and Exchange Company, capital stock, 1902, | 25 60 |
| 23, | Hillside Coal and Iron Company, capital stock, 1902, ... | 25 00 |

SCHEDULE K—Continued.

SCHEDULE OF COLLECTIONS.

| Year. | Name. | Amount. |
|----------|---|------------|
| 1903. | | |
| Nov. 23, | Pennsylvania Coal Company, capital stock, 1902, | 25 00 |
| 23, | New York, Susquehanna and Western Railroad Com- pany, capital stock, 1902, | 25 00 |
| 24, | Midvalley Coal Company, capital stock, 1902, | 100 00 |
| 24, | Olyphant Water Company: | |
| | Capital stock, 1902, | \$200 00 |
| | Loans tax, 1902, | 155 80 |
| | | 355 80 |
| 24, | Lewisburg, Milton and Watsontown Passenger Railway Company, capital stock, 1902, | 175 00 |
| 24, | Montoursville Passenger Railway Company, capital stock, 1902, | 25 00 |
| 27, | Barr Pumping Engine Company: | |
| | Loans tax, 1896, | \$228 00 |
| | Loans tax, 1897, | 423 65 |
| | Loans tax, 1898, | 434 96 |
| | Loans tax, 1899, | 486 42 |
| | Loans tax, 1900, | 584 58 |
| | Interest on same, | 782 91 |
| | | 2,940 52 |
| Dec. 1, | Electric Traction Company, capital stock, 1902, | 100 00 |
| 1, | People's Traction Company, capital stock, 1902, | 100 00 |
| 1, | Philadelphia Rapid Transit Company, capital stock, 1902, | 100 00 |
| 1, | Philadelphia Traction Company, capital stock, 1902, ... | 100 00 |
| 1, | Union Traction Company, capital stock, 1902, | 100 00 |
| 1, | Cambria Coal Mining Company: | |
| | Capital stock, 1892, | \$25 00 |
| | Capital stock, 1893, | 75 00 |
| | Capital stock, 1894, | 75 00 |
| | Capital stock, 1895, | 75 00 |
| | Capital stock, 1896, | 75 00 |
| | Capital stock, 1897, | 75 00 |
| | Capital stock, 1898, | 75 00 |
| | Capital stock, 1899, | 75 00 |
| | Capital stock, 1900, | 103 00 |
| | Capital stock, 1901, | 103 00 |
| | Capital stock, 1902, | 125 00 |
| | | 881 00 |
| 1, | Buck Run Coal Company, capital stock, 1902, | 102 50 |
| 1, | E. P. Wilbur Trust Company, capital stock, 1902, | 175 00 |
| 1, | Provident Life and Trust Company of Philadelphia, capital stock, 1902, | 51 59 |
| 1, | Penn Gas Coal Company, capital stock, 1902, | 1,000 00 |
| 1, | Western Union Telegraph Company: | |
| | Capital stock, 1901, | \$1,396 00 |
| | Capital stock, 1900, | 100 00 |
| | | 1,496 00 |
| 1, | Jefferson and Clearfield Coal and Iron Company, capi- tal stock, 1902, | 6,500 00 |
| 1, | Rochester and Pittsburg Coal and Iron Company, capi- tal stock, 1902, | 3,450 00 |
| 2, | Webster Coal and Coke Company: | |
| | Loans tax, 1902, | \$396 44 |
| | Capital stock, 1902, | 1,250 00 |
| | | 1,646 44 |
| 2, | Westinghouse Electric and Manufacturing Company, capital stock, 1902, | 5,560 00 |
| 7, | Silver Brook Coal Company, capital stock, 1901, | 550 00 |
| 9, | Reynoldsville and Falls Creek Railroad Company, capi- tal stock, 1902, | 325 00 |
| 10, | Fairview Coal Mining Company, capital stock, 1902, .. | 437 00 |
| 23, | Seranton Gas and Water Company, capital stock, 1902, .. | 3,750 00 |
| 23, | Wyoming Valley Electric Light, Heat and Power Com- pany, capital stock, 1902, | 875 00 |

SCHEDULE K—Continued.

SCHEDULE OF COLLECTIONS.

| Year. | Name. | Amount. |
|----------|--|-----------|
| 1904. | | |
| Jan. 5, | Lake Shore and Michigan Southern Railway Company: Capital stock, 1901, \$5,550 00 Capital stock, 1902, 6,450 00 | 12,000 00 |
| 5, | Lehigh Coal and Navigation Company, capital stock, 1901, | 6,775 00 |
| 5, | Blubaker Coal Company, capital stock, 1902, | 100 00 |
| 5, | Logan Gregg Hardware Company, loans tax, 1902, | 12 78 |
| 7, | Fire Insurance Company of the County of Philadelphia, capital stock, 1902, | 34 48 |
| 25, | Sharon Tin Plate Company, loans tax, 1902, | 12 66 |
| Feb. 15, | Lehigh and Wilkes-Barre Coal Company: Capital stock, 1901, \$3,500 00 Capital stock, 1902, 1,500 00 | 5,000 00 |
| Mar. 2, | Philadelphia Securities Company: Capital stock, 1898, \$50 00 Capital stock, 1900, 50 00 Capital stock, 1899, 50 00 Capital stock, 1901, 50 00 | 200 00 |
| 3, | Economy Light, Heat and Power Company, capital stock, 1902, | 111 25 |
| 3, | Freeport Water Works Company, capital stock, 1902, .. | 78 00 |
| 3, | People's Electric Light, Heat and Power Company of Nanticoke: Capital stock, 1901, \$50 00 Capital stock, 1902, 50 00 | 100 00 |
| 7, | Dunbar Furnace Company, capital stock, 1902, | 125 00 |
| 7, | Morris and Whitehead, bankers, capital stock, 1902, ... | 12 50 |
| 7, | Delaware, Lackawanna and Western Railroad Company, capital stock, 1902, | 21,250 00 |
| 21, | Bangor Water Company, capital stock, 1902, | 250 00 |
| 31, | Wyoming Valley Electric Light, Heat and Power Company: Loans tax, 1901, \$197 60 Loans tax, 1902, 190 00 | 387 60 |
| 31, | Lehigh Coal and Navigation Company, loans tax, 1902, | 2,371 37 |
| Apr. 11, | J. Hampton Moore, ex-treasurer, Philadelphia, interest on State moneys collected during 1901-2-3, per decree of court of common pleas of Dauphin county, | 9,547 35 |
| 18, | Coaldale Mining Company: Capital stock, 1899, \$125 00 Capital stock, 1901, 200 00 | 325 00 |
| 29, | Blossburg Coal Company, capital stock, 1903, | 25 00 |
| 29, | Erie Land Improvement Company, capital stock, 1903, | 25 00 |
| 29, | Buffalo, Bradford and Pittsburg Railroad Company, capital stock, 1903, | 25 00 |
| 29, | Erie Railroad Company, capital stock, 1903, | 25 00 |
| 29, | Erie and Wyoming Valley Railroad Company, capital stock, 1903, | 25 00 |
| 29, | Hillside Coal and Iron Company, capital stock, 1903, ... | 25 00 |
| 29, | Jefferson Railroad Company, capital stock, 1903, | 25 00 |
| 29, | New York, Lake Erie and Western Coal and Railroad Company, capital stock, 1903, | 25 00 |
| 29, | New York, Susquehanna and Western Coal Company, capital stock, 1903, | 25 00 |
| 29, | Northwestern Mining and Exchange Company, capital stock, 1903, | 25 00 |
| 29, | Nypano Railroad Company, capital stock, 1903, | 25 00 |
| 29, | Pennsylvania Coal Company, capital stock, 1903, | 25 00 |

SCHEDULE K—Continued.

SCHEDULE OF COLLECTIONS.

| Year. | Name. | Amount. |
|-----------|--|-----------|
| 1904. | | |
| Apr. 29, | Wilkes-Barre and Eastern Railroad Company, capital stock, 1903, | 25 00 |
| 29, | Butler Mine Company, Limited, capital stock, 1903, | 25 00 |
| 29, | Florence Coal Company, Limited, capital stock, 1903, .. | 25 00 |
| May 25, | Union Improvement Company, capital stock, 1898, | 1,330 00 |
| June 20, | Anthracite Land and Improvement Company, capital stock, 1897-8-9-'00-'01-2-3, loans tax, 1898, | 100 00 |
| July 6, | Shade Gap Railroad Company: | |
| | Loans tax, 1893, | \$172 90 |
| | Capital stock, 1893, | 15 00 |
| | Capital stock, 1894, | 15 00 |
| | Capital stock, 1895, | 15 00 |
| | Capital stock, 1896, | 15 00 |
| | Capital stock, 1897, | 15 00 |
| | Capital stock, 1898, | 15 00 |
| | Capital stock, 1899, | 15 00 |
| | | 277 90 |
| 26, | C. Schmidt and Sons Brewing Company, capital stock, 1903, | 1,000 00 |
| Aug. 3, | Johnstown Light, Heat and Power Company, capital stock, 1903, | 290 64 |
| 3, | Fall Brook Coal Company, capital stock, 1902, | 25 00 |
| 5, | American News Company: | |
| | Capital stock, 1889, | \$667 67 |
| | Capital stock, 1890, | 666 67 |
| | Capital stock, 1891, | 666 66 |
| | Capital stock, 1892, | 666 67 |
| | Capital stock, 1893, | 666 67 |
| | Capital stock, 1894, | 666 66 |
| | Capital stock, 1895, | 666 67 |
| | Capital stock, 1896, | 666 67 |
| | Capital stock, 1897, | 666 66 |
| | Capital stock, 1898, | 666 67 |
| | Capital stock, 1899, | 666 67 |
| | Capital stock, 1900, | 666 66 |
| | Capital stock, 1901, | 666 67 |
| | Capital stock, 1902, | 666 67 |
| | Capital stock, 1903, | 666 66 |
| | | 10,000 00 |
| 5, | Central News Company: | |
| | Capital stock, 1870, | \$60 00 |
| | Capital stock, 1871, | 60 00 |
| | | 120 00 |
| 12, | Beech Creek Coal and Coke Company, capital stock, 1901, | 504 17 |
| 12, | Bethlehem Consolidated Water Company, capital stock, 1903, | 275 00 |
| Sept. 14, | J. Langdon & Co., Incorporated, capital stock, 1903, | 213 00 |
| 26, | Pneumatic Transit Company: | |
| | Capital stock, 1902, | \$15 00 |
| | Capital stock, 1903, | 100 00 |
| | | 15 00 |
| 29, | American Dredging Company, capital stock, 1903, | 250 00 |
| Nov. 23, | Enterprise Transit Company, capital stock, 1903, | 687 50 |
| 28, | Hollenback Coal Company, capital stock, 1903, | 887 50 |
| 28, | Jefferson Coal Company, capital stock, 1903, | 125 00 |
| 28, | Silver Brook Supply Company, Limited, capital stock, 1903, | 25 00 |
| 28, | Empire Coal Mining Company, capital stock, 1903, | 275 00 |
| 28, | E. P. Wilbur Trust Company, capital stock, 1903, | 175 00 |
| 28, | East Deer Township Water Company, capital stock, 1903, | 10 00 |
| 28, | Lewisburg, Milton and Watsonstown Passenger Railway Company, capital stock, 1903, | 150 00 |

SCHEDULE K—Continued.

SCHEDULE OF COLLECTIONS.

| Year. | Name. | Amount. |
|----------|---|-----------|
| 1904. | | |
| Nov. 28, | Philadelphia Warehousing and Cold Storage Company, capital stock, 1903, | 875 00 |
| 28, | State Line and Sullivan Railroad Company, capital stock, 1903, | 75 00 |
| 28, | W. K. Niver Coal Company, capital stock, 1903, | 25 00 |
| 29, | Upper Lehigh Supply Company, Limited, capital stock, 1903, | 50 00 |
| 29, | Rockhill Iron and Coal Company, capital stock, 1903, .. | 175 00 |
| 29, | Beech Creek Cannel Coal Company, capital stock, 1903, .. | 15 00 |
| 29, | The United Gas Improvement Company, capital stock, 1903, | 17,500 00 |
| 29, | Truman M. Dodson Coal Company, capital stock, 1903, .. | 75 00 |
| 29, | Lackawanna Iron and Steel Company, capital stock, 1903, | 825 00 |
| 29, | Mortgage Trust Company of Pennsylvania, loans tax, 1903, | 85 78 |
| 29, | Silver Brook Coal Company, capital stock, 1903, | 500 00 |
| 30, | International Navigation Company, capital stock, 1903, .. | 75 00 |
| 30, | Hudson Coal Company, capital stock, 1903, | 510 00 |
| 30, | Huntingdon and Broad Top Mountain Railroad and Coal Company, capital stock, 1903, | 1,325 00 |
| 30, | Upper Lehigh Coal Company, capital stock, 1903, | 875 00 |
| 30, | Nescopec Coal Company, capital stock, 1903, | 187 50 |
| Dec. 1, | Philadelphia and West Chester Traction Company, capital stock, 1903, | 175 00 |
| 1, | Midvalley Coal Company, capital stock, 1903, | 550 00 |
| 1, | Scranton Gas and Water Company, capital stock, 1903, .. | 4,162 50 |
| 1, | Penn Gas Coal Company, capital stock, 1903, | 250 00 |
| 1, | Diamond Coal Land Company: | |
| | Capital stock, 1903, | \$25 00 |
| | Capital stock, 1902, | 25 00 |
| | | 50 00 |
| 1, | Leetonia Railway Company, capital stock, 1903, | 25 00 |
| 1, | Kittanning Consolidated Natural Gas Company, capital stock, 1903, | 125 00 |
| 5, | Tamaqua and Lansford Street Railway Company, capital stock, 1903, | 100 00 |
| 5, | Jamestown and Franklin Railroad Company, capital stock, 1903, | 75 00 |
| 5, | Bear Creek Ice Company, capital stock, 1903, | 125 00 |
| 5, | Parrish Coal Company, capital stock, 1903, | 325 00 |
| 5, | Highland Coal Company, capital stock, 1903, | 300 00 |
| 5, | Fairmount Park Transportation Company, capital stock, 1903, | 700 00 |
| 5, | Westinghouse Air Brake Company, capital stock, 1903, .. | 6,400 00 |
| 5, | Olyphant Water Company, capital stock, 1903, | 200 00 |
| 5, | Goodyear Lumber Company, capital stock, 1903, | 880 00 |
| 5, | Lehigh and Wilkes-Barre Coal Company, capital stock, 1903, | 3,250 00 |
| 5, | Santo Domingo Silver Mining Company, capital stock, 1867-1903, | 37 00 |
| 5, | Fall Brook Coal Company, capital stock, 1903, | 25 00 |
| 6, | St. Mary's Gas Company, capital stock, 1903, | 13 00 |
| 7, | People's Electric Light, Heat and Power Company, Nanticoke: | |
| | Capital stock, 1903, | \$25 00 |
| | Loans tax, 1903, | 147 25 |
| | | 172 25 |
| 7, | Delaware, Lackawanna and Western Railroad Company, capital stock, 1903, | 23,500 00 |
| 7, | Bangor and Portland Railway Company, capital stock, 1903, | 375 00 |
| 9, | Dunkirk, Allegheny Valley and Pittsburg Railroad Company, capital stock, 1903, | 1,937 50 |

SCHEDULE K—Continued.

SCHEDULE OF COLLECTIONS.

| Year. | Name. | Amount. |
|----------|--|--------------|
| 1904. | | |
| Dec. 12, | Scranton Railway Company: | |
| | Loans tax, 1903, | \$88 18 |
| | Capital stock, 1903, | 2,745 00 |
| | | 2,833 18 |
| 12, | Coudersport and Port Allegany Railroad Company, capital stock, 1903, | 25 00 |
| 12, | Southwark Foundry and Machine Company, bonus, | 75 00 |
| 12, | Buffalo, Bradford and Pittsburg Railway Company, capital stock, 1903, | 500 00 |
| 13, | Franklin and Clearfield Railroad Company, capital stock, 1903, | 137 50 |
| 15, | Cranberry Improvement Company, capital stock, 1903, | 232 50 |
| 15, | Finance Company of Pennsylvania, capital stock, 1903, .. | 2,275 00 |
| 15, | Black Creek Improvement Company, capital stock, 1903, .. | 50 00 |
| 15, | Provident Life and Trust Company of Philadelphia, capital stock, 1903, | 150 00 |
| 15, | Buck Run Coal Company, capital stock, 1903, | 192 00 |
| 15, | Equitable Illuminating Gas Light Company of Philadelphia, loans tax, 1903, | 1,225 00 |
| 19, | Pennsylvania Company for Insurance on Lives and Granting Annuities, capital stock, 1903, | 750 00 |
| 19, | Alden Coal Company, capital stock, 1903, | 375 00 |
| 19, | Hazleton Gas Light Company, loans tax, 1903, | 209 00 |
| 19, | Alden Supply Company, Limited, capital stock, 1903, .. | 12 50 |
| 19, | Chevington and Bunn Coal Company, capital stock, 1903, | 62 50 |
| 19, | Midvalley Supply Company, Limited, capital stock, 1903, | 25 00 |
| 20, | Investment Company of Philadelphia, capital stock, 1903, | 1,262 00 |
| 21, | Alliance Coal Mining Company, capital stock, 1903, | 175 00 |
| 21, | Lehigh Coal and Navigation Company, capital stock, 1903, | 1,750 00 |
| 21, | Tionesta Valley Railway Company, capital stock, 1903, | 650 00 |
| 21, | Slate Belt Electric Street Railway Company, capital stock, 1903, | 15 00 |
| 23, | Atlantic Crushed Coke Company, capital stock, 1903, .. | 25 00 |
| 27, | People's Ice and Cold Storage Company, capital stock, 1902, | 41 00 |
| 28, | Kingston Coal Company, capital stock, 1903, | 1,500 00 |
| 28, | Clearfield Bituminous Coal Corporation, capital stock, 1903, | 474 00 |
| 28, | Shenango Valley Railroad Company, capital stock, 1903, .. | 89 50 |
| | Total, | \$423,212 31 |

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