

Commonwealth of Pennsylvania

REPORT

AND

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

PENNSYLVANIA

FOR THE

TWO YEARS ENDING DECEMBER 31, 1920

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1925

REPORT OF THE ATTORNEY GENERAL

FOR THE

Two Years Ending December 31, 1920.

Office of the Attorney General,
Harrisburg, Pa., Jan. 1, 1921

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

I have the honor to submit a report and summary of the official business transacted by the Attorney General during the two years ending December 31, 1920. It represents almost entirely the incumbency of William I. Schaffer, my immediate predecessor, who was commissioned Attorney General on the 21st day of January, 1919, and who occupied that office until December 14, 1920, at which time he resigned to become a Justice of the Supreme Court of the Commonwealth. On the date last above mentioned I was commissioned as Attorney General to fill the vacancy thus occasioned.

On the 28th day of January, 1919, Honorable Robert S. Gawthrop was commissioned First Deputy Attorney General and Honorable William M. Hargest, Honorable Emerson Collins, Honorable Bernard J. Myers and Honorable William I. Swoope were commissioned Deputies Attorney General. On June 14, 1919, Honorable Edmund K. Trent, commissioned a Deputy Attorney General in 1918, until the end of the next session of the Senate, resigned. He was then appointed a Special Deputy Attorney General to attend to departmental matters in the western part of the State. On June 14, 1919, Honorable Frank M. Hunter was commissioned Deputy Attorney General to fill the vacancy thus created. On June 18, 1920, Honorable William M. Hargest resigned to become a Judge of the Twelfth Judicial District comprising Dauphin County. On the 30th of June, 1920, Honorable George Ross Hull was appointed to the place thus made vacant. Frank M. Eastman, Esq., was appointed a Special Deputy Attorney General to collect escheatable moneys and property, and George W. Coles, Esq., was appointed a Special Deputy Attorney General, vice Richard W. Williamson, to collect moneys due the Commonwealth for the maintenance of the indigent insane.

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The ratification of the Nineteenth Amendment to the Federal Constitution raised the question as to whether a special session of the Legislature was necessary in order to enable women to vote at the general election occurring in November, 1920. In August of that year my predecessor advised the Governor that the effect of this amendment was to strike the word "male" out of the State Constitution and statutes and that women could, under the existing laws, qualify themselves for and exercise the right of suffrage in the Commonwealth at that election. During my incumbency the question arose whether women were eligible to hold public office in the Commonwealth. On December 22, 1920, I advised the Governor that while the Nineteenth Amendment did not limit the power of the Legislature or impose any restrictions upon this State to prescribe as it might see fit the qualifications to hold office therein, yet having effected an absolute equality of women with men, in the right to vote, it operated to complete the destruction of the common law disqualification of women to hold office; and that, therefore, a woman is now eligible to all public offices in the Commonwealth unless there be some express constitutional or statutory disqualification.

The Act of July 19, 1918, P. L. 1049, authorized the construction of a Soldiers' and Sailors' Memorial Bridge and pylons as a memorial to the citizens of this Commonwealth who served in the military and naval forces of the United States in the late Great War. It further authorized the purchase or condemnation of property the acquisition of which is necessary for the construction of this memorial. A large number of properties, the titles of which have been searched and approved by this Department, have already been acquired by purchase, and a condemnation proceeding is now pending in the Court of Common Pleas of Dauphin County to determine the amount of damages to be paid for two tracts of land taken by the Commonwealth.

The Act of July 18, 1919, P. L. 1053, provided for the construction of a permanent office building in the Capitol Park Extension area, and also for the erection of three temporary office buildings, and the widening of Walnut Street. This Department has been called upon to prepare a large number of contracts, with their accompanying bonds, for the performance of the many varied portions of these public works.

The increased amount of escheatable money recovered and paid into the State Treasury makes it proper at this time to give in detail a report of this branch of the Department's activities.

The Bureau of Escheats was created on April 1, 1917, and immediately prepared a supplement to the Act approved June 7, 1915, P. L. 878, effecting a number of necessary amendments to that act. It then co-operated (with former Deputy Attorney General Hargest) in the preparation and argument of Union Trust Company v. Powell

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and Germantown Trust Company v. Powell, 265 Pa. 71, and Columbia National Bank v. Powell, 265 Pa. 85 (1919). The decisions in the two cases first mentioned upheld the constitutionality of the Act approved June 7, 1915, P. L. 878, but the decision in the last named case held that the language used in said act was not sufficient to make the act apply to National banks. This defect was cured by the passage of the Act of July 12, 1919, P. L. 926, amending said Act of 1915, so as to make it specifically applicable to National Banks, which act was drafted by this bureau.

The decisions in the above named cases not having been rendered until May 21, 1919, it was impossible for the bureau to begin active operations until after that date, when they were at once entered upon. It had, however, in the meantime, drafted and secured the passage of the four Acts of May 16, 1919, P. L. pp. 169, 174, 177 and 182.

The first of these acts (P. L. 169), provides for an almost automatic method of taking over, without escheat, of unclaimed funds in the hands of fiduciaries of all kinds after the settlement of their final accounts.

The second of these acts (P. L. 174), provides for an absolutely automatic method of taking over unclaimed distributive shares of the assets of dissolved corporations. The operation of this and the preceding act has already saved to the Commonwealth \$29,753.97 in the informers' and escheators' fees.

The third of these acts (P. L. 177), provides a simple method for taking over, without escheat, moneys and property made escheatable under the provisions of any Act of Assembly and was passed with a special view to taking over moneys escheatable under the provisions of the Act of June 7, 1915, P. L. 878, the proceedings for the enforcement of an escheat under which act are tedious, expensive and altogether impracticable. The collections made by the bureau have mainly been made under the provisions of this act.

The last of these acts (P. L. 182), amended the Act of April 17, 1872, P. L. 62, so as to provide for a simpler method of securing refunds of moneys collected under said Act of 1872, than was originally provided for by said act.

The work of this bureau is done in intimate connection with a similar bureau in the Department of the Auditor General. The latter bureau prepares and distributes blanks upon which reports of escheatable items are required to be made, together with necessary circulars and instructions, receives and files such reports, card indexes all items reported, gives the notices and makes the advertising required by law, and prepares court lists of escheatable items which it transmits to this bureau to be inserted in the petitions for escheat to be presented to the several courts. The Bureau of Escheats of the

Auditor General's Department also employs a staff of accountants to examine the books of corporations subject to the Act of June 7, 1915, to ascertain items omitted from the reports of such companies, and obtain other data for the use of that office.

The duties of the Bureau of Escheats of this Department are naturally confined to the institution and trial of the necessary proceedings for the taking over of escheatable moneys and property, the preparation of the necessary legal papers and the keeping of proper dockets and records.

During the two years ending December 31, 1920, which covers the whole period of its activities, this bureau has, in conjunction with the corresponding bureau of the Auditor General's Department, collected and paid into the State Treasury \$300,051.79 of which amount \$13,974.63 has been refunded to claimants. The percentage of moneys reclaimed is therefore 4.6, and while the acts under which these moneys have been collected and said refunds made have not been sufficiently long in operation to enable an average to be arrived at, it is not thought that the percentage of refunds of the amounts collected will be much in excess of the percentage thus far refunded.

In addition to this amount there are unclaimed moneys to the amount of \$21,462.04 for which orders are or are about to be obtained and which will be paid into the State Treasury in the near future.

The following amounts were collected respectively under the following named acts above referred to:

Act of May 16, 1919, P. L. 169,	\$74,384.92
Act of May 16, 1919, P. L. 174,	1,660.93
Act of May 16, 1919, P. L. 177,	225,005.94
	<hr/>
	\$300,051.79

To collect the foregoing moneys one hundred and three petitions and accompanying orders were prepared and filed under the provisions of the Act of May 16, 1919, P. L. 177, and nine petitions and orders were prepared and filed under the provisions of the Act of the same date P. L. 169. The small number of petitions drawn under the latter act is accounted for by the fact that in many instances fiduciaries paid in moneys voluntarily, thus making it unnecessary to file petitions, and a considerable amount of money was also voluntarily paid in under the provisions of the Act of May 16, 1919, P. L. 177, making it unnecessary to file petitions against the companies making such voluntary payments.

In addition to the foregoing, petitions against National banks in Philadelphia County to the number of twenty-four have been prepared and filed, action on which will await the determination of the constitutionality of the Act of July 12, 1919, P. L. 926, and thirteen

petitions to the Orphans' Court in Philadelphia County which have not yet been ordered to be received by that court. These petitions involve \$99,556.31.

No moneys have thus far been collected from National banks pending a decision in several cases in the Court of Common Pleas for Philadelphia County, No. 5, in which the constitutionality of the Act of July 12, 1919, P. L. 926, has been raised.

The collections of the bureau under the Act of May 16, 1919, P. L. 177, have been confined to Allegheny, Berks, Dauphin, Franklin, Lancaster and Philadelphia Counties, but as stated, no collections from National banks have been made from those counties or elsewhere, and it is thought that the moneys taken over in said counties are not more than fifty per cent. of what should have been returned and which will be ultimately received by the bureau. No petitions have as yet been filed for the taking over of certain increments of interest on trust funds which will aggregate a very large sum, but investigations preparatory to the filing thereof are being made. Collections under P. L. 169, have naturally come from all over the Commonwealth.

The expense of this bureau has been about sixteen per cent. of the amount recovered, which, however, includes the expense of organization which was considerable.

The object of the Acts of 1919 relative to the taking over of unclaimed funds without escheat being as much to secure the payment to depositors and others of moneys which they had forgotten or were unaware of as it was to take over moneys for the state, it is of interest to note that of the number of unclaimed funds reported to the Auditor General's Department 5,796 items were claimed by and paid to the persons entitled to the same, after notice and advertisement had been given and made by this Department. These items varied in amount from a few cents to several hundred dollars, so that it is impossible to give the exact amount so claimed and paid without the expenditure of more labor than the subject seems to make warrantable, but it is safe to say that between \$50,000.00 and \$75,000.00 has thus been claimed and paid; this in addition to \$13,974.63 which was taken over by the Commonwealth and afterwards refunded as above stated.

The subjoined summary makes reference only to the formal and official opinions rendered during this biennial period. These constitute but a small part of the advisory work done by the Department. Legal advice to the heads of State Departments and other State Officers, not requiring the deliverance of formal opinions was given daily and constantly by way of oral opinions and informal correspondence.

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Neither does the Summary contain any reference to the informal hearings held before the Attorney General as legal advisor to the Governor and heads of Departments, on such subjects as the extradition of persons arrested for crimes committed outside the State, the revocation of commissions of Notaries Public, the institution of insolvency proceedings against banks, insurance companies and building and loan associations and the conduct of such proceedings, the grant of letters patent and charters of incorporation, the use of the name of the Commonwealth in quo warranto and mandamus proceedings and similar matters.

These informal hearings, held not only at Harrisburg, but also at Philadelphia and Pittsburgh, in order to accommodate the persons interested, far outnumbered the formal hearings reported in the summary.

*Summary of the Business of the Attorney General's Department from
January 1, 1919, to December 31, 1920, Inclusive.*

Quo warranto proceedings in Common Pleas of Dauphin County,	40
Equity proceedings in Common Pleas of Dauphin County, . . .	13
Equity proceedings in Common Pleas of Philadelphia County, ..	2
Actions in assumpsit instituted by the Commonwealth in the Common Pleas of Dauphin County,	18
Orders to show cause, etc. against insolvent companies and associations,	6
Mandamus proceedings in Common Pleas of Dauphin County, ..	7
Cases argued in the Supreme Court of Pennsylvania,	29
Cases argued in the Superior Court of Pennsylvania,	3
Cases argued in the Supreme Court of the United States,	4
Tax appeals in the Common Pleas of Dauphin County,	31
Bridge proceedings under the Act of June 3, 1895, P. L. 130, and supplements,	7
Insurance charters approved by the Attorney General,	11
Bank charters approved by the Attorney General,	65
Applications for sewerage approved by the Attorney General, ..	109
Formal opinions rendered in writing,	255
Cases now pending in the Supreme Court of Pennsylvania,	2
Proceedings under Act of July 19, 1919, P. L. 1056A, for refund of monies erroneously paid into the State Treasury,	1
Proceedings under Act of May 16, 1919, to procure payment in the State Treasury of escheatable monies,	1

COLLECTIONS.

For 1919,	\$308,030.55
For 1920,	156,374.59
Total,	<hr/> \$464,405.14

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The amounts collected under the Escheat Acts of May 16, 1919, are not included in the schedule of collections, inasmuch as the same did not pass through the department, but were paid direct into the State Treasury.

The Bureau of Maintenance Collections of this department, during the period from January 1, 1919 to December 31, 1920, inclusive, collected \$343,176.34, which amount is included in the collections made by the department above referred to.

SPECIAL CASES.

Attention is called to the cases in which the Attorney General's Department was concerned, which involved important issues.

In re Hannis Distilling Company.

This was an appeal by defendant to the Dauphin County Court from a settlement made by the Auditor General and State Treasurer for capital stock tax due the Commonwealth. The defendant was incorporated under the laws of West Virginia for the purpose of "distilling liquors and selling the same at wholesale." The distilling was done outside the State and the product was brought into Pennsylvania where it was blended and sold. None of its capital was employed in distilling in Pennsylvania.

The Dauphin County Court held that this company was liable to the ten mills tax upon the value of property employed within the State under the Act of July 15, 1897, P. L. 294, and was not taxable at the rate of five mills under the Act of July 22, 1913, P. L. 903. The Supreme Court affirmed the judgment of the Dauphin County Court. The case is reported in 265 Pa. 376.

Ida Collins vs. Commonwealth of Pennsylvania *Harry C. Swift vs. Commonwealth of Pennsylvania.*

In the biennial report for 1917-1918, page 14, reference was made to the above stated suits, which at the time had not been fully disposed of. These were actions in trespass brought in accordance with

special Acts of Assembly passed in 1917, authorizing suits against the Commonwealth to recover damages for injuries alleged to have been suffered from the failure to maintain, in proper repair, certain State Highways of the Commonwealth. In both suits judgments were recovered against the Commonwealth. On appeal to the Supreme Court, the judgments in both cases were reversed. The Collins case is reported in 262 Pa. 572, and the Swift case in the same volume, at page 580.

The Supreme Court in reversing the judgments of the court below held that in the absence of a general statute assuming such liability, the Commonwealth was not liable for the torts of its officers and employees, and that the special Acts of Assembly which authorized the bringing of these suits were unconstitutional and in violation of Article III, Section 7, of the Constitution, forbidding special legislation. In 1917 twenty-four similar suits were authorized by the General Assembly, all of which remaining untried, will now terminate.

Nolan vs. Jones et al.

In the biennial report for 1917-1918, page 13, reference was made to this proceeding which had not then been disposed of. The Superior Court, in 67 Superior Court Reports 430, sustained the constitutionality of the Cold Storage Act of May 16, 1913, P. L. 216. The plaintiff appealed the case to the Supreme Court, which, in an opinion reported in 263 Pa. 124, affirmed the judgment of the Superior Court, declaring that this law was a legitimate exercise of the police power of the State for the protection of public health and did not contravene the State or Federal Constitutions.

Commonwealth vs. The Welsh Mountain Mining and Kaolin Manufacturing Company.

This was an appeal by defendant to the Dauphin County Court from a settlement made by the Auditor General and State Treasurer for tax on capital stock. The defendant company was incorporated under the laws of this State for the purpose of "mining fire clay, fire sand, feldspar and kaolin, with the right to prepare for market and vend the product of their mine."

In the process of mining, silica rock is taken from the quarry in large pieces and dumped into a stone crusher, passed into other

crushers and through sieves of various size mesh. The rock has no commercial use or value as such, but when converted into sand, known in the trade as "silica sand," it has considerable value and is adapted to particular uses for which it was not adapted as rock. The question involved was whether or not this process was manufacturing within the meaning of the Act of June 1, 1889, P. L. 420, as amended by the Act of June 7, 1911, P. L. 673, which allows exemption from capital stock tax on so much of the capital stock as is actually and exclusively employed in carrying on manufacturing within the State.

The Supreme Court, in the opinion reported in 265 Pa. 380, held that the process in question was manufacturing within the meaning of the Acts of Assembly referred to and affirmed the opinion of the court below.

Columbia National Bank, Union Trust Company, Germantown Trust Company, Corporations vs. Powell, Auditor General of the Commonwealth of Pennsylvania.

In the biennial report for 1917-1918, page 7, reference was made to the equity proceedings brought against Auditor General Powell by the corporations plaintiff above named, which at the time had not been fully disposed of. These were bills in equity to restrain the Auditor General from enforcing the Escheat Act of June 7, 1915, P. L. 878. The cases turned on the constitutionality of said Act. The Dauphin County Court dismissed the bills. Appeals were then taken to the Supreme Court, in 1917, and the latter court remanded the cases to the Dauphin County Court for re-trial. (See 260 Pa. 181). The Dauphin County Court again sustained the constitutionality of the Act and appeals were taken to the Supreme Court. The Supreme Court again upheld the constitutionality of the Act as to the two Trust Companies, in an opinion reported in 265 Pa. 71. With regard to the Columbia National Bank it held in an opinion reported in 265 Pa. 85, that said act only applied to institutions governed by the laws of the State and did not apply to National Banks.

Commonwealth of Pennsylvania vs. John McGlinn Distilling Company.

This was an appeal by defendant to the Dauphin County Court from the settlement made by the Auditor General and State Treasurer for tax on capital stock. The Commonwealth assessed the defendant, a Delaware Corporation, capital stock tax at the rate of

ten mills upon the actual value of its capital invested within this State. The company claiming it was liable to pay the five mills tax, appealed to the Common Pleas of Dauphin County which upheld the contention of the Commonwealth. On appeal to the Supreme Court it was held in an opinion reported in 265 Pa. 346, that a foreign corporation authorized "to manufacture, distill, brew, rectify, refine, blend and deal in beverages of all kinds both alcoholic and non-alcoholic," but which is solely engaged in the business of blending and selling whiskey at wholesale, is subject to the ten mill tax upon the value of invested capital within the State, under the provisions of the Act of July 15, 1897, P. L. 292, Section 2; the test is not the nature of the business conducted, but whether the corporation in question was "organized and incorporated for the purpose of distilling liquors and selling the same at wholesale."

The Court further held that the Legislature had the right to classify a corporation, which has, under its charter the right to carry on more than one kind of business, even though it may be actually engaged in the pursuit of a single business.

In Re State Highway Route No. 72, Appeal of Ellen K. Watson, et al.

In the biennial report of 1917-1918, at page 14, reference was made to the above stated case, which at the time was in the Superior Court on appeal and undisposed of. This was a proceeding instituted in the Quarter Sessions of Allegheny County to recover damages in connection with the change of grade in a State Highway. The Commonwealth filed exceptions to the report of viewers on the ground that it was not liable for damages for the improvement of a State Highway, where land was not actually taken. The Allegheny County Court approved the report of the viewers. The Superior Court in an opinion found in 71 Superior Court Reports 85, reversed the judgment of the court below.

The Supreme Court, on appeal, in 265 Pa. 369, held that the Commonwealth was not liable for damages by reason of injury caused to property in the improvement or reconstruction of a State Highway under Act of May 31, 1911 (P. L. 468), where the former grade has been changed or altered without the taking or appropriation of land.

In re Howard S. Hand, a Pilot.

The Board of Commissioners of Navigation suspended Hand from acting as a pilot until he should return to the agents for a Norwegian vessel, certain pilotage charges found to be illegally collected

by him. The Philadelphia County Court set aside the decision of the Board and directed that the pilot be reinstated to his former standing. The board thereupon appealed to the Supreme Court, which, in the case reported in 266 Pa. 277, reversed the court below, holding that the Board under the Act of June 8, 1907, P. L. 469, had authority to adjust all differences between masters, owners, and consignees of ships and pilots, involving the actions of the pilot, and if the latter had collected money to which he was not entitled, the Board could lawfully suspend him until the money was refunded.

Atlantic Refining Company, a Corporation, vs. F. A. VanValkenburg, et al., Board of Mercantile Appraisers for Philadelphia County.

This action is based on a bill in equity filed in Philadelphia County for an injunction to restrain the assessment and collection of a mercantile tax. The corporation plaintiff appealed to the Supreme Court from the decree entered in favor of the defendants, and the latter court in an opinion found in 265 Pa. 457, held that this company was liable, under the Act of May 2, 1899, P. L. 184, for the mercantile tax on the "whole value, gross, of business transacted annually," at distributing stations established at various points, apart from its main plant, when the orders for certain of its products came through the main plant, but sale and delivery was made through the distributing stations referred to.

Henry G. Wasson vs. Cyrus E. Woods, Secretary of the Commonwealth of Pennsylvania.

The plaintiff was a candidate for the office of Judge in Allegheny County and instituted mandamus proceedings against the Secretary of the Commonwealth to compel him to certify his name for printing on the official election ballot. At the primary election there were seven candidates for five vacancies in the office. Six of the candidates, including the plaintiff, received sufficient votes under the Act of July 24, 1913, P. L. 1001, amended by the Act of July 8, 1909, P. L. 745, to constitute them sole nominees for the office at the general election. The Secretary of the Commonwealth proposed to certify the names of the five receiving the highest number of votes, for five vacancies to be filled. The plaintiff claimed that his name should be certified together with the others. The lower court refused the mandamus.

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The Supreme Court, on appeal, in an opinion found in 265 Pa. 442, upheld the constitutionality of Act of 1919, P. L. 745, amending Section 13 of the Uniform Primary Law of 1913, P. L. 1001, and affirmed the decision of the court below.

In re Shenango Furnace Company.

This is an appeal by defendant from the settlement made by the Auditor General and State Treasurer for tax on capital stock. The defendant, a Pennsylvania corporation, owns all the shares of the capital stock of Shenango Steamship Transportation Company, also a Pennsylvania corporation. Tax was paid on the portion of the capital stock represented by property located in Pennsylvania, but no tax was charged or paid on the remainder of the capital stock represented by property located outside of the State.

The Supreme Court, on appeal, in an opinion reported in 268 Pa. 283, held that the capital stock of a Pennsylvania corporation represented by shares of stock in another Pennsylvania corporation, not doing business in the State, and whose capital stock is not liable to taxation here because it was represented by property permanently located outside of the State, is liable for said tax under the Acts of January 3, 1868, P. L. 1318, June 1, 1889, P. L. 420, June 8, 1891, P. L. 229, and June 17, 1913, P. L. 507.

In re Hostetter Estate.

This case is based on the claim of the Commonwealth of Pennsylvania for direct inheritance tax in the estates of Theodore R. Hostetter, Jr., a minor, and Rosetta R. Hostetter, deceased. The Orphans' Court of Allegheny County awarded to the Commonwealth the amount of its claim for said tax and the executor of Theodore R. Hostetter, Jr., appealed from this judgment to the Supreme Court. The latter court, in an opinion found in 267 Pa. 193, affirmed the decree of the court below. The circumstances of this case are briefly as follows: Theodore R. Hostetter, Jr., formerly resided in Pennsylvania, and after the death of his father changed his domicile to New York, where he died during his minority. His father dying intestate, a guardian for the minor's share of the estate was appointed in Pennsylvania. The minor also inherited an estate from a grandmother. The assets of both estates consisted of stocks, bonds, mortgages, and real estate acquired by virtue of mortgage foreclosures

located and secured by real estate within the State of Pennsylvania. All of the property had been continuously kept in Pennsylvania, and all corporations whose stock and bonds were included in the assets, with a single exception, were Pennsylvania corporations.

The Supreme Court in the opinion referred to held, that the general rule that movables follow the person is not of universal application, but depends mainly on the extent of the control the beneficiary has over the estate. The court held that both estates are subject to the Pennsylvania direct inheritance tax imposed by Act of July 11, 1917, P. L. 832.

In re Rowford Knitting Company.

This is an appeal by defendant from a settlement made by the Auditor General and State Treasurer for tax on corporate loans. Defendant company was a Pennsylvania corporation having its principal office and place of business in the city of Philadelphia. The Accounting Officers of the Commonwealth charged the company with tax on an indebtedness represented by promissory notes payable six months after date and owed to a co-partnership doing a banking business. The borrowed money was used by the company in the purchase of material and in the payment of its employees. The defendant objected to payment of the tax on the ground that the indebtedness had been incurred for current expenses, and was not subject to loans tax. The Dauphin County Court decided that the corporation was not taxable for State purposes, on this indebtedness, under section 17 of the Act of June 17, 1913, P. L. 507, 516. The court also held that section 17 of the said Act imposed no duty on the corporations to collect tax on this indebtedness, inasmuch as such obligations are taxable under section 1 of the same Act, for county purposes, which tax is collectible by the local authorities.

The Supreme Court in an opinion, found in 268 Pa. 266, affirmed the judgment of the Court below.

Commonwealth vs. Lehigh and New England Railroad Company.

This is an appeal by defendant from a settlement made by the Auditor General and State Treasurer for tax on corporate loans. The Accounting Officers of the Commonwealth charged tax on \$1,950,000, car equipment trust certificates or securities, and \$900,000 indebtedness, represented by promissory notes, discounted and negotiated by private bankers. The latter indebtedness was incurred to meet the company's current expenses.

The Dauphin County Court denied the liability of the company for the tax in question. On an appeal to the Supreme Court, it was held in the opinion, found in 268 Pa. 271, that a corporation is not taxable for State purposes on equipment trust certificates issued in connection with a lease and agreement for the purchase of certain railroad equipment and rolling stock, under Section 17 of the Act of June 17, 1913, P. L. 507, 516, inasmuch as such obligations are already taxable under Section 1 of the same Act, which imposes a tax for county purposes on "car trust securities." The court also held that a corporation is not taxable for State purposes on indebtedness represented by promissory notes negotiated and discounted by private bankers, under Section 17 of the said Act, inasmuch as such obligations are already taxable for county purposes under Section 1 of the same Act.

In re Lancaster Electric Light, Heat and Power Company.

This is an appeal by the defendant from a settlement made by the Auditor General and State Treasurer for tax on corporate loans. The defendant corporation was chartered in Pennsylvania. The accounting officers of the State imposed a loans tax upon that portion of its indebtedness which was represented, not by any obligation given by it to the person to whom the indebtedness was due, but appeared only in a statement contained in the company's books as cash advanced to it. The Dauphin County Court held that this indebtedness was not subject to the loans tax for State purposes imposed by Section 17, Act of June 17, 1913, P. L. 507, but that such indebtedness is taxable under Section 1 of said Act, for county purposes, and is properly collectible by the local authorities. From this judgment the Commonwealth took an appeal to the Supreme Court, which affirmed the judgment of the Court below on the opinion filed. This case has not yet been reported.

*Trustees of State Hospital of the Middle Coal Field of Pennsylvania
vs. Lehigh Valley Coal Company.*

In the biennial report for 1917-1918, page 14, reference was made to this case, which at the time, had been appealed to the Superior Court, but had not been disposed of. It arose on a case stated in an action of assumpsit brought in Luzerne County, to recover the actual cost of medical, surgical and hospital services rendered de-

fendant's employees who were removed to plaintiff's hospital "by permission of defendant," under the provisions of the Workmen's Compensation Act of June 2, 1915, P. L. 736. The lower Court entered judgment in favor of the plaintiff.

The Superior Court, on appeal, in an opinion found in 71 Superior Court Reports 545, held that an employer is liable for the charges incident to the caring for injured persons who have been sent to a hospital with its consent, pursuant to Section 306, paragraph "E" of the Act of June 2, 1915, P. L. at page 742. It also held that the Act incorporating the hospital in question, while providing free treatment for persons injured about the mines, etc., did not contemplate the exemption of employers from lawful charges incident to the care of injured employees sent to the hospital in accordance with the provisions of the Workmens' Compensation Act.

The Supreme Court on appeal affirmed the judgment of the Superior Court. (See 267 Pa. 474).

In re Clyde Steamship Company.

This is an appeal by defendant from a settlement made by the Auditor General and State Treasurer for tax on capital stock. The defendant company is a foreign corporation engaged in Interstate Commerce, which leased wharves and a dock in the City of Philadelphia, where certain of its equipment was used. The accounting officers of the Commonwealth charged it with a tax on that proportion of its capital stock representing its office furniture and appliances for loading and unloading passengers and freight, permanently located in this State and employed in transacting its transportation business. The Dauphin County Court held that the company was properly taxable under Sections 4 and 5 of the Acts of June 8, 1891, P. L. 229, and of June 8, 1893, amendatory of the Act of June 1, 1889, P. L. 420, whereby tax is imposed on the actual value of the capital stock of domestic and foreign corporations doing business in the State or having capital or property employed or used here in any manner. The Supreme Court, on appeal, in an opinion found in 268 Pa. 278, affirmed the judgment of the Court below, holding that the tax was properly assessed and was not an interference with Interstate Commerce.

Commonwealth vs. Thorne, Neale and Company, Inc.

This is an appeal from an assessment for mercantile tax arising under the Act of May 2, 1899, P. L. 184. The case was originally tried in Philadelphia County. The defendant company is engaged

in the business of buying and selling coal. It sought to evade liability on the greater portion of the tax assessed, for the reason that it was levied on business wherein it acted as agent for other coal companies. The sole question involved was whether the company conducted its business so as to make it liable to the Commonwealth as a wholesale vendor for a mercantile tax "for the whole volume of its business," on its gross sales. The Superior Court, on appeal, in an opinion reported in 70 Superior Court Reports, 599, held that a vendor, within the meaning of the Mercantile Tax Act, is one who buys to sell, and that a corporation with power to buy and sell coal is liable for the mercantile tax on the whole volume of its gross sales, as provided by Act of May 2, 1899, P. L. 184, where it appears that it dealt directly with its customers; transmitted orders received from them to the coal operator; that shipments were made by the operator according to the company's directions; that the coal was charged and billed to the company and by the company to its customers; that it made the collections from its customers; that the company never had possession of the coal, but that deliveries were made direct to customers upon its direction, etc. The Court further held that the company was not acting as an agent under a commission, but was a principal, buying and selling on its own account, and therefore subject to the tax imposed by law. The Supreme Court, on appeal, in an opinion found in 264 Pa. 408, affirmed the judgment of the Superior Court.

In re Pennsylvania Water and Power Company.

This is an appeal by defendant from a settlement made by the Auditor General and State Treasurer for tax on gross receipts. The defendant company was formed by the merging of two Water and Power Companies. The original companies were both incorporated for the purpose of storage and transportation of water and water power for commercial and manufacturing purposes, and "also in order that the water power may be supplied to the public to the best advantage, in furtherance of the corporate purposes, the development by the use of the same by electric current and power to the public." The present company has been and is now engaged in supplying electric current to the public, individuals, firms and corporations. The sole question involved in this case was whether a corporation organized as a Water Power Company is liable to pay the Commonwealth a gross receipts tax on the business of generating and furnishing electricity for light and power. The Dauphin County Court held that the defendant company was not an Electric Light

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Company, within the Act of June 1, 1889, P. L. 420, and was not, therefore, subject to tax on its gross receipts. From this judgment the Commonwealth has appealed to the Supreme Court and the appeal will be heard at the May Term 1921.

Commonwealth of Pennsylvania

vs.

Tony Vigliotti and Rosie Vigliotti.

This was an appeal of the defendants, to the Superior Court, from the sentence of the Court of Quarter Sessions of Fayette County.

The defendants were convicted of selling intoxicating liquors which contained an excess of one-half of one per centum of alcohol. The basis of the appeal to the higher court was that the Prohibitory Amendment to the Federal Constitution, (the 18th Amendment), and the Act of Congress of October 28, 1919, known as the Volstead Act, superseded the Act of May 13, 1887, (P. L. 108), known as the Brooks High License Law.

On account of the great importance of the subject, the Attorney General filed a brief in the Superior Court. In it he contended that the Brooks High License Law had not been repealed or made inoperative, even though it conflicted with the Federal Constitution and the Volstead Act. He argued that the national legislation covered only intoxicating liquors containing more than one-half of one per centum of alcohol, while the State law included vinous, spirituous, malt or brewed liquors containing any percentage of alcohol, and that the effect of the Federal amendment and the Volstead Act is to limit the operation of the license granted under the State law to the sale of non-intoxicating liquors.

The case was argued before the Superior Court, on October 11, 1920, and has not yet been disposed of.

County of Philadelphia vs. Commonwealth of Pennsylvania.

In the biennial report for 1917-1918, page 20, reference was made to this action, which at the time had been submitted to the Philadelphia County Court, and was awaiting decision. Subsequently a judgment was rendered in favor of the Commonwealth, and an appeal taken to the Supreme Court by the County, plaintiff. This appeal was argued at Pittsburgh, September 27, 1920, and the Supreme Court has ordered a re-argument of the case for February 14, 1921.

This is an action of assumpsit under the special Act of June 22, 1917, P. L. 636, authorizing suit against the Commonwealth for moneys advanced by the county for the payment of certain expenses incident to the conduct of the primary elections for the years 1911-1914, inclusive.

The Commonwealth's defense is that the special Act under which this suit was brought is in violation of Section 7, Article III, of the Constitution of Pennsylvania; that under the Act of March 30, 1811, 5 Smith's Laws 228, this county, as well as any other county, had the power and privilege of obtaining a settlement and judgment for the amount due; that this Act gave general jurisdiction in such cases to the Dauphin County Court to grant relief; that the Act authorizing the county of Philadelphia to bring suit was a special Act providing the method of collecting its debt and changing the method of such collection as to this county alone.

While the Supreme Court, in the case of *Ida Collins vs. the Commonwealth*, reported in 262 Pa. 572, declared unconstitutional the special Act of Assembly under which that action of trespass, was instituted, the Commonwealth, in the present action of assumpsit, contends that Article I, Section 11, of the Constitution, must be considered in connection with the 28th clause of Section 7 of Article III of the Constitution, and that the county of Philadelphia had the power and privilege of obtaining the same relief under the general Act of 1811, which is given it under the special act of 1917.

The Telephone Rate Cases in the State and Federal Courts.

President Wilson, under the Joint Resolution of Congress of July 16, 1918, took possession and exclusive control of the great telephone and telegraph systems of the United States, as a war emergency measure, and Albert S. Burleson, Postmaster General, was designated by him to have charge of the United States Telephone and Telegraph Administration. The latter official, in the exercise of his authority, undertook to increase the tolls and rates. The Attorney General determined, if possible, to prevent the Postmaster General from making such increase, in Pennsylvania. Accordingly, on January 29, 1919, he filed in the Dauphin County Court a Bill in Equity asking for a preliminary injunction against the Bell Telephone Company of Pennsylvania.

The Bill of Complaint alleged that the defendant company, in obedience to the formal order of The Public Service Commission, had filed with it certain schedules for intrastate rates, which rates were to be the maximum rates to be charged, and were in operation

at the time of the institution of this proceeding; that the defendant subsequently notified the Commission, that on and after a certain date, it would charge and collect for intrastate services under a new schedule of rates, computed under direction of the United States Telegraph and Telephone Administration, A. S. Burleson, Postmaster General; that from said date the defendant has charged and collected for intrastate services tolls different from, and in many cases in excess of, tolls for the same service, determined by the Commission. The Attorney General asked for an injunction restraining the defendant company from violating The Public Service Company Law of 1913, the order of The Public Service Commission referred to, and also to restrain the defendant from charging and receiving such tolls until it shall have asked for and received the approval of the Commission.

The Court promptly awarded a preliminary injunction, which was in force until June, 1919, when the same—for reasons which will hereafter appear—was finally dissolved.

During the pendency of this proceeding, Albert S. Burleson, Postmaster General of the United States, on April 10, 1919, in the United States District Court for the Eastern District of Pennsylvania, filed a Bill of Complaint in Equity against The Public Service Commission of the Commonwealth of Pennsylvania and William I. Schaffer, Attorney General, asking that the defendants be enjoined from interfering in any manner with the plaintiff, or with any telegraph or telephone company in the possession or operation of the plaintiff, within the Commonwealth, in charging and collecting at the rates prescribed by the official order of the Postmaster General. The Attorney General, in his answer, maintained that the fixing and regulating of rates to be charged and collected by telegraph and telephone companies, is not incident to the prosecution of war, and that neither the President nor the Postmaster General, plaintiff, had any legal authority to fix or regulate such rates.

The District Court granted a temporary restraining order, and on April 15, 1919, granted an interlocutory injunction against the defendants.

In the meanwhile certain Attorneys General and Public Service Commissions of other states, endeavored to prevent the Postmaster General from increasing telegraph and telephone tolls and charges, by proceedings in the Courts of their respective States, which finally reached the United States Supreme Court on appeal. Reference will be made to two of these proceedings instituted by other States, for the reason that the Attorney General of Pennsylvania, by permission of the latter Court, intervened and filed briefs as *amicus curiae*.

The first was the proceeding brought by The Public Service Commission of Massachusetts against the New England Telephone and

Telegraph Company. The Supreme Judicial Court of that State dismissed, for want of jurisdiction, the action, the purpose of which was to enjoin the telephone company from putting into effect the schedule of intrastate rates fixed by the Postmaster General. The Attorneys General of six states were permitted to intervene, and filed briefs. The United States Supreme Court, in a short opinion reported in 250 U. S. 195, affirmed the judgment of the Massachusetts Court. The second case was that of the Dakota Central Telephone Company, et al. vs. the State of S. Dakota, et al. The State of South Dakota sought to enjoin the telephone company from putting into effect intrastate rates fixed by the Postmaster General. The Supreme Court of that State allowed the injunction, but on appeal the United States Supreme Court, in an elaborate opinion, reported in 250 U. S. 163, reversed the Dakota Court, and upheld the authority of Congress, under the war power, to confer upon the President by the Joint Resolution, of July 16, 1918, the power to take over and operate telephone and telegraph systems as a war emergency measure. It also upheld the authority of the President to assume such control under the provisions of the Joint Resolution referred to, and held that State control over intrastate telephone rates ceased with the exercise by the President of the authority conferred upon him as a war emergency measure.

Commonwealth of Pennsylvania vs. the State of West Virginia.

On May 5, 1919, the Attorney General, presented a petition to the United States Supreme Court for leave to file a Bill of Complaint against the above named defendant. He was authorized and directed to institute proceedings by a Joint Resolution of the Senate and House of Representatives of this Commonwealth, approved April 18, 1919, P. L. 87. The purpose of the proceeding was to have declared unconstitutional, and to enjoin the enforcement of, a statute of the State of West Virginia, approved February 17, 1919, whose operation would discriminate against the citizens of Pennsylvania in the transportation of natural gas from West Virginia into this State, thereby endangering the lives and affecting the health, comfort and pecuniary advantage of the citizens of Pennsylvania. The Court granted permission to file the bill. June 2, 1919, a preliminary injunction was awarded and subsequently a Commissioner was appointed by the Court to take testimony and report the same. This proceeding is still pending. Brief reference to this case is found in 40 Supreme Court Reporter, 357.

In re Goldwyn Distributing Corporation.

A very important case, settling the power and authority of the Pennsylvania State Board of Censors over the exhibition of moving pictures, was the case of Goldwyn Distributing Corporation, reported in 265 Pa. 335. The question involved was whether on appeal to the Court of Common Pleas under the Act of May 15, 1915, P. L. 534, from an order of disapproval, on reasonable grounds, of a motion by the Board of Censors, the whole matter is before the Court *de novo*, and whether the Court is called upon to sit as super-censors, in order to review the decisions of the administrative body created by the Act, or whether the Court is limited to determining whether the Board has unreasonably and maliciously abused its discretion.

The facts in the case were that a motion picture film entitled "The Brand", was submitted to the Pennsylvania State Board of Censors, under the Act of May 15, 1915, P. L. 534, for approval. The Board disapproved it because it was the story of a woman who leaves her husband for an earlier lover, and lives with him for two years without marriage. The woman returns and is forgiven by her husband, who brands the seducer, hence the title.

A re-examination was made when the film was again disapproved by a majority of the Board. The owners of the film rights for the State of Pennsylvania took an appeal, under Section 26 of the Act, to the Court of Common Pleas No. 2, of Philadelphia County. Testimony was taken by the Court, which also viewed the film, and after hearing argument, filed an opinion that in their judgment the picture did not tend to debase morals, reversed the action of the Board as arbitrary and oppressive, and ordered the Board to approve the film as modified by the elimination made by direction of the Court.

The Commonwealth appealed to the Supreme Court. The case was earnestly contested by the Film Company, which considered it a test case involving the whole proposition of the censorship of moving pictures, and retained very eminent counsel. The Supreme Court affirmed the contention of the Commonwealth, and in an exhaustive opinion reviewed and upheld the powers and authority of the Board of Censors under the Act of 1915, and decided that on appeal "the sole inquiry is whether the Board acted arbitrarily, unreasonably, and in such a way as to amount to an abuse of discretion." The Supreme Court also upheld the authority of the Board to adopt reasonable rules and regulations as to the kind of pictures which would be approved.

Under the supervision of this Department fifty-six prosecutions for violations of the Censorship Act of 1915 were brought in Pittsburgh, Pa., sixty-one prosecutions in Philadelphia, Pa., five in To-

wanda, Pa., and three in Erie, Pa: Fines were levied in all but six of these cases, and a large sum collected and paid to the State Treasurer.

In re North Penn Bank.

On July 18, 1919, the Commissioner of Banking took possession of the North Penn Bank, of Philadelphia, by virtue of the authority conferred upon him by the Act of May 21, 1919 (P. L. 209). An examination of the bank made shortly before this date disclosed the fact that it was insolvent and the Commissioner of Banking therefore took possession of the business of the bank, because it was in an unsafe and unsound condition to do business.

Prior to the passage of the Act of May 21, 1919, the affairs of insolvent institutions such as this were administered by receivers appointed by the various courts of common pleas of the Commonwealth.

Immediately after taking possession the Commissioner of Banking appointed a Deputy to take charge of the affairs of the bank and he, together with the Attorney General's office, immediately proceeded to liquidate the same.

The closing statement of the bank showed assets and liabilities amounting to \$2,455,148.49, and the affairs were found to be in a very unsatisfactory condition, due to the way in which they had been managed by the Cashier and other officers of the institution. The paying teller of the bank had absconded. The Attorney General's Department, in connection with the District Attorney's Office in Philadelphia, immediately instituted prosecutions against the officers and directors of the bank for perjury, making false statements to the Banking Commissioner, conspiracy, and receiving deposits after the bank was known to be insolvent. Some of these cases have been tried and the defendants convicted.

In one case, that of the President, an acquittal was had.

Prior to the failure of the bank a large amount of funds had been deposited therein by the Commissioner of Insurance, as Statutory Liquidator of the Pittsburgh Life and Trust Company, dissolved. At the time the bank closed its doors the balance in this account amounted to \$229,000. This balance was secured by a judgment bond, upon which the directors were sureties, and a bond upon which the Hartford Indemnity Company was surety. The Attorney General's Department immediately undertook the collection of an amount sufficient to pay this deposit from the individual sureties and the corporate surety. The corporate surety resisted the claim and the

suit on the bond was tried in the court of common pleas of Philadelphia County and an appeal from the judgment therein taken to the Supreme Court. Through the efforts of the Attorney General's Department, the assets of the North Penn Bank were sold to the Phoenix Trust Company, a new corporation which started business in the building occupied by the North Penn Bank. Under the contract between the Commissioner of Banking and the Phoenix Trust Company relating to the sale of the assets of the North Penn Bank, the assets were handled by the Phoenix Trust Company by banking practices, rather than by immediate liquidation, and a very much larger amount was thereby realized for the depositors of the North Penn Bank.

Taking possession of the assets of the bank for the purpose of liquidation by the Commissioner of Banking, was found to be a great deal less expensive than having a receiver appointed by the court of Common Pleas.

*Willis Collins, Plaintiff, vs. Charles A. Snyder, Auditor General,
Harmon M. Kephart, State Treasurer, and Du Bois
Hospital, Du Bois, Pa., et al.*

This was a Bill in Equity filed by plaintiff in the Dauphin County Court, against the Auditor General and State Treasurer of Pennsylvania, and against sixty-six defendant institutions all of which institutions were named in various appropriation bills as recipients of State funds appropriated by the Legislature of Pennsylvania, in 1919. The complainant asked that these State Officials be enjoined by the Dauphin County Court from paying out the said moneys.

The Bill alleged that Article III, Section 18, of the Constitution, prohibited appropriations to "denominational or sectarian" institutions, corporations or associations, and further averred that all the defendant institutions fell within the prohibited class and asked that they also be enjoined from receiving the moneys appropriated. The Attorney General demurred to the Bill on behalf of the two State officials charging that the Bill of Complaint was multifarious as to parties defendant, as well as to subject matter. The demurrer alleged that the Bill on its face attacked the constitutionality of sixty-six different Acts of Assembly making appropriations in varying amounts to sixty-six different institutions, unconnected with one another; that the evidence by which the Court must determine whether any single one of said institutions is sectarian or denominational is separate and distinct from the evidence which must be submitted in reference to any other institution. The court, on November 17, 1919, sustained the Demurrer filed by the Attorney General, and dismissed the Bill.

Whereupon the plaintiff, on April 8, 1920, instituted five new proceedings in Equity against the State Treasurer and five of the institutions included as defendants to the former Bill, to-wit; The Institution of Protestant Deaconesses, a corporation, St. Timothy's Memorial Hospital and House of Mercy, Roxborough, a corporation, Duquesne University of the Holy Ghost of Pittsburgh, a corporation, the Sisters of Mercy of Crawford and Erie Counties, and the Jewish Hospital-Association of Philadelphia, a corporation. The new proceedings were of the same general character as the former one, but the Auditor General was not included as defendant. The Dauphin County Court filed opinions holding that the corporate name of the institution does not render the institution denominational or sectarian within the meaning of Article III, Section 18, of the Constitution; that to render the defendant denominational or sectarian within the meaning of the Constitution, acts must be done pursuant to powers conferred which are promotive of the tenets and interests of a particular denomination or sect. The Court found that the facts in these cases did not establish a denominational or sectarian institution within the meaning of the Constitution, and that, therefore, the Acts of Assembly making an appropriation to the same are valid.

At this writing these cases have not been reported nor have appeals been taken to the higher Court.

*H. H. Robertson Company, a Corporation, vs.
Globe Indemnity Company, a Corporation.*

This is an appeal from the Judgment of the Common Pleas of Allegheny County arising on a case stated. Judgment was entered against the Indemnity Company in the Court below, and an appeal therefrom taken to the Supreme Court, in which the Judgment of the lower Court was sustained. The case has not yet been reported.

The plaintiff, a subcontractor, sought to recover from the contractor's surety the price of materials furnished by plaintiff in the course of construction of a section of State highway under the Act of May 31, 1911, P. L. 468. The question before the Supreme Court was as to whether a material man, either in his own name or in the name of the Commonwealth for his use, can recover against the surety of a bond given the Commonwealth by a contractor under the provisions of the Act above stated. The Commonwealth was not a party to the record, but on account of the importance of the question the Attorney General intervened and filed a brief. The Commonwealth is naturally interested in seeing that bonds like the one in suit shall not be exhausted by persons furnishing labor and material, who, by the recovery of a judgment against a defaulting contractor

engaged on State Highway work, may deplete and exhaust the indemnity on which the Commonwealth must depend in order to recoup itself.

The Supreme Court affirmed the judgment of the Court below. The Court based its decision solely upon the record in this case, and the Judgment does not in any manner affect or prejudice the rights of the Commonwealth, which was not an original party to this proceeding.

United States of America, Complainant, vs. James E. Mooney, Mercantile Appraiser, A. Harry Clayton, County Treasurer, William H. Murphy, Deputy County Treasurer, and Charles A. Snyder, Auditor General of Pennsylvania.

This was a proceeding in Equity brought in the District Court of the United States for the Eastern District of Pennsylvania. The United States District Attorney filed his Bill of Complaint against the defendants, asking that the assessment of a mercantile tax on the eating-house and cafe of the complainant, operating through the United States Shipping Board Emergency Fleet Corporation, be declared illegal, null and void, and that they be restrained from collecting the said mercantile tax. The United States Shipping Board, authorized by Act of Congress, created a corporation known as the United States Shipping Board Emergency Fleet Corporation. The last named corporation, in 1917, entered into a contract with the Merchant Ship-Building Corporation for the construction of forty vessels, the latter corporation being in the agreement designated as "agent", and the Emergency Fleet Corporation as the "owner". Under this agreement the Merchant Ship-Building Corporation agreed to construct and maintain, during the continuance of the contract, buildings, appurtenances, etc., including such commissary and other facilities as the Emergency Fleet Corporation should deem necessary. The Merchant Corporation, as an adjunct to its ship building operations, established an eating-house or cafe, in Bucks County, primarily for the use of its employes, but at which such of the public as wished to dine were accommodated. About five per cent. of the gross receipts of the restaurant were derived from public patronage, the remainder coming directly from the employes. The Emergency Fleet Corporation supervises and controls all expenditures on account of the restaurant.

The Mercantile Appraiser of Bucks County assessed a tax against the Merchant Ship-Building Corporation, agent, as a private corporation doing business in Pennsylvania in conducting the said restaurant. The Ship-Building Corporation appealed, in the manner pre-

scribed by the Mercantile License Laws of the State, to the Mercantile Appraiser and the County Treasurer of said County, constituting a Board of Appeal. The assessment of the tax was held to be valid, and the plaintiff thereupon filed his Bill in the United States Court, asking that the defendants be restrained from proceeding in the State Courts for the collection of the tax.

Judge Dickinson, of the United States Court, in December, 1920, declined to interpose between the State taxing authorities and the Merchant Ship-Building Corporation, the real plaintiff, and dismissed the Bill for want of equity. This case has not been reported.

Paul C. Wolff vs. State Highway Commissioner.

The plaintiff asked the Dauphin County Court for a Writ of Mandamus against the defendant, alleging that he was the owner of a motor vehicle which the defendant refused to register under the provisions of the Act of June 30, 1919, P. L. 678. The defendant, in his Return, alleged as a reason for such refusal, that the plaintiff had not complied with all of the provisions of the said Act in that he neglected or refused to give certain information concerning "lights" by the application for registration, nor did he make affidavit as to his age, mental or physical capacity, and experience in the operation of a motor vehicle.

Judgment was entered for the defendant, on the demurrer filed, on the ground that the plaintiff had not complied with the Act referred to in the preparation of his application for registration. The Court held that all the questions contained in the application blank prepared by the State Highway Commissioner are necessary in order that he may possess all the information specifically required by the Act, and without which information he could not determine intelligently whether a license should issue.

This case has not been appealed.

In re M. T. Wilkins et al., School Directors of Mill Creek Township School District (Erie County).

In this case the Attorney General asked the Dauphin County Court for a peremptory Writ of Mandamus directed to the defendant School Directors, seeking to compel them to enforce the provisions of Section 12 of the Act of June 5, 1919, P. L. 399, relating to the vaccination of school children. The defendants in their Return filed questioned the jurisdiction of the Court to entertain the proceeding, the constitutionality of the Act of Assembly, and the propriety of enforcing its provisions.

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Judge Henry, specially presiding, on January 10, 1921, refused the Writ of Mandamus. The Court held that it had jurisdiction of the subject matter and the parties in the case, and that the Act of June 18, 1895, P. L. 203, as amended by the Act of 1919, *supra*, is constitutional, but maintained that said Act provided a full and complete remedy for its violation, and therefore refused the writ.

The other cases in which the Department was concerned are either of minor importance or have not reached adjudication by the Dauphin County Court, and will be discussed in the succeeding Report, by which time they will in all probability have been finally disposed of.

Respectfully submitted,

GEO. E. ALTER,
Attorney General.

OPINIONS TO THE GOVERNOR

OPINIONS TO THE GOVERNOR.

CORPORATION POLICE.

The act of 1865, P. L. 225, does not authorize the appointment of policemen for express companies.

The constitutional mandate precludes the construction of said act which would extend its provisions to corporations other than railroad companies; therefore it is limited to the subject expressed in its title.

The supplementary act of April 11, 1866, P. L. 99, whereby the provisions of the act of 1865 were extended to certain cases, did not embrace express companies, and hence has no bearing on the question of the power to appoint a policeman for an express company.

Office of the Attorney General,
Harrisburg, Pa., February 4, 1919.

Harry S. McDevitt, Esq., Private Secretary to the Governor, Harrisburg, Pa.

Dear Sir: There was duly received your communication of the 29th ult., to the Attorney General, asking to be advised whether an Express Company is such a corporation as is entitled to apply to the Governor for the appointment of a policeman, pursuant to the provisions of the Act of February 27, 1865, P. L. 225.

Section 1 of said Act provides as follows:

"That any corporation owning, or using, a railroad, in this state, may apply to the Governor to commission such persons as the said corporation may designate, to act as policemen for said corporation."

A careful consideration of the above Act, as a whole, leads clearly to the conclusion that it was not intended thereby to give to corporations other than railroad companies the right to have policemen

appointed for them. The term "using, a railroad", as employed in the above Section, does not mean using it as a shipper, as by an express company, or in other like way, but imports using it in operation thereof, as for example, by a lessee or some operating company other than the owner. To hold otherwise would be to open the door to the appointment of policemen for a multitude of concerns. We are helped to an understanding of the true intent and scope of the measure by a reference to its title, which reads:

"An Act empowering railroad companies to employ police force."

The provision of the State Constitution in force at the time of the passage of the above enactment, relative to the requirement of the title of a bill, and, as will be noted, being largely the same in effect as the corresponding one in our present Constitution, was as follows:

"No bill shall be passed by the legislature containing more than one subject, which shall be expressed in the title, except appropriation bills." (Article XI, Section 8, Constitution of Pennsylvania of 1838, as amended in 1864).

That constitutional mandate precludes a construction of the said Act which would extend its provisions to corporations other than "railroad companies". It is limited to the subject expressed in its title. In an opinion by Attorney General Hensel, reported in 11 C. C. Reports, 438, holding that this Act did not apply to street railways, it was said:

"I am of the opinion that an act of this character should be strictly and not liberally construed, and that it should not be held to extend beyond the plain and obvious purposes of its enactment, unless such intentment clearly appears in the Act."

The conditions attendant upon the operation of railroads create the special needs in their case for their own police force, and those using them as shippers, or patrons in any capacity, enjoy the benefits arising from this policing which it may be presumed is commonly adequate for their due protection in such use.

It may be noted that the supplement to the aforesaid Act, approved April 11, 1866, P. L. 99, whereby the provisions of said Act of 1865 were extended to certain cases, did not embrace express companies and hence has no bearing on the question here under consideration.

In accordance with the foregoing, you are therefore advised that the said Act of 1865 does not authorize the appointment of policemen for an express company.

Very respectfully yours,

EMERSON COLLINS,
Deputy Attorney General.

REQUISITIONS FROM OTHER STATES.

Pennsylvania will neither grant nor honor requisitions for extradition in cases of fornication and bastardy.

Under the rules adopted at the Interstate Extradition Conference in 1887, no demands for extradition of persons charged with petty offences should be made except in special cases under aggravated circumstances.

Office of the Attorney General,
Harrisburg, Pa., February 13, 1919.

Honorable William C. Sproul, Governor of the Commonwealth,
Harrisburg, Pa.

Sir: This Department has before it the application of the Governor of Massachusetts for the return to that State of one Spylios Assimakopulos, charged with the crime of "begetting with child".

You have submitted to us this requisition and asked to be advised whether it should be honored. The crime of "begetting with child" named in this requisition is essentially the same as that of fornication and bastardy, in Pennsylvania and other states.

At the Interstate Extradition Conference held in New York, August 1887, it was resolved by the representatives of the several states there assembled, that the Governors of the demanding states should discourage the proceedings for the extradition of persons charged with petty offenses, and that, except in special cases under aggravating circumstances, no demands should be made in such cases.

One of the rules adopted pursuant to that Conference was that requisitions should not issue in cases of fornication and bastardy. This State has consistently observed that rule, and until the rule is changed at a conference of the governors of the various states, or by some other proper advisory authority, so that there can be a uniform practice on the subject, I think the rule should be adhered to.

I am informed that prior to 1913 what amounts to fornication and bastardy in this State was not a crime in Massachusetts. It was made a crime in that year, and the attitude of the State toward the offense has been since that time materially changed. This is not so in Pennsylvania. Fornication and bastardy has been a criminal offense in Pennsylvania since 1860. Notwithstanding it has been regarded as a crime in Pennsylvania, yet this State has consistently declined to ask for the return to it of persons charged here with that offense. The uniformity in carrying out the rules of practice adopted at the Conference in 1887 should not depend upon the change of attitude in any particular state, because in that event confusion would be introduced into the matter of issuing and granting requisitions. There might be a comity existing between Massachusetts and Pennsylvania in requisitions for fornication and bastardy which the other states would not recognize. There might be a comity between Pennsylvania and Ohio for extradition in cases of desertion which other states would not recognize, and so on, as to other so-called petty offenses. Confusion would be bound to result.

Therefore, it is better that there should be a uniformity of practice as far as possible.

Pennsylvania having adhered to the rules of practice, and having heretofore declined to grant or honor requisitions in cases of fornication and bastardy. I am of opinion that no exception should be made in this case.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

APPROPRIATIONS—EMERGENCY PUBLIC WORKS FUND—LAPSE.

The appropriation to the Emergency Public Works Fund did not lapse into the general fund in the State Treasury, on May 31, 1919.

Office of the Attorney General,
Harrisburg, Pa., May 21, 1919.

Honorable William C. Sproul, Governor of the Commonwealth of
Pennsylvania, Harrisburg, Pa.

My dear Governor: In your letter of the 20th inst. you ask to be advised whether the appropriation covered by Section 7, of the Act of July 25, 1917, P. L. 1193 lapses with the expiration of the fiscal year ending May 31, 1919.

This Act provides for the extension of the public works of the Commonwealth during periods of extraordinary unemployment caused by temporary industrial depression, and appropriates a fund of \$40,000 for that purpose, to be known as the Emergency Public Works Fund.

The general principle may be stated to be that unless the Act making the appropriation is of such a nature that it could not have been expected or intended, reasonably, that the sum appropriated would be expended, or its expenditure actually contracted for by the end of the two fiscal years succeeding the meeting of the Legislature, the balance not expended or actually contracted for to be expended will be deemed to revert to the State Treasury at the end of the said two years. There is, however, no inflexible rule governing the matter and when the legislative intent to the contrary is apparent, the rule has no application and the appropriation remains available, to be expended, within a reasonable time, for the accomplishment of the purpose for which it was made.

There is nothing in the language of this Act which places any limit on the time within which the appropriation must be expended. The Act is not phrased in the language which is used in making appropriations for the government for two years, nor is the language "\$40,000, or so much thereof as may be necessary." The appropriation was made to the Emergency Public Works Commission "to be held for the purposes of this act." This language, as well as the whole purpose of the Act makes it manifest that it was the legislative intent that the appropriation should remain available for the purpose of completing the great public work of the Commonwealth when conditions demand it.

There is abundant precedent for this conclusion, and you are advised, therefore, that no part of the funds appropriated by this Act will lapse into the general fund in the State Treasury on May 31, 1919, but that it will remain available for the purpose of carrying out the provisions of the Act.

I may add that the view herein expressed is in accord with the principle stated in an opinion of Attorney General Todd, dated June 15, 1908, Official Opinions of the Attorney General, 1907-1908, page 103.

Very truly yours,

WILLIAM I. SCHAFER,
Attorney General.

IN RE EXTRADITION OF LUNATIC.

When a person has been judicially determined to be a lunatic, he is a ward of the State until his disability is removed by proper proceedings in the court which committed him, and during that period he is not subject to requisition proceedings from another State, and could not be lawfully delivered to it.

Office of the Attorney General,
Harrisburg, Pa., July 15, 1919.

Honorable William C. Sproul, Governor of Pennsylvania, Harrisburg, Pa.

Sir: A requisition was presented to you, from the Governor of New York, for the return to that State of a fugitive from justice therefrom, Harry K. Thaw.

A previous requisition had been presented to your predecessor, and upon a hearing held before Honorable Francis Shunk Brown, then Attorney General, it was determined that, because of the fact that Thaw had been found by one of the Courts of Common Pleas of Philadelphia County to be a lunatic without lucid intervals, the requisition of the Governor of New York should not be honored.

In the requisition proceeding now before you, this finding of lunacy and the determination of your predecessor is fully recited. The only reason therein alleged for the rendition of Thaw is that—

“On information and belief, the mental condition of the said Harry K. Thaw has sufficiently improved to warrant the issuance of a warrant by the Governor of the State of Pennsylvania for the return of the said fugitive, Harry K. Thaw, to the County of New York, to be tried upon the indictments outstanding against him.”

This is based upon the allegation that he had been permitted to leave the Pennsylvania Hospital for the Insane where he is confined.

A hearing was held by me on July 9th, at which appeared Attorneys representing the District Attorney of New York, and Attorneys representing the Committee of the person of Thaw.

At this hearing it developed that the order of commitment issued by the Court of Common Pleas of Philadelphia County, committing Thaw to the institution where he is now detained, contained as a part of the order a direction that he should not be permitted to depart from the institution at any time, except upon the order of the Court. By duly certified orders of the Court, it further appeared that he had twice been permitted, under the Court's direction, and in charge of a keeper, to visit his mother in Pittsburgh.

In my opinion, the status of Thaw is today just what is was at the time of the prior hearing on the first requisition; that is to say, he is a lunatic without lucid intervals, so determined judicially after inquisition and full hearing as provided by our statutes. The question as to any change in his condition, if a change shall take place, is one for the Court having custody of him to determine, and not for your determination.

I am in full agreement with the conclusion of Attorney General Brown, that a lunatic, judicially determined so to be, is a ward of the State until his disability is removed by proper proceedings in the Court which committed him; that he is not subject to requisition proceedings from another State and could not be lawfully delivered to it.

I, therefore, advise you that the demand of the State of New York for the return of Harry K. Thaw to that State for trial should not, under his present status, be honored.

Very truly yours,

WILLIAM I. SCHAFFER,
Attorney General.

AUCTIONEERS' LICENSES.

The Act of June 26, 1873, P. L. 332, repealed the Act of April 9, 1859, P. L. 435, in so far as the latter act authorized the Governor to issue commissions to auctioneers, and hence licenses to auctioneers must be issued by the county treasurer and not by the Governor.

Office of the Attorney General,
Harrisburg, Pa., December 10, 1919.

Honorable William C. Sproul, Governor of the Commonwealth,
Harrisburg, Pa.

Sir: We have before us the request of Robert E. Irwin, Attorney-at-Law, Philadelphia, asking that the Governor issue a commission as auctioneer of the fourth class, to Henry Brouse, Joseph McConnell and Daniel Neely, doing business as partners, pursuant to the Act of April 9, 1859, P. L. 435, upon the payment of five hundred dollars into the State Treasury, and giving security in the sum of two thousand dollars.

This is an unusual application. I am advised by the Secretary of the Commonwealth that there has not been a commission issued

by the Governor under this Act of Assembly for forty years. In an opinion given to the Secretary of the Commonwealth, dated May 19, 1874, by Honorable Samuel M. Dimmick, Attorney General, he held that the Act of June 26, 1873, P. L. 332, repealed the Act of 1857, and that "henceforth auctioneers will not be commissioned by the Governor, but will receive a license or commission to transact business from the treasurers of their respective counties."

The Honorable Lyman D. Gilbert, Deputy Attorney General, advised the Secretary of the Commonwealth, on October 17, 1876, that "the purpose of the Act of Assembly of 26 of June, 1873, was, in my judgment, to introduce a uniform rule throughout the Commonwealth upon the subject of the commission or license fee to be paid by auctioneers, and its passage prevents the Governor from issuing commissions to auctioneers, even where earlier local laws had authorized him to do so."

It seems, however, that Attorney General Henry W. Palmer disagreed with this conclusion and with the opinion of Attorney General Dimmick, and held that the Act of 1873 did not repeal a local Act of March 10, 1869, authorizing the Governor to appoint an auctioneer for the borough of Chambersburg. However, since 1879 no requests for such appointments have been made.

In the case of *Commonwealth ex rel. Luden vs. Kutz, County Treasurer*, 6 Dist. Rep. 571, which was a mandamus to require the County Treasurer to issue to the relator an auctioneer's license, Judge Endlich, after examining the local laws on this subject in Berks County under which auctioneers were commissioned by the Governor, held that the Act of 1873 repealed all previous legislation, including local laws, as to the amount and manner of payment to be exacted for the privilege of engaging in the auctioneering business, and that thereafter licenses to auctioneers must be issued by the County Treasurer and not by the Governor.

It is apparent that, notwithstanding there was a conflict of opinion between Attorney General Palmer and Attorney General Dimmick and Deputy Attorney General Gilbert, the opinions of the latter have been acquiesced in and are consistent with the decision of Judge Endlich above referred to.

We also acquiesce in the opinion of Attorney General Dimmick and the decision of Judge Endlich, and advise you that the Act of 1873 repealed the Act of April 9, 1839, in so far as the latter Act authorized the Governor to issue commissions to auctioneers.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General

HERSHEY BROTHERS' APPLICATION.

A charter will not be granted to a proposed corporation under the name of "Hershey Brothers," for the purpose, *inter alia*, of manufacturing and selling chocolate, against the protest of the Hershey Chocolate Company, an existing corporation organized under the laws of the Commonwealth, and engaged in the business of manufacturing and selling chocolate in the same general locality as that in which the proposed corporation desires to locate; the granting of such a charter to the applicant would produce uncertainty and confusion in the public mind.

Office of the Attorney General,
Harrisburg, Pa., December 31, 1919

Hon. William C. Sproul, Governor of Pennsylvania, Harrisburg, Pa.

Sir: I have your communication of the twenty-third instant enclosing an application for a charter to a proposed corporation under the name of "Hershey Brothers," for the purpose, *inter alia*, of manufacturing and selling chocolate.

A protest against the issuing of letters patent to the proposed corporation was filed by the "Hershey Chocolate Company", an existing corporation organized under the laws of this Commonwealth and engaged in the business of manufacturing and selling chocolate in the same general locality as that in which the proposed corporation desires to locate.

After a hearing in the office of the Secretary of the Commonwealth in accordance with the rules of that Department, John F. Whitworth, corporation clerk, filed an opinion recommending the approval of the application and the issuing of letters patent to "Hershey Brothers."

Your Excellency now asks to be advised by this Department in relation to the granting or refusing of letters patent to the proposed corporation.

In considering the application of a proposed corporation its name becomes of vital importance when such name is similar to that of a corporation already in being, and when such proposed corporation intends to engage in the same, or substantially the same, business within the same locality as that transacted by the one already in existence, the corporate name is of such importance as to constitute the sole ground for the refusal of a charter.

I am of opinion that the granting of letters patent to "Hershey Brothers" to enable them to engage as a corporation in the same business as that of the "Hershey Chocolate Company" in the same general locality would result in such uncertainty and confusion in the public mind that the charter should be refused. Ample auth-

ority for this position may be found in the opinion of Attorney General Brown in the case of *Sterling Coal Company* reported in 45 County Court Reports, page 296.

For these reasons you are advised to refuse the charter.

Yours very truly,

WILLIAM I. SCHAFFER,
Attorney General.

MARRIAGE LICENSE.

A notary public of one county has no authority to take the affidavits of applicants for marriage license to be issued by the clerk of the Orphans' Court of another county.

Office of the Attorney General
Harrisburg, Pa., December 31, 1919.

Hon. William C. Sproul, Governor of Pennsylvania, Harrisburg, Pa.

Sir: There was duly received your communication of the twenty-third instant asking to be advised whether a notary public residing in one county has authority under the laws of the Commonwealth to take the affidavits of applicants desiring marriage licenses to be issued by the Clerk of the Orphans' Court of another County in which the ceremony is to be performed.

The Act of June 18, 1895, P. L. 202, section 1 provides that:

"No person within this Commonwealth shall be joined in marriage until a license shall have been obtained for that purpose from the Clerk of the Orphans' Court in the County wherein either of the contracting parties resides or in the County where the marriage is performed."

This Act which regulates the issuance of licenses is limited to the County in which either of the parties resides or the County in which the ceremony is to be performed.

Prior to the passage of the Act of March 24, 1905, P. L. 58, parties intending marriage were required to appear in person before the Clerk of the Orphans' Court or the proper County as fixed by the Act of 1895, *supra*. Section 1 of the Act of 1905 amended the Act of 1895 in its 3d Section by providing, *inter alia*,

"* * * or, the parties intending marriage may, either separately or together, appear before any magistrate, alderman, notary public or justice of the peace of the township, ward or county, wherein either of the con-

tracting parties resides, and in the County where the license is desired, who may, and is hereby authorized, to inquire of them touching the legality of their contemplated marriage, the age of the parties, the consent of the parents or guardians when required, and such prior marriage and dissolution thereof; and such inquiries and the answers thereto having been subscribed and sworn to by the parties before such officer may be forwarded to the Clerk of the Court,, who, if satisfied, after an examination thereof that the same is genuine and that no legal objection to the contemplated marriage exists, shall grant a license therefor."

This Act merely changes the procedure in securing a marriage license by relieving applicants from going before the Clerk of the Orphans' Court of the proper County and by permitting them in certain cases to appear before a notary or certain other persons qualified to administer oaths or affirmations for the purpose of swearing to the application. Manifestly this provision of the Act was passed to relieve applicants of the inconvenience of journeying to the County Seat in every case. It does not change the law of 1895 which fixes the Counties in which the license may be issued as the County in which either of the parties resides or the County of the performance of the ceremony.

It will be observed that in cases where applicants for a marriage license desire to secure the same by making application before a notary public they may not appear before a notary public in any County, but must appear before a notary public of the County in which one of the parties resides and the County where the license is desired. The words "where the license is desired" mean where the license is issued. Therefore, when this method of obtaining a marriage license is pursued, that is, when the application is made before a notary public instead of directly before the Clerk of the proper Orphans' Court one of the contracting parties and the notary public before whom the application is made, and the Clerk of the Orphans' Court which will issue the license must reside in the same County. These three facts must concur in every case in which the application for the license is made before a notary public and not directly to the Clerk of the proper Orphans' Court.

You are therefor advised that a notary public of one County has no authority to take the affidavits of applicants for marriage license to be issued by the Clerk of the Orphans' Court of another County.

Yours very truly,

WILLIAM I. SCHAFFER,
Attorney General.

DELAWARE COUNTY.

The special Act of March 22, 1871, P. L. 436, relative to the Delaware County Prison, was not repealed by the general Act of June 19, 1913, P. L. 528.

Office of the Attorney General
Harrisburg, Pa., February 2, 1920.

Mr. Harry S. McDevitt, Secretary to the Governor, Harrisburg, Pa.

Sir: Your letter of January 22nd, asking for an opinion as to whether the notice to deliver a convict sentenced to electrocution should, under a special Act relating to Delaware County, be directed to the Sheriff or to the Warden of the county jail, under the Acts of Assembly hereinafter mentioned, duly received. In reply would say, that the special Act of March 22, 1871, P. L. 436, Section 7, provides as follows:

"That the keeper of said prison, appointed and qualified to act, and who shall have entered upon the duties of his office, he shall, ex-officio, be the keeper of the jail of Delaware county, and shall have the same power which by law is now vested in the high sheriff of said county: Provided nevertheless, That the said keeper shall and he is hereby bound to deliver unto the sheriff of the said county, all prisoners who, by virtue of any sentence, order or decree of any court, he shall be required and directed to receive and take charge of for the purpose of carrying into execution such sentence, order or decree."

The general Act of June 19, 1913, P. L. 528, Section 4, provides as follows:

"Upon the receipt of such warrant the said warden shall, by a written notice under his hand and seal, duly notify the officer having the custody of such convict to deliver such convict to the custody of such warden, and it shall be the duty of such officer to forthwith cause such delivery to be made. Thereupon, and until the penalty of death shall be inflicted, or until lawfully discharged from such custody, said convict shall be kept in solitary confinement in said penitentiary. During such confinement no person except the officers of such penitentiary, the counsel of such convict, and a spiritual adviser selected by such convict, or the members of the immediate family of such convict, shall be allowed access to such convict without an order of said court or a judge thereof."

This Act of June 19, 1913, has a general repealing clause in Section 11, in these words:

"All acts or parts of acts inconsistent herewith are hereby repealed."

The question, therefore, arises in this case, whether the general repealing clause at the end of the Act of June 19, 1913, by implication repeals the special Act of March 22, 1871, relating to Delaware County.

It has been decided by our Supreme Court that a local or special act is not repealed by implication by a subsequent general statute containing inconsistent provisions on the same subject, in the absence of a clear and manifest legislative intent disclosed by the general act to repeal the local act.

Parkway Opening, 249 Pa. 367.

"A local law is presumably passed to meet local and exceptional conditions, and a general statute is passed to meet general conditions, but this does not imply that the local conditions are changed, or that the legislature intended to change the law previously deemed necessary or appropriate to such local conditions."

Commonwealth vs. Brown, 210 Pa. 29.

"Where a prior law is local and particular, and the later law is general, there is no presumption of intention to repeal the prior law by the later one, but, on the contrary, this is a very strong presumption that no such intent existed."

Commonwealth vs. Brown, 25 Super. Ct. 269.

"A general repealing clause is not to be interpreted, when standing alone, as evidence of any intention to repeal prior local laws, unless there is something else in the act to evidence such intention."

Starr vs Caldwell, 17 Dist. Rept. 669.

"A local statute is not repealed or affected by a subsequent general act, where neither interferes with the other and both may be enforced."

Pittsburgh Legal Journal vs. Bruff, 19 Dist. Rept. 591.

We would, therefore advise you that as the special Act of March 22, 1871, relating to Delaware County, has never been expressly repealed, as it is not inconsistent with the provisions of the general Act of June 19, 1913, and as both of them can be carried out, this Act is still in force and that therefore, the notice, so far as relates

to convicts confined in Delaware County Jail should be directed to the Sheriff of said County as the person who, under Section 7 of the special Act of March 22, 1871, P. L. 435, is the legal custodian of a prisoner sentenced.

Very truly yours,

W. I. SWOOPE,
Deputy Attorney General.

RETIREMENT ACT.

A clerk appointed by the Auditor General, assisting the Register of Wills of Allegheny County in the collection of the inheritance tax, his compensation being paid by the State, is a State Employee within the meaning of the Act of June 14, 1915, P. L. 973, as amended.

Office of the Attorney General,
Harrisburg, Pa., March 26, 1920.

Honorable William C. Sproul, Governor of Pennsylvania, Harrisburg, Pa.

Sir: I have before me the application of H. H. Bengough to be retired under the Act of June 14, 1915, P. L. 973, as amended by the Act of June 7, 1917, P. L. 559, and the question is, whether Mr. Bengough is a "State employe" within the meaning of these Acts of Assembly.

The facts are as follows:

Mr. Bengough was appointed a State clerk by Auditor General McCauley, in the office of the Register of Wills of Allegheny County, and he has been reappointed and has served continuously since that time.

He was a clerk, assisting the Register and Agent of the Commonwealth in all the duties incident to the collection of inheritance tax, and making the monthly report thereof to the Auditor General. His compensation was fixed from time to time, and the payment thereof regularly made by the State, and he was on the payroll of the Auditor General's Department. I am advised by C. W. Myers, Chief of the County Bureau of the Auditor General's Department, that his work has been exclusively confined to the matter of inheritance taxes due the Commonwealth, and that he has received no other compensation than that paid to him by the Commonwealth.

The duties of his position have constantly been increasing because the inheritance taxes which were collected in Allegheny County have increased from \$200,000, in 1899, when he was appointed, to over \$1,600,000, in 1919.

He is now seventy-four years of age, and is afflicted with almost total loss of sight, due to cataracts, and is otherwise physically disqualified because of arterio sclerosis and a weakened condition as the result of a recent attack of influenza.

From the facts herein set out, I have no hesitancy in advising you that Mr. Bengough is a "State employe" within the meaning of this Act, although he actually performed the duties of his position in the office of the Register of Wills of Allegheny County, who was the Agent of the State for the purpose of the collection of inheritance taxes.

If the Agent of the State had paid Mr. Bengough out of his commissions, quite another question would have arisen, but inasmuch as he was on the regular pay-roll of the Auditor General's Department, and was paid out of the funds of the State, he is, in my opinion, a "State employe."

The papers on file are sufficient to justify you in finding that the applicant is permanently incapacitated for performing his regular duties so as to authorize his retirement under said Acts of Assembly. In that event he should advise you that he holds "himself in readiness to perform special duties in such way—as he may be reasonably able to do," after his retirement.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

MAGISTRATES IN PHILADELPHIA

In filling a vacancy caused by the death of a magistrate in Philadelphia, the Governor should commission a person of the same political party as the deceased magistrate.

Office of the Attorney General,
Harrisburg, Pa., May 5, 1920.

Honorable William C. Sproul, Governor of Pennsylvania, Harrisburg, Pa.

Sir: I have a communication of your Secretary under date of the 29th ultimo, in which, referring to the death of John F. McNenny.

one of the minority magistrates of Philadelphia County, my advice is asked whether, in filling the vacancy thus occasioned, you should commission a person of the same political party as the deceased magistrate.

The office of Magistrate in Philadelphia was created by Article V Section 12 of the State Constitution, which provides that—

“In Philadelphia there shall be established for each thirty thousand inhabitants, one court, not of record, of police and civil causes, with jurisdiction not exceeding one hundred dollars; such courts shall be held by magistrates whose term of office shall be six years, and they shall be elected on general ticket at the municipal election, by the qualified voters at large; and in the election of said magistrates no voters shall vote for more than two-thirds of the number of persons to be elected when more than one are to be chosen.”

and by the enabling Act of February 5, 1875, P. L. 56. Your power to fill the vacancy is conferred by Section 9 of that statute, which, *inter alia*, provides as follows:

“Should any vacancy happen in the office of magistrate, either by death, resignation, disqualification, removal, or otherwise, said vacancy shall be filled for the full term of five years, (now six under the Constitutional Amendment), in the manner hereinbefore set forth at the next succeeding municipal election held in said City after said vacancy shall happen; and it shall be the duty of the Governor in the meantime to appoint and commission a suitable person to fill said vacancy until the first Monday of April, (now the first Monday of January), next succeeding the first municipal election after said vacancy shall happen.”

The purpose of limiting the number of magistrates for which an elector may vote at any election is apparent, and was thus expressed by a member of the Constitutional Convention while the section was under discussion on the floor of the Convention:

“No one would contend here that it would be right or proper that all these minor magistrates in a large city like this should belong at any one time to any one political party; and this provision was inserted so that the minority party as at present existing would get about its fair share, taking into consideration the present number of the members of the two parties.” (Debates, Volume 6, page 330).

I am of the opinion that your appointee should be of the same political party as the person whose place is to be filled. This duty,

while not imposed by an express mandate of the law, is implied from the foregoing constitutional provision. The minority chose the decedent as one of its representatives, largely by reason of the constitutional provision adopted for its benefit, and that minority should not be deprived of the representation which it had thus secured, solely through the accident of death.

I note the statement in the letter accompanying your Secretary's communication, that on the first Monday of January, 1922, thirteen vacancies will regularly occur in these magistrates courts, of which seven will be majority vacancies, or less than the ratio which the Constitution endeavored to secure. This is a situation, however, which must be left to the consideration of the electors and should not be adjusted by you through vacancy appointments. Minority representation is clearly recognized in certain offices by the law of this Commonwealth. It was contemplated by Article V Section 16 of the Constitution, which limited the number of candidates for the office of Judge of the Supreme Court for which an elector could vote on one ballot, and by Article XIV, Section 7 of the organic law which prohibited an elector from voting for more than two county commissioners or county auditors, and which, as to the filling of vacancies, expressly provides that—

"Any casual vacancy in the office of county commissioner or county auditor shall be filled by the court of common pleas of the county in which such vacancy shall occur, by the appointment of an elector of the proper county, who shall have voted for the commissioner or auditor whose place is to be filled."

The principle was recognized by the Legislature when, in the creation of the Superior Court, by the Act of June 24, 1895, P. L. 212, it provided that no elector should vote for more than six candidates on any one ballot for the judges thereof.

Any action by you other than that which tended to preserve the benefit which the minority had secured through the constitutional provision, would be repugnant to the spirit of the fundamental law.

You are, therefore, specifically advised that in filling the vacancy occasioned by the death of Magistrate John F. McNenny, you should commission a person of the same political party as was the deceased magistrate.

Very truly yours,

W. L. SCHAFFER,
Attorney General.

IN RE DENTISTRY.

The legislature in authorizing the formation of corporations to carry on "any lawful business" did not intend to include the professions, so that a charter cannot be granted to practice dentistry. The right to practice dentistry is in the nature of a franchise or license, and cannot be sold, assigned or inherited. It is not a business open to all but a personal right regulated by an act of assembly.

Office of the Attorney General,
Harrisburg, Pa., July 14, 1920.

Honorable William C. Sproul, Governor of the Commonwealth,
Harrisburg, Pa.

Sir: I return herewith the application for a charter of the "White Dentists," which was referred to me with a request for an opinion as to whether its purpose is within the Acts of Assembly authorizing the granting of charters.

The application states the purpose to be

"cleaning, treating, extracting, filling, crowning, and bridging teeth; manufacturing and installing artificial teeth and rendering the services and attention customary, necessary and usual in dentistry, and oral hygiene; the same to be performed by duly and legally qualified dentists."

It is contended that this purpose is within the letter and spirit of the Act of July 9, 1901, P. L. 624, which amends the 18th Section of the Act of April 29, 1874, P. L. 73, by authorizing the formation of companies "for the transaction of any lawful business not otherwise specifically provided for by Act of Assembly."

As stated by Attorney General Carson in *In re Sayre Trackless Trolley Co.*, 13 Dist. Rep. 602:

"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."

The question arises whether the purpose of the proposed corporation is not unlawful because it contemplates the conduct of an inherently lawful business in a method forbidden by law. The manifest and express purpose of the applicants for this charter is to practice dentistry in the State of Pennsylvania. The right to practice dentistry in this State is regulated by Act of Assembly. It is in the

nature of a franchise or license from the State. It cannot be sold, assigned, or inherited, but must be earned by hard study and good conduct. It is attested by a certificate or license from the Board of Dental Examiners of the State. It is not a lawful business except for persons who have complied with all the conditions required by statute. The practice of dentistry is not a business open to all, but a personal right, limited to persons of good moral character, with special qualifications ascertained and certified after a long course of study and a thorough examination by the Board of Dental Examiners.

Section 3 of the Act of May 3, 1915, P. L. 219, provides, *inter alia*, as follows:

“A person shall be deemed to be engaged in the practice of dentistry within the meaning of this Act..... who is manager, proprietor or conductor of a place for performing dental operations.”

The same Act provides in Section 1 thereof, as follows:

“Any person who shall practice dentistry without having been registered in accordance with the provisions of this Act shall be guilty of a misdemeanor” etc.

The language of the sections of the Act of 1915 quoted, make it plain that a corporation which conducts a place for performing dental operations, is engaged in the practice of dentistry. It is impossible for a corporation to be examined as to its fitness to practice dentistry. It cannot secure a license so to practice. As these conditions cannot be performed by a corporation, it follows that the practice of dentistry by it is an unlawful business for a corporation to engage in. Manifestly, it was not the intent of the Legislature, when it undertook to regulate the practice of dentistry, and to issue licenses for the practice thereof, that others than natural persons should receive a license to practice.

I am not unmindful of the fact that there is precedent in Pennsylvania for the granting of a charter to a corporation whose purpose is to practice dentistry. I believe, however, that such corporations are formed for the purpose of evading the provisions of the law regulating the practice of dentistry.

I am of opinion that the Legislature in authorizing the formation of corporations to carry on “any lawful business,” did not intend to include the professions.

When the provisions of the law regulating the practice of dentistry are read in connection with the law relating to the forming of business corporations, it is obvious that they do not relate to the same subject-matter.

If there ever was any justification for the granting of a charter to a corporation whose purpose was to practice dentistry, on the ground that it was lawful business, the Act of 1915 referred to, makes it unlawful to grant a charter to a proposed corporation whose purpose is to practice dentistry in this State.

You are advised, therefore, not to issue the letters-patent to the White Dentists, as applied for.

Very respectfully yours,

WILLIAM I. SCHAFER,
Attorney General.

CHARTERS.

The College of Dental Prosthesis cannot be incorporated under the general incorporation Act of April 29, 1874 and its supplements, but the application for its incorporation must be submitted to the College and University Council as required by the Act of June 26, 1895, P. L. 327.

Office of the Attorney General,
Harrisburg, Pa. August 3, 1920

Harry S. McDevitt, Esq., Private Secretary to the Governor,
Harrisburg, Pa.

Sir: Your communication of July 28, 1920, enclosing an application for a charter for the College of Dental Prosthesis, to be formed for the purpose of giving oral and clinical instruction in prosthetic and all branches of dentistry, including dental surgery, and in the making of dentures, crowns and bridges; to give post graduate courses of instruction, and to award certificates of proficiency and diplomas to its students who have successfully attended its courses of instruction, and asked to be advised if such charter can be granted by the Governor, duly received.

In reply would say that under the Act of June 26, 1895, P. L. 327, Section 1 provides that—

“All institutions of learning hereafter to be incorporated as colleges, universities or theological seminaries with power to confer degrees (xx) in art, pure and applied science, philosophy, literature, law, medicine and theology, or any of them, shall be incorporated in the manner hereinafter set forth with general power as follows:”

The application here is for the incorporation of a college to teach Dental Prosthesis and other branches of surgery connected with the practice of dentistry, and to award certificates of proficiency and diplomas.

A diploma is defined—

“..to be a document bearing 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. *State v. Gregory*, 83 Mo. 123, 130, 53 Am. Rep. 565.”

In other words, a diploma is synonymous with the conferring of a degree and brings the proposed institution, which intends to award diplomas, directly under the provisions of the Act of 1895 aforesaid.

You are therefore advised that the proposed application for a charter for the College of Dental Prosthesis should be submitted to the College and University Council, and such an institution cannot be chartered under the act approved April 29th, 1874, and its supplements.

Yours truly,

WILLIAM I. SWOOPE,
Deputy Attorney General.

THE 19TH AMENDMENT.

The effect of the adoption of the 19th Amendment is to strike out of the Pennsylvania Constitution and laws the word “male,” so that now the State Constitution in reality reads. “Every citizen twenty-one years of age possessing the qualifications (enumerated in it) will be entitled to vote at all elections;” but as it does not operate to change, alter or abrogate any other qualification, it will be incumbent upon women who desire to vote to proceed to qualify themselves for the exercise of the right precisely as men must qualify for its exercise. Hence, under existing laws, the right to vote at the general election in November, 1920, is vested in all women of the State who possess the necessary qualifications, and who pay a county tax and are enrolled and registered.

Office of the Attorney General,
Harrisburg, Pa., August 19, 1920.

Honorable William C. Sproul, Governor of Pennsylvania, Harrisburg, Pa.

Sir: Responding to your request for my opinion whether, in view of the ratification of the Nineteenth Amendment to the Federal Con-

stitution granting suffrage to women, they can, under existing laws, qualify themselves for and exercise the right of suffrage in the Commonwealth of Pennsylvania at the general election to be held in November, 1920, I advise you as follows:

The analogy, in respect to the principle involved in the question under consideration, between the Fifteenth Amendment to the Constitution of the United States and the Nineteenth Amendment thereto is so complete that the decisions as to the effect of the former upon the Constitutions and statutes of the several States are definitely applicable and controlling in the case of the latter. It has been abundantly and decisively held that the Fifteenth Amendment nullified any constitutional or statutory provision denying to any one the right of suffrage on the ground of race, color or previous condition of servitude. In like manner we must conclude that the Nineteenth Amendment renders nugatory any provision in our State Constitution or laws limiting or restricting suffrage to male citizens, or which is repugnant to an exercise of that right by women.

Speaking of the effect upon State Constitutions and State laws of the ratification of the Fifteenth Amendment to the Federal Constitution, the Supreme Court of the United States said, in *Neal vs. Delaware*, 103 U. S. 370:

“Beyond question the adoption of the Fifteenth Amendment had the effect, in law, to remove from the State Constitution, or render inoperative, that provision which restricts the right of suffrage to the white race. * * *”

Further, the opinion authoritatively declares:

“The State recognizes, as is its plain duty, an Amendment to the Federal Constitution, from the time of its adoption, as binding on all of its citizens and every department of its government, and to be enforced, within its limits, without reference to any inconsistent provisions in its own constitution or statutes.”

And in *Guinn v. United States*, 238 U. S. 347, decided so late as June 21, 1915, the Supreme Court of the United States, citing and reaffirming *Neal vs. Delaware*, spoke thus through its present great Chief Justice:

“As the command of the Amendment (the Fifteenth Amendment) was self-executing and reached without legislative action, the conditions of discrimination against which it was aimed, the result might arise that, as a consequence of the striking down of a discriminating clause, a right of suffrage would be enjoyed by rea-

son of the generic character of the provision which would remain after the discrimination was stricken out. * * * A familiar illustration of this doctrine resulted from the effect of the adoption of the Amendment on State Constitutions in which, at the time of the adoption of the Amendment, the right of suffrage was conferred on all white male citizens, since by the inherent power of the Amendment the word 'white' disappeared and therefore all male citizens, without discrimination on account of race, color, or previous condition of servitude, came under the generic grant of suffrage made by the state."

In *Myers vs. Anderson*, 238 U. S. 367, the Supreme Court of the United States, again speaking through its Chief Justice, said:

"But the fifteenth amendment by its self-operative force obliterated the word 'white,' and caused the qualification therefore to be 'every male citizen.'"

The Court further said:

"The fifteenth amendment by its self-operative force, without any action of the state, changed the clause in the Constitution of the State of Maryland conferring suffrage upon 'every white male citizen' so as to cause it to read 'every male citizen,'"

and held that the effect of the amendment could not be changed by any antecedent or subsequent legislation.

The Fifteenth Amendment to the Federal Constitution provides:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State, on account of race, color, or previous condition of servitude."

The legal effect of the adoption of this amendment was to strike out of the State Constitutions and laws all provisions which confined suffrage to the white race.

The Nineteenth Amendment is worded in language similar to the Fifteenth—

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

The effect of the Fifteenth Amendment having been decided to be to strike the word "white" out of State Constitutions and laws, it

follows that the result flowing from the adoption of the Nineteenth Amendment is to strike out of Pennsylvania's Constitution and laws the word "male" so that now our State Constitution in reality reads:

"Every citizen twenty-one years of age, possessing the qualifications (enumerated in it), shall be entitled to vote at all elections."

While the Nineteenth Amendment inhibits the State from making sex a qualification for voting, and consequently as part of the supreme law of the land wholly eliminates such qualification therefor, it does not operate to change, alter or abrogate any other qualification, under our laws and Constitution, entitling a citizen to vote. It will be incumbent upon the women to proceed to qualify themselves for the exercise of this right precisely as men must qualify for its exercise. In other words, the measure of qualification will be exactly the same for men and women. These requisites, as enumerated in Section 1, Article VIII, of the Constitution of Pennsylvania are as follows: ("subject to such laws requiring and regulating the registration of electors as the General Assembly may enact")—

1. Citizenship of the United States at least one month.
2. Residence in the State one year immediately preceding the election, or having been previously a qualified elector or native born citizen of the State and having removed therefrom and returned within six months.
3. Residence in the election district two months immediately preceding the election.
4. Payment of a State or county tax if twenty-two years of age and upwards, which shall have been assessed at least two months and paid at least one month before the election.

All women, therefore, possessing these constitutional qualifications are eligible to vote. All of these requirements may be inherently possessed by a woman, except assessment, registration and the payment of a tax.

The question then arises, can women, under the law as it now stands, be assessed, pay a tax and register where registration is required.

The Acts of Assembly on the subject of assessment, liability to taxation and registration, beginning with the Act of April 15, 1834, P. L. 509, point out a method by which all citizens of the Commonwealth can be assessed, pay taxes and register. No one who is a citizen, and, of course, women are just as much citizens as men, can be denied the right to be assessed, to pay taxes, to be enrolled or to be registered in accordance with the law. Indeed, the Constitution

provides that all laws on the subject of elections "shall be uniform throughout the State," and it will now be incumbent upon county commissioners, assessors and registration officers to meet the condition which has arisen out of the enfranchisement of women, and to afford every facility to them to qualify themselves as electors.

It is urged that the women themselves shall be diligent to see that they are assessed in due time and form. They should not be content to assume that this will be done, but everywhere make inquiry to see that it actually has been done. The situation is a novel and unprecedented one in our Commonwealth, and without their vigilant and intelligent co-operation it may happen that many assessors, however faithful or anxious to do their full duty will overlook some names.

It being obvious from a reading of these Acts that women can be assessed and have the right to pay a county tax, and it being the duty of county commissioners and the assessors throughout the State to see that they are enrolled and assessed and do pay a tax, and this enrollment and tax payment, when otherwise qualified, in boroughs and townships entitling them to vote and to register in cities, I am of the opinion that under existing laws the right to vote at the general election in November is vested in all the women of the State who possess the necessary constitutional qualifications, and who pay a county tax and are enrolled and register.

Yours very truly,

WILLIAM I. SCHAFFER,
Attorney General.

CHARTERS.

Public policy requires the refusal of a charter to Samuel Shuman under the name of "Jacobs." This is a family name, and it does not indicate a corporation, nor does it have individuality.

Office of the Attorney General,
Harrisburg, Pa., October 6, 1920.

Honorable William C. Sproul, Governor of the Commonwealth,
Harrisburg, Pa.

Sir: I have before me the application of Samuel Shuman and others for a charter and the granting of letters patent to them under the name "Jacobs", together with your request to be advised whether a charter should be granted.

There is one objection to this proposed charter, in my judgment, which requires its refusal. The name "Jacobs" is a family name. The name does not indicate that it is a corporation, nor does it possess any individuality. The granting of a charter under such an appellation would give sanction to a practice which would encourage others to preempt a family name as a corporate name, and thus exclude others of the same name from the use thereof.

I am advised that in some States there is legislation forbidding a corporation to take the name of a person without adding the word "company" or "corporation". It has been held in some jurisdictions that a proposed corporation may not adopt the name of a person as its name, over his protest, and where it does so it is liable to him for the subsequent damages. See *C. H. Batchelder & Co. vs. Batchelder*, 220 Mass. 42.

While I have not found in this or other jurisdiction any precedent covering the precise question before you, I am of opinion that sound public policy requires the refusal of this charter.

Very truly yours,

WILLIAM. I. SCHAFFER,
Attorney General.

IN RE CHARTER NAMES.

While there seems to be no objection to the use of a family or historic name as a part of a corporate name, to incorporate a historic or other revered name alone for purely commercial reasons, is entirely different. It fails to commend itself to one's sense of propriety and offends against good taste and sound public policy. Application for charter for a general or department store under the name of "Ben Franklin, Inc.," refused.

Office of the Attorney General,
Harrisburg, Pa., October 6, 1920.

Honorable William C. Sproul, Governor of the Commonwealth,
Harrisburg, Pa.

Sir: I have before me the application of certain persons to secure a charter for the purpose of conducting a general or department store under the name "Ben Franklin, Inc."

You ask to be advised whether this charter should be granted.

There seems to be a growing tendency to incorporate companies under the name of some historic character. The tendency should be curbed without delay. The field from which to select names of

corporation is so broad that no possible hardship will follow the refusal to establish a precedent which will result in encouraging applicants for charters to select names of this kind. To permit the forming of a corporation to conduct the character of business indicated by this application, under the name of "Ben Franklin, Inc." tends to commercialize the name of a great national character, and one especially revered in Pennsylvania.

It seems to me that the case is entirely different from the granting of a charter under such a name as "The John Hancock Insurance Company". While there seems to be no objection to the use of a family or historic name as a part of a corporate name, to incorporate an historic or other name alone is essentially different. It fails to commend itself to one's sense of propriety, and offends against good taste and sound public policy.

I recommend, therefore, that the application for this charter be refused until an appropriate name is selected.

Respectfully yours,

WILLIAM. I. SCHAFFER,
Attorney General.

IN RE WOMEN OFFICE HOLDERS.

Women, in the absence of a constitutional or statutory provision specifically disqualifying them from holding office, are now eligible to hold public office in Pennsylvania. The XIX Amendment to the Federal Constitution abrogated any contrary common law rule.

Office of the Attorney General,
Harrisburg, Pa., December 22, 1920.

Honorable William C. Sproul, Governor of the Commonwealth,
Harrisburg, Pa.

Sir: I am in receipt of your communication of the 16th instant asking to be advised whether a woman is eligible for appointment to fill a vacancy in the office of Clerk of the Court of Quarter Sessions of the County of Luzerne.

Your inquiry raises the general question of the eligibility of women to hold public office in this Commonwealth.

Section 3 of Article X of the Constitution makes women "eligible to any office of control or management under the school laws of this State." This is not to be construed as implying that they are necessarily excluded by the Constitution from all other offices upon the

principle *expressio unius est exclusio alterius*, but simply as inhibiting the Legislature from disqualifying them from becoming school officials. The Legislature has so interpreted it in the act authorizing their appointment to the office of notary public.

Under the common law women were disqualified from holding public office, and pursuant thereto this Department, from time to time, held them to be ineligible for certain offices. Attorney General Kirkpatrick in an extensive review and citation of the common law authorities decided that a woman was ineligible for the office of notary public, (*Attorney General's Reports*, 1887-1888, page 7); Attorney General Carson ruled that they were ineligible for the office of commissioner of deeds, (*Attorney General's Reports*, 1903-1904, page 351); and Deputy Attorney General Cunningham for that of mercantile appraiser, (*22 District Reports*, 182).

These opinions are entitled to the great weight justly attaching to all the utterances and deliverances of the learned officials delivering them. In my opinion, they correctly stated the law at the time of their rendition, but we now face a changed situation arising out of the extension to women of the right to vote by virtue of the Nineteenth Amendment to the Federal Constitution. While the Nineteenth Amendment does not limit the power of, or impose any restriction upon, the States to prescribe, as they may see fit, the qualifications to hold office therein, yet having effected an absolute equality of women with men in the right to vote, can we deem their common law disqualification to hold office longer in force? Had our own State, by amendment to the Constitution, conferred the right to vote upon women, it could scarcely be doubted that it would have operated also to vest them with the right to hold office in all cases where there was no specific provision to the contrary. The reason upon which the common law disqualification of a woman to hold office was based disappeared when she was vested with the right to take part in the government as a voter. A rule valid in view of her status as a non-electror was rendered invalid upon her attaining the franchise of an elector. Under our scheme of government the right of a citizen to take part in the work of government as an elector implies the further attribute of eligibility to participate therein as an office-holder, in the absence of a disability specifically imposed. It certainly would be anomalous to have one-half of the voting citizens of the Commonwealth ineligible to hold an office for which they may vote, solely for a reason which by the supreme law of the land is expressly inhibited as a ground for denying them the right to vote.

I am of the opinion that women, in the absence of a constitutional or statutory provision specifically disqualifying them from holding

an office, are now eligible to hold public office, and that any common law rule to the contrary is abrogated. The obligations and duties resting upon women as voters are precisely the same as those in the case of men, and a rational construction of our laws leads to the conclusion that the privileges of citizenship should be measured by the same standard for both.

Since there is no constitutional or statutory provision specifically disqualifying a woman from holding the office of Clerk of the Court of Quarter Sessions, you are advised that she is eligible to be appointed thereto.

Yours very truly,

GEORGE E. ALTER,
Attorney General.

OPINIONS TO THE AUDITOR GENERAL

OPINIONS TO THE AUDITOR GENERAL.

TAXATION OF WRITS.

Original writs issued out of the County Court of Allegheny County are subject to the tax of fifty cents imposed by Section 3 of the Act of April 6, 1830, P. L. 272.

Office of the Attorney General,
Harrisburg, Pa., January 29, 1919.

Honorable Charles A. Snyder, Auditor General, Harrisburg, Pa.

Sir: This Department is in receipt of your favor asking whether the writs issued out of the County Court of Allegheny County are taxable.

Section 3 of the Act of April 6, 1830, P. L. 272, provides:

"That the prothonotaries of the courts of common pleas and of the district courts, and the prothonotary of the supreme court having original jurisdiction, and the court of nisi prius of this Commonwealth, shall demand and receive on every original writ issued out of said courts, (except the writ of habeas corpus,) and on the entry of every amicable action, the sum of fifty cents; on every writ of certiorari issued to remove the proceedings of a justice or justices of the peace or aldermen, the sum of fifty cents."

It was evidently the legislative intention to provide a tax of fifty cents upon every original writ which issued out of every court in this Commonwealth. The Act of May 5, 1911, P. L. 198, which created the County Court of Allegheny County, provided, by the 5th Section, which was amended by the Act of May 14, 1915, P. L. 505, that "the prothonotary of Allegheny County shall be the clerk of the court hereby created and shall assume and perform all the duties of clerk thereof."

Section 19 of said Act, as amended by the Act of April 2, 1913, P. L. 21, provides:

"The fees and costs for all witnesses, *writs*, entries, and other services charged for, shall be the same in amount as the charge for the corresponding fee, *writ*, entry or service in the courts of common pleas and quarter sessions of said county."

I am, therefore, of opinion and so advise you, that original writs issued out of the County Court of Allegheny County, are subject to the tax of fifty cents imposed by Section 3 of the Act of April 6, 1830.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

MEADVILLE DISTILLING COMPANY'S LICENSE.

DISTILLING COMPANIES—LICENSE

A distilling company which did not distill during the year 1918, and desires a state license to sell its product on hand from previous years, should pay a license fee of one hundred dollars, under the Act of July 30, 1897, P. L. 464.

Office of the Attorney General,
Harrisburg, Pa., February 24, 1919.

Honorable Charles A. Snyder, Auditor General, Harrisburg, Pa.

Sir: Your favor of the 17th inst., addressed to the Attorney General, is at hand.

You ask to be advised as to what amount the Meadville Pa. Distilling Company should pay for a license for the year beginning March 1, 1919.

The facts I understand to be as follows:

The Meadville Pa. Distilling Company has been operating a distillery for a number of years, at Meadville, Pa. For the last three years no license has been granted by the Court of Crawford County, but the distillery has been paying its State license and selling to dealers in quantities of not less than forty gallons. The company paid \$1500 for the license year ending March 1, 1918, and \$1,000 for the license year ending March 1, 1919, pursuant to the Act of July 30, 1897, P. L. 464.

Owing to the order of the President of the United States of September 8, 1917, no distilling was done by this company during the year 1918. The company now desires a license to dispose of the surplus stock which it has on hand.

Under existing laws the sale of whiskey must be stopped on July 1, 1919, and thereafter no whiskey can be sold until peace is officially declared. In any event, because of the adoption of the Prohibition Amendment, the manufacture and sale of whiskey cannot be carried on after January 16, 1920.

The Act of July 30, 1897, P. L. 464, provides for a graded license fee to be paid, based upon the annual production "in the preceding year."

It provides, among other things,—

"Each distiller, the annual production of whose distillery in the preceding year was less than fifty barrels, shall pay annually a license fee of one hundred dollars."

From this amount the license fee is graded, for distilleries, up to \$2,000.

The Act also provides that:

"All distilleries and breweries established and located in any part of the Commonwealth, shall pay a license fee of \$1,000 for the first year."

The theory upon which the Act of 1897 is drawn, is that the annual production should determine the amount of the license fee. A new distilling company is required to pay \$1,000 in lieu of a fee based upon production, but thereafter the annual production determines the amount of the fee. This distilling company paid \$1,000 for a license which expires March 1, 1919. It did not distil during the year 1918. It now desires a license to sell the product which it distilled in 1917.

The license of \$1,000 which it paid for the year ending March 1, 1919, covers the production of the whiskey which it now desires to sell. It is not a new distillery, and therefore is not subject to the license fee of \$1,000 for such distilleries. It has yearly paid the license based upon the preceding year in which it was distilling.

The situation is one which was not contemplated when the Act of 1897 was drawn. That Act contemplates a license based upon the annual production "in the preceding year." There was no such annual production in this case. The distillery is not a new distillery and yet it has paid a license based upon all of the whiskey which it has heretofore produced. Being an old distillery, and its product being less than fifty barrels, in the preceding year, I am of opinion that it comes within the provision of the Act of 1897 which provides that each distiller whose annual production was less than fifty barrels in the preceding year shall pay an annual license fee of \$100.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

DEPUTY SUPERINTENDENT OF PUBLIC INSTRUCTION.

The duties of the superintendent of public instruction may, pending a vacancy, and pursuant to the Act of March 22, 1917, P. L. 11, be lawfully performed by either of the two deputy superintendents, since they hold equal rank and both stand next in authority to the head of the department; and, as both cannot perform those duties, the Governor may indicate which of the two should act.

Office of the Attorney General,
Harrisburg, Pa., March 19, 1919.

Honorable Charles A. Snyder, Auditor General, Harrisburg, Pa.

Sir: There was duly received your communication of the 19th inst., relative to the right of Mr. C. D. Koch, Deputy Superintendent of Public Instruction, to act as Superintendent of Public Instruction during the existing vacancy in that office.

From your communication it appears that Mr. Koch has informed your Department that the Governor has designated him "as the deputy to conduct the affairs of the Department of Public Instruction, pending the appointment of the Superintendent to succeed the late Nathan C. Schaeffer."

You ask to be advised whether according to law, Mr. Koch is authorized to act as Superintendent of Public Instruction and perform the duties of that office, including the drawing of warrants and signing settlements. The Act of March 22, 1917, P. L. 11, provides as follows:

"That whenever, by reason of the absence, incapacity, or inability of the head or chief of any of the departments of the State Government to perform the duties of his office, or whenever a vacancy in the office of the head or chief of any of the departments of the State Government occurs, the duties of the head or chief of such departments shall be performed by the deputy, chief clerk, or other person next in authority, until such disability is removed or the vacancy filled."

The question here, therefore, turns upon the point: Who is the person next in authority to the Superintendent of Public Instruction? The Act of May 18, 1911, known as the School Code, by Article X, Section 1009, authorizes the Superintendent of Public Instruction to "appoint two deputy Superintendents of Public Instruction." They are equal in rank, and, it seems, receive the same salary. Priority in commission would not bestow priority in rank, in the legal sense. Since there are two persons of equal rank standing next in authority to the Superintendent of Public Instruction, we are presented with the question whether either or neither of them, can exercise the duties of the head of this Department in case of a vacancy.

It is a familiar principle that a statute is to be made effective if possible. The purpose of the Act of 1917 was to prevent the interruption of the activities and functions of the Department when the Chief thereof was incapable of performing his duties, or a vacancy existed, and it should be so construed as to advance the remedy sought.

In my opinion, the duties of the Superintendent of Public Instruction may, pending the existing vacancy, and pursuant to said Act of 1917, be lawfully performed by either of the two Deputy Superintendents of Public Instruction, since they hold equal rank and both stand next in authority to the head of the Department.

In the interest of public convenience, however, only one should assume to so act. The Governor, having indicated which of the two incumbents in this office should act, his designation should govern.

You are, therefore, advised that during the existing vacancy Mr. Koch is authorized to act as Superintendent of Public Instruction, and perform the duties of that office, including the drawing of warrants and signing settlements.

Very truly yours,

WILLIAM I. SCHAFFER,
Attorney General.

INSURANCE OF STATE PROPERTY.

It is not lawful for any Department of the State government to place outside insurance against loss by fire or other casualty on property acquired by the Commonwealth since the approval of the Act of May 14, 1915, P. L. 524.

Insurance against theft may be carried on automobiles owned by the Commonwealth. Such risk is not covered by the Act of May 14, 1915, P. L. 524.

Office of the Attorney General
Harrisburg, Pa., April 9, 1919.

Honorable Charles A. Snyder, Auditor General, Harrisburg, Pa.

Sir: There was duly received your communication to the Attorney General of the 4th inst. requesting an opinion upon the following questions:

First: Whether the Board of Public Grounds and Buildings or other Department of the State government may lawfully place outside insurance for protection against loss by fire or other casualty on automobiles which the Commonwealth owns and has acquired since the passage of the Act of May 14, 1915, P. L. 524.

Second: Whether insurance against loss by theft may lawfully be carried on automobiles.

The said Act of May 14, 1915, P. L. 524, created an Insurance Fund for the purpose of rebuilding, restoring and replacing property owned by the Commonwealth "damaged or destroyed by fire or other casualty." Section 7 of the Act makes it unlawful for any department, bureau, commission or other branch of the State government to purchase any policy of insurance on any property owned by the Commonwealth, the term of which shall extend beyond December 31, 1920, or to obtain any "for any amount in excess of the amount of insurance outstanding at the date of the approval of this act," after deducting therefrom twenty per centum for each calendar year elapsing after December 31, 1915. The purpose in view is for the State to carry its own insurance against loss by fire or other casualty.

In the course of an opinion by Deputy Attorney General Hargest to the Superintendent of the Board of Public Grounds and Buildings, dated June 14, 1916, (Report of Attorney General 1915-1916, page 459) it was said that "no provision is made for insuring new buildings erected since the passage of the Act." In harmony with and following the conclusion there reached it was further held in an opinion by the writer hereof, to the Superintendent of the Board of Public Grounds and Buildings, dated March 12, 1919, that no insurance against loss by fire or other casualty can be placed on property acquired by the Commonwealth subsequent to the date of the approval of the Act, protection against such loss in such case being afforded pursuant to its provisions. That ruling governs the first of the above stated questions.

The determination of the second question submitted by you depends upon whether insurance against loss by theft is of such a nature as to come within the purview of the Act. Clearly such is not the case. The Act relates solely to insurance against loss by "fire or other casualty."

In an opinion by First Deputy Attorney General Keller to the Highway Commissioner, dated October 4, 1916, (Report of Attorney General 1915-1916, page 268) it was held that the theft of an automobile was not such a casualty as was intended to be covered by the Act, and that if it was desired by a Department to provide against loss by theft of automobiles it will be necessary "to take out a special policy of insurance covering such risk, the prohibition in the Act of 1915 against obtaining a policy of insurance being necessarily limited to the kinds of insurance provided for by the fund which it created." That ruling governs the second of the above stated questions.

In accordance with the foregoing, you are therefore advised:

First: That it is not lawful for any Department to place outside insurance against loss by fire or other casualty on property acquired by the Commonwealth since the approval of the aforesaid Act of 1915, and this applies as well to automobiles as other kinds of property.

Second: That insurance against loss by theft may lawfully be taken out and carried, in such amount as may be deemed wise, on automobiles owned by the Commonwealth, insurance against such risk not being covered by said act.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

BOILER INSURANCE STATE HOSPITAL FOR THE INSANE
AT DANVILLE.

The insurance of boilers at a State Hospital for the Insane is subject to the provisions of the Act of May 14, 1915, P. L. 524, but this Act does not relieve from the necessity of having the boilers inspected.

Office of the Attorney General
Harrisburg, Pa. May 13, 1919.

Honorable Charles A. Snyder, Auditor General, Harrisburg, Pa.

Sir: There was duly received your communication of the 7th inst. relative to boiler insurance on boilers at the State Hospital for the Insane, at Danville, Pa.

You state in your communication that it has been the policy of your Department "to treat boiler insurance the same as insurance on any other State property damaged or destroyed by fire or other casualty, as set forth in the Act of May 14, 1915, P. L. 524, creating an Insurance Fund." This is clearly a correct interpretation of this Act, and in harmony with a ruling in an opinion rendered by Deputy Attorney General Hargest to the Superintendent of the Board of Public Grounds and Buildings, dated August 5, 1918, as to whether the fund created by the above mentioned Act will cover the destruction of property by boiler explosion, which is not destroyed by fire, in the course of which opinion it was said:

"The Act to which you refer provides for a fund—
'..... for the rebuilding, restoration, and replacement of any structures, buildings, equipment or other property owned by the Commonwealth of Pennsylvania, and damaged or destroyed by fire or *other casualty*.'

There can be no question that the fund created by this Act covers the damage to buildings caused by boiler explosions, even though unaccompanied by fire.

It is also plain, under the provisions of this Act of Assembly, that any policy of insurance which is taken out to cover boiler explosions shall be calculated by taking the amount of the insurance at the date of the approval of the Act, and—"deducting from such amount twenty per centum thereof for each calendar year which shall have elapsed from and after the thirty-first day of December, Anno Domini one thousand nine hundred and fifteen, to the date of purchasing' said insurance."

It is noted in the correspondence accompanying your communication that it is agreed that boiler insurance is not simply for the purpose of insuring against loss, but also covers the cost of boiler inspection. That is true. The fact, however, that boiler insurance against a property loss arising from a defective boiler is subject to the said Act of 1915, and that the cost of the restoration of the property injured or destroyed by a casualty from such cause shall be paid from the Fund created by the Act, does not relieve those charged with the management of any State institution from the plain duty of having its boilers duly inspected, in order to safeguard life against the perils of defective boilers. There should be such inspection in all cases. Boiler inspection has a two-fold purpose, namely, to provide against a property loss consequent upon a defective one, and yet the more vital object of insuring against injury to human life from such cause.

Under the Act of May 2, 1905, P. L. 352, requiring boiler inspection in all establishments as therein defined, it is provided in Section 19 that such inspection shall either be "by a casualty company in which said boilers are insured, or by any other competent person approved by the Chief Factory Inspector" (now the Commissioner of Labor and Industry). It will be thus seen that the Commonwealth recognizes that there may be boiler inspection without boiler insurance. The Industrial Board has established a comprehensive system of boiler inspection, one of its provisions being that no person is authorized to act for the Commonwealth as a boiler inspector unless he shall have passed a prescribed examination and been duly commissioned by the Commissioner of Labor and Industry. This provides a ready method for any State institution to have the benefit of the services of a boiler inspector upon whose competency the Commonwealth has itself thus set its seal of approval.

In accordance with the foregoing, you are therefore advised that boiler insurance is subject to the provisions of the said Act of May

14, 1915, P. L. 524, but that the Act does not operate to relieve any State institution from the duty of having its boilers duly inspected.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

LIQUOR LICENSE FEES—POWER OF STATE TO REFUND.

Liquor license fees paid under Acts Nos. 6 and 7, approved February 26, 1919, cannot be refunded, if the license becomes ineffective by the operation of Federal laws or regulations.

Office of the Attorney General,
Harrisburg, Pa., June 23, 1919.

Honorable Charles A. Snyder, Auditor General, Harrisburg, Pa.

Sir: This Department has before it the letter of the City Treasurer of Philadelphia, which you have submitted, and upon which you request an opinion.

You ask to be advised whether the State should receive the fees for licenses to sell liquor after the first of July, 1919, and if such license fees are received, whether they can subsequently be refunded.

I understand this request to be made because of the uncertainty and the agitation concerning the sale of liquor after the first of July. The Federal laws and regulations prohibit such sale after July first, and bills are now pending in Congress to permit the sale of liquor to continue after that time, and until the Prohibition Amendment goes into effect.

By Acts Nos. 6 and 7, approved February 26, 1919, it is provided that each person who is licensed to sell vinous, spirituous, malt or brewed liquors, either at wholesale or retail, and each brewer, distiller, rectifier, compounder, bottler or agent so licensed under the laws of this Commonwealth, may pay the annual license fees provided by law, and any additional fee or tax, in twelve monthly instalments.

"The instalment for the first month shall be paid as now provided by law before the license is issued to the applicant, and each subsequent instalment at any time before the beginning of each succeeding month. Failure to make any of said monthly payments in advance shall terminate said license and all rights therein, and the licensee shall forthwith return the same to the Court of authority by which it was issued."

It appears that the holders of licenses are anxious to pay for the period beyond July first, so that the sale of liquor may be continued by them in the event of a change in the Federal laws and regulations, but that such licensees desire to know whether, in the event that the Federal laws and regulations are not changed, the State will return the license fees paid.

These licensees cannot sell without a license, and under the statute above quoted such license is *ipso facto* terminated by the failure to pay the monthly instalment in advance.

The State cannot authorize the sale of intoxicating liquors after July first, 1919, unless there is a change in the Federal statutes and regulations. If such change is made, the licenses heretofore granted, will authorize the sale after that date, but the persons to whom the licenses have been granted, cannot expect any proportion of those fees to be returned, unless the present Legislature makes some provision therefor. Neither the Auditor General nor the State Treasurer has any authority to return to the licensees any part of the fees, unless the Legislature gives specific authority so to do.

I understand a bill for that purpose is now pending which has not yet been passed.

The fact that the Act of March 29, 1907, P. L. 38 permits the treasurers of the respective counties to hold the license fees for thirty days, does not alter this situation. The fees are paid monthly, in advance, for the license, and when so paid to the treasurers of the counties, who are acting as the agents of the State in the collection thereof, the Auditor General and State Treasurer have no power to authorize the respective county treasurers to refund to the licensees any part of such instalments, based upon any condition which arises subsequent to the payment.

Under the circumstances, I am compelled to advise you that any licensees who pay fees to the State in the hope of being able to sell after July first, will do so at their own risk, and that there is now no authority for the return to them of any portion of said fees in the event that the Federal laws and regulations remain unchanged.

I herewith return the letter of the City Treasurer of Philadelphia.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

STOCK-TRANSFER TAX.

Certificates of stock from a corporation to a trustee to be held as collateral for fixed loans and the retransfer of such certificates from the trustee back to the corporation, and likewise the transfer of certificates to the trustee in substitution of the first certificates are taxable both upon the transfer to the trustee and the transfer from the trustee to the corporation.

Such transaction is a delivery of the shares of stock; it invests the trustee with a beneficial interest; and invests the trustee with the possession and use of the stock to secure future payment of collateral notes; and therefore comes within the language of the taxing statute of 1915, P. L. 828.

Office of the Attorney General,
Harrisburg, Pa., August 8, 1919.

Honorable Charles A. Snyder, Auditor General, Harrisburg, Pa.

Dear Sir: We have your recent request asking for an opinion as to whether transfers of certificates of stock from a corporation to a trustee to be held as collateral for fixed loans and re-transfer of such certificates of stock from the trustee back to the corporation or the transfer of other certificates to the trustee in substitution for the first mentioned certificates of stock, are required to be taxed.

I understand that the transaction which gives rise to your request is something like this: A corporation transfers to a trust company an issue of its stock or the stock of other companies owned by it. The trust company holds the stock as trustee to secure the payment of collateral notes issued by such corporations and subsequently other certificates of stock are substituted for the stock originally issued, and when the notes or a part of them are paid, the stock held to secure them is re-transferred by the trustee back to the corporation.

The Act of June 4, 1915, P. L. 828, provides as follows:

"That a state tax of two cents on each one hundred dollars of the face value, or fraction thereof, is hereby imposed on all sales or agreements to sell or memoranda of sales of stocks, and upon any and all deliveries or transfers of shares or certificates of stock in any domestic or foreign corporation, co-partnership association, or joint-stock company, made on or after the date when this act takes effect, whether made upon or shown by the books of the corporation, co-partnership association, or joint-stock company; or by any assignment in blank, or by any delivery; or by any paper, or agreement, or memorandum, or other evidences of sale or transfer, whether intermediate or final; and whether investing the holder with the beneficial interest in or legal title to said stock merely, with the possession or use thereof for any purpose, or to secure the future payment of money or the future transfer of any stock."

The transaction above indicated is certainly a delivery of the shares or certificates of stock. The delivery is shown by the trust agreement. It is an intermediate delivery until the payment of the

notes. It invests the trustee with a beneficial interest for the holders of the notes. It also invests the trustee with the possession and use of the stock to secure the future payment of the collateral notes, and therefore it comes within the language of the Act of Assembly above quoted.

I am, therefore, of opinion that certificates of stock transferred to a trustee as above indicated, are taxable both upon the transfer to the trustee and the transfer from the trustee to the corporation.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

BANK DEPOSITS.

The Act of June 20, 1919 (No. 258), does not authorize a tax upon the deposit of a non-resident decedent in a bank in Pennsylvania.

Office of the Attorney General,
Harrisburg, Pa., August 18, 1919.

Honorable Charles A. Snyder, Auditor General, Harrisburg, Pa.

Dear Sir: We have your favor asking for an opinion as to whether a bank deposit in this State, standing in the name of a resident of the State of New York who died in New York subsequent to the approval of the Act of June 20, 1919, No. 258, is subject to the tax imposed by that Act.

This Act is entitled:

“An Act providing for the imposition and collection of certain taxes upon the transfer of property passing from a decedent who was a resident of this Commonwealth at the time of his death, and of property within this Commonwealth of a decedent who was a non-resident of the Commonwealth at the time of his death; and making it unlawful for any corporation of this Commonwealth, or national banking association located therein, to transfer the stock of such corporation or banking association, standing in the name of any such decedent, until the tax on the transfer thereof has been paid; and providing penalties; and citing certain acts for repeal.”

The Act imposes a tax upon the transfer of any property, real or personal, or of any interest therein or income therefrom. As to the transfer of the property of non-residents, paragraph B of Section 1 imposes the tax as follows:—

“when the transfer is by will or intestate laws of real property within this Commonwealth, or of goods, wares or merchandise within this Commonwealth, or of shares of stock of corporations of this Commonwealth, or of national banking associations located in this Commonwealth, and the decedent was a non-resident at the time of his death.”

It is the settled law of this Commonwealth that intangible personal property has its situs for taxation at the domicile of the owner. *Hood's Estate*, 21 Pa. 106; *McKean vs. Northampton County*, 41 Pa. 519; *Com'th. vs. Curtis Publishing Company*, 237 Pa. 333.

It has also been settled that a deposit in a bank in this State creates the relation of debtor and creditor between the bank and the depositor, and that the deposits of foreign corporations doing business in Pennsylvania are not taxable here.

From these principles it follows that the deposit of a non-resident in a bank in Pennsylvania is not subject to the Act above mentioned, unless it is distinctly made subject by the terms thereof.

This Act taxes the transfer of personal property “or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations in the following cases,” but as to the property of non-residents, the tax is limited to the transfer of “goods, wares or merchandise within this Commonwealth or the shares of stock of corporations of this Commonwealth or of national banking associations located in this Commonwealth.”

The property which a non-resident has in a bank deposit consists of a debt against the bank and is not within the kinds of property mentioned in this Act of Assembly. Assuming that the transfer of a bank deposit owned by a non-resident decedent takes place in this Commonwealth, it is still the transfer of a claim or intangible interest and is not the transfer of goods, wares, merchandise or of shares of stock.

For these reasons I am of the opinion that the Act of June 20, 1919, No. 258, does not authorize a tax upon a deposit of a non-resident decedent in a bank in this Commonwealth.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

APPROPRIATIONS—LIENS.

Under the Act of 1911, P. L. 736, the lien of an appropriation covers the building erected by the money appropriated and the necessary appurtenances thereto.

Office of the Attorney General,
Harrisburg, Pa., October 15, 1919.

Honorable Charles A. Snyder, Auditor General, Harrisburg, Pa.

Sir: This Department is in receipt of your letter of the 3d inst., requesting a construction of the Act of 1911, P. L. 736, which provides for a lien against property of certain institutions to recover the appropriations made by the Commonwealth thereto.

The facts which have given rise to this request I understand to be as follows:

Pennsylvania State College is the owner of more than 1,800 acres of land which has been acquired at various times, and through various purchases. In 1917 there was appropriated \$1,003,000 (App. Act 1917, No. 383-A) for general maintenance of the school of agriculture, etc., and among the various purposes is the following:

“.....or enlargement, alteration and additions to buildings as in the judgment of the trustees may be required.”

Acting under this authority, the Board of Trustees erected Unit B of the Engineering School at a cost of \$57,670.47, to be paid out of said appropriation, and transmitted to the Auditor General, upon the form prescribed by him, a description of the real estate upon which the building was erected. This description apparently covers only the land actually occupied by the building.

You ask to be advised whether such description is sufficient or whether it should be enlarged to include all the land conveyed by the deed, upon part of which land the building is located.

The Act of Assembly provides:

“That all appropriations of moneys hereafter made by this Commonwealth.....for structures, erections or other permanent improvements of any kind, shall be a lien as hereinafter set forth upon the real estate upon which such structure, erection or other permanent improvement is to be made.”

There are provisions for filing the description with the Auditor General, and entering the same as a lien in the office of the prothonotary of the proper county.

While it is true that the language of this Act, strictly construed, provides only for a lien "on the real estate *upon which* such structure" is erected, and notwithstanding Acts of Assembly giving liens such as this are to be strictly construed, it would be manifestly inadequate to limit the lien to the exact number of feet of land covered by a building without any appurtenances or ways of ingress or egress. On the other hand, it would also be improper to extend this lien to cover all of the land belonging to the institution which, in this instance, is 1,800 acres.

In order to give this Act of Assembly a reasonable construction, I think the description should cover all the land included in the conveyance upon a part of which the building is erected, where this is practical. There may be instances in which it is impractical to apply such rules, particularly where a large tract is acquired by one conveyance, and in that event there should be a sufficient description allowing for the appurtenances and for ways of ingress and egress to the property, so that in the event of a sale the title could be obtained not only to the building, but to sufficient land appurtenant thereto, to enable ingress and egress therefrom. /

You also ask whether the description, if defective or deficient, would limit the lien for the appropriation to the land actually covered by such improvement.

I have to advise you that the lien is in any event limited to the land described, and if the land is improperly described, or land is described upon which the building is not erected, nevertheless, the lien cannot be extended beyond that actually contained in the description.

I return herewith the extract of the minutes of the Board of Trustees and the description of the property filed in your office.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

The Pennsylvania State Oral School for the Deaf at Scranton, Pa., is not within the prohibition of the Act of May 23, 1893, P. L. 112, forbidding in certain cases the use of butter substitutes.

Office of the Attorney General,
Harrisburg, Pa., December 13, 1919.

Honorable Charles A. Snyder, Auditor General, Harrisburg, Pa.

Sir: This Department is in receipt of your favor of recent date, asking whether the Pennsylvania State Oral School for the Deaf,

Scranton, Pennsylvania, comes within the classes of institutions prohibited by the Act of May 23, 1893, P. L. 112, from using substitutes for butter.

This Act of Assembly prohibits any charitable or penal institution in the State from using or furnishing to its inmates these substances, the manufacture of which is prohibited by the Act of May 21, 1885, P. L. 22. The substances prohibited by this latter Act are oleo-margarine and similar substitutes for butter.

The Pennsylvania State Oral School for the Deaf is an institution intended for the instruction of deaf children. It is an educational institution. It is not either a charitable or penal institution. Only charitable and penal institutions are prohibited by the Act of May 23, 1893, from using or furnishing to their inmates oleomargarine or substitutes for butter. It therefore follows that this institution is not within the prohibition of that Act.

This conclusion is in keeping with the opinion of First Deputy Attorney General Keller of January 8, 1919, with reference to the Clarion State Normal School.

I return herewith the copy of Mr. Keller's opinion and the copy of the opinion of Judge Reed, which you transmitted with your communication.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

STOCK TRANSFERS—TRANSFER TAX.

A transfer of shares of the stock of a corporation to a voting trustee is within the Act of June 4, 1915, P. L. 821, and subject to the tax imposed thereby.

Office of the Attorney General,
Harrisburg, Pa., December 31, 1919.

Honorable J. Lord Rigby, Chief, Bureau of Corporations, Auditor General's Department, Harrisburg, Pa.

Sir: Some time ago you asked this Department whether stamps were properly affixed to transfers of stocks made by the Executor of the Estate of Matilda DeWitt, deceased. The facts, I understand, to be as follows:

Matilda DeWitt died in 1909, leaving a Will by which she bequeathed a residuary estate consisting of seventy-five shares of preferred and twenty-seven shares of common stock of Hoffman, DeWitt

& McDonough Company. This stock was bequeathed to Mrs. DeWitt by her husband, who died in 1908. This Company was declared insolvent and a receiver appointed for it in 1908. The receivership was terminated June 30, 1917. After the receivership was terminated, the Pennsylvania Company for Insurance on Lives and Granting Annuities, the Executor under the Will of Emanuel DeWitt, the husband of Matilda DeWitt, filed its account, and, under an adjudication by the Orphans' Court of Montgomery County, this stock was transferred to Samuel Englander, Executor under the Will of Matilda DeWitt. Mr. Englander filed his account as Executor in the Orphans' Court of Philadelphia County March 31, 1919. There was some contest in the estate of Matilda DeWitt, and the stock in question was transferred by Samuel Englander, Executor, to Herman G. Storm, Voting Trustee, under an agreement executed by all of the residuary legatees under the Will of Matilda DeWitt. This transfer was made July 7, 1919. The Executor affixed stock transfer stamps to the amount of \$14.00 on the preferred stock, and \$6.40 on the common stock, and also affixed United States Internal Revenue Stamps thereon. Counsel for the Executor claims that these transfers are not subject to the stamp taxes, inasmuch as Matilda DeWitt died in 1909, before the passage of the Transfer Stamp Tax Act. I cannot agree with that contention.

The Act of June 4, 1915, P. L. 828, imposing this tax, provides:

"That a State tax of two cents on each one hundred dollars of the face value, or fraction thereof, is hereby imposed on all * * * deliveries or transfers of shares or certificates of stock in any domestic or foreign corporation, * * * made on or after the date when this act takes effect, whether made upon or shown by the books of the corporation, co-partnership association, or joint-stock company, or by any assignment in blank, or by any delivery: * * * and whether investing the holder with the beneficial interest in or legal title to said stock merely, with the possession or use thereof for any purpose."

This Act of Assembly imposes a tax on the transfer, even though it may invest the holder with merely the legal title. The transfer by the Executor to Herman G. Storm, Voting Trustee, was made in 1919, and invested Storm with the legal title to the stock for the purpose of voting the same. The Treasury Department of the United States, by Treasury Decision No. 2752, dated August 14, 1918, has determined that under the Act of Congress the tax applies to the transfer of stock to or from voting trustees.

In my opinion, therefore, this transfer was directly within the terms of the Act, and the stamps were properly affixed.

I return herewith the correspondence submitted by you.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

IN RE NOTARY FEES.

The Act of May 10, 1919, P. L. 903, prescribes the fees to be charged by a Notary Public for taking an affidavit.

It is the plain duty of a Notary Public to keep an accurate account of all fees received for services performed or fees which he was authorized by law to charge for services performed. The Commonwealth has an interest in the fees of a Notary Public when they exceed the sum of \$1,500 and cannot be deprived of its percentage thereof by the failure of the Notary to charge according to the fee bill.

Office of the Attorney General,
Harrisburg, Pa., December 31, 1919.

Mr. Fred T. MacDonald, Assistant Deputy Auditor General,
Harrisburg, Pa.

Sir: There was duly received your communication of the 29th inst. asking to be advised whether a Notary Public may charge, for administering an oath or affirmation, less than the fee prescribed by the Act of Assembly approved May 10, 1919, P. L. 903.

That act is entitled, "An act regulating the fees of Notaries Public." It provides, *inter alia*, that

"from and after the passage of this act, the fees of notaries public shall be as follows: administering an oath or affidavit, writing out and certifying the same with seal, fifty cents."

I assume that by the words "administering an oath or affidavit" you mean to include the entire service above mentioned. I assume further that your inquiry is prompted by the sense of the obligation imposed upon your office by the Act of April 14, 1840, P. L. 335, which provides, that "every notary shall be subject to all the provisions of the Act of Assembly passed the tenth day of March, 1810, P. L. 79, entitled, an act taxing certain officers and the supplement thereto passed the twenty-fourth day of March, 1818, P. L. 300, and shall give bond with two sufficient sureties to be approved by the

Governor in such amount as may be determined by him, conditioned for the faithful payment to the State Treasurer of all taxes and moneys which he shall become liable to pay to the Commonwealth under the above recited acts."

The Act of 1810, *supra*, provides that certain officers shall keep or cause to be kept a fair and accurate account of all the fees received for services performed by them, or any person employed by them in their respective offices, and shall annually thereafter furnish a copy of such account upon oath or affirmation to the Auditor General, who shall proceed to examine the account so furnished by said officers and whenever the amount of any of the said accounts shall exceed the sum of \$1,500, the Auditor General shall charge the said officers respectively fifty per cent. on the amount of such excess, which sum shall be paid by said officers into the Treasury for the use of the Commonwealth. The last mentioned Act of Assembly is still in force and its provisions are made applicable to the office of Notary Public by the Act of 1840, *supra*. Under these acts it is the plain duty of a Notary Public to keep an accurate account of all the fees received for services performed by him, or fees which he was authorized by law to charge for services performed. The Commonwealth has an interest in the fees of a Notary when they exceed the sum of \$1,500. Manifestly the Commonwealth cannot be deprived of its fifty per centum of the fees of a Notary in excess of \$1,500 by the failure of the Notary to charge according to the fee bill provided by the Act of Assembly. This does not mean that a Notary Public is obliged to charge the full fee prescribed by the Act of Assembly, but it does mean that in keeping the "fair and accurate account of all fees" for the purpose of taxation, he is chargeable with the fee fixed by law for the services performed by him in order properly to arrive at the amount, if any, which shall be due the Commonwealth. There is no reason why a Notary Public may not remit his fees for services in whole or in part, but he must not fail to keep an accurate account of the fees to which he is entitled for the purpose of making payment into the State Treasury of fifty per centum of any and all fees in excess of \$1,500. His own generosity may not operate to prejudice the right of the Commonwealth to receive what may be due under the law.

Very truly yours,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

ESCHEATS—ACT OF MAY 16, 1919.

In so far as the general escheat act of May 2, 1889, P. L. 66, as amended by the Act of May 11, 1911, P. L. 281, applies to unclaimed moneys in the possession of any fiduciary, it is repealed by the Act of May 16, 1919, P. L. 169.

Office of the Attorney General,
Harrisburg, Pa., February 3, 1920.

Honorable Charles A. Snyder, Auditor General, Harrisburg, Pa.

Sir: I have before me your communication, asking whether Section 24 of the General Escheat Act is repealed by Section 5 of the Act of May 16, 1919, P. L. 169.

Section 24 of the Escheat Act of May 2, 1889, P. L. 66, as amended by Section 4 of the Act of May 11, 1911, P. L. 281, provides, in part, as follows:

“That any person who shall first inform the Auditor General, by writing, signed by such person in the presence of two subscribing witnesses, that any escheat hath occurred by reason of the fact that any person hath died intestate, without heirs or known kindred, a widow or surviving husband, or by reason of any other fact, *and who shall procure necessary evidence to substantiate the fact of said escheat, and shall prosecute the right of the Commonwealth to the property escheated with effect,* shall be entitled to one fourth part of the proceeds of all property * * *.”

The Act of May 16, 1919, P. L. 169, providing for the payment of unclaimed funds in the hands of fiduciaries into the State Treasury, provides in Section 5 that when any fiduciary, on the audit or adjudication of his account, finds himself in possession of any moneys not awarded to any claimant, or awarded to claimants the whereabouts of whom, or their legal representatives, the fiduciary has been unable to ascertain, such fiduciary shall, within sixty days after the date of such audit or adjudication, file in the Court having jurisdiction of his account a sworn statement of such unawarded or unclaimed moneys. Thereupon the proceedings set out in the Act shall be taken to secure the payment of such moneys into the State Treasury, and the fiduciary and his sureties, upon such payment, shall be relieved of liability.

The Act provides a penalty for a fiduciary failing to file the statement required. The statement is to be filed in duplicate, and a copy forwarded by the clerk or prothonotary of the Court to the Auditor General of the Commonwealth, as provided in Section 2 of said Act of Assembly.

Prior to the passage of the Act of 1919 it was customary, when it became known that an executor or administrator had moneys for which there was no known lawful claimant, for some one to make an information in escheat. In such cases, when the escheator was appointed and the moneys ultimately escheated, the informant's and escheator's fees amounted to forty per cent of the fund.

The law, prior to the Act of 1919, required the informant not only to give the information, but to "procure necessary evidence to substantiate the fact of said escheat", and "prosecute the right of the Commonwealth to the property escheated with effect."

It is apparent that Section 5 of the Act of May 16, 1919, was intended to furnish a method by which the Commonwealth could secure the "necessary evidence to substantiate the fact" that there were no claimants to any portion of an estate, without depending upon an informant. This Act now secures to the Commonwealth all the information that an informant supplied prior to its passage.

It is obvious that it was the purpose of this Act to save to the Commonwealth the large amount of money heretofore paid in informants' and escheator's fees.

It must be also remembered that the system has been changed. Under an escheat the money was paid into the Commonwealth, and there was no provision for repayment of escheated moneys in the event that a lawful claimant was subsequently found. Under the system created in 1919 the moneys are paid into the Commonwealth without escheat, and are returned to any lawful claimant, who subsequently proves his right thereto. This Act of Assembly, therefore, has not only provided a way by which the Commonwealth should get the information which was formerly given to it by informers, but has also changed the policy of the State with reference to the payment to it of unclaimed funds. Moreover, the Act of 1919 provides a method of securing the payment into the State Treasury, and it is no longer necessary for an informant to "prosecute the right of the Commonwealth."

The conclusion is irresistible that in so far as the General Escheat Act of May 2, 1889, as amended by the Act of May 11, 1911, applies to unclaimed moneys in the possession of any fiduciary, that Act is supplied, and therefore repealed, by the Act of May 16, 1919, P. L. 169.

Very truly yours,

Wm. M. HARGEST,
Deputy Attorney General.

CAPITAL STOCK REPORTS.

The Act of June 13, 1907, P. L. 640, provides the exclusive system for the taxation of trust companies, and they are specifically excluded from the General Taxing Act of June 1, 1889, P. L. 420, and its amendments. Therefore, a trust company is not required to report under the Act of 1889 on the forms prescribed by the Auditor General for the taxation of its capital stock.

Office of the Attorney General,
Harrisburg, Pa., March 5, 1920.

Honorable Charles A. Snyder, Auditor General, Harrisburg, Pa.

Sir: This Department is in receipt of your letter of recent date, enclosing copy of a communication from Messrs. Murray, Prentice & Howland, Attorneys-at-Law, in reference to the duty of The Equitable Trust Company of New York to file stock reports with the Auditor General.

I understand the facts to be:

That The Equitable Trust Company, a corporation of the State of New York, maintains a branch office in Pennsylvania, for the purpose of purchasing and selling securities, and that it is what its name implies, a trust company. It contends that it is not required to file Capital Stock reports under the General Taxing Act of June 1, 1889, P. L. 420, and its amendments.

Section 20 of that Act, as last amended on July 15, 1919, P. L. 948, provides, *inter alia*:

"That hereafter, except in the case of banks, savings institutions, title insurance or *trust companies*, building and loan associations, and foreign insurance companies, it shall be the duty of the president, vice-president, secretary, or treasurer of every corporation having capital stock * * *, and doing business in and liable to taxation within this Commonwealth, * * * to make annually, on or before the last day of February, for the calendar year next preceding, a report in writing to the Auditor General on a form or forms to be prescribed and furnished by him."

Section 21 of the Act of 1889, as last amended by the Act of July 22, 1913, P. L. 903, imposes a tax of five mills upon "every corporation * * * from which a report is required by the twentieth section hereof."

The Act of June 13, 1907, P. L. 640, provides for the making of reports by trust companies to the Auditor General, and the taxation of the shares of stock of such companies. This Act provides

the exclusive system for the taxation of trust companies. Inasmuch as such companies have been specifically excluded from the General Taxing Act of 1889 and its amendments, and that Act applies only to the taxation of corporations from which a report is required, it is apparent, and I so advise you, that The Equitable Trust Company is not required to report under that Act for the taxation of its capital stock, on the forms prescribed by the Auditor General.

Very truly yours,

Wm. M. HARGEST,
Deputy Attorney General.

SALARY OF JUDGES.

The increase in the salary of judges, due to increase in the population of their districts, as shown by the census of 1920, becomes effective as of the date of the legal ascertainment and official announcement of such increase of population and not as of January 1, 1920.

Office of the Attorney General,
Harrisburgh, Pa., March, 17, 1920

Hon. Charles A. Snyder, Auditor General, Harrisburg, Pa.

Dear Sir: This Department is in receipt of your request concerning the compensation of Judges, as affected by the decennial census.

The Act of Congress, approved March 3, 1919, (Public—No. 325—65th Congress) providing for the fourteenth decennial census, requires the information to be obtained “as of the date of January first in the year in which the enumeration shall be made.”

Necessarily the official announcement of the census will be somewhat delayed.

Under the Act of July 1, 1919, P. L. 708, the salaries of Judges of the Courts of Common Pleas are graded from \$7,000 in districts having a population of less than 65,000 to \$10,000 in districts having a population of 100,000 but less than 500,000, and the Judges of the Orphans' Courts receive the same salaries as Judges of the Courts of Common Pleas.

I understand when the census is declared some of the judicial districts will have a population which will put them in a different classification so as to increase the salaries of the judges, and your

precise inquiry is whether such judges are entitled to that increased salary from the first day of January, 1920, the time fixed for the enumeration, or from the date when the census is declared.

The Act of Assembly fixing the salaries of the judges does not say how the population of the judicial districts is to be ascertained.

In *Luzerne County vs Glennon*, 109 Pa., 564 the Court held:

“For the purpose of classification of Counties under the Salary Acts the United States decennial census is the sole test of population. The population at an intermediate time cannot be proved as a fact, but each county must remain in the class in which the last census found it until it is transferred to another class by a subsequent census.”

In *Guldin vs. Schuylkill County*, 149 Pa., 210, a case in which the question was whether the population under the census of 1890 put the coroner in a different classification from that under the census of 1880, the Supreme Court said:

“In the absence of any legislative provision for otherwise ascertaining the fact, the population of a county is to be determined by the last Federal census.”

It, therefore, is apparent that the salaries of the judges are to be determined by the decennial census.

It has been settled that the salaries of judges may be increased during their terms.

Commonwealth vs. Mathues, 210 Pa., 372.

The case of *Lewis vs. Lackawanna County*, 200 Pa., 590 is decisive of the question which you ask. In that case the District Attorney was elected November 6, 1900, and entered upon the duties of his office July 7, 1901. The census was announced in the press bulletin November 19, 1900, after the election. The question was whether the District Attorney was entitled to the fees applicable to the County of the population as shown by the census of 1890, or whether he was entitled to a salary as shown by the census of June 1, 1900, but announced in the press bulletin of November 19, 1900.

The Superior Court (17 Superior Court, 25), reversing the Court below, held that while the census was not declared until the press bulletin of November 19, 1900 yet, under the Act of Congress, the enumeration having been made as of the first of June, when the declaration was made, it related back to the first of June and did not relate to the date on which the announcement was made.

The Supreme Court, reversing the Superior Court, in an opinion by Mr. Justice Mitchell said in part:

"Before the fact can become a part of the State law and be made the basis of action, it must be established by competent evidence. It follows, therefore, that it is not the mere existence of the fact that must govern its application, but its legal and official ascertainment."

"But it is argued that as the census was taken as of June 1, 1900, the act must be taken to be established as of that date without regard as to when the result is made known. This will not help the difficulty. There is no retrospective force in the census act, nor was any such effect intended. A date certain was necessary to insure correctness, uniformity, the avoidance of duplication, etc., and that is all that was intended. * * * The only escape from such intolerable inconvenience and confusion is by adherence to the logical principles of the law that the fact becomes applicable, only from its legal ascertainment."

I, therefore, advise you that the additional salaries of any judges whose salaries are increased by the population of the judicial district as shown by the decennial census will not take effect as of January 1, 1920, but as of the date of the legal ascertainment and official announcement of the fact by the Director of the Census.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

MERCANTILE LICENSE

A, desiring a suit of clothes but without money to pay for it, and unable to obtain credit, goes to B, who gives him an order upon a merchant. A selects his suit from the merchant's stock, delivering his order on B for payment, and B pays the merchant. A subsequently pays B, in installments, the price of the suit plus ten per cent for making the advancement. Held that B was not liable to mercantile license tax but was not liable for tax as a merchandise broker under the Act of May 7, 1907, P. L. 175.

Office of the Attorney General,
Harrisburg, Pa., April 13, 1920.

Honorable Charles A. Snyder, Auditor General, Harrisburg, Pa.

Sir: The Attorney General is in receipt of your recent letter, asking for an opinion upon the following stated facts:

A man in Carlisle asks for your opinion as to whether business done as hereinafter described is subject to the mercantile license tax. The matter is as follows:

A, desiring a suit of clothes, but without the ready money to pay for it, and unable to obtain credit, goes to B, who gives him an order upon a merchant. A selects his suit from the merchant's stock, delivering his order on B for payment, and B pays the merchant. A subsequently repays B in instalments the price of the suit plus ten per cent. additional for making the advancement.

It is clear that this transaction does not subject B to the payment of mercantile license tax. He does not buy or sell the clothes, and the merchant who does sell them must figure the amount in the business which he does upon which the tax is based.

But the Act of May 7, 1907, P. L. 175, imposing a license tax on various kinds of brokers, provides, among other things, in Section 2, paragraph (d):

"Merchandise brokers are those who, for a commission or other compensation, make contracts of sale or purchase of personal property for others."

I am of opinion that this describes the transaction above outlined. While B does not make the original contract, it is, nevertheless, made on and pursuant to the order which he gives upon the merchant, and he subsequently pays the merchant.

He is, therefore, in my opinion, subject to the payment of the license, as a merchandise broker, required by this Act of Assembly.

I return to you herewith the correspondence.

Very truly yours,

Wm. M. HARGEST,
Deputy Attorney General.

TAXATION.

The balance of an insurance policy due on the policy of a soldier who was insured in the War Risk Insurance passes to the heirs of the soldier, is not subject to taxation in Pennsylvania, and should not be appraised for the purpose of levying the transfer inheritance tax thereon.

Office of the Attorney General,
Harrisburg, Pa., April 13, 1920.

Honorable Charles A. Snyder, Auditor General, Harrisburg, Pa.
Attention Mr. C. W. Myers.

Sir: Some time ago you asked for an opinion upon the following facts:

Mrs. Ada Emma Alexander died, leaving to survive her a husband and several children, one of whom was a soldier in the late war. The soldier was killed and he was insured in The War Risk Insurance in the sum of \$10,000, having made his mother the beneficiary. The payments under the War Risk Insurance were made monthly to the mother during her life and at her death about \$9,000, remained unpaid, which unpaid amounts she willed to her husband. You desire to be advised whether the transfer inheritance tax under the Act of June 20, 1919, P. L. 521, can impose upon the unpaid balance of \$9,000, represented by the policy of The War Risk Insurance.

I am advised by Colonel R. H. Hallett, Assistant Director, in charge of compensation and claims in the Bureau of War Risk Insurance "that the descent of the entire amount of such insurance is to the heirs of the deceased soldier, as provided by the laws of his State in cases of intestacy, and not to the heirs of his mother, who may have been the beneficiary."

The State of Pennsylvania is not concerned with this question. It is concerned as to whether the balance of \$9,000, due under the policy, is taxable. The War Risk Insurance Act provides in Section 28, in part, as follows:

"That the allotments and family allowances, compensation, and insurance payable under Article II, III and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Articles II, III or IV; and shall be exempt from all taxation."

The War Risk Insurance was passed in order to make the military and naval service of the country more attractive to those who had dependents. It was undoubtedly an instrumentality of the Government to aid in raising the large army and navy necessary in the World War. The Act of Congress has said, in terms, that the insurance payable "shall be exempt from all taxation." It is a well-known and well-settled principle that the instrumentalities of one government are free from taxation by another. The States did not confer upon the Federal Government the right to tax their instrumentalities, and on the other hand, the State has no right to tax the property or instrumentalities of the United States. Even if the Act of Congress had been silent on this subject, I am of opinion that The War Risk Insurance, being distinctly a Federal instrumentality, would not be subject to taxation by a State.

I therefore advise you that the balance of the insurance due on the policy of War Risk Insurance issued to the son of Mrs. Ada

Emma Alexander need not be appraised for the purpose of levying the transfer inheritance tax thereon, under the Act of June 20, 1919, above referred to.

Very truly yours,

Wm. M. HARGEST,
Deputy Attorney General.

IN RE TAX OF LIENS, ETC.

A scire facias upon a commonwealth lien is taxable and a scire facias to revive a judgment is not taxable under the Act of April 6, 1830, P. L. 272. There is nothing in the act taxing appeals of any character as such.

Office of the Attorney General,
Harrisburg, Pa., June 22, 1920.

Honorable Charles A. Snyder, Auditor General, Harrisburg, Pa.
Attention: Mr. C. W. Myers, *Chief of County Bureau.*

Sir: You recently requested an opinion based upon a letter of Mr. William Fackenthal, Easton, Pennsylvania, with reference to the taxation of certain matters under the Act of April 6, 1830, P. L. 272.

I will take up the questions propounded by Mr. Fackenthal, and answer them seriatim. He refers to agreements, agreements, for compensation for disability, certificates for liens of State taxes, and conditional sale contracts.

I. "Is a State tax payable on these instruments, as being 'judgment by confession * * * where suit has not been previously commenced', within the meaning of the third section of the Act of 1830 (April 6)?"

The Act of 1830 impose a tax on—

"every original writ * * *, (except the writ of habeas corpus,) and on the entry of every amicable action, the sum of fifty cents; on every writ of certiorari issued to remove the proceeding of a justice or justices of the peace or aldermen, the sum of fifty cents; on every entry of a judgment by confession or otherwise, where suit has not been previously commenced, the sum of fifty cents; and on every transcript of a judgment of a justice of the peace or alderman, the sum of twenty-five cents."

The only kind of agreement which would come within the designation of the Act would be an agreement to enter an amicable action for a judgment by confession. The agreements above referred to are not of this character. The Act does not tax a certificate, as such, and, therefore, none of the instruments referred to in this question are taxable.

II. "Is State tax payable on:—

1. Amicable scire facias to revive a judgment by confession, and to continue the lien thereof?

"2. Amicable scire facias to revive an adverse judgment, and to continue the lien thereof?"

This matter was thoroughly considered in an opinion given by me to the Auditor General, June 27, 1916 (Reports of Attorney General, 1915-1916, p. 157), in which the conclusion was reached that there was a distinction between a scire facias to revive a judgment and other kinds of writs of scire facias—that the former was merely a continuation of an original suit and not an original writ, and, therefore, a writ of scire facias, whether to revive a judgment by confession or an adverse judgment, is not taxable.

III. "Is an alternative mandamus, commenced by petition, on which a writ is issued, an original action and subject to State tax, within the meaning of the third section of the Act of April 6, 1830?"

Attorney general Carson, in an opinion given to your Department March 9, 1905 (Report of Attorney General, 1905-1906, p. 64), held that an alternative mandamus was an original writ within the meaning of this Act. I see no reason to question the correctness of that conclusion, and, therefore, answer this question in the affirmative.

IV. "Are (1) amicable actions sur mechanics' lien, and (2) amicable actions sur municipal liens, amicable actions within the meaning of the third section of the Act of April 6, 1830?"

In an opinion by Deputy Attorney General Cunningham to your Department, dated May 2, 1907 (Report of Attorney General, 1907-1908, p. 85), he advised you that mechanics' and municipal liens, when filed, are merely claims, but when reduced to judgment they are taxable within the language of the Act, which provides a tax upon "every entry of a judgment by confession or otherwise, where suit has not been previously commenced." We do not question the correctness of that opinion.

V. "Appeals:—

"Are (1) appeals from board of tax revision, (2) appeals from compensation board, and (3) appeals from mercantile appraiser taxable?"

The Act of Assembly taxes "original writs", "the entry of every amicable action", "writ of certiorari", the "entry of a judgment", and "transcript of a judgment." There is nothing in the Act of Assembly taxing appeals of any character, as such.

VI. "Are these actions, which are commenced by praecipe, taxable as original writs:—

- "1. Capias ad respondendum?
- "2. Replevin?
- "3. Scire facias sur mortgage?"

In each of these cases a writ follows the issuance of a praecipe, and the writ is the first writ in the proceedings; therefore, each of them come within the designation of "original writ" upon which a tax is required to be paid.

VII. "Are these actions, which are commenced by praecipe, taxable as original writs:—

- "1. Scire facias sur Commonwealth lien?
- "2. Scire facias sur judgment?"

In the case of *United States vs. Payee*, 147 U. S. 687, 37 L. Ed. 332, it is said:

"While a scire facias to revive a judgment is merely a continuation of the original suit * * * a scire facias upon a recognizance, * * * is as much an original cause as an action of debt upon a recognizance, or a bill in equity to annul a patent."

I, therefore, advise you that a scire facias upon a Commonwealth lien is taxable, and a scire facias to revive a judgment is not.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

BREWERS LICENSE.

A brewer, making malt or brewed liquors with any percent of alcohol content must pay the graduated license fees provided in the Act of July 30, 1907, P. L. 464.

Office of the Attorney General,
Harrisburg, Pa., August 18, 1920.

Honorable Charles A. Snyder, Auditor General, Harrisburg, Pa.

Sir: Your request of the 10th instant for an opinion from this Department as to whether a brewing company which brewed beer having an alcholic content of 2-75/100 per centum by volume and beer having an alcholic content of less than one half of one per cent, neither of said beers being intoxicating, is liable to pay only the minimum brewer's license fee, or the graduated license fees fixed under the Act of July 30, 1897, P. L. 464.

In an opinion rendered by the Attorney General to the Director of the Bureau of Food, holding that the drink called "Virginia Dare Wine" did not come within the nonalcoholic drink act of March 11, 1909, P. L. 15, as amended by the act of June 16, 1919, P. L. 480, and was therefore not subject to the supervision of that officer, it was said:

"The Act of May 13, 1887, P. L. 108, known as the 'Brooks high license law,' prohibits the sale, without a license, of 'spirituous, vinous, malt and brewed liquors.' In construing this act of assembly it has been held that if a liquor is vinous or spirituous conviction may be sustained, even though there was no evidence that the liquor was intoxicating or had an intoxicating effect. *Com. v. Reyburg*, 122 Pa. 299, and that if the liquor sold without a license contained any alcohol such sale violated the law, even though the percentage of alcohol was slight. Convictions have been sustained where the drink was admitted to contain 87/100 of one per cent. *Com. v. Wenzel*, 24 Pa. Super. Ct. 467. It has also been held that it is a violation of this law to sell liquor containing two per cent. of alcohol, even though there be no evidence that the drink was intoxicating *Hatfield v. Com.*, 120 Pa. 395; *Com. v. Burns*, 38 Pa. Super. Ct. 514.

I am, therefore, of the opinion that the act of Congress has not superseded the Brooks high license law in so far as beverages are concerned which contain less than one-half of one per centum of alcohol by volume, and that a license is required to sell such beverages."

The sale of vinous, spirituous and malt liquors containing less than one-half per cent. alcohol is forbidden in Pennsylvania, and is a crime unless the seller is duly licensed. The criminal provisions of the Act of May 13, 1887, Section 15, P. L. 113, apply to all sales of liquor at wholesale or retail, and not to retail sales exclusively.

Commonwealth vs. Sweitzer, 129 Pa. 644.

Commonwealth vs. Matis, 55 Pa. Super. Ct. 551.

Judge Naxey, of Lackawanna County, in an opinion rendered March 2, 1920, reported in 48 Pa. C. C. at page 494, states in reference to the wholesale Act of July 30, 1897, P. L. 464, that the purpose of this Act as expressed in the title is "To provide revenue and regulate the sale of malt, brewed, vinous and spirituous liquors or any admixture thereof."

"The mere fact that the framer of the title of the act erroneously used the phrase 'intoxicating liquors' in indexing part of the contents of the act, instead of the words 'vinous, spirituous, malt and brewed liquors,' which are used in the act itself, would not warrant the inference that the act required increased license fees only for the sale of intoxicating beverages.....

It would be a bold exercise of judicial power to find as a fact that the sole purpose of our liquor license laws was to regulate the sale of intoxicating liquors, and to declare those laws nullified because such purpose can no longer be served. 'Liquor' is any beverage that contains alcohol, and even though the alcoholic content is less than one-half of one per cent., the beverage is liquor still and some citizens may still desire to drink it, and the state may continue to deem it expedient to place restrictions around and derive revenue from its sale."

In licensing brewers under the Act of July 30, 1897, P. L. 464, the Court of Quarter Sessions must construe this Act in harmony with the other acts in regard to the sale of liquors.

Judge Rice of the Superior Court said, in the following case:

"A brewer needs no license to manufacture, but the general policy of the commonwealth, as exhibited by and embodied in its statutes, forbids him to sell the product of his manufacture without complying with certain conditions precedent which the state has prescribed. By complying with them he obtains the privilege to sell—a privilege not enjoyed by the generality of citizens. The privilege to sell generally is obtained

through proceedings in the court of quarter sessions, but the privilege to sell only to dealers licensed by the court may be obtained by paying a certain sum into the state treasury and obtaining from the state treasurer 'a certificate thereof which shall be framed and exposed to view in said brewery.' This right or privilege is, in both classes of cases, granted by the state, and permits the doing of that which without such grant would be unlawful.....The rule applies.....that all other acts in pari materia may be consulted to ascertain the intent of the legislature: Endlich on Interpretation of Statutes, sec. 356. Particularly should the rule apply when the two acts were passed at the same session of the legislature."

Com. vs. Mutual Union Brewing Co., 58 Pa. Super. Ct. 647.

In accordance with the decisions cited above, you are therefore advised that a brewer, manufacturing malt or brewed liquors containing any per cent. of alcohol, must pay the graduated license fee provided in the Act of July 30, 1897, P. L. 464, regardless as to whether or not the malt or brewed liquors brewed by it are intoxicating.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

TAXATION.

Limited partnerships formed under the Uniform Limited Partnership Law are required to file with the Auditor General certificates of registration and capital stock reports, but are not required to pay a bonus upon their capital stock.

Office of the Attorney General,
Harrisburg, Pa., August 30, 1920.

Mr. J. Lord Rigby, Chief, Bureau of Corporations, Auditor General's Department, Harrisburg, Pa.

Sir: I have your communication of the 28th ult. A reply has been delayed by reason of my absence from the city.

You ask whether limited partnerships formed under the Act of April 12, 1917, P. L. 55, entitled, "An act relating to partnerships," and otherwise known as "The Uniform Limited Partnership Act," are required to file with your Department the certificate of

registration provided for by Section 19 of the Act of June 1, 1889, P. L. 420, and the reports contemplated by Section 20 of that law; and also whether such partnerships are required to pay a bonus and to produce a receipt showing said payment before the Recorder of Deeds of the several counties can accept the partnership articles for record. The material portions of the sections referred to are as follows:

"Section 19. That hereafter no *limited partnership*, bank, *joint-stock association*, association, corporation or company whatsoever, formed, erected, incorporated or organized, by or under *any* law of this Commonwealth, general or special, or formed, erected, incorporated or organized under the law of any other state, and doing business in this Commonwealth, shall go into operation, without first having the name of the institution or company, the date of incorporation or organization, the act of assembly or authority under which formed, incorporated or organized, the place of business, the post office address, *the names of the president, chairman, secretary and treasurer or cashier*, and the amount of capital authorized by its charter, and the amount of capital paid into the treasury, registered in the office of the auditor general; and every limited partnership, bank, association, joint stock association, company or corporation whatsoever, now engaged in business in this Commonwealth, shall within ninety days after the passage of this act, register as herein required in the office of the auditor general; all the corporations, companies, associations limited partnerships aforesaid, shall annually hereafter notify the auditor general of any change in their officers; and any such institution or company which shall neglect or refuse to comply with the provisions of this section, shall be subject to a penalty of five hundred dollars, which penalty shall be collected on an account settled by the auditor general and state treasurer in the same manner as taxes on capital stock are settled and collected."

Section 20 as amended by the Act of July 15, 1919, P. L. 948—

".....it shall be the duty of the *president, vice-president, secretary or treasurer* of everylimited partnershipnow or hereafter organized or incorporated by or under any laws of this Commonwealth, and of everylimited partnership now or hereafter incorporated or organized by or under the law of any other state or territory of the United States, or by the United States or by any foreign government, and doing business in and liable to taxation within this Commonwealth..... to make annually, on or before the last day of February for the calendar year next

preceding, a report in writing to the Auditor General on a form or forms to be prescribed and furnished by him, stating specifically:

* * * * *

The affidavit of any two of the following named officers of such corporation, limited partnership, joint-stock association, or company, namely, *the president, vice-president, secretary, or treasurer*, shall be attached to said report, that the statements in the report are true and correct,.....”

You state that your first inquiry is occasioned by the fact that the partnership act does not provide for any of the officers above named, and that there seems therefore to be no one in existence with authority to make and file these reports, and the importance of the inquiry is evident when it is observed that Section 21 of the Act of 1889, as amended which lays a tax on capital stock, confines the imposition to—

“every corporation, joint-stock association, limited partnership and company whatsoever, from which a report is required under the twentieth section hereof.”

The determinative question is whether the term “limited partnership”, as used in the sections above quoted, comprehends a partnership formed under the Uniform Partnership Act, and the silence of that act, as to the officers named in those sections, is but an argument which may aid in arriving at a conclusion.

I am of the opinion that the term includes partnerships formed under the uniform partnership law. The language of Section 20 of the Act of 1889, as last amended, is that it shall be the duty of the president, vice-president, secretary or treasurer—

“of *every*limited partnership.....now or hereafter organized by or under *any* law of this Commonwealth.....to make and file the report therein provided.”

and certainly such partnerships are within the literal words of the statute.

It is a well established principle of law that in the absence of ambiguity no exposition of a statute should be made which is opposed to express words. The rule is thus stated by Thayer, P. J. in *Reimer Harrow Co. vs. Rosenberger*, 16 Philadelphia 191.

“The general rule is that a *verbis legis non est recedendum*, for nothing can so well explain the meaning of the makers of the act as their own direct words.....

It is dangerous to give scope for making a construction against the express words where it is not certain that the meaning of the law makers is not opposed to them."

In Pittsburgh v. Kalchthaler, 114 Pa. 547, the Act of March 7, 1846, P. L. 78, authorized councils of the city of Pittsburgh to levy a tax on goods, etc., sold in the city, and it was held by the lower court that the act did not apply to a butcher who slaughtered his own cattle and sold the meat at a stall in a public market on market days. In reversing the court below Mr. Justice Green said:

"We find ourselves unable to agree with this construction. In point of fact the literal words of the Act do include sales by butchers of fresh meat. This meaning is conceded in a general sense in the opinion of the court, but it is thought upon other considerations that such a meaning should not be given in this class of cases. We think it is always unsafe to depart from the plain and literal meaning of the words contained in legislative enactments out of deference to some supposed intent, or absence of intent, which would prevent the application of the words actually used to a given subject. Such a practice is really substituting the theories of a court, which may, and often do, vary with the personality of the individuals who compose it, in place of the express words of the law as enacted by the law-making power. It is a practice to be avoided and not followed. It has been condemned by many text writers and by many courts. Occasionally it has been departed from, but the path is a devious and a dangerous one, which ought never to be trodden, except upon considerations of the most convincing character and the gravest moment."

There is nothing either in the Revenue Law of 1889, or in the Partnership Act of 1919 which discloses any intent to exclude partnerships formed under the latter statute from the provisions of the former. The fact that the partnership act does not provide for the officers named in the revenue statute does not indicate any such intent. It may well be that the partnership law does not require the existence of such officers so as to enable the partnership to legally transact business with the public, but the revenue law requires their existence in order that the capital stock reports may be filed in the form, manner and at the times specified; and it becomes incumbent upon the partnership to raise up such officers if it does not wish to have a settlement estimated against it based on knowledge independently acquired, and if it desires to escape the penalty provided by the statute for failure to file such reports.

If the silence of the Act of 1919 is sufficient to take these partnerships out of the revenue law, then limited partnerships formed

under the act of May 9, 1899, P. L. 261, are beyond the scope of such law, for it is equally silent as to any such officers, and yet this class of partnerships is expressly required to pay a bonus upon its formation and partakes very closely of the nature of a corporation; then limited partnerships form under the act of June 2, 1874, P. L. 271, may easily evade the law, for no provision is made in that act for the officers of president or vice-president and it expressly enacts that the officers of secretary and treasurer may be held by one person; partnerships formed in states having no partnership statute other than the Uniform Law, could, while doing business in this state, abstain from complying with the provisions of the Act of 1889, notwithstanding that act expressly applies to such as are formed "under any law of another state"; If such silence were to control the question, then in the event of all partnerships formed under the Act of 1874, constituting one person as secretary and treasurer, the extraordinary situation would exist, where the legislature required reports from and imposed a tax on—

"every limited partnership formed under *any* law of this Commonwealth,"

and yet the state powerless to invoke the requirement against a single one. I am unable to infer a legislative intent to create such situations; the silence of the Act of 1919 on partnership officers, does not control your question; the partnership to which the revenue law relates are limited partnerships *formed under any act of this Commonwealth or any other state, and not limited partnerships having by express statutory creation the officers of president, vice-president, secretary or treasurer.*

As to the certificates of registration required by Section 19 of the Act of 1889, it is pertinent to observe that the requirement to file the same is upon the "limited partnership" and not upon any specified officer thereof.

I am not unaware of the opinion of former Attorney General McCormick (Attorney General's Reports 1895-96, p. 153) that partnerships formed under the Limited Partnership Act of March 21, 1836, P. L. 143, are not within the intent of the Act of 1889, nor to the effect of the Act of 1919 on the statute of 1836, nor to the similarity of partnerships formed under these two laws. I am of the opinion that Sections 19 and 20, and therefore Section 21, of the Act of 1889 were intended to reach those partnerships created by act of the law as contradistinguished from those created by act of the parties, and that when the legislature intends to confine its enactments to particular kinds of limited partnerships, it does so by language, the meaning of which is unmistakable, as in the case of the limited partnership bonus act.

As to your second inquiry, I beg to advise that the only statute subjecting limited partnerships to bonus is the Act of May 8, 1901, P. L. 149, which by its express terms is confined to limited partnerships formed under the Acts of 1874 and 1899 hereinbefore referred to.

Specifically answering your inquiries, you are now advised,

First: That limited partnerships formed under the Uniform Limited Partnership Law are required to file the certificate of registration and the capital stock reports required by Sections 19 and 20 of the Act of June 1, 1889, P. L. 420;

Second: That partnerships formed under the Uniform Partnership Law are not required to pay a bonus.

Very truly yours,

FRANK M. HUNTER,
Deputy Attorney General.

WESTERN STATE PENITENTIARY.

The premiums on the bonds of the officers and employees of the Western State Penitentiary cannot be paid out of appropriations made to carry into effect the Act of 1915, P. L. 626.

The term "Insurance", as used in the Appropriation Act of 1919 P. L. 115, is broad enough to include the payment of premiums on bonds.

Office of the Attorney General,
Harrisburg, Pa., September 3, 1920.

Honorable Charles A. Snyder, Auditor General, Harrisburg, Pa.

Sir: I am in receipt of a communication from your Department, enclosing a requisition from the Western State Penitentiary for premiums to the American Surety Company on bonds of certain employees of that Institution. The persons covered by these bonds are clerks, bookkeepers, storekeepers, and other similar employees of the Penitentiary, and also of its Treasurer, and the requisition is drawn chargeable to the item of "Insurance" contained in the Act making an appropriation to the Penitentiary (Appropriation Acts, 1919, P. L. 115). You direct attention to the statute of May 28, 1915, P. L. 626, entitled "An Act requiring all State officials and employees who receive and disperse public moneys to give bond for the faithful performance of their official duties," and to the Act of April 23, 1919, P. L. 141, making it the duty of the Board of Public Grounds and Buildings to procure and pay for the various bonds required by the statute, to be given by such officials and employees.

The statute of 1909, to which you refer, has been repealed by the Act of June 16, 1919, P. L. 482, creating the Board of Commissioners of Public Grounds and Buildings, but its provisions have been substantially re-enacted by that Act.

You inquire whether the requisition can be honored, and if so, the appropriation item against which it should be charged.

In an opinion rendered by former Deputy Attorney General Kun (Attorney General's Reports 1915-1916, page 661), interpreting the Act of 1915, it was held the Act comprehends only the bond of the treasurer of a State institution who receives moneys appropriated by the Legislature for its use. It was therein further stated:

"It is, of course, entirely proper for your Board of Trustees to require bonds of such employes and subordinates who, in the judgment of the Trustees hold such positions of trust which require them to be bonded. This is a matter as to which the Board of Trustees must exercise their own sound judgment and discretion. The premiums for such bonds, however, cannot be paid out of the special appropriation to the Board of Public Grounds and Buildings, as already indicated, but will have to be paid out of the appropriation to your Institution."

It follows from this opinion that the officers and employes covered by the bonds in question, except possibly "Charles A. Rook, Treasurer," are not "State officials or employes" within the meaning of the said Act of 1915, and that the Board of Commissioners of Public Grounds and Buildings would have no authority to pay for the premiums thereon. Whether the premium on the bond of the treasurer should be paid depends upon the obligation of that instrument. If the obligation be solely for the faithful application of State appropriations, the premium should not be paid, as the law contemplates that the treasurer of this Institution should be bonded for that purpose by the Board of Commissioners of Public Grounds and Buildings; if, however, the obligation be for the faithful application of moneys received from other sources, as for example, from counties in the Western State Penitentiary District, the premium should be paid provided there exists an available appropriation.

I am of the opinion that the premiums on these bonds are properly chargeable to the item "Insurance" contained in the appropriation made to the Western State Penitentiary by the Act of 1919, hereinfore cited. The law is settled that bonds or contracts of companies which guarantee the fidelity of employes and which make the business one for profit, are insurance contracts: Joyce on the Law of Insurance, Vol. 1, Paragraph 339a.

You are accordingly advised—

First—That the premiums on bonds of the officers and employes of the Western State Penitentiary cannot be paid out of appropriations made to carry into effect the Act of 1915.

Second—That the term "Insurance" as used in the Appropriation Act of 1919 to the Western State Penitentiary comprehends premiums on bonds of employes of this Institution. Whether the premium on the bonds of Charles A. Rook, Treasurer, should be paid depends upon the circumstances hereinbefore stated.

In reply to your further inquiry as to what kinds of insurance the said item comprehends, I have to advise that this Department will not render opinions on abstract questions, but only on specific inquiries based upon actual states of facts, and the full import of the term can therefore only be ascertained as particular cases arise.

I return your enclosures.

Very truly yours,

FRANK M. HUNTER,
Deputy Attorney General.

The Pennsylvania Historical Commission has power to assist in the purchase of Fort Morris, at Shippensburg, Pa., the title to be in the Borough of Shippensburg.

Office of the Attorney General,
Harrisburg, Pa., September 28, 1920.

Honorable Charles A. Snyder, Auditor General, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 15th inst. relative to the purchase of the site of Fort Norris with the assistance of the Pennsylvania Historical Commission.

It appears that on June 11, 1920, the Pennsylvania Historical Commission adopted a Resolution that it pay one-half of the purchase price of the site of Fort Morris, at Shippensburg, to an amount not exceeding \$750.00, the Civic Club of that place to pay the other half, the title to the land so acquired to be vested in the Borough of Shippensburg, which "shall have care of the property and maintain it free of taxes forever." The actual amount which the Commission is now called upon to pay on account of the foregoing is the sum of \$529.16. You ask to be advised whether the Commission possesses the authority to make the aforesaid purchase under the authority bestowed upon it by the Act of July 13, 1913, P. L. 1265, as amended by the Act of June 22, 1917, P. L. 624.

Section 4 of said Act reads, in part, as follows:

"The Pennsylvania Historical Commission may, upon its own initiative or upon petition of municipalities or historical societies, mark by proper monuments, tablets, or markers, places or buildings, within this Commonwealth, where historical events have transpired, and may arrange for the care and maintenance of such markers or monuments. It may also undertake, within the means at its command, the preservation or restoration of ancient or historic public buildings, military works, or monuments connected with the history of Pennsylvania; and to this end it may contract with cities, boroughs, and townships, for and on behalf of the Commonwealth, or with historical societies or other associations, with proper bond or security, for the maintenance of such buildings, works and monuments as a consideration for assistance in their erection, restoration, preservation, or marking by said commission."

This statute, creating the Pennsylvania Historical Commission equipped with power and means to act, has for its end the promotion of an important and beneficial public object and as one having that character should receive a construction as broad and liberal as its language in its most extensive signification will permit. *Endlich on the Interpretation of Statutes*, 107-108.

By virtue of the above quoted provision of Section 4 of the Act, the Commission can assist in the preservation or restoration of any historic buildings, military works or monuments with an arrangement with the municipality where located for their care and maintenance. Tested by what is sought to be accomplished by the Act, I see no real distinction between that and the rendering of assistance to acquire and set apart for all time from other uses the site where such historic structure had once stood, in order to perpetuate the memory of its existence and the deeds and events connected therewith. The express power to do the former may fairly be construed as implying or including the right to do the latter so as to more fully effectuate the obvious purposes in view. This is one way and a most effective one of marking historic places.

In this present instance the title to the land is to be vested in the Borough of Shippensburg, which presumably under the condition of the conveyance will be pledged to give this historic site the contemplated care and maintenance. To deny the Commission the power to do what is here proposed would, in my opinion, be contrary to the spirit and true intent of the Act under which the proceeding is being had, and put an unfortunate limitation upon its activities.

You are, therefore, advised that the Pennsylvania Historical Commission has the authority under said Act to assist in acquiring the site of Fort Morris, at Shippensburg, in accordance with the above recited Resolution.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

TAXATION.

The Commonwealth has no right under existing legislation to tax National and State banks engaged in fiduciary business under authority of the Federal Reserve Act and the Act of July 17, 1919, P. L. 1032, as trust companies under the Act of 1907, and impose upon the value of their capital stock a tax of five mills.

Office of the Attorney General,
Harrisburg, Pa., October 6, 1920.

Honorable J. Lord Rigby, Chief, Bureau of Corporations, Auditor General's Department, Harrisburg, Pa.

Sir: Your request for an opinion as to the right of the Commonwealth to tax State banks that have accepted the provisions of the Act of July 17, 1919, P. L. 1032, as trust companies under the Act of June 13, 1907, P. L. 640, instead of as banks under the Act of July 15, 1897, P. L. 292, and the right of the Commonwealth to tax National banks authorized to act in a fiduciary capacity by the Federal Reserve Board under the Act of 1907 instead of under the Act of 1897, is received by this Department.

The Act of 1919, P. L. 1032, above referred to, provides a method whereby State banks incorporated under the laws of this Commonwealth may acquire the right to engage in fiduciary business in which trust companies organized under the laws of this Commonwealth have authority and are permitted to act, and the Act of Congress, known as the Federal Reserve Act, gives to Federal Reserve Board the power to authorize National banks to engage in fiduciary business the same as trust companies are now authorized to do.

National and State banks are taxed by the Commonwealth by authority of the Act of July 15, 1897 P. L. 292, entitled "An act to provide revenue by taxation".

Section 1 of the Act provides:

"Every bank or savings institution having capital stock, incorporated by or under any law of this Commonwealth or under any law of the United States, and located within this Commonwealth, shall, on or before the twentieth day of June in each and every year, make to the Auditor General a report in writing, verified by the oath or affirmation of the president, cashier or treasurer, setting forth the full number of shares of the capital stock subscribed for or issued by such bank or saving institution, and the actual value thereof, which shall be ascertained as hereinbefore provided; whereupon it shall be the duty of the Auditor General to assess such shares for taxation at the same rate as that imposed upon other moneyed capital in the hands of individual citizens of the State, that is to say, at the rate of four mills upon each dollar of the actual value thereof * * *."

Trust companies are taxed by virtue of the Act of June 13, 1907, P. L. 640, which provides:

"That from and after the passage of this act, every company incorporated under the provisions of section twenty-nine of 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, and its supplements; for the insurance of owners of real estate, mortgages, and others interested in real estate, from loss by reason of defective titles, liens, and incumbrances; and every company entitled to benefits of, and every company having any of the powers of, companies entitled to the benefits of an act entitled 'An act conferring upon certain fidelity, insurance, safety deposit, trust, and savings companies the powers and privileges of companies incorporated under the provisions of section twenty-nine of an act, entitled 'An act to provide for the incorporation and regulation of certain corporations,' approved April twenty-ninth Anno Domini one thousand eight hundred and seventy-four, and of the supplements thereto,' approved June twenty-seventh, one thousand eight hundred and ninety-five, commonly known as title insurance, or trust, companies, shall, on or before the twentieth day of June in each and every year, make to the Auditor General a report in writing, verified by the oath or affirmation of the president, secretary, or treasurer, setting forth the full number of shares of the capital stock subscribed for or issued by such company, and the actual value thereof, which shall be ascertained as hereinafter provided; and thereupon it shall be the duty of the Auditor General to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof * * *."

In my opinion the Commonwealth has no authority to tax State and National banks given fiduciary powers by the Act of 1919 or the Federal Reserve Board as trust companies under the Act of 1907. The Act of July 15, 1897, P. L. 292, authorizing the Commonwealth to tax National and State banks provides for a tax of four mills upon every bank or savings institution having capital stock incorporated by or under any law of this Commonwealth, or under any law of the United States. The Act of June 13, 1907, imposing a tax of five mills upon the capital stock of trust companies, authorizes the imposition of that tax only upon those companies incorporated under the Act of 1874 and the supplement of 1895.

The distinguishing feature, therefore, seems to be with relation to the Act under which these various financial institutions are incorporated, and neither the Federal Reserve Act, giving Nation banks authority to engage in a fiduciary capacity, nor the Act of 1919, P. L. 1032, giving State banks the right to engage in a fiduciary capacity, in any way changes the method of incorporation of such institutions, nor does it bring them within the provision of the Act of 1874 and the Act of 1895, providing for the incorporation of trust companies.

You are, therefore, advised that the Commonwealth has no right to tax National and State banks engaged in fiduciary business under authority of the Federal Reserve Act and the Act of 1919, above referred to, as trust companies under the Act of 1907 and impose upon the value of their capital stock a tax of five mills. In order to do so further legislation will be necessary.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General.

IN RE LIQUOR LICENSES.

No retail liquor licensed dealer who has failed to make the monthly payments in advance as required by the Act of February 26, 1919, P. L. 10, can retain his license by now making the omitted payments, but by the expressed terms of said Act, the license was terminated when he defaulted.

Office of the Attorney General,
Harrisburg, Pa., November 11, 1920.

Honorable Charles A. Snyder, Auditor General, Harrisburg, Pa.

Sir: Your request for an opinion from this Department, whether retail licensed liquor dealers who have not paid up their monthly

installments of their license fee, could pay up their back payments and retain their license, duly received. In reply, would say that by the provisions of the Act of the 26th day of February, 1919, P. L. 10, Section 8, it is provided in the last clause:

"Provided further, That each person licensed to sell vinous, spirituous, malt or brewed liquors, or any admixture thereof, under the provisions of this act, may pay the annual license fees herein provided for and any additional tax or license fee now established by law, in twelve monthly installments. The installment for the first month shall be paid as now required by law before a license is issued to the applicant, and each subsequent installment at any time before the beginning of each succeeding month. Failure to make any of said monthly payments in advance shall terminate said license and all rights therein, and the licensee shall forthwith return the same to the court or authority by which it was issued."

Under this provision the license is immediately forfeited by failure to make the payments.

You are, therefore, advised that no retail licensed dealer who has failed to make the monthly payments in advance can retain his license by now making the omitted payments, but by the expressed terms of assembly the license is terminated.

Yours truly,

W. I. SWOOPE,
Deputy Attorney General.

TRANSFER INHERITANCE TAX—CORPORATIONS—ACT OF JUNE 30,
1919.

Where a decedent is, at the time of his death, the owner of stock of a corporation, and subsequent to his death a stock dividend is declared, no "waiver" is required for the transfer of the stock representing such dividend, the shares standing in the name of the decedent having been appraised as of the time of his death and the tax paid thereon.

Where a decedent prior to his death and subscribed for stock of a contemplated corporation, but had not paid for the same, and where the stock is subsequently paid for and a certificate issued in the name of the estate, a "waiver" is required before the stock can be transferred out of the estate.

Where a decedent prior to his death had subscribed for stock of an existent corporation, but had not paid for the same, and where the stock is subsequently paid for and a certificate issued in the name of the estate, a "waiver" is not required before the stock can be transferred out of the estate, unless there be additional circumstances sufficient to give to such subscriber the status of a corporate shareholder.

Office of the Attorney General,
Harrisburg, Pa. November 11, 1920.

Mr. Christian W. Myers, Chief, County Bureau, Department of Auditor General, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 19th ultimo requesting an interpretation of the Transfer Inheritance Tax Act approved June 20, 1919, P. L. 521, with respect to the following:

"First: A decedent is the owner of stock of a corporation at the time of his death, and subsequent to his death, a stock dividend is declared. The stock standing in his name was, of course, inventoried as of the date of his death, and the inheritance tax paid thereon.

"Question: Would a waiver be required for the transfer of the shares represented by the stock dividend?

"Second: A decedent, prior to his death, had subscribed for some stock of a Corporation, but had not paid the same. The stock is subsequently paid for by the Executor, and a certificate issued in the name of the Estate.

"Question: Would a waiver be required before this stock can be transferred out of the Estate?"

Sections 35 and 36, respectively, prohibit personal representatives and corporations from transferring stock standing in the name of a decedent without what is popularly termed a "waiver" being first secured from the Auditor General. They read as follows:

"Section 35. No executor, administrator, or trustee of any decedent, resident or non-resident, shall assign or transfer *any stock* of any corporation of this Commonwealth or of any national banking association located in this Commonwealth, *standing in the name of such decedent*, or in the joint names of such decedent and one or more other persons, or in trust for a decedent, subject to the tax hereinbefore imposed, *until* such tax has been paid, unless the Auditor General consents to such transfer prior to such payment in manner hereinafter provided.

"Section 36. No corporation of this Commonwealth or national banking association located in this Commonwealth shall transfer *any stock* of such corporation or of such banking association, *standing in the name of a decedent*, whether resident or non-resident, or in the joint names of a decedent and one or more persons, or in trust for such decedent, unless the Auditor General has filed with said corporation or national bank-

ing association a certificate that the tax imposed by this act on the transfer of such stock has been fully paid, or otherwise consents thereto in writing, and it shall be lawful for the Auditor General, either personally or by representative, to examine the shares of stock of such decedent at the time of such transfer and also the transfer books of said corporation or association showing such transfer * * *."

It is important to observe that the tax contemplated by the statute is not laid upon the physical act of the corporation in transferring on its books the shares of its stock standing in the name of a decedent, but that it is imposed, by Section one, either upon that intangible, invisible and incorporeal thing, the translation or passing of the title to, or interest in the shares from one person to another, described in the Act as a "transfer" and brought about by will, intestate laws, or by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death, or upon the coming into possession or enjoyment of a contingent or defeasible estate in expectancy, or of property transferred pursuant to a power of appointment.

By Section 2 of the Act the tax on the "transfer" is to be computed on the clear value of the property *at the time of the passing*, while by Section 3 the tax on the contingent or defeasible estate in expectancy is computable upon its value *at the time the right of possession accrues, or at the time of its actual payment*, if the person liable therefor avails himself of the privilege of making payment before such accrual.

The prohibition contained in Section 36 is, therefore, not pertinent to the *imposition* of the tax, but was intended to better insure its collection and payment.

These preliminary observations afford a clear approach to the disposition of your specific inquiries. As to the first, it appears that the shares passed to the person liable for the tax instantly upon the decedent's death; that they were appraised as of that time; that the tax based upon such valuation has been paid, and that subsequently to such death the stock dividend was declared. If this dividend represented corporate assets, howsoever carried in the corporate accounts, existing at the time of the decedent's death, it was reflected in the value of the shares which "passed," and upon which the tax has been calculated and paid; if it represented assets received subsequent to such death, it was not, as has been before pointed out, taxable under the Act. In neither case therefore, is the "waiver" necessary to insure the payment of the tax, and consequently it is not required by the statute.

As to your second inquiry, you state that the decedent had prior to his death "*subscribed*" for certain shares of stock, payment therefor being made by his Executor and the certificates issued in the latter's name. You do not state when the corporation was chartered. This opinion is predicated upon the assumption that it was at or prior to the time of the subscriber's demise. Is a "waiver" required before this stock can be transferred out of the estate. The prohibition in both Sections 35 and 36 is expressly confined to the transfer "*of stock standing in the name of a decedent,*" i. e. standing in such name on the books of the corporation.

The disposition of your second inquiry rests, therefore, upon a further question—did the decedent's subscription give him the status of a holder of "stock" within the meaning of the Act, and I am of the opinion that this depends upon whether the agreement was what is technically termed a "subscription agreement," by which I mean an agreement to buy shares of stock in a contemplated corporation, or whether it was an agreement to buy stock in a corporation already in existence. If the subscription was for the purchase of shares in a contemplated corporation, the decedent had "*stock*" standing in his name, within the meaning of the statute and a "waiver" is required. The nature of such an agreement, and its difference from the ordinary contract of purchase and sale is clearly defined in the case of *Bole vs. Fulton*, 233 Pa. 609. The case arose on a bill in equity by creditors to compel the payment of a stock subscription which had been executed subsequent to the issuance of letters patent. The Court said:

"There is a well-recognized distinction between original subscriptions for stock in a corporation to be formed, and subscriptions for shares in an existing corporation. In the one case the engagement between the subscribers is created directly by the act of subscription, which, when once the corporation has been created by letters patent, issued on the strength of the subscription, becomes absolute, not subject to recall, and dischargeable only by actual payment. By the act of incorporation, without more, *the original subscribers become members of the corporation*, entitled to all the rights and privileges of membership, including the right to vote, the right to share in the profits, and *the right to compel specific performance of the contract of membership*: *Curry v. Scott*, 54 Pa. 270, *Garrett v. Dillsburg*, etc., R. R. Co. 78 Pa. 465. In the other case the contract is not between the subscribers, except as it is shown that the subscriptions were mutual considerations for each other, but between each individual subscriber and the corporation as it exists, and is simply a contract of purchase and sale * * *.

* * * * *

"The receiver of the insolvent corporation finding defendant's name appended to a subscription list, included him in his bill among the original and statutory shareholders who have not paid their subscriptions in full, and obtained a decree against him as a stockholder. *But he never was a stockholder.*"

The distinction is thus stated by *Morawetz on Private Corporations, Section 46*:

"The contract which exists among the members of a corporation, and which constitutes them a corporate association, is the contract of membership. *This contract gives the contracting parties the status of shareholders; it invests them with the continuing rights of shareholders, together with the corresponding liabilities and the performance of this contract will always be specifically enforced,* though a failure to perform rarely presents a ground for an action for damages. On the other hand, a contract to become a shareholder, or to subscribe for shares in a company at a future day, *does not give the contracting party the status of shareholder until after the contract has been fully executed by taking the shares or actually subscribing upon the books, and, upon failure to perform the contract, the corporation will be entitled to recover only the damages suffered,—that is, the difference between the amount which the defendant agreed to pay or contribute on account of the shares, and the value of an equal number of shares in the market.*"

In *Baltimore City Pass. Ry. Co. v. Hambleton*, 77 Md. 341, the Court said, *inter alia*:

"When the subscription to formative stock precedes the creation of the body corporate which will ultimately issue the certificate, there is, of necessity, at the time such subscriptions are entered into, no corporation in existence with which a contract could be made. The subscribers as a consequence and for the very purpose of effecting an organization, *become stockholders by the mere act of subscribing* if there are no conditions precedent prescribed, and they are thereby invested with the privileges and subjected to the liabilities incident to that relation * * *. But the same reasons do not apply, and the same conditions do not obtain, in the case of new or additional stock, authorized to be issued by an existing and completely organized corporation. A subscription to such new stock does not necessarily of itself make the subscriber a stockholder, because, generally speaking, it is a mere contract between the sub-

scriber and the corporation, * * * *To constitute a subscriber for new stock a stockholder, something more than a mere subscription is requisite; payment is necessary. The subscription is but the contract. Payment when called by the company, and when made by the subscriber constitutes him a shareholder, whether a certificate has been issued or not.*"

There may be cases where the agreement to purchase shares in an existing corporation is coupled with additional circumstances sufficient to constitute the decedent a shareholder e. g. where he had paid the subscription price before his death, but the certificate had not yet been issued. Exceptional cases will, however, have to be met as they arise.

You are accordingly now specifically advised:

First: Where a decedent is, at the time of his death, the owner of stock of a corporation, and subsequent to his death a stock dividend is declared, no "waiver" is required for the transfer of the stock representing such dividend, the shares standing in the name of the decedent having been appraised as of the time of his death and the tax paid thereon.

Second: Where a decedent prior to his death had subscribed for stock of a contemplated corporation, but had not paid for the same, and where the stock is subsequently paid for and a certificate issued in the name of the estate, a "waiver" is required before the stock can be transferred out of the estate.

Third: Where a decedent prior to his death had subscribed for stock of *an existent corporation*, but had not paid for the same, and where the stock is subsequently paid for and a certificate issued in the name of the estate, a "waiver" is not required before the stock can be transferred out of the estate, unless there be additional circumstances sufficient to give to such subscriber the status of a corporate shareholder.

Yours truly,

FRANK M. HUNTER,
Deputy Attorney General.

OPINIONS TO THE
SECRETARY OF THE COMMONWEALTH

OPINIONS TO THE SECRETARY OF THE COMMONWEALTH.

LIMITED PARTNERSHIPS.

A limited partnership formed under the Act of May 9, 1899, P. L. 261, and the amendments of July 9, 1901, P. L. 625, and April 12, 1917, P. L. 67, must have the receipt of the State Treasurer for the bonus due under the Act of May 8, 1901, P. L. 149, recorded in the office for the recording of deeds in the county in which its office is situated before engaging in business. This receipt constitutes a part of the partnership articles, and must be certified as such before being filed in the office of the Secretary of the Commonwealth.

Office of the Attorney General,
Harrisburg, Pa. January 6, 1919.

Mr. John F. Whitworth, Corporation Clerk, Office of the Secretary
of Commonwealth, Harrisburg, Pa.

Sir: This Department is in receipt of your communicatoin of the 18th ult. enclosing a partnership agreement dated October 2, 1918, between George Stockburger and Robert J. Wagner, both of the City of Philadelphia. The articles of agreement contain the following statement:

"Whereas, the aforesaid parties hereto desire to enter into articles of co-partnership and desire to limit the liability of *all* the partners for the debts of the partnership to the amount of capital subscribed by such partners, respectively, in accordance with the Act of Assembly of the Commonwealth of Pennsylvania, approved the ninth day of May, 1899, and the amendments thereto of the ninth day of July, 1901, and the twelfth day of April, 1917, P. L. 67, the said parties have agreed and by these presents do agree to associate themselves in a partnership with limited liability as follows:"

There is also enclosed a receipt for bonus paid by the above partners pursuant to the Act of May 8, 1901, P. L. 120.

You ask whether this bonus receipt should first be recorded in the office for recording of deeds of Philadelphia County before being filed in your office.

Prior to May 8, 1901, there was no bonus imposed on partnerships formed under the Act of 1899. The only instrument required to be recorded in the office for the recording of deeds, and therefore

the only document which could be certified by such recorder to the office of the Secretary of the Commonwealth, was a copy of the articles of partnership. Section 1 of the said Act of 1899 provides as follows:

"A copy of said articles of partnership, and all amendments thereto, duly certified by the recorder of **deeds**, shall also be filed, within thirty days after the recording of said articles or amendments in said recorder's office, in the office of the Secretary of the Commonwealth. The business of the partnership may be commenced after the articles of partnership have been left for record in the office of the recorder of deeds."

By the Act of May 8, 1901, P. L. 149, partnership associations, formed under the Act of 1899 referred to, were required to pay to the State Treasurer, for the use of the Commonwealth, a bonus of one-third of one percentum upon the amount of capital stock which the partnership has at the time of its formation, and a like bonus on any subsequent increase thereof. This act, to insure the payment of this bonus, provides, that—

"no company formed under the provisions of said acts shall go into operation or exercise any privileges until said bonus has been paid.

Section 2. No articles of association, forming a partnership association under either of the acts aforesaid, or any amendment thereto increasing the capital thereof, *shall be accepted for record by the recorder of **deeds** in any county in this Commonwealth* unless there be annexed thereto a receipt of the State Treasurer for the amount of bonus due under this act, said receipt to be made a part of the articles of association and recorded therewith."

It is obvious, therefore, that a partnership formed under the Act of 1899, and subsequent to the Act of 1901, was required to record the bonus receipt with the articles of association, and that since the act made the receipt a part of such articles, a copy of the said receipt, as well as the partnership agreement, would have to be certified for filing in the office of the Secretary of the Commonwealth. It has been submitted to you, however, that "the Uniform Limited Partnership Act" (1917, P. L. 55), and the Act of April 12, 1917, P. L. 67, amending the said Act of 1899, changed the procedure insofar as to render thereafter unnecessary the recording of the bonus receipt.

I am not in accord with this contention. The Uniform Limited Partnership Act, while complete on the subject with which it deals, has no effect whatsoever upon the Partnership Act of 1899 insofar

as the said Act of 1899 relates to the formation of partnerships wherein *all* of the partners have their liability limited. The Uniform Limited Partnership Act contemplates only those partnerships which have one or more *general* partners. The Act of April 12, 1917, P. L. 67, amending the Act of 1899, likewise makes no change in the procedure for the formation of partnerships between two persons, both of whom are to be limited as to their liability. That amendment was passed pursuant to the approval of the Uniform Limited Partnership Act and its only purpose was to extract from the original act all authority for the subsequent formation of partnerships where one or more, but *not all*, of the members were limited in their liability, and to provide for the partnerships then existing where the liability of more than one, but *not all* the partners were limited. This purpose is indicated by the title which, after reciting the original Act of 1899 and its amendment of July 9, 1901, P. L. 625, proceeds as follows:

"by excepting and excluding all partnerships, *hereafter* formed, in which the liability of one or more, *but not all*, of the partners is limited to the amount subscribed by such partners to the common stock, from the benefit and operation of said act; and to provide for *existing* partnerships where the liability of more than one but *not all* the partners is limited."

The amendment of 1917 did not therefore operate to change, in the slightest, the procedure for the formation of partnerships between two persons with limited liability *in both*. Neither was this procedure affected by the prior amendment of 1901, P. L. 625; the sole purpose of that act as appears from its title being to include banks and trust companies from the benefit and operation of the original statute.

As to the contention that the partnership in question was formed under the amendment of 1917 and not under the original Act of 1899, it is sufficient to say that the reference in the Bonus Act of 1901 to the statute of 1899 included any amendment to that statute, it being a well settled rule of statutory construction that an amendment is an integral part of the original act; and further; as before stated, the intent of the amendment of 1917 was not to *authorize the formation of any partnership whatsoever*, but rather to *prohibit the subsequent formation* of certain partnerships under the provision of the original act.

You are accordingly advised that the partnership in question must have the receipt for bonus recorded in the office for the recording of deeds of Philadelphia County, that the receipt consti-

tutes a part of the Articles of Co-Partnership and must be certified as a part of such articles before you can legally receive it for filing.

I return herewith the Articles of Co-partnership, the Bonus Tax Receipt and certain other communications.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

AMENDMENTS TO THE CONSTITUTION—PUBLICATION OF JOINT
RESOLUTION.

The Joint Resolution No. 4 of the legislative session of 1919, proposing an amendment to Section 1 of Article IX of the Constitution of Pennsylvania, provides that the amendment should be submitted to the electors of the State at large at the general election to be held on the Tuesday next following the first Monday of November, 1919. As there is no general election in 1919, the resolution falls.

Office of the Attorney General,
Harrisburg, Pa., July 8, 1919.

Honorable Cyrus E. Woods, Secretary of the Commonwealth, Harrisburg, Pa.

Dear Sir: There has been received by this Department your letter of June 25, inquiring whether the amendment to Section 1 of Article IX of the Constitution of Pennsylvania, as proposed in Joint Resolution No. 4 of the Legislative Session of 1919, should be published this year, or in the year 1920.

Section 1 of Article XVIII of the Constitution expressly provides that the Secretary of the Commonwealth shall cause such amendments to be published three month before the next *general election*.

Section 2 of Article VIII provides that the *general election* shall be held biennially on the Tuesday next following the first Monday in November in each *even numbered year*.

Section 3 of Article VIII provides for municipal elections, which shall be held on the Tuesday next following the first Monday of November in each odd numbered year.

The publication of an amendment in the manner required by the Constitution must precede its submission to the voters. The requirement is publication three months before the next general election. While the Constitution provides in Section 1 of Article XVIII that amendments may be submitted to the electors of the State in

such manner and at such time, at least three months after being agreed to by the two Houses as the General Assembly may prescribe, this provision must be read in conjunction with the provision relative to publication, and when so read, the plain meaning of the whole section is that the Constitution has fixed the earliest day at which an amendment may be submitted to the electors at the general election next succeeding the three months publication, and to that extent has limited the General Assembly in its powers to prescribe the date of submission.

Measured by this rule, what of the Joint Resolution providing the amendment in question? Its second section prescribes that the amendment shall be submitted to the electors of the State at large, at the general election to be held on the Tuesday next following the first Monday of November in the year 1919.

There is no general election to be held in the year 1919. It follows, therefore, that the publication required by the Constitution cannot be made before the date fixed in the Resolution for submission to the electors, and that the amendment cannot be submitted upon the day named therein.

The views herein expressed are in accord with the reasoning of First Deputy Attorney General Keller in an opinion upon a somewhat similar question, under date of July 10, 1917.

You are advised, therefore, that the proposed amendment should not be published in the year 1919, and that inasmuch as the date is fixed in the Resolution for submitting the question to the electors, there will be no reason to publish the amendment after that date; therefore, the Resolution falls.

Very truly yours,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

SOLDIERS VOTE.

A soldier, sailor or marine who returns home in time to conform with the election laws in order to vote, must do so. The Act No. 382, approved July 15, 1919 is intended to waive every requirement for voting which such soldier, sailor or marine cannot meet because of his absence at war.

Office of the Attorney General,
Harrisburg, Pa., August 22, 1919.

Honorable Cyrus E. Woods, Secretary of the Commonwealth, Harrisburg, Pa.

Sir: Your favor of the 18 inst., addressed to the Attorney General, asking for a construction of Act No. 382, approved July 15, 1919, is at hand.

The question which you propound is whether soldiers, sailors and marines who are discharged before the date on which they may be enrolled or assessed in order to vote at the Primaries this fall, or before the date upon which payment of taxes is required in order to vote, are entitled to the benefits of this Act of Assembly.

I understand that the Personal Registration days in cities of the first class are August 26, September 2 and 6; in cities of the second class September 4, 9 and 13, and in other cities August 28, September 2 and 13; that the days on which persons who are entitled to vote must be assessed are September 2 and 3, but that taxes may be paid up to and including October 4, and that the Act of July 25, 1913, P. L. 1043, requires enrollment on the sixty-second or sixty-third day before the Primary. This would be July 16 this year.

The Act of Assembly is entitled:

"An act providing for voting by soldiers, sailors, and marines, in service or discharged therefrom, returning to their homes, who have been unable to qualify themselves as electors in accordance with existing law."

The title to this Act is self-explanatory. It does not and is not intended to apply to voting by all soldiers, sailors and marines, but only to those who are in the service, or who have been discharged and returned to their homes too late "to qualify themselves as electors in accordance with existing law." Section 1 of the Act provides that any soldier, sailor or marine in service or who has served in the army or navy of the United States, and who has returned to his home, shall be entitled to vote in his respective election district as a soldier, sailor or marine, notwithstanding that he has not been assessed and has not paid the usual taxes, or is not personally registered in the district in which he resides, but this Act contains the the following proviso, which is not easily misunderstood.

"Provided, That such election at which he offers to vote shall occur at such a time as has prevented such soldier, sailor or marine from being assessed and from having paid his usual taxes, and, where the same is necessary, from having been personally registered, after his return to his home, as is required in the case of an elector by the Constitution."

It, therefore, follows that no soldier, sailor or marine who returns home in time to be enrolled or assessed and pay his usual taxes, and to be registered where personal registration is necessary, is entitled to vote as provided by this Act, but only those soldiers, sailors

and marines who have been discharged and returned to their homes too late to qualify themselves as electors are entitled to vote as provided by this law.

I am of the opinion that a soldier, sailor or marine who returns home after the date for enrollment must, however, comply with other election laws as to registration and the payment of taxes, if he returns prior to the days on which registration and payment of taxes are required. In other words, that the soldiers, sailors or marines who return must meet every requirement of the law which they can meet, but the Act of Assembly is intended to waive every requirement which such soldiers, sailors and marines cannot meet.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

CLERK OF THE ORPHANS COURT.

The Act of July 8, 1919, P. L. 736, following the Constitutional requirement, makes the Register of Wills the Clerk of the Orphans Court in Washington County, and the fact that one was voted for and received the highest number of votes cast for Clerk of the Orphans Court, does not entitle him to that office.

Office of the Attorney General,
Harrisburg, Pa., November 26, 1919.

Honorable Cyrus E. Woods, Secretary of the Commonwealth, Harrisburg, Pa.

Sir: This Department is in receipt of your letter of the 18th inst., in reference to the Clerk of the Orphans' Court of Washington County.

The facts I understand to be as follows:

By the Act of July 8, 1919, P. L. 736, a separate Orphans' Court was created for Washington County. Section 4 of that Act provides that "the Register of Wills of said county shall be the Clerk of the said Orphans' Court, and subject to its direction in matters pertaining to his office."

At the election held in Washington County on the 4th of November, 1919, according to the return made by the Prothonotary to the Secretary of the Commonwealth, E. C. McGregor received the highest number of votes, as Clerk of the Quarter' Sessions, Clerk of the Oyer and Terminer and Clerk of the Orphans' Court. John Aiken was elected Register of Wills.

You ask to be advised whether Aiken should be bonded and commissioned simply as Register of Wills or as Register of Wills and Ex-officio Clerk of the Orphans' Court, and whether McGregor shall be bonded as Clerk of the Quarter Sessions and Clerk of the Court of Oyer and Terminer.

The General Act of July 2, 1839, P. L. 559, relating to the election of prothonotaries, clerks, recorders and registers provides that in the County of Washington one person shall be elected "to fill the offices of clerk of the courts of general quarter sessions, and oyer and terminer and Orphans' Court; one person to fill the office of register of wills, etc.

Section 22 of Article V of the Constitution provides, among other things:

"In any county in which a separate orphans' court shall be established, the register of wills shall be clerk of such court, and subject to its direction, in all matters pertaining to his office."

This constitutional provision has been carried into legislative enactment by the Act of April 25, 1889, P. L. 52, and by several other act of Assembly, providing in certain cases, for the appointment of Assistant Clerk of the Orphans' Court.

There can be no doubt that the Act of 1919, following the constitutional requirement, makes the Register of Wills the Clerk of the Orphans' Court of Washington County. The fact that E. C. McGregor was voted for and received the highest number of votes cast for Clerk of the Orphans' Court, does not have the effect of making him such clerk. The Register of Wills is the Ex-officio Clerk of that Court.

This is in line with the decisions of the Supreme Court in the case of *French vs. the Commonwealth*, 78 Pa. 339, and *Taylor vs. the Commonwealth*, 103 Pa. 96.

You should, therefore, see that John Aiken furnishes a bond as Register of Wills and Ex-officio Clerk of the Orphans' Court and that E. C. McGregor furnishes bond as Clerk of the Court of Quarter Sessions and Clerk of the Court of Oyer and Terminer of Washington County.

I herewith enclose the election return filed by the Prothonotary of Washington County.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

IN RE BALLOTS.

The Act of July 9, 1919, P. L. 829, made a radical change in the method of voting at a general or municipal election. Where a ballot marked with a cross-mark (X) in the party square also contains a cross-mark opposite the name of one of two or more candidates on the same party ticket, for the same office, every candidate of that party will receive one vote, except the candidates for the office which the voter marked individually. As to that office, only the candidate whose name was followed by the cross-mark (X) receives a vote.

Office of the Attorney General,
Harrisburg, Pa., December 15, 1919.

Honorable Cyrus E. Woods, Secretary of the Commonwealth, Harrisburg, Pa.

Sir: There was duly received your communication of the 3rd inst. inquiring to be advised how a ballot marked as follows should be counted:

"The voter makes a cross-mark (x) in a party square in the straight party column on the ballot and also makes a cross-mark (x) opposite the name of one candidate of the same party for an office where two are to be elected."

The answer to the question involves the interpretation of the Election Law approved July 9, 1919, P. L. 1919, P. L. 829, which is the last amendment of the twenty-second section of the Act of June 10, 1893, P. L. 419. This is the section of our election law which provide the method of preparing and marking the ballot at the election, as distinguished from the primary.

Since 1893, the Acts of Assembly have provided two methods of voting, the one where the voter desired to vote for all the candidates of a particular political party; and the other where he desired to vote for particular candidates. In the first case, the simplest method of expressing his intention was by marking in the party square; in the second case, it is necessary to place the cross-marks after individual names. These methods were mutually exclusive. When a voter had placed a cross in the party square he had exhausted his privilege of voting. See *Gearhart Township Election, 192, Pa. 446*; and *Dailey's Appeal, 232 Pa. 540*. No further marking was allowed unless the voter wished to mark the names of all his party nominees in addition to marking in the same party square, or unless there were two officers to be elected and only one name was printed in the party designation, in which case the voter might vote for the candidate of another party. *Pfaff v. Bacon, 249 Pa. 297*.

The Act of 1919 made a radical change in the law by the following language:

“* * * Provided, That the voter may make a cross-mark in the appropriate square, opposite the name of the party of his choice, in the straight party column on the left of the ballot, and may also make a cross-mark in the square to the right of any individual candidate whom he favors. In such case his vote shall be counted for all the candidates of the party in whose straight party column on the left of the ballot he placed such cross-mark, except for those offices for which he has indicated his choice by marking in the squares to the right of individual candidates, and his vote shall be counted for such individual candidates which he has thus particularly marked, notwithstanding the fact that he made a mark in the straight party column on the left of the ballot: Provided further, That in any case where more than one candidate is to be elected to any office, the voter shall, if he desires to divide his vote among candidates of different parties, make a cross (x) mark in the appropriate square, to the right of each candidate for whom he desires to vote, not exceeding the total number to be elected for such office, and no vote shall be counted for any candidate in such group not individually marked, notwithstanding the mark in the party square.”

The evident purpose and certain effect of this amendment was to render it easy to cut a straight party ticket by making it possible for a voter to make a cross-mark in a party square and also to place cross-marks to the right of the names of any individual candidates whom he favors. Under this provision of the law, where a cross-mark (x) is placed in a party square and an additional cross-mark (x) is placed in a square to the right of the name of a candidate for any office on the same or any other party ticket, the latter cross-mark (x) eliminates that office from the effect and operation of the cross-mark (x) in the party square. This is true whether one or more than one candidate is to be elected to that office and whether the voter divides his vote between candidates of different parties or votes for the proper number of candidates of one party or votes for less than the whole number of candidates for that office for whom he is entitled to vote. In every such case, as to the office so eliminated from the effect of the mark in the party square the vote must be counted only for the candidates opposite whose names the cross-mark (x) has been placed, as though there were no mark in the party square; provided, of course, that the voter has not invalidated his ballot for that office by marking more than the requisite number of candidates. As to the offices not thus eliminated from the effect of the mark in the party square, that mark casts a vote for each candidate of the party in whose party square the cross-mark (x) was placed.

Specifically answering your inquiry, therefore, when a voter makes a cross-mark (x) in a party square in the straight party column on the ballot and also makes a cross-mark (x) opposite the name of one candidate of the same party for an office where two are to be elected, the cross-mark (x) in the party square operates to cast a vote for every candidate of the party in whose party column it was placed, except the candidates for the office for which the voter marked individually. As to that office, only the candidate whose name was followed by the cross-mark (x) receives a vote.

Very truly yours,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

CUTSHALL'S CASE.

The manifest purpose of the act of April 26, 1889, P. L. 60, was to prevent an interregnum in any office pending a contested election, it being against the public interest that there should be a vacancy therein.

James A. Snodgrass received 5,160 votes for the office of sheriff on the Republican ticket, H. B. Cutshall received 4,896 votes on the Democratic ticket and H. Cutshall received 380 votes on the Prohibition ticket; pending a petition on behalf of H. B. Cutshall contesting the election of Snodgrass on the ground that H. B. Cutshall and H. Cutshall are one and the same person, a commission should issue to the said Snodgrass for sheriff.

Office of the Attorney General,
Harrisburg, Pa., December 31, 1919.

Honorable Cyrus E. Woods, Secretary of the Commonwealth,
Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 29th ultimo asking to be advised whether the Governor should issue a commission to James A. Snodgrass as Sheriff of Crawford County, pending the decision of the Court In re the contested election of the said James A. Snodgrass to said office.

From the information before this Department in this matter it appears that at the election held on November 4, 1919, James A. Snodgrass received 5160 votes for the office of Sheriff on the Republican ticket; that H. B. Cutshall received 4896 votes on the Democratic ticket for said office, and H. Gutshall received 380 votes for said office on the Prohibition ticket.

On November 7th the said H. B. Cutshall filed a petition in the Court of Common Pleas of Crawford County averring, inter alia,

that H. B. Cutshall and H. Cutshall are one and the same individual, and praying the Court "to compute the votes so cast on the Democratic and Prohibition tickets for 'Gutshall' as cast for 'H. B. Cutshall,'" and to certify that the said H. B. Cutshall received a majority of all the votes cast for the office of Sheriff of Crawford County.

In an opinion filed by Judge Prather on December 1, 1919, the foregoing petition was quashed on the ground that the Court of Common Pleas did not have jurisdiction to hear and grant the prayer of the Petitioner, and that the question involved in this contest properly belonged to a contested election in the Court of Quarter Sessions. It further appears that the Court of Common Pleas of said County of Crawford with his assistants, sitting as a Computing Board, certified and returned that James A. Snodgrass was duly elected to the said office of Sheriff of Crawford County. On the fourth day of December, 1919, a petition was filed in the Court of Quarter Sessions of said County, on behalf of the said H. B. Cutshall, contesting the election of the said James A. Snodgrass as Sheriff, and averring, inter alia, that

"On the face of the returns it appearing that James A. Snodgrass, Republican, received a plurality of the votes cast at said general election for the office of Sheriff of Crawford County, the Court of Common Pleas of said County with his assistants sitting as a computing board certified and returned that James A. Snodgrass was duly elected to the said office of Sheriff of Crawford County. * * *

"That the Court of Common Pleas erred in counting and certifying the votes cast for H. B. Cutshall, Democrat, and H. Cutshall, Prohibition, separately, but should have cumulated the same, and by so doing H. B. Cutshall would have been duly and regularly elected to the office of Sheriff of the County of Crawford, and by counting said votes separately for H. B. Cutshall, Democrat, and H. Cutshall, Prohibition, as two separate and distinct persons H. B. Cutshall was defeated and denied the right to the office of Sheriff of Crawford County, to which he is of right justly entitled."

The Court fixed Tuesday, December 23, 1919, as the time for hearing said petition. So far as this Department is advised, there has been no determination as yet of the case, but the same remains pending.

It also appears that Mr. Snodgrass has filed his bond and recognizance as Sheriff, duly approved by the Judge of the County and the Governor, in the office of the Secretary of the Commonwealth.

The Act of April 26, 1889, P. L. 60, provides for the issuing of commissions in cases of contested elections. It is thereby made the duty of the Governor in the case of any officer receiving a commission from the Governor

“ * * * To issue a commission to such person, notwithstanding that the election of such person to any or either of said offices may be contested, in the manner now provided by law: Provided, That whenever it shall appear by the decision of the proper tribunal having jurisdiction of said contested election, that the person to whom said commission shall have issued, has not been legally elected to the office for which he has been commissioned, then a commission shall issue to the person who shall appear legally elected to said office; the issuing of which commission shall nullify and make void the commission already issued, and all power and authority under said commission first issued, shall thereupon cease and determine.”

The manifest purpose of this Act was to prevent an interregnum in any office pending a contested election, it being against public interest that there should be a vacancy therein.

Under the facts in this case and pursuant to the above Act of Assembly, you are, therefore, advised that a commission should issue to the said James A. Snodgrass as Sheriff of Crawford County.

Very truly yours,

William I. Schaffer,
Attorney General.

CONSTITUTIONAL AMENDMENT.

A clerical error in the printing of a joint resolution proposing an amendment to the Constitution, manifest and certain, the Legislative intent being without doubt, should be corrected in the advertisement of the proposed amendment.

Office of the Attorney General,
Harrisburg, Pa., June 30, 1920.

Honorable Cyrus E. Woods, Secretary of the Commonwealth,
Harrisburg, Pa.

Sir: I beg to acknowledge yours of the 24th instant in which we are informed as follows:

"Joint Resolution, designated as No. 3 A., proposing an Amendment to Section One of Article Eight of the Constitution was erroneously certified in one particular to this Department by the officers of the General Assembly

The error consists in the retention of the first 'Fourth' Paragraph in the Amended portion of the section. The Legislative Journal shows (see page 1311 Legislative Journal of the House, April 22, 1919) that this first 'Fourth' paragraph was stricken out by unanimous consent.

It is the practice in the General Assembly when a bill or resolution is amended only by striking out a portion thereof not to reprint the bill but to cross the words stricken out with red ink and enclose them with brackets.

In the present instance, through some clerical oversight, this was not done notwithstanding the fact that the records clearly show the action of the General Assembly.

Please advise me whether, in the copy of the proposed Amendment which I furnish to the newspapers for publication three months immediately preceding the election, I shall omit or include the first Paragraph designated as 'Fourth'."

I beg to advise you this first "Fourth" should be omitted from the copy of the proposed Amendment which you furnish to the newspapers for publication, as required by Article XIX of the Constitution.

The error is so manifest and certain, the method by which it resulted is so plain, and, upon inspection of the Legislative Journal, the legislative intent so free from doubt, that your duty is clear.

Very truly yours,

Robert S. Gawthrop,
First Deputy Attorney General.

IN RE NON-PARTISAN NOMINATIONS.

The Act of July 9, 1919, P. L. 832, repeals the Act of July 24, 1913, P. L. 1001, relating to the withdrawal of nominees on the Non-Partisan ticket, so that nominees may now withdraw their names before the election.

Office of the Attorney General,
Harrisburg, Pa., July 13, 1920.

Honorable Cyrus E. Woods, Secretary of the Commonwealth, Harrisburg, Pa.

Sir: I have your communication of the 22d ult., requesting an opinion as to whether a candidate nominated at the Uniform Primary

Election may withdraw his name from nomination, and if so, when the withdrawal papers shall be filed.

I understand that your inquiry results from the apparent conflict between Section 3 of the Act of July 9, A. D. 1919, P. L. 832, which amended Section 7 of the Act of June 10, A. D. 1893, P. L. 419, and Section 17 of the Act of July 24, A. D. 1913, P. L. 1001.

Section 3 of the Act of 1919 referred to, provides as follows:

"Any person whose name has been presented as a candidate for the office of Presidential Elector, Member of the House of Representatives of the United States, or for any State office, including those of judges, senators and representatives, may cause his name to be withdrawn from nomination by request in writing, signed by him and acknowledged before an officer qualified to take acknowledgements of deeds, and filed in the office of the Secretary of the Commonwealth at least fifty days previous to the day of the election, and all candidates for other offices, with the county commissioners of the respective counties at least twenty-five days previous to the day of the election; and no name so withdrawn shall be printed upon the ballots."

Section 17 of the Act of 1913 referred to, which is entitled "An Act to regulate nominations and elections for all elective offices of cities of the second class, and all offices of Judge of a Court of Record; providing for non-partisan nominations and elections for said offices," etc., provides as follows:

"No candidate for any office within the provisions of this Act, nominated at or after a primary, may withdraw his name as candidate for election."

The question arises, therefore, whether the above quoted portion of Section 17 of the Non-partisan Act of 1913, has been repealed by the Act of July 9, A. D. 1919, P. L. 832. The latter Act amends Sections 5, 6 and 7 of the Act of 1893, P. L. 419. It is a general Act or an amendment to a general Act, and contains no repealing clause.

Does it repeal by implication the provision in the Non-partisan Act which prohibits withdrawals from nomination by candidates nominated thereunder? While repeals by implication are not favored in the law, and this principle applies with particular force when applied to an implied repeal of a special law by a general law, if there be in the later Act something showing that the attention of the Legislature has been turned to the earlier special Act, and that it intended to embrace the special cases within the general Act, the general Act may be construed to constitute a repeal of the special Act.

The Courts have held that the intent to repeal may be inferred from the fact that the provisions of the two Acts are glaringly repugnant to; and radically irreconcilable with, each other, so that it is impossible for both to stand.

An examination of the above quoted inconsistent Sections of the Acts of 1913 and 1919, makes it reasonably clear that the Legislature of 1919 had in mind the prohibition against withdrawal from nomination by candidates nominated under the Non-partisan Act of 1913.

The Act of 1919 specifically mentions the office of Judge as one from which a candidate may withdraw after nomination. It is to be presumed that the Legislature knew the provisions of prior legislation upon the subject. Manifestly the purpose of the Legislature in passing the later Act, was to establish again that uniformity in the law which had existed prior to the passage of the Non-partisan Act, by prescribing that all persons nominated for offices may withdraw in the manner therein prescribed.

You are, therefore, advised that a person nominated to the offices named in the third Section of the Act of July 9, 1919, P. L. 832, may withdraw his name from nomination in the manner therein prescribed, and that in all cases in which the nominating petition has been filed in the office of the Secretary of the Commonwealth, the withdrawal must be filed at least fifty days previous to the day of the election. In all other cases the withdrawal must be filed with the County Commissioners of the proper county, at least twenty-five days previous to the day of the election.

Very truly yours,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

CHARTERS OF SECOND CLASS.

A proposed charter for a corporation of the second class for the purpose of "mining, quarrying, excavating and boring for coal, limestone, sandstone, shale, fire-clay and other minerals and substances incidentally developed; the manufacture of the same into coke, lime, cement, building-stone, bridge-stone, foundation-stone, brick, etc.," is plural and will not be approved.

Under art. xvi, § 6, of the Constitution, which provides that "no corporation shall engage in any business other than that expressly authorized in its charter," and the Act of April 29, 1874, § 3, P. L. 73, 74, which provides that the charter of a corporation of the second class shall set forth the purpose for which it is formed, the description of the business in which the corporation shall engage, as contained in the "statement of purpose," must be (a) certain and specific, and (b) describe a single kind of business.

In framing a statement of purpose, it is not sufficient to confine it within the bounds of one of the twenty clauses of section 2 of the Act of 1874, nor is it sufficient to confine the purpose to those set forth in the Acts of April 7, 1849, P. L. 563, and July 19, 1863, P. L. (1864) 1102.

The distinction between the business in which the corporation proposes to engage and the incidental operations which it may have the power to engage in should be clearly drawn in the statement of purpose.

Office of the Attorney General,
Harrisburg, Pa., October 19, 1920.

Honorable Cyrus E. Woods, Secretary of the Commonwealth, Harrisburg, Pa.

Sir: This Department is in receipt of your recent communication requesting an opinion as to whether a Certificate of Incorporation containing the following statement of purpose should be approved:

"Mining, quarrying, excavating and boring for coal, lime-stone, sand-stone, shale, fire-clay and other minerals and substances incidentally developed: The manufacture of the same into coke, lime, cement, building-stone, bridge-stone, foundation-stone, brick and etc."

I am of the opinion that this statement of purpose embraces a plurality of "purposes" and that the Certificate of Incorporation should not be approved in this form. I shall at the conclusion of this opinion suggest an amendment of the statement of purpose which will avoid the objections which I find.

To determine the question submitted we must consider (1) the office or function of the statement of "purpose" in a Certificate of Incorporation, and the essentials of singleness and certainty which are required in it, (2) the criterion according to which singleness of purpose is to be determined, and (3) the application of that criterion to the particular statement of purpose under consideration.

(1) The Constitution of Pennsylvania, in Section 6 of Article XVI, provides that "no corporation shall engage in any *business* other than *that* expressly authorized in its charter", and Section 3 of the Act of April 29, 1874, P. L. 74, provides, *inter alia*, that in the formation of corporations of the second class, "the charter of an intended corporation..... shall set forth..... (2) the *purpose* for which it is formed, (3) the place or places where its business is to be transacted....."

The charter of such a corporation consists of the general laws under the provisions of which it is organized, together with the Certificate of Incorporation, approved and recorded as required by law. It is not the function of the "statement of purpose" in the Certificate to confer powers upon the corporation. *McClurg Gas Construction Co., 4 Dist. Rep. 349 (Bulkin, Attorney General)*. Its powers are de-

rived from the statutes, and no other powers than those prescribed by the Legislature in the General Corporation Acts can be conferred by including them in the Certificate. *Case of Medical College of Philadelphia, 3 Wharton (Pa.) 444; Fletcher's Encyclopedia of Corporations, Vol. I Sections 119, 195, 207.* The function of the "statement of purpose" in the Certificate of a corporation of the second class is to designate, describe or characterize the business in which the proposed corporation will engage. When the Certificate is in due form of law approved, Letters-Patent issued and the Certificate recorded, then all the powers, privileges, immunities and franchises set forth in the Act of 1874 and its amendments and supplements, vest in the corporation to be employed by it in the prosecution of the *business* which is described in the "Statement of purpose."

It has been uniformly held that the description of the business in which the corporation shall engage, as contained in the "statement of purpose", shall meet two essential requirements: (a) it must be certain and specific, and (b) it must describe a single kind of business.

"Under the Constitution of Pennsylvania and the legislation passed to enforce and make effective that instrument, and especially the acts providing for the incorporation and regulation of corporations, it is clear that the legislative intention was to *distinctly define* the object and purposes for which a charter will issue. The construction of the tax laws and other considerations strengthen the idea that there should be *singleness of purpose* expressed in the application for a grant of letters-patent."

Newton Hamilton Oil and Gas Co., 10 Pa. C. C. 452, (Hensel Attorney General, 1891).

"The law contemplates the organization of corporations devoted to a single purpose, and the incorporation of companies for dual or incongruous purposes should not be allowed unless there is a clear warrant in express language found in the Acts of Assembly conferring the power and granting corporate franchises. Any general expression which may embrace many different purposes, or kinds of business, is still more obnoxious to this principle."

Glenwood Coal Co., 6 Pa. C. C. 575, (Kirkpatrick, Attorney General, 1889).

Since the approval of the Act of April 29, 1874, and the opinion of Attorney General Lear rendered May 24, 1874, (in re Butchers' Ice and Coal Co., 2 Chester, 184) the courts, this Department and the Executive Department, have, in an unbroken line of decisions, opinions and rulings, adhered to the principle that no corporation

shall be incorporated for the purpose of transacting more than one kind of business. This principle has found direct legislative expression in the Acts of July 9, 1901, P. L. 624, and June 3, 1911, P. L. 635, which extended the scope of the "purposes" for which corporations might be formed so as to include "companies for the transaction of any lawful business not otherwise specifically provided for by Act of Assembly; Provided, however, that no corporation shall be chartered under this amendment *with the authority to transact more than one kind of business which must be set forth in its charter.*"

(2) By what criterion shall singleness of purpose be determined? Section 2 of the Act of 1874 contains twenty separate clauses in which are described in outline the various kinds of business for which corporations may be formed. Some of these clauses contain the description of a single business, while others, particularly the seventeenth and eighteenth, describe a large variety of kinds of business. The latter clause, by the amendments cited above, has now been extended so as to include "any lawful business". In framing a statement of purpose it is not sufficient to confine it within the bounds of one of these twenty clauses. *New Gas Light Company*, 7 Dist. Rep. 191; 21 Pa. C. C. 369. Nor is it sufficient to confine the purpose to those set forth in the Act of April 7, 1849, and July 19, 1863, which acts are referred to in the eighteenth clause of Section 2 of the Act of 1874. The fact that the terms, "mining, quarrying, excavating and boring", which are used in the statement of purpose under consideration, are all of them included within the limits of the eighteenth clause referred to, and are all of them within the limits of the Act of 1849 and its supplements, is immaterial. *Whitworth on Creation of Corporations for Profit*, pages 114 and 123.

It is suggested in a letter accompanying your request for an opinion that since there is little or no distinction between the mechanical processes of mining, quarrying, excavating and boring, that the purpose stated is a single one. An examination of many reported decisions discloses that the term "mining" is applied to operations under ground, and "quarrying" to operations upon the surface, and a like distinction is drawn between "excavating" and "boring". In my opinion such distinctions are not material in determining whether the purpose stated be single or not. An enterprise engaged in producing coal is a coal mining or coal producing company, whether the coal be taken from the ground by one or another of the mechanical processes referred to. An enterprise engaged in producing gold is a gold mining or gold producing company, whether it use one or another of the well-known processes of separating gold. The business of such company would not be changed by a change in the mechanical processes employed. If it were so, the progress of science

and invention, by providing new mechanical processes, might compel many of our industrial corporations to be re-chartered time and again.

In Glenwood Coal Co., 6 Pa. C. C. 575, Kirkpatrick Attorney General, (1889) said, that a charter should not be granted for the "mining of minerals." His objection was not to the plurality of the mechanical processes named in this statement of purpose, but to the plurality and uncertainty of the term "minerals".

I am of the opinion that the character of the business of industrial corporations (those engaged in producing raw materials and in manufacturing), is to be determined by inquiring what commodities or articles of trade it produces, and that this is the criterion by which to judge whether the business described in the statement of its corporate purpose is a single business or not. Unless two raw materials are uniformly and universally found joined in nature, or two manufactured products have by the custom of trade and commerce been uniformly and generally produced by the same business entity, their production does not constitute a single business.

(3) Applying this test to the statement of purpose submitted, I cannot avoid the conclusion that it is uncertain and it embraces more than a single kind of business. If the Certificate applied for be granted, the corporation might conduct a coal mining business, a lime-stone quarry business, a fire-brick business, a pressed-brick business and a cement business, most of which would not be in any manner connected with the others. I do not believe that this can be permitted.

It is well settled, however, that a corporation has power not only to do the things expressly mentioned in its charter, but also such things as are incident thereto and so connected therewith that the grant of one necessarily carries with it the grant of the others. *Commonwealth vs. Thackers Manufacturing Co.*, 156 Pa. 510; *Malone vs. Lancaster Gas Light Co.*, 102 Pa. 309; *Glenwood Coal Co.*, 6 Pa. C. C. 575; *Washington Mining and Improvement Co.*, 9 Pa. C. C. 323; *Fletcher's Encyclopedia of Corporations*, Vol. 2, Sec. 828.

If the business of the proposed corporation be the mining of coal, it would have, as incidental thereto, the power to manufacture the coal into coke, to remove from the earth any minerals or other valuable substances which were found upon or underneath the land while the corporation was engaged in the pursuit of its main business and to manufacture them into marketable products; and the corporation may, if it so desires, mention these incidental "purposes" in its statement of purpose.

The applicant should, therefore, choose which of the several kinds of business shall be *the business* of the proposed corporation and so frame its statement of purpose that that business shall constitute

the business of the corporation, and that the other operations appear and be authorized only as incident to the conduct of *the business*.

If it choose the mining of coal, the statement of purpose should read substantially as follows:

"The mining of coal, and, as incident thereto, the manufacture of coke and the mining, quarrying, excavating and boring for limestone, shale, fire clay, and other minerals and substances incidentally developed, and the manufacture thereof into lime, cement, building-stone and brick".

The distinction between *the business* in which the corporation proposes to engage, and the incidental operations which it may have the power to engage in, should be clearly drawn in the statement of purpose.

Very truly yours,

GEORGE ROSS HULL,

Deputy Attorney General,

**OPINIONS TO THE
COMMISSIONER OF BANKING**

OPINIONS TO THE COMMISSIONER OF BANKING.

COMMISSIONER OF BANKING.

The Act of June 17, 1915, § 2, P. L. 1012 (Loan Shark Act), provides that "interest shall not be payable in advance and shall be chargeable only upon unpaid balances." When a loan, originally made for more than \$100 (on which the interest rate is 2 per cent. per month), has been reduced to \$100 or less, the interest charge of 3 per cent. per month allowed on loans not exceeding \$100 cannot be charged on such balance.

This legislation was not passed in the interest of money lenders, but in aid of "individuals pressed by lack of funds to meet immediate necessities." The rate of interest chargeable under the act is clearly fixed according to the amount of the loan when made, and that rate may not be changed.

Office of the Attorney General,
Harrisburg, Pa., January 14, 1919.

Honorable Daniel F. Lafean, Commissioner of Banking, Harrisburg,
Pa.

Sir: I am in receipt of your recent inquiry, relative to interest charges collectible under the Act of June 17, 1915, P. L. 1012, known as the Loan Shark Act.

Section 2 of the Act provides for rates of interest "upon loans not exceeding One Hundred Dollars in amount not more than three per centum per month; upon loans exceeding One Hundred Dollars in amount, and not exceeding Three Hundred Dollars, not more than two per centum per month" (and in addition, certain fees for investigation, etc.).

There is also the provision in the same section that "interest shall not be payable in advance and shall be chargeable only upon unpaid balances."

Certain money lenders have advanced the ingenious contention that because of this latter provision, when a loan originally made for more than One Hundred Dollars (on which the interest rate is two per cent per month) has been reduced to One Hundred Dollars, or less, the interest charge of three per cent per month may be made on such balance.

The difficulty with this proposition is that the provision as to charging interest "only upon unpaid balances" has no reference whatever to the rate of interest, but is directed to the principal upon which interest provided by the Act may be charged.

This legislation was not passed in the interest of money lenders, but in aid of "individuals pressed by lack of funds to meet immediate necessities", as stated in Section 2 of the Act. This legislation must, therefore, be construed most liberally as to them and on the other hand most strictly as to any claim thereunder to charge usurious interest not specifically and clearly authorized therein.

The rate of interest chargeable under the Act is clearly fixed according to the amount of the loan when made and there is no logical theory upon which that rate may be changed. There cannot be two rates of interest on the same loan. Indeed, if there could be any doubt about that proposition it is removed by the legislative expression in the same Section:

"It shall not be lawful for said lender to divide or split up applications for loans, under any pretext whatsoever, so as to require or exact any other or greater charges than prescribed herein; or to make any charges for renewals or extensions, or for any transfers or changes, of any loan or loans within four months of the date of the original loan."

You are, therefore, advised that upon loans exceeding One Hundred Dollars in amount and not exceeding Three Hundred Dollars in amount, not more than two per centum per month may be charged, and this rate of interest cannot be legally increased to three per centum per month on any unpaid balance thereof at any time.

Very truly yours,

JOSEPH L. KUN,
Deputy Attorney General.

STATE BANKS.

Under section 4 of the Act of May 13, 1876, P. L. 161, which requires notice of an intended application for a charter for a state bank to be advertised in two newspapers printed in the county in which such corporate body is intended to be located at least once a week for three months before the application is made, the advertisement must be continuous for three months and the application made at the time when the notice indicates that it is to be made; an application made more than four months after the date fixed in the notice was refused.

Office of the Attorney General,
Harrisburg, Pa. March 4, 1919.

Honorable John S. Fisher, Commissioner of Banking, Harrisburg, Pa.

Sir: This Department has before it the Articles of Association, and Certificate of Incorporation, of the Elderton State Bank, for the approval of the Attorney General.

The Act of 1876, under which this bank is incorporated, requires

“notices of such intended application to be advertised in two newspapers printed in the county in which such corporate body is intended to be located, at least once a week for three months before such application shall be made.”

The notices attached to the Certificate of Incorporation say that application will be made for this charter “October 21, 1918, at 2 o'clock P. M.”

The proof of publication in the Kittanning Tribune shows that the first publication of this notice was July 26th. The three months from the date of the first notice would be October 26th, so that three months notice was not given by publication in “The Kittanning Tribune.” The proof of Publication of the notice in the “The Panther Valley Advance” shows that the publications were made July 10, 17, 24, 31; August 7, 14, 21, 28; September 4; December 18, 25 and January 1, 8, 1919.

This Publication was not continuous. There was a hiatus of more than two months when no publication was made. The application was filed in the Banking Department February 25, 1919.

I think it was the intention of the Legislature that there should be a continuous publication of once a week for three months and that the application should be made at the time when the notice indicates that it is to be made. This application was made more than four months after the date fixed in the notice. If this notice is sufficient, a notice of intended application published for three months in one year might be sufficient if the application were not actually made for more than a year afterward. Certainly this would not be within the Legislative intention. Is four months delay within such legislative intention? Who shall determine how much delay there may be in filing the application, if it is not filed at the time fixed by the notice?

I am, therefore, of opinion that the notice does not comply with the requirements of the Act of Assembly, and I herewith return to you the Certificate of Incorporation and the Articles of Association, without the approval of the Attorney General.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

TRUST COMPANIES.

A trust company incorporated under the Acts of April 29, 1874, P. L. 73, and May 24, 1881, P. L. 22, may lawfully buy first mortgages on real estate and issue to its customers certificates setting forth that the trust company has assigned or sold part of the bond accompanying any such mortgage to the certificate holder, and guaranteed the payment of principal and interest thereon to the holder, less a charge for the services of the company in guaranteeing and collecting the interest and paying it over.

Office of the Attorney General,
Harrisburg, Pa., March 11, 1919.

Honorable John S. Fisher, Commissioner of Banking, Harrisburg, Pa.

Sir: Your letter of the 27th ultimo, submitting a plan which has been outlined by a certain Trust Company, of Philadelphia, for the sale to its customers of an undivided interest in loans secured by bond and mortgage, and requesting an opinion as to the legality of this line of business when carried on by a trust company, is received.

This Trust Company is incorporated under Section 29 of the General Incorporation Act, approved the twenty-ninth day of April, A. D. 1874, P. L. 73, as supplemented by the Act approved the twenty-fourth day of May, A. D. 1881, P. L. 22.

The plan, as set forth in the letter of the Treasurer of said Trust Company to you, is as follows:

The Trust Company is to buy first mortgages on real estate, not over sixty per cent. of the market value, and issue to its customers certificates setting forth that said Trust Company has assigned or sold a part of the bond accompanying said mortgage to said customer. This certificate would guarantee the payment of principal and interest on that portion of the bond and mortgage assigned to the customer, less a certain percentage of said interest retained by the Trust Company to pay it for its services in guaranteeing and collecting the interest and paying the same over to the assignee or holder of the certificate.

I see nothing in the plan, as set forth, contrary to the laws relating to trust companies. In fact, trust funds are often invested by trust companies in large mortgages and certificates issued to fiduciaries, or usually to the trust company, itself, as fiduciary, for a certain portion of said mortgage, setting forth the amount of the mortgage assigned to the particular trust. In this way the funds of a trust which are in a small amount can be invested in a first class mortgage, and, in my opinion, the sale to its customers by a trust com-

pany of an undivided interest in loans secured by bond and mortgage, and certificate issued evidencing such sale in the form submitted by said Trust Company, is not in violation of any law of the Commonwealth.

• Very truly yours,

B. J. MYERS,
Deputy Attorney General.

TRIPLE SHARES.

Under the act of 1874 the installments on shares in building and loan associations may be paid at such time and place, and the stock paid off and retired, as the by-laws direct, but periodical payments cannot be provided by the by-laws to exceed two dollars on each share.

It is illegal to require installments of three or four dollars in order to retire shares in a shorter time; the limit of periodical payments is two dollars.

Office of the Attorney General,
Harrisburg, Pa., April 10, 1919.

Honorable John W. Morrison, Deputy Commissioner of Banking,
Harrisburg, Pa.

Dear Sir: Your letter of the 3d instant, addressed to the Attorney General, was duly received.

You desire to know whether a building and loan association may issue triple and quadruple shares to mature in four and three years respectively, collecting three and four dollars per share, instead of one dollar.

Clause 2 of Section 37 of the Act of April 29, 1874, P. L. 73, regulates the issuance of the shares of building and loan associations and provides, among other things,

“that the capital stock may be issued in series, but no such series shall in any issue exceed in the aggregate 500,000, the installments of which stock are to be paid at such time and place as the by-laws shall appoint; no periodical payment of such installments to be made exceeding two dollars on each share and said stock may be paid off and retired as the by-laws shall direct.”

This language seems to be plain. The installments on shares of building and loan associations may be paid at such time and place, and the stock paid off and retired, as the by-laws direct, but periodical

payments cannot be provided by the by-laws to exceed two dollars on each share. This is a limitation which the building and loan association cannot exceed.

Therefore, you are advised that it would be illegal to require installments of three or four dollars in order to retire shares in a much shorter time than would be possible if the periodical payments did not exceed two dollars.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General

IN RE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES, ETC.

A corporation subject to be examined by the bank examiners under the Act of Feb. 11, 1895, P. L. 4, as amended by the Act of May 20, 1901, P. L. 345, must pay the statutory fee for each year, regardless of whether it was actually examined or not during any year.

Office of the Attorney General,
Harrisburg, Pa., April 10, 1919.

Honorable John W. Morrison, Deputy Commissioner of Banking,
Harrisburg, Pa.

Dear Sir: Your favor of the 3rd instant, addressed to the Attorney General, was duly received.

You ask to be advised whether the Pennsylvania Company for Insurances on Lives and Granting Annuities, should be required to pay the fees for the year 1918.

It appears that the company paid on May 2, 1918, the sum of \$5,539.56 for fees for the year 1917, but no examinations were made during the year 1917, and the question now arises whether the company should pay for the year 1918, inasmuch as no examination was made of that company for the year previous.

The answer to this question depends upon whether or not the fees required by the 4th section of the Act of February 11, 1895, as amended by the Act of May 20, 1901, P. L. 345, are specific fees to cover the examination of the corporation paying the same, or whether they are the contributions required by law to cover the general expense of the Banking Department in making the examinations of all corporations.

If the law requires the Pennsylvania Company for Insurances on Lives and Granting Annuities to pay for its own examinations, and it

paid for examinations in 1917, when none were made, it would be equitable to relieve it from payment in 1918, but if the law requires the corporation to contribute to the Banking Department its proportion of the expense of making examinations, then the fact that an examination was not made in any particular year, would not entitle the corporation to pass the next year without the payment of its contribution to the expenses of the Banking Department.

The Act of Assembly above referred to, provides, in part, as follows:

"It shall be the duty of the Commissioner of Banking, as often as he shall deem proper, to examine or cause to be examined the books, papers and affairs of each and every corporation subject to supervision as aforesaid, and whenever he shall deem it necessary or proper, he shall assign a qualified examiner or examiners to make such examinations. *** The compensation of examiners and expenses of examinations provided for by this Act shall be paid by warrant drawn by the Auditor General on the State Treasurer, upon requisition made by the Commissioner of Banking, *and in order to help pay such expenses* all corporations subject to the supervision of the Banking Department, (except building and loan associations doing business exclusively within this State) shall annually, upon the first Monday of May, in each year, pay into the Treasury of the State the following amounts, in addition to any taxes or fees imposed by existing laws upon such corporations, the sum of twenty-five dollars (\$25) each, and in all cases of such corporations having capital stock, for each one hundred thousand dollars (\$100,000) of capital stock, or fractional part thereof, in excess of \$100,000 the sum of \$5.00 shall be paid annually at the time aforesaid; and all such corporations shall pay annually at the time aforesaid, the sum of two cents for each \$1,000 of assets, and the sum of two cents for each \$1,000 of trust funds, which it may have."

It is apparent that the contribution to be paid by corporations having capital stock under the supervision of the Banking Department, is determined by the amount of the capital stock. The Legislature did not intend that each corporation should pay the exact amount expended in making the examination of the corporation. It intended that such expenses should be covered by general contributions of all corporations under the supervision of the Banking Department, based upon the amount of the capital stock. That being the scheme adopted, a corporation could not be relieved from paying its annual contribution merely because no examination of it was made during the calendar year. It might easily happen that the

Banking Department should see fit to make an examination of a corporation in January, and another in December of the same year, and not make any examination during the entire calendar year following. In such case if the corporation paid its annual contribution for the year in which it was twice examined, and nothing for the year in which it was not examined, it would be escaping what it should equitably be required to pay.

I am, therefore, of opinion, and so advise you, that the fact that the Pennsylvania Company for Insurances on Lives and Granting Annuities must pay the fees provided by law for the year 1918, notwithstanding there was no examination made of that company during the year 1917.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

BANKING DEPARTMENT—ACT OF MAY 21, 1919.

There is no such conflict between Sections 9 and 52 of the Act of May 21, 1919, as to invalidate either of them.

The legislature has power to appropriate a sum sufficient to meet the deficiency between the cost of the examination of building and loan associations by the Banking Department and the fees paid by building and loan associations for such examination.

Office of the Attorney General,
Harrisburg, Pa., May 26, 1919.

Honorable John S. Fisher, Commissioner of Banking, Harrisburg, Pa.

Sir: Your request for an opinion as to whether or not Section 9 of the Act of May 21, 1919, relating to the organization, maintenance and operation of the Banking Department, and Section 52 of the same Act are in conflict, is received.

Section 9 (a) of the Act aforesaid provides that

“The expenses of the banking department shall, until the first day of June one thousand nine hundred and nineteen, be paid by the State on requisition of the Commissioner of Banking and warrant of the Auditor General out of funds appropriated therefor.

"From and after the date of the approval of this act all moneys derived by the banking department from fees, assessments, charges, penalties and otherwise shall be paid by the Commissioner of Banking into the State treasury for safe keeping, and shall by the State Treasurer be placed in a separate fund to be available for the use of the banking department, upon requisition of the Commissioner of Banking. All such moneys so paid into the State treasury are hereby specifically appropriated to the banking department for the purpose of paying the salaries of the commissioner, the deputy commissioners, the examiners and the other employees of the department, and the expenses of the department, including the rental of such rooms or quarters as the Commissioner of Banking may deem necessary outside of the capitol.

"The Auditor General shall upon requisition of the Commissioner of Banking, from time to time, draw warrants upon the State Treasurer for the amounts specified in such requisitions, not exceeding, however the amount in such fund at the time of the making of any such requisitions."

Section 52 provides—

"This act shall take effect as of May first, nineteen nineteen."

Upon first reading, these sections seem to be in conflict, for Section 9 provides how the expenses of the Banking Department shall be paid from and after the date of the approval of the Act, and Section 52 provides that the Act shall go into effect as of May first, nineteen nineteen, while Section 9 also provides that the expenses of the Banking Department until the first day of June shall be paid out of funds appropriated therefor. Upon a careful examination of the whole Act, however, I am of the opinion that the sections above quoted do not conflict. The appropriation for the expenses of the Banking Department made by the Legislature of the Session of 1917 continues until the end of the present fiscal year, to-wit, May 31, 1919, and Section 9 of the Act provides that the expenses until the first day of June shall be paid out of this appropriation. Section 52 provides that the Act shall go into effect as of the first of May. Then the expenses of the Department from the time the Act goes into effect, or from the time the Commissioner of Banking starts to reorganize his Department, up until the first of June would be paid out of this appropriation. In other words, the expenses of the Banking Department from May 1 to June 1, 1919 shall be paid out of the appropriation for that Department as heretofore.

The Commissioner, however, is authorized to immediately recognize the Banking Department, in accordance with the provisions of

the Act, and all moneys received from the date of the approval of the Act shall be paid by him into the State treasury to be placed in a separate fund for the Banking Department. This means that all funds collected from the date of the approval of the Act shall be paid by the Commissioner into the State treasury.

In the construction of statutes the various sections should be read that the whole shall stand, if possible, and I am of the opinion that there is no such conflict between Sections 9 and 52 of this Act as to invalidate either of them.

You have also requested my opinion on the question whether or not the Legislature can make an appropriation to the Banking Department to cover the deficiency occasioned by the examination of building and loan associations.

Section 9 (b) of the Act provides that all the expenses incurred in the operation of the Banking Department shall be charged to, and paid by, the corporations and persons subject to the supervision of the Department in equitable proportions: provided, however, that the charge for the examination of building and loan associations shall not exceed the sum of five dollars for each one hundred thousand dollars, or fraction thereof, of assets of said building and loan association, with a minimum charge to said building and loan association of ten dollars. I understand there are about 2,200 building and loan associations subject to the provisions of this section and that the fees from said associations for examination will amount to about \$32,000, which amount will not be sufficient to pay for the examination of said associations. In my opinion, there is no legal reason why the Legislature cannot appropriate a sum sufficient to meet the deficiency thus created by the examination of these buildings and loan associations.

Yours very truly,

B. J. MYERS,
Deputy Attorney General.

BANKS AND BANKING.

The Banking Department should render bills to the various banking institutions of the State, for the year 1918, under the Act of February 11, 1895, and not under the Act of May 21, 1919. .

Office of the Attorney General,
Harrisburg, Pa., June 5, 1919.

Hon. John S. Fisher, Commissioner of Banking, Harrisburg, Pa.

Sir: I have received the request of your Department under date of May 29, 1919, for an opinion as to whether or not the Banking

Department should render bills to the various banking institutions of the State for the year 1918 under the Act of February 11, 1895, and its supplements, or whether the Commissioner of Banking shall make a levy upon the banking institutions under the Act of May 21, 1919.

I understand by the year 1918 you mean the year beginning May 1, 1918 and ending May 1, 1919.

The Act of May 21, 1919, provides in Section 9 (b)—

“That all expenses of the Banking Department shall be charged to and paid by the corporations and persons subject to the supervision of the Department in equitable proportions at such times and in such manner as the Commissioner of Banking shall by general rule or regulation annually prescribe.”

Section 52 of the same Act provides that the Act shall take effect as of May 1, 1919.

The services rendered by the Banking Department for the year 1918, for which the collections are about to be made, were certainly under the provisions of the Act of February 11, 1895, and its supplement, and as they were rendered prior to the approval of the Act of 1919, to-wit: May 21, 1919, and prior to the time at which the Act goes into effect in accordance with Section 52, to-wit: May 1, 1919, in my opinion there is no authority conferred upon the Commissioner by the Act of May 21, 1919, for the collection of any fees for the year 1918, and the bills should therefore go out as heretofore to the various banking institutions of the State under the Act of February 11, 1895.

Very truly yours,

B. J. MYERS,
Deputy Attorney General.

NATIONAL BANKS.

National banks, before doing the business of executor, trustee, administrator, guardian, etc., must comply with regulations relating to trust companies incorporated in Pennsylvania.

Office of the Attorney General,
Harrisburg, Pa., October 14, 1919.

Honorable John S. Fisher, Commissioner of Banking, Harrisburg, Pa.

Sir: Your request to be advised whether or not the Department of Banking shall continue to require National banks before doing the business of executor, trustee, administrator, etc. to comply with the opinion of the Attorney General of June 26, 1918, has been received by this Department.

You are advised as follows:

On June 26, 1918, Honorable Francis Shunk Brown, Attorney General, advised Honorable Daniel F. Lafean, Commissioner of Banking of the Commonwealth of Pennsylvania, that National banks desiring to act as trustee, executor, administrator or registrar of stocks and bonds must comply with the statutes of the Commonwealth of Pennsylvania relating to the same subjects, and submit to examination by the Commissioner of Banking so far as their trust business is concerned.

In addition the Act of May 21, 1919, being Act No. 130, provides that the supervision of the Banking Department, its duties and powers—

“shall also extend and apply to all national banking associations, located in this State, now or hereafter incorporated under the laws of the United States, which shall, in pursuance of Federal law or regulation, be granted a permit to act or shall act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity.”

The opinion of Attorney General Brown, above referred to, quotes the opinion of Mr. Chief Justice White of the Supreme Court of the United States in the case of the First National Bank of Bay City vs. Fellows, 244 U. S. 216, in which the Chief Justice says:

“Of course, as the general subject of regulating the character of business just referred to is peculiarly within state administrative control, state regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came, in virtue of authority conferred upon them by Congress, to exert such particular powers.”

The Act of 1919, above referred to, in my opinion is, therefore, applicable to all National banks who desire to exercise the functions of executor, administrator, trustee, etc. In my opinion the regulations prescribed by the Act of May 21, 1919, above referred to, are not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate against National banks.

The Act of July 17, 1919, authorizing banking companies incorporated and organized under the laws of the Commonwealth, and having capital stock at least equal to the capital stock which trust companies are required by law to have to act in any fiduciary capacity, confers upon banking companies so incorporated, the right to act in a fiduciary capacity upon complying with the provisions of the

Act, and subjects them to the same regulations of the Banking Department as National banks attempting to perform the same functions.

You are, therefore, advised to continue to require National banks before doing the business of executor, trustee, administrator, guardian, etc. to comply with the regulations relating to trust companies incorporated under the laws of this Commonwealth.

Very truly yours,

W. I. SCHAFFER,
Attorney General.

SALE OF STEAMSHIP TICKETS.

National Banks, State Banks and Trust Companies are exempt from the provisions of the Act of July 17, 1919.

Notice of application for license to sell steamship tickets should be advertised once a week for thirty days.

Where no legal journal is published in the county from which an application for license to sell steamship tickets is made, nor in any county adjacent thereto, at such times that the applicant can comply with the requirements of the Act of July 17, 1919, advertisement in a legal journal will not be required.

An applicant for license to sell steamship tickets must file a bond with two sufficient sureties, or a surety company. Deposits of collateral in lieu of sureties cannot be approved.

Office of the Attorney General,
Harrisburg, Pa., October 30, 1919.

Honorable John S. Fisher, Commissioner of Banking, Harrisburg, Pa.

Sir: Your various requests for opinions interpreting certain provisions of Act No. 397, approved the seventeenth day of July, A. D. 1919, entitled "An act requiring licenses to sell steamship tickets or orders for transportation to or from foreign countries, and providing penalties," have been received by this Department. They are as follows:

First: Is the last proviso in Section 1, which reads as follows:

"And provided further, That the provisions of this act shall not apply to any duly incorporated national bank, State bank, or trust company."

intended to exempt national banks, State banks, or trust companies from the necessity of taking out a license under the act?

Second: Does the provision of the act, which requires the notice to be advertised in one daily newspaper of general circulation in the county in which the applicant intends to do business for thirty days, require the insertion daily or once a week for four weeks during the period of thirty days?

Third: The act provides for the publication in a legal journal if any is published in the county, and if not, then in a legal journal of the next adjacent county having such journal, for thirty days. Some legal journals are only issued quarterly or semi-annually.

Fourth: Does the provision of the act, which makes it the duty of the Commissioner of Banking to require the applicant for a license to file with the application a bond in the penal sum of one thousand dollars, with two or more sufficient sureties, who shall be freeholders within the Commonwealth of Pennsylvania, or an approved surety company bond, also authorize the Commissioner of Banking to accept the applicant's bond without any sureties secured by a deposit of liberty bonds or other approved securities.

I will answer these queries in their order:

First: The proviso contained in Section 1, that the provisions of this act shall not apply to any duly incorporated national bank, State bank, or trust company, in my opinion was clearly intended to exempt national banks, State banks or trust companies from the necessity of taking out a license under the act, and to exempt such corporations from all the provisions of the act. This is confirmed by the history of the passage of the Act of Assembly through the Legislature in 1919. The bill was originally introduced on May 5, 1919, by Hon. James A. Walker, in the House of Representatives and did not contain the proviso above referred to. It was referred to the Committee on Banks and Banking and reported from said Committee of the House, May 6, 1919, without said proviso. It was amended on second reading in the House of Representatives, May 19, 1919, without said proviso. It was amended on third reading in the House of Representatives, May 27, 1919, and was again amended on third reading in the House on June 4, 1919, without the proviso, and the proviso only appeared in the bill as re-reported from the Committee on Banks and Building & Loan Associations in the Senate on June 19, 1919. To my mind this indicates clearly that, upon the consideration of the measure, it was found that it would apply to national banks, State banks and trust companies, and in order to express the legislative intention that it should not apply to such banks and trust companies, the proviso was inserted.

Second: Although the act requires the notice of the application for license to be advertised in one daily newspaper of general circu-

lation in the county in which the applicant intends to do business and also in the legal journal of such county, if any there is, and if not, then in the legal journal of the next adjacent county having such journal, for thirty days, I do not think it was the intention to compel the advertising in each daily issue of the daily paper for thirty days, but simply that the application should be advertised as other applications for like purposes are advertised, that is, once a week for thirty days. You are therefore advised not to require the advertisement to be inserted daily.

Third: Where no legal journal is printed in the county from which the application is made, or in any county adjacent thereto, each week, or at such time that the applicant can comply with the regulation relating to the publication in a legal journal during the thirty days of his advertisement of an application for license, you are advised not to require the applicant to advertise in a legal journal.

Fourth: The provision of the act relating to the bond and sureties to be required is very clear. It makes it the duty of the Commissioner of Banking to require the applicant for a license to file a bond with two or more sufficient sureties, or surety company. This leaves no discretion in the Commissioner for approval of a bond without sureties where the applicant deposits liberty bonds or other securities therewith. It is your duty, as Commissioner of Banking, to require the applicant to file a bond in the manner and form prescribed by the act. If you feel that the sureties on any bond are not sufficient, you may require additional sureties, or corporate surety, but you have no authority to accept liberty bonds or other securities as collateral security therefor.

Very truly yours,

Bernard J. Myers,
Deputy Attorney General.

IN RE DEMAND LIABILITIES.

The words "immediate demand liabilities" in Section Two of the Act of 1907, P. L. 189, include bills payable on demand as well as deposits payable on demand of banks and trust companies, so that in fixing the amount of the reserves of such institutions at fifteen per centum, demand deposits, bills payable on demand and all other demand liabilities must be included among the demand liabilities.

In fixing the liabilities of banks and trust companies, a distinction should be made between bills payable on demand and bills payable on time. Bills payable on time need not be considered in computing the amount of reserve to be carried for the protection of demand deposits; which reserve shall only be fifteen per centum of demand liabilities.

Office of the Attorney General,
Harrisburg, Pa., October 30, 1919.

Honorable John S. Fisher, Commissioner of Banking, Harrisburg, Pa.

Sir: There has been received by this Department your request for an opinion as to whether or not bills payable are to be calculated among demand liabilities of banks and trust companies incorporated under the laws of this Commonwealth in fixing the amount of the reserves of such institutions.

The Act of 1907, P. L. 189, entitled:

"To provide for the creation and maintenance of a reserve fund in all banks, banking companies, savings banks, savings institutions, companies authorized to execute trusts of any description and to receive deposits of money, which are now or which may hereafter be incorporated under the laws of this Commonwealth, and in all trust companies or other companies receiving deposits of money, which may have been heretofore or which may hereafter be incorporated under section twenty-nine of the act approved April twenty-ninth, one thousand eight hundred and seventy-four, entitled 'An act for the creation and regulation of corporations', and the supplements thereto."

provides that all banks, banking companies, savings banks, savings institutions, companies authorized to execute trusts of any description and to receive deposits of money incorporated under the laws of this Commonwealth, and all trust companies or other companies receiving deposits of money, incorporated under the laws of this Commonwealth, are required to create and maintain a reserve fund.

Section 2 of the act provides:

"Every such corporation receiving deposits of money subject to check or payable on demand shall at all times have on hand a reserve fund of at least fifteen per centum of the aggregate of all its immediate demand liabilities."

Section 3 of the act provides:

"Every such corporation receiving deposits of money payable at some future time shall at all times have on hand a reserve fund equal to seven and one-half per centum of all its time deposits."

In my opinion the words in section 2, "immediate demand liabilities" include bills payable on demand as well as deposits payable on demand. I think this position is fortified by section 4 of the act

itself, which indicates the Legislative intention clearly to be to protect the depositors in such institutions by requiring a reserve calculated on all demand liabilities to be maintained; for section 4 of the act sets forth that "immediate demand liabilities shall include all deposits payable on demand, and all items in the nature of claims payable on demand"; and, "time deposits shall include all other deposits not payable by the contract of deposit on demand."

The very evident intention of the Legislature was to safeguard the moneys placed upon deposits with such institutions by depositors dealing therewith, and it seems to me to be just as important to maintain a reserve for the protection of depositors against the unlawful or injudicious acts of directors of such corporations in borrowing money on bills payable of the corporations, as it is to protect them from unlawful and injudicious acts of the directors in lending money or using money which the depositors deposit with them.

A careful scrutiny of the definitions in section 4 of the act, to wit, "immediate demand liabilities" and "time deposits" will demonstrate that "immediate demand liabilities" unlike "time deposits", include other than deposits, to wit, "all items in the nature of claims payable on demand." Items in the nature of claims payable on demand would include bills payable, cashiers' checks, etc., and I am, therefore, of the opinion that the reserve to be maintained on account of deposits of money subject to check or payable on demand should be calculated on the basis of fifteen per centum of the demand deposits, bills payable on demand and all other demand liabilities.

A distinction should be made between bills payable on demand and bills payable on time. Bills payable on time need not be considered in computing the amount of reserve to be carried for the protection of demand deposits; which reserve shall only be fifteen per centum of demand liabilities.

Yours very truly,

BERNARD J. MYERS,
Deputy Attorney General.

BANKS—LOANS—SECURITY.

Banks incorporated under the laws of Pennsylvania have no authority to loan their funds on the security of second mortgages or other liens upon encumbered real estate.

Office of the Attorney General,
Harrisburg, Pa., December 3, 1919.

Honorable John S. Fisher, Commissioner of Banking, Harrisburg, Pa.

Sir: There has been received at this Department, your request for an opinion as to whether or not State banks incorporated under

the provisions of the Act of 1876 are prohibited from lending money on promissory notes and accepting as additional collateral security to said notes mortgages which are second liens on real estate.

The Act of 1876, P. L. 161, Section 7, provides as follows:

"All associations incorporated under the provisions of this act shall have the power and may borrow or lend money for such period as they may deem proper, may discount bills of exchange, foreign or domestic, promissory notes or other negotiable paper, and the interest may be received in advance, and shall have the right to hold in trust or as collateral security for loans, advances or discounts, estate, real, personal or mixed, including the notes, bonds, obligations or accounts of the United States, individuals or corporations, and to purchase, collect and adjust the same, and to dispose thereof for the benefit of the said corporation or for the payment of the debts as security for which the same may be held: Provided, That no interest shall be paid directly or indirectly for any money deposited with such association, except foreign correspondents or correspondents in other states on daily balances, and then at a rate not to exceed three per centum per annum."

The purpose of this Act, as set forth in its title, is to provide "for the incorporation and regulation of banks of discount and deposit", and the Act nowhere authorizes banks incorporated by authority of its provisions to lend on the security of mortgages, or invest their funds in the purchase of mortgages.

The Act of 1901, P. L. 639, authorizes banks chartered under the laws of the Commonwealth to loan money on the security of bonds and mortgages on *unincumbered real estate situated in this state*, and to invest their funds in the purchase of such mortgages. This latter Act was amended by the Act of 1913, P. L. 972. This amendment, however, only authorized an increase in the amount which might be loaned or invested by banks in this way.

A careful consideration of these Acts of Assembly leads me to the conclusion that banks incorporated under the Act of 1876 were never intended by the Legislature to have authority to loan money on the security of mortgages, nor to invest their funds therein, being incorporated, as the title of the Act shows, as banks of discount and deposit. The Act of 1901, however, enlarged their powers by giving them authority to loan money on the security of mortgages on *unincumbered real estate* and invest their funds in the purchase of such mortgages.

I am, therefore, of the opinion that banks incorporated under the laws of this Commonwealth have no authority whatever to loan their funds on the security of second mortgages or any other liens on *incumbered real estate*.

A bank that loans money on a promissory note and accepts as additional collateral security to said note, at the time the loan is made, a mortgage which is a second lien on real estate practices a subterfuge to evade the clear and distinct provisions of the law; and the fact that such banks are nowhere prohibited by Act of Assembly from loaning money in this way does not empower them to do so by implication.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General.

BUILDING AND LOAN ASSOCIATIONS.

Building and Loan Associations have the right to charge premiums on loans with stock of the association as collateral, provided the loans are made to the stockholders bidding the highest premium therefore at an open meeting of the association.

Office of the Attorney General,
Harrisburg, Pa., January 8, 1920.

Honorable John S. Fisher, Commissioner of Banking, Harrisburg, Pa.

Sir: There has been received by this Department your request for an opinion as to whether building and loan associations incorporated under the Act of April 29, 1874, P. L. 73, have the right to charge premiums when loans are made to shareholders who assign their stock as collateral therefor, without the security of a mortgage.

Section 37 of the Act of April 29, 1874, P. L. 96, incorporating building and loan associations, provides as follows:

"They 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* * * *."

Clause 4 of the same section is as follows:

"That the said officers shall hold stated meetings, at which the money in the treasury, if over the amount fixed by charter as the full value of a share, shall be

offered for loan in open meeting, and the stockholder who shall bid the highest premium for the preference or priority of loan, shall be entitled to receive a loan of not more than the amount fixed by charter as the full value of a share for each share of stock held by such stockholder * * *."

You will note that the Act authorizes building and loan associations not only to loan money on bond and mortgage, but also on other security, and premiums can be charged thereon, provided the money is loaned in accordance with the provisions of Clause 4 of Section 37, i. e., that the money in the treasury be offered for loan in open meeting and the stockholders given an opportunity to bid a premium for the same.

In *Stiles' Appeal* 95 Pa. 122, the Supreme Court held that a premium on money in an association could only be charged where the law relating to the association has been strictly complied with. The association in that case was one incorporated under the Act of 1859, which is supplemented by the Act of 1874, and contained practically the same provision relating to offering the money in open meeting and loaning it to the stockholder bidding the highest premium therefor.

In *Klein vs. Pennsylvania Savings Fund and Loan Association*, *Pittsburgh Legal Journal*, Old Series, Vol. 52, page 109, Judge Frazer decided the same thing with relation to an association incorporated under the Act of 1874, and quoted *Stiles' Appeal*, supra.

The decisions of the Courts are all to the point that a premium can only be charged where the money is bid for in open meeting, thus avoiding any semblance of usury.

Inasmuch as the Act authorizes associations incorporated under its provisions to loan money on other securities, as well as bonds and mortgages, I am of the opinion that associations have the right to charge a premium on loans with the stock of the association as collateral, provided the loans are made to the stockholders bidding the highest premiums therefor at an open meeting of the association, in accordance with the provisions of the Act of Assembly hereinbefore quoted.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General.

BUILDING AND LOAN ASSOCIATIONS.

Under section 1 of the Act of May 14, 1913, P. L. 205, which makes it lawful for a building and loan association to set aside from the net profits a sum, not to exceed 5 per cent. thereof, each year as a reserve fund for the payment of contingent losses, the directors may not take any sum from the matured value of a series for this purpose. An association desiring to avail itself of the act should make the deduction from the profits on all its business for the year and not place the whole burden on a single series which happens to mature at the end of the year.

Office of the Attorney General,
Harrisburg, Pa., January 22, 1920.

Honorable John W. Morrison, First Deputy Commissioner of Banking, Harrisburg, Pa.

Sir: Your request for an opinion as to whether or not a building and loan association, whose shares showed a mature value of \$201.74, was justified in deducting \$1.74 from each share and allowing the shareholder \$200.00, the par value thereof, has been referred to me.

The Act of May 14, 1913, P. L. 205, Section 1, provides:

"That it shall be lawful for any mutual savings fund or building and loan association, now incorporated or hereafter to be incorporated:

"(a) To set aside from the net profits a sum, not to exceed five per centum thereof each year, as a reserve fund for the payment of contingent losses, until the total amount of such fund so set aside shall equal five per centum of the assets of such association * * *."

In connection with your request for an opinion on this matter, you have forwarded a considerable amount of correspondence and the Thirteenth Annual Report of the Building and Loan Association whose directors deducted the sum of \$1.74 from the amount paid the shareholder.

This report for the year ending September 15, 1919, shows the "present value" of stock of the second series marked "matured" to be \$201.74. If, therefore, that was the matured value of the stock, the shareholder was entitled to receive the matured value and the directors had no right to deduct from the matured value any sum to be set aside for contingent losses.

The par value of \$200.00 had evidently been reached some time prior to the date of September 15, 1919, at which time it had reached the value of \$201.74. The regular meeting of the Association was the second Thursday of each month, and the second Thursday of September, 1919, was on the 11th of September. The regular meeting

of the Association in August was on the 14th of August. In order to bring his share of stock to the value set forth in the report as of September 15th, it was necessary for the shareholder to pay his dues at the meeting on the 11th of September and the meeting on the 14th of August. Presumably the shares matured at a value of \$200.00 some time between the regular meetings for the months of August and September. When they matured the shareholder was entitled to his money; that is, the par value of the shares, and if the series was continued, and he paid in afterward, he was also entitled to the additional value over and above the par value of the shares.

If the directors of the Association were disposed to set aside a certain amount out of the profits of the Association for the year to meet contingent losses, in accordance with the Act of 1913 before referred to, they could have done so, and they should have done so before the stock of a series matured.

This amount should have been deducted from the profits of the Association on all its business for the year and not arbitrarily deducted from a sum which was the value of the shares of a particular series at the date of the end of the year, to wit, September 15th.

In my opinion the directors of the Association are not justified in deducting the sum of \$1.74 from each share under the stated facts, as submitted in the correspondence and report hereinbefore referred to, and you are therefore so advised.

Yours very truly,

BERNARD J. MYERS,
Deputy Attorney General.

POLISH-AMERICAN STEAMSHIP AGENCY.

The Act of June 19, 1911, P. L. 1060, regulating the business of receiving money on deposit or for transmission to others, does not authorize corporations, either domestic or foreign, to be licensed to do such business.

Each agent or solicitor of the A steamship agency, a corporation incorporated under the laws of another state, must be licensed as an individual under the provisions of the Act of 1911, to solicit and receive money to be transmitted to the steamship agency in such state and by the agency to persons in foreign countries.

Office of the Attorney General,
Harrisburg, Pa. January 23, 1920.

Honorable Peter C. Cameron, Second Deputy Commissioner of Banking, Harrisburg, Pa.

Sir: There has been received at this Department your request for an opinion as to whether or not—

(1) A foreign corporation can qualify under the Act of June 19, 1911, entitled—"An act to provide for licensing and regulating private banking in the Commonwealth of Pennsylvania; and providing penalties for the violation thereof," to engage in the business of receiving deposits of money for safe-keeping or for transmission to another; and

(2) Whether such corporation has the right to engage in such business within this State through the medium of branch agents, or otherwise, without obtaining a license.

I understand this request for an opinion is based upon a letter to you from the Polish-American Steamship Agency, a corporation incorporated under the laws of the State of New York and duly licensed to engage in the money exchange business by the State of New York, requesting to be advised under what conditions that Company can carry on a money exchange business in the State of Pennsylvania, and stating further that in order to do so it may be necessary to have solicitors in the State of Pennsylvania.

The Act approved the 19th day of June, A. D. 1911, P. L. 1060, "to provide for licensing and regulating private banking in the Commonwealth of Pennsylvania; and providing penalties for the violation thereof," sets forth that no individual, partnership or unincorporated association shall hereafter engage, directly or indirectly, in the business of receiving deposits of money for safe-keeping, or for the purpose of transmission to another, or for any other purpose, without having first obtained a license to engage in such business.

Section 8 excepts from the provisions of the Act—(1) Banks incorporated by the Commonwealth of Pennsylvania; (2) Hotel Companies; (3) Express companies or telegraph companies receiving money for transmission; (4) Individuals, partnerships or unincorporated associations who file with the Commissioner of Banking a bond in the sum of \$100,000; or deposit securities with the Commissioner of Banking; (5) Licensed brokerage firms; (6) Firms engaged in private banking for some years prior to the passage of the act.

In my opinion, the Act in no way applies to corporations either domestic or foreign. It does not authorize such corporations to be licensed to do such business, and if a domestic corporation cannot be licensed to engage in the business contemplated by this Act of Assembly, certainly a foreign corporation cannot be licensed to engage in the same business.

You are, therefore, advised that each agent or solicitor of the Polish-American Steamship Agency, a corporation incorporated under the laws of the State of New York, must be licensed as an individual under the provisions of the Act of 1911, *supra*. in order to solicit

and receive money to be transmitted to the Polish-American Steamship Agency in New York, and by the Polish-American Steamship Agency in New York to persons in foreign countries.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General.

BUILDING AND LOAN ASSOCIATIONS.
NO. 2.

Supplementing opinion of January 8, 1920.

Office of the Attorney General,
Harrisburg, Pa. January 30, 1920.

Honorable John S. Fisher, Commissioner of Banking, Harrisburg, Pa.

Sir: I desire to supplement my opinion of January 8, 1920, on the question as to whether building and loan associations incorporated under the Act of April 29, 1874, P. L. 73, have the right to charge premiums when loans are made to shareholders who assign their stock as collateral therefor, without the security of a mortgage, by calling your attention to the Act of May 14, 1913, P. L. 205, which makes it lawful for building and loan associations to provide in their by-laws that the loans shall be made first to the members of the associations, or to persons intending to become members, who shall bid the highest premiums for the preference or priority in procuring loans, and also makes it lawful for the borrowers from such associations to agree in writing upon a given rate of premiums, not to exceed two per centum per annum upon the amount of the loan, without bidding for preference or priority.

You are, therefore, advised that building and loan associations have the right to charge premiums on loans with the stock of the associations as collateral, provided the loans are made to the stockholders bidding the highest premiums therefor at an open meeting of the association, as set forth in my opinion of January 8, 1920, and such associations also have the right to charge a premium on loans with the stock of the associations as collateral, provided the loans are made to members of the associations or those intending to become members, upon an agreement in writing signed by the borrowers to pay a given rate of premium not to exceed two per centum per annum, provided such provision is set forth in the by-laws of the associations, in accordance with the Act of 1913 above quoted.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General.

STATE BANK CASHIER.

The Act of May 13, 1876, § 18, P. L. 161 does not prohibit a cashier of a banking company, organized under that act, from performing the duties of the office of secretary of a building and loan association. The performance of the duties of the latter office does not constitute an engaging in another "profession, occupation or calling" other than that of cashier, contrary to that act, unless his duties as secretary interfere with the performance of his duties as cashier.

Office of the Attorney General,
Harrisburg, Pa., March 25, 1920.

Honorable John W. Morrison, First Deputy Banking Commissioner,
Harrisburg, Pa.

Sir: There has been received at this Department your request for an opinion as to whether the cashier of a State Bank, incorporated under the Act of May 13, 1876, can, at the same time, hold the office of secretary of a building and loan association; and, whether the former opinion of Hon. William M. Trinkle, given your Department, June 20, 1912, is reversed by the opinion of the Superior Court in *Solomon vs. Moyer*, *Superior Court Report*, Vol. 71, page 4.

Section 18 of the Act of May 13, 1876, P. L. 161, provides, that—

"No cashier of any corporation under this act shall engage in any other profession, occupation or calling, either directly or indirectly, than that of the duties appertaining to the office of cashier; * * *"

In his opinion of June 12, 1912, Mr. Trinkle finds that this act prohibits a cashier of a banking company, organized under the Act of 1876, from performing the duties of the office of treasurer of a building and loan association for the reason that the performance of the duties of the latter office constitutes an engaging in another "profession, occupation or calling", other than that of the duties appertaining to the office of cashier.

In *Solomon vs. Moyer*, 71 Super. Ct. Rep. 4, Judge Kephart, in delivering the opinion of the court, said:

"It was not the purpose of this act to prescribe as law that a cashier engaging in any single transaction would be brought within the terms of the act. It has reference to a general occupation, profession or calling. A single purchase or business transaction such as here made, nor an incidental employment in some other capacity by a cashier, would not be within the intendment of the act. The language has a much wider significance. It

embraces employment or business by which one usually gets his living. Many cashiers of State banks have other occupations or employment, as treasurers in building and loan associations, beneficial organizations or charitable institutions, where a small compensation is paid. To sustain the appellant's contention, all of these acts are unlawful."

It is true the above language of the Court applied to the Act of March 31, 1860, Section 64, P. L. 399, but the provisions of that act are practically the same as those of the Act of May 13, 1876, P. L. 161, and it applies with equal force in the construction of the latter act.

I appreciate that so far as the practical solution of the problem in your Department is concerned, it is better that no hard and fast rule be made which provides that the cashier of a State Bank either may or may not be the secretary of a building and loan association. In my opinion, however, in the light of Judge Kephart's opinion cited above, the law does not prevent the cashier of a State Bank from filling the office of secretary of a building and loan association. The application is for you. In rural communities the office of secretary of a building and loan association does not usually engage much of the time of the person filling the office. In large cities, it may. You have the authority to say to the cashier of a bank that he must give up the office of secretary of a building and loan association if you find that it is interfering with his duties as cashier.

Yours very truly,

BERNARD J. MYERS,
Deputy Attorney General.

BUILDING AND LOAN ASSOCIATION INTEREST.

Under the act of April 10, 1879, P. L. 17, when a borrower from a building and loan association tenders payment of loan with interest and satisfaction fee, it is the duty of the officers to accept and satisfy the mortgage notwithstanding the fact that such tender is not made at a regular meeting; interest cannot legally be collected from the date of tender to the next regular meeting.

Office of the Attorney General,
Harrisburg, Pa., May 5, 1920.

Honorable John W. Morrison, First Deputy Commissioner of Banking, Harrisburg, Pa.

Sir: There has been received by this Department your request for an opinion as to whether a Building and Loan Association can legally collect interest from the date a borrower tendered payment

of a loan until the next regular meeting of the Association, the Association having refused to accept payment of the loan on the date it was tendered by the borrower.

The Act approved the 10th day of April, A. D. 1879 entitled:

“An Act relating to mutual saving fund, building and loan associations, regulating the mode of charging premiums, bonus or interest in advance, of with-drawals, of repayment and collection of loans, also restricting the power to levy excessive fines, and defining the rights and liabilities of married women stockholders, and prescribing the non-application to these associations of the bonus tax and registry laws for corporations”.

provides in Section 4, P. L. 17:

“A borrower may repay a loan at any time * * *”. I am of the opinion that under the above Section of the Act of 1879, when the borrower tendered the amount of his loan with interest and satisfaction fee, it was the duty of the officers of the Association to accept it and satisfy the mortgage given by the borrower, notwithstanding the fact that such tender was not made at a regular meeting of the Association.

The regular meetings of the Association are held for the purpose of the collection of dues on stock and making loans to those applying therefor. It is not necessary to have such meeting for the purpose of payment of the principal and interest due the Association on the loan.

In *Winn vs. New Southwark Building Association*, 20 *District Reports*, 625, Judge Ferguson, in the Court of Common Pleas No. 3, Philadelphia County, interpreting Section 4 of the Act of 1879 says:

“We are of opinion the proviso in the Act of 1879 was inserted for the protection of the stockholder, * * * * *.”

The question there involved was not the same as here, but the same line of reasoning can be applied to this case, and it seems to me to be contrary to the spirit of the Act to impose upon the borrower the payment of additional interest after he is ready to repay his loan in accordance with the provisions of the Act of 1879, which gives him the privilege of repaying it at any time.

You are, therefore, advised that a Building and Loan Association cannot legally collect interest from the date a borrower tenders payment of his loan to the next regular meeting of the Association.

Yours very truly,

BERNARD J. MYERS,
Deputy Attorney General.

IN RE BANK CHARTER.

An application for a charter incorporating a state bank was refused where the advertisement named certain persons as the incorporators while the application in fact was made by other persons. This was misleading and did not comply with the law. A charter application for a state bank must be advertised three months not three weeks.

Office of the Attorney General,
Harrisburg, Pa., June 17, 1920.

Honorable John W. Morrison, First Deputy Banking Commissioner,
Harrisburg, Pa.

Dear Sir: This Department is in receipt of your recent letter requesting an opinion as to whether the advertisement for the proposed Arcadia State Bank compiles with the law.

This advertisement gives notice that an application will be made to the Governor, Attorney General and Commissioner of Banking "by O. S. Gorman, J. D. Dunlap, S. McMillen, E. J. Ferrier, and G. W. McCullough" for the charter of an intended corporation, to be called the Arcadia State Bank.

The certificate of incorporation and the Articles of Association presented to the Banking Commissioner, show that O. S. Gorman, Theo. Kharas, S. McMillen, E. J. Ferrier, and G. W. McCullough, are making an application and have associated themselves together for the purpose of carrying on the banking business under this corporate name, so that the advertisement is misleading and untrue, in that it states that together with the others named, J. D. Dunlap, will make the application for this charter, whereas in his stead Theo. Kharas is making such application.

It has been the policy of the law to require thorough advertisement before the charter for a bank can be issued. Three weeks' advertisement is the usual time required for other corporations, but in the case of a charter for a bank the law requires an advertisement "in two newspapers printed in the county in which such corporate body is intended to locate, at least once a week for three *months* before such application shall be made."

So that it is the policy of the law that the community in which the intended bank is to be located, should be thoroughly advised and have an opportunity to file any objection thereto.

In this instance the public were misled. It may be that there would be no objection to an application for a charter for the Arcadia State Bank, if made by the men who were advertised to make it. On the other hand, it may be that the community would object to the incorporation of such bank if the applicant were made by Theo. Kharas. It therefore follows that the advertisement is misleading

and untrue, and the public have not been advised who the real applicants are. If no names had been given in this advertisement the public would have been put on notice and inquiry, as to who the applicants were, and would not have been misled.

But when the application names the incorporators, and other persons in fact apply for the charter, the public has been misled.

I am, therefore, of opinion that this charter can not legally be granted, pursuant to the published notice that re-advertisement is necessary.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

TRUST COMPANY AGENCY.

A Trust Company cannot be permitted to carry a certain amount of its funds at an agency established by it. Such an agency can only be operated when all of the assets of the Company are removed from the agency to the main office of the Company at the end of each day's business.

Office of the Attorney General,
Harrisburg, Pa., July 1, 1920.

Hon. John S. Fisher, Commissioner of Banking, Harrisburg, Pa.

Dear Sir: I have received your request of the twenty-third instant for an opinion as to whether or not a Trust Company incorporated under the Act of 1874 can open an agency and allow a considerable amount of funds to remain in such agency, provided the same are properly housed and safeguarded with burglary insurance.

In the opinion of Attorney General Hensel, reported in 4 District Reports, 54 and opinions of the Attorney General for 1893 and 1894, page 114, that distinguished law officer of the Commonwealth said;

"I am of the opinion that it is against public policy, against the intent and spirit of the banking laws, and in direct contravention of the fiftieth section of the Act of 1850, for banks to maintain various branches, scattered over so wide a territory as the city and county of Philadelphia. It was held by this Department and the Auditor General's Department in a case occurring at the very outset of my present official term, under the Savings Bank Act of May 20, 1889, 'that no authority exists for banks incorporated under that Act to establish branch offices or agencies.' While no such ex-

press prohibition occurs in the Act of 1874, and its supplements, authorizing an incorporation of trust companies and defining their powers, I am likewise of the opinion, and advise you, that even a trust company doing a quasi banking business, such as receiving deposits and paying out moneys, has no right to establish branches within even the municipal limits of a city and county which it has designated in its charter as the location of its place of business. For manifest reasons, the entire business of such companies should be brought within the whole view and supervision of the state's officers. If they were permitted to scatter their branches widely over the extended territory of a city like Philadelphia, such supervision would be practically impossible. The assets would be scattered and dispersed, their liabilities be unknown and undefined. *I can conceive that certain persons at certain places might be designated, during certain hours of the day, to receive and pay out moneys for a trust company located in another part of the same city, provided a full report of the operations of the day were made to the principal place of business at the close of the day, the assets transferred thereto, and the liabilities reported, so that, in effect, the business at the suboffice, or sub-agency would be actually the business of the main office transacted, for convenience, at another place, but immediately related to it, just as a messenger, officer or counsel of trust company might transact certain of its business outside of its main office; but whenever such an office became in fact, or within the contemplation of the law, a 'branch' establishment, I am of the opinion that it ought not to be permitted."*

Following the foregoing opinion Deputy Attorney General Kun, in an opinion to the Commissioner of Banking on March 22, 1916, Opinions of the Attorney General for 1915 and 1916, page 281, said:

"You are accordingly advised that trust companies, incorporated under the general incorporation Act of 1874, and its supplements, may lawfully maintain sub-offices or sub-agencies for the restricted purpose of receiving and paying out moneys, providing a full report of the operations is made to the principal place of business at the close of the day, the assets transferred thereto and the liabilities reported; but they may not maintain branch offices in the strict sense of the term for the transaction of their general business."

In an opinion to the Commissioner of Banking, Opinions of the Attorney General, 1915 and 1916, page 291, Deputy Attorney General Davis, referred to the foregoing opinions of Attorney General Hensel, and Deputy Attorney General Kun, setting forth that the legality of such sub-offices is affirmed only when

"a full report of the operations is made to the principal place of business at the close of the day, the assets transferred thereto, and the liabilities reported."

Mr. Davis says:

"Neither expediency nor inconvenience can justify a departure from these restrictions, and unless they are adhered to, such trust companies are doing business in a manner unauthorized and unwarranted by law, and which, as you state, interfere with a proper and careful examination by your Department."

You do not state in your letter that the trust company making the application to open an agency and keep a portion of its assets there, is incorporated under the Act of 1874. I take for granted that it is.

I appreciate the great danger in transferring the money back and forth, and also note that it is necessary to have considerable funds at the agency because large pay-rolls are handled at that point. Nevertheless, I can see no good reason for modifying in any way the rule laid down by Attorney General Hensel, and followed by this Department to the present time.

In my opinion the opinions of Attorney General Hensel, and Deputies Attorney Kun and Davis, correctly state the law, and I, therefore, advise you that you cannot permit the carrying of a certain amount of funds at the office of the agency of a trust company, whether the same are properly housed and safeguarded with burglary insurance or not, and such agency can only be maintained when all the assets of the company are removed from the agency to the main office of the company at the end of its day's business.

Yours very truly,

BERNARD J. MYERS,
Deputy Attorney General.

RE. LOAN COMPANIES.

A Loan Company licensed under the Act of June 17, 1915, as amended by the Act of 1919, known as the "Loan Shark Act" may not be permitted to operate a mercantile trade acceptance business, a species of banking business.

Office of the Attorney General,
Harrisburg, Pa., July 21, 1920.

Honorable John W. Morrison, First Deputy Commissioner of Banking, Harrisburg, Pa.

Dear Sir: This Department is in receipt of your request for an opinion as to whether or not a Loan Company holding a license is-

sued under the provisions of the Act of June 17, 1915, as amended by the Act of June 4, 1919, may be permitted to operate a mercantile trade acceptance business in connection with the loan business.

I note the letter of the corporation, licensed under the Act known as the "Loan Shark Act," above referred to, sets forth its plan of business as follows:

A dealer in electrical appliances sells an electric washing machine on the instalment plan, taking a lease or a conditional bill of sale from the purchaser thereof. This dealer desires to obtain the cash on the purchase immediately, and therefore, negotiates with the Loan Company a trade acceptance, which the Company discounts, taking the lease or conditional bill of sale as security therefor.

In my opinion, there is no authority at law for the Loan Company to engage in this kind of business. The Act of 1915, as amended by the Act of 1919 known as the "Loan Shark Act," entitled persons, partnerships and associations or corporations who are properly licensed to loan money in sums of \$300 or less, with or without security, to individuals, and to charge the borrowers thereof interest and fees upon various amounts as set forth in the Act. The Act specifically provides that interest shall not be payable in advance,

The business proposed to be done by the Loan Company is a banking business clearly. While the Loan Company is authorized to lend money up to \$300 in accordance with the provisions of the Act, it is not authorized to engage in a banking business, or to discount negotiable instruments, the Act specifically providing that no interest shall be charged in advance.

You are, therefore, advised that the new branch of business referred to would violate the provisions of the Act of June 17, 1915, as amended by the Act of June 4, 1919, and such a business could not be considered a part of the Loan business, nor could it be conducted separately and distinctly from such Loan business without the supervision of your Department.

Yours very truly,

BERNARD J. MYERS,
Deputy Attorney General.

BANKING.

It is not obligatory, under the provisions of the Act of May 21, 1919, P. L. 209, upon the Commissioner of Banking to take possession of and liquidate all failing corporations over which the Department has supervision. Where the Court has appointed a Receiver to liquidate, the Commissioner of Banking may, in his discretion, allow such Receiver to wind up such corporation.

Office of the Attorney General,
Harrisburg, Pa., August 10, 1920.

Honorable John S. Fisher, Commissioner of Banking, Harrisburg,
Pa.

Sir: There has been received at this Department your request for an opinion as to whether the Banking Department Act of May 21, 1919, P. L. 209, makes it obligatory upon your Department to take possession of and liquidate all corporations over which your Department has supervision.

Section 21 of the Act of May 21, 1919, P. L. 209, provides that—

“The Commissioner of Baking *may*, after hearing had upon notice given, with the approval and consent of the Attorney General, take possession of the business and property of any corporation or person subject to the supervision of the Banking Department, whenever it shall appear to him that such corporation or person”

has violated the law, the regulations of the Department, or is in a condition forbidden by the Act, as more specifically set forth in Section 21.

In my opinion this section of the Act is not mandatory upon the Commissioner of Banking in all cases of liquidation. Section 22 of the Act provides that immediately upon taking possession, as provided in Section 21, the Commissioner shall file a certified copy of the certificate setting forth that he has so taken possession in the Prothonotary's office, after the filing of such certified copy the Commissioner shall supersede any receiver previously appointed by, any Court for, or any assignee or trustee for creditors appointed by, such corporation or person.

This seems to contemplate the appointment of a receiver by the Court as heretofore, leaving to the Commissioner of Banking discretion in the matter, and making it optional with him whether to take possession and supersede the receiver so appointed by the Court, as the Commissioner sees fit or as he thinks the circumstances of the case warrant. You will note that Section 21 of the Act uses the word “may” not “shall.”

You are, therefore, advised that the Court of Common Pleas of the proper county may still appoint a receiver, upon proper application, for a corporation subject to the supervision of the Banking Department, who is authorized and empowered to proceed with the liquidation of the affairs of such corporation, unless you, as Commissioner, see fit to supersede such receiver and take posses-

sion of the corporation in accordance with Sections 21 and 22 of the Act of May 21, 1919, above referred to.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General.

IN RE TRUST FUNDS.

A trust company cannot legally invest trust funds in bonds issued by a private corporation, the security for which is a mortgage covering the real estate of the corporation. This is not a legal investment in Pennsylvania and is prohibited by Article III, Section 22, of the Constitution of Pennsylvania.

Office of the Attorney General,
Harrisburg, Pa. August 16, 1920.

Honorable P. G. Cameron, Second Deputy Commissioner of Banking,
Harrisburg, Pa.

Sir: Your request for an opinion as to whether or not a trust company under the supervision of your Department can invest trust funds in bonds issued by a certain hotel company, a private corporation, the security for which is a mortgage covering the hotel property, has been received by this Department.

Section 22 of Article III of the Constitution of Pennsylvania, provides:

"No act of the General Assembly shall authorize the investment of trust funds by executors, administrators, guardians or other trustees, in the bonds or stock of any private corporation, and such acts now existing are avoided saving investments heretofore made."

Section 41 (a) of the Fiduciary Act, approved June 7, 1917, P. L. 447, provides:

"When a fiduciary shall have in his hands any moneys the principal or capital whereof is to remain for a time in his possession or under his control, . . . such fiduciary may invest such moneys in the stock or public debt of the United States, or in the public debt of this Commonwealth, or in bonds or certificates of debt now created or hereafter to be created and issued according to law by any of the counties, cities, boroughs, townships, or school districts of this Commonwealth, or in mortgages or ground rents in this Commonwealth."

In my opinion, Section 22 of Article III of the Constitution above quoted prohibited the Legislature from authorizing the investment of trust funds in such securities as you have indicated in your request for an opinion.

In *Commonwealth ex rel. v. McConnell*, 226 Pa. 244, it was decided that this section of the Constitution repealed the Acts of April 1, 1870, P. L. 45 and April 4, 1873, P. L. 59, which authorized trustees

to invest in the bonds of the Pennsylvania Railroad Company; and the Act of March 29, 1872, P. L. 31, which authorized investments in the bonds of the Philadelphia & Reading Railway Company.

There is nothing contrary to this section of the Constitution in the Act of June 7, 1917, P. L. 447. That act does not authorize fiduciaries to invest in the bonds or stock of any private corporation.

You are therefore advised that the investment by a trust company under the supervision of your Department in the bonds issued by a private corporation, security for which is a mortgage covering the real estate owned by the private corporation, is not a legal investment under the Constitution and laws of the Commonwealth.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General.

NATIONAL BANKS ACTING AS FIDUCIARIES.

Under the Act of May 21, 1919, P. L. 209, providing that the supervision of the Banking Department shall extend to all national banking associations located in Pennsylvania which shall, in pursuance of Federal law or regulation, be granted a permit to act, or shall act, as trustee, executor or administrator, etc., national banks are bound by a rule of the department requiring trust companies to deposit uninvested trust funds, properly ear-marked as such, in some institution other than their own, notwithstanding the language of the Act of Congress of Sept. 26, 1918, § 11 (*k*), — Stat. at L. —, amending the Federal Reserve Act, which apparently permits national banks to retain trust funds awaiting investment in their own institutions under certain restrictions.

Office of the Attorney General,
Harrisburg, Pa., August 16, 1920.

Honorable John S. Fisher, Commissioner of Banking, Harrisburg, Pa.

Sir: Your request for an opinion, as to whether or not national banks engaged in fiduciary business under the provisions of the Federal Reserve Act may deposit uninvested trust funds in their own banks, has been received.

In my opinion a national bank, located and doing business in the State of Pennsylvania, engaged in fiduciary business under a permit from the Federal Reserve Board by authority of the Federal Reserve Act, cannot lawfully deposit trust funds in said national bank.

In an opinion to Hon. Daniel F. Lafean, Commissioner of Banking, on June 26, 1918, Hon. Francis Shunk Brown, Attorney General,

held that national banks desiring to act as trustee, executor, administrator, registrar of stocks and bonds must comply with the statutes of the Commonwealth of Pennsylvania relating to the same subject, and submit to examination by the Commissioner of Banking so far as their trust business is concerned.

The Act of May 21, 1919, P. L. 209, provides that the supervision of the Banking Department, its duties and powers:

“shall also extend and apply to all national banking associations, located in this State, now or hereafter incorporated under the laws of the United States, which shall, in pursuance of Federal law or regulation, be granted a permit to act or shall act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity.”

In the case of the *First National Bank of Bay City vs. Fellows*, 244 U. S. 216, Mr. Chief Justice White says:

“Of course, as the general subject of regulating the character of business just referred to is peculiarly within state administrative control. state regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came, in virtue of authority conferred upon them by Congress, to exert such particular powers.”

In an opinion to you under date of October 14, 1919, Hon. William I. Schaffer, Attorney General, held, that the Act of 1919 above referred to is applicable to all national banks that exercise the functions of executor, administrator, trustee, etc., and that the regulations prescribed by the Act of May 21, 1919, *supra* are not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate against national banks. That such regulations are not discriminatory or so unreasonable is clearly verified by the fact that banking companies incorporated and organized under the laws of the Commonwealth of Pennsylvania, desiring to act in a fiduciary capacity, are subject to the same regulations of the Banking Department as trust companies and state banks attempting to perform the same functions. This is by virtue of the Act of July 17, 1919, authorizing banking companies incorporated and organized under the laws of the Commonwealth of Pennsylvania, and having capital stock at least equal to the capital stock which trust companies are required by law to have, to act in any fiduciary capacity.

It is true that the Federal Reserve Act has been amended by the Act of September 26, 1918, so that Section 11 (k) reads as follows:

"Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Federal Reserve Board."

I understand from your communication that certain national banks take the position that they can deposit uninvested trust funds in their own institutions by virtue of this amended provision of the Federal Reserve Act. In my opinion this provision does not apply to national banks doing a fiduciary business in the State of Pennsylvania. When national banks qualify to do a fiduciary business in Pennsylvania, they accept the provisions of the Act of May 9, 1889, P. L. 159, which provide, that—

"The said companies shall keep all trust funds and investments separate and apart from the assets of the companies, and all investments made by the said companies as fiduciaries shall be so designated as that the trust to which such investment shall belong shall be clearly known."

It is a regulation of the Banking Department of the Commonwealth of Pennsylvania, and a well settled practice with relation to trust funds in this Commonwealth, that all such funds shall be absolutely segregated; and uninvested trust funds shall be deposited in some other institution properly ear-marked as trust funds. This regulation has been applied indiscriminately to trust companies, state banks qualified to do a fiduciary business under the Act of July 17, 1919, and national banks qualified to engage in fiduciary business under the Federal Reserve Act. While it is true that the Federal Reserve Act, as amended by the Act of September 26, 1918, authorizes national banks to carry uninvested trust funds in their own institutions provided United States bonds or other securities shall be set aside to protect such funds, I do not think that provision applies to the fiduciary business of national banks in Pennsylvania, and it seems to me that the policy is conclusively determined by that portion of the opinion of Mr. Chief Justice White of the Supreme Court of the United States in *First National Bank of Bay City*, 244 U. S. 216, above quoted, in which he says that the general subject of regulating the character of business just referred to (fiduciary business) is peculiarly within state administrative control; and state regulations for the conduct of such business, if

not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came, by virtue of authority conferred upon them by Congress, to exert such particular powers.

In the case cited in your communication and request for an opinion, a national bank chartered by Congress is doing a fiduciary business by virtue of authority conferred upon it by Congress and thereby exerting particular powers. Such a national bank, under Mr. Chief Justice White's opinion, clearly comes within State administrative control and State regulations for the conduct of such business are controlling upon such banks. Certainly no one can contend successfully that the regulations imposed by your Department by virtue of the authority conferred upon it by the several Acts of Assembly relating thereto are discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, for they apply to trust companies incorporated for the purpose of engaging in a fiduciary business, to state banks qualified to engage in a fiduciary business, and to national banks with authority conferred upon them by Congress to engage in fiduciary business, in an equal degree.

If, therefore, any national bank refuses to comply with the regulations of your Department relative to fiduciary business, you are advised to compel such compliance by authority of the power conferred upon you by the Act of May 21, 1919, P. L. 209, above referred to; or, by injunction to restrain said national bank from engaging in fiduciary business until it complies with the regulations of your Department relating to the deposit of uninvested trust funds.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General.

NATIONAL BANKS ENGAGING IN A FIDUCIARY BUSINESS.

National Banks which have been granted fiduciary powers by the Federal Reserve Board, and who desire to engage in a fiduciary business in Pennsylvania, must accept the provisions of the Act of May 9, 1889, P. L. 159. Any bank failing to so qualify, should be restrained by injunction in a bill in equity to be brought by the Commissioner of Banking.

Office of the Attorney General,
Harrisburg, Pa., August 16, 1920.

Honorable John S. Fisher, Banking Commissioner, Harrisburg, Pa.

Sir: There has been received at this Department several letters from the Chairman of the Federal Reserve Bank of Philadelphia, together with your replies thereto relating to national banks within

the Commonwealth of Pennsylvania which have recently been granted fiduciary powers by the Federal Reserve Board and refuse to file, with the Secretary of the Commonwealth, acceptance of the Act of May 9, 1889, P. L. 159, with your request to be advised as to whether these national banks must comply with the provisions of the Act of 1889, and the method of compelling such compliance.

In an opinion under date of August 16, 1920, I advised you that national banks, engaging in a fiduciary business, must comply with the regulations of your Department relating to such business, and deposit uninvested trust funds in institutions other than their own, notwithstanding the provision of the Federal Reserve Act, as amended by the Act of September 26, 1918. That opinion rules the present case. Banks incorporated under the laws of the State of Pennsylvania as banking institutions and desiring to engage in a fiduciary business must accept the provisions of the Act of General Assembly approved the ninth day of May, 1889, P. L. 159, and in my opinion, national banks qualified by the Federal Reserve Board under the Federal Reserve Act to engage in a fiduciary business must also qualify to engage in such business by accepting the provisions of the Act of May 9, 1889, P. L. 159, aforesaid.

If any national bank, qualified by the Federal Reserve Board by authority of the Federal Reserve Act to engage in a fiduciary business, fails or refuses to accept the provisions of the Act of May 9, 1889, P. L. 159, before referred to, you are advised to file a bill in equity in the proper court of common pleas having jurisdiction of such national bank, praying the court to issue an injunction to restrain said national bank from engaging in such fiduciary business until it complies with the laws of the State of Pennsylvania and the regulations of your Department relating thereto.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General.

SMALL LOANS ACT.

The prothonotary's fee for entry of a judgment on a note given as security for a loan under the Small Loans Act of June 17, 1915, P. L. 1012, as amended by the Act of June 4, 1919, P. L. 375, is not within the meaning of section 2 of said Act so as to prevent a lender from making his reimbursement for the payment thereof a condition precedent to his participation in the satisfaction of such judgment.

Office of the Attorney General,
Harrisburg, Pa., December 2, 1920.

Honorable John S. Fisher, Commissioner of Banking, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of November 18th, relative to the Small Loans Act of June 17, 1915, P. L. 1012, as amended by the Act of June 4, 1919, P. L. 375.

You state that a licensee under this law, confessed judgment pursuant to the authority contained in a note given as security for a loan; and you substantially inquire whether the prothonotaries' fee for entry of the judgment, is within the prohibition of section two of the Act, so as to prevent the licensee from making his reimbursement for the payment thereof a condition precedent to his participation in the satisfaction of the judgment.

The pertinent provisions of section two are as follows:

"Section 2. Any person, persons, co-partnership, association, or corporation who shall obtain a license in accordance with the provisions of section one of this act, shall be entitled to loan money in sums of three hundred (\$300) dollars or less, either with or without security, to individuals pressed by lack of funds to meet immediate necessities, at his, their, or its place of business, for which said license is issued, and to charge the borrowers thereof for its use or loan, interest at a rate not to exceed three and one-half ($3\frac{1}{2}$) per centum per month. *No fees, fines, or other charges, either in addition to or as a part of the above specified interest, shall be charged or collected under any pretext whatsoever.*"

I am of the opinion that the Prothonotaries' entry fee is not within the provision above quote. The "fees, fines, or other charges" contemplated are examination, renewal or transfer fees, fines for delinquency in interest payments, and other charges designed to circumvent the usury law, and the proceeds of which, belong to the lender, but not court charges incident to reducing a note, given as security, to judgment and in which the lender has no property interest. The prohibition relates to charges of the lender for the *use of the money*, not to charges of a public officer, the payment of which is necessary to *perfect the security*; it is ancillary to the preceding sentence of the section, and its purpose is to make indubitable the legislative intent that the pecuniary return to the lender must not exceed the rate of interest specified in the Act.

You are accordingly now specifically advised that the prothonotaries' fee for entry of a judgment on a note given as security for a loan under the Act of June 17, 1915, P. L. 1012, is not within the meaning of section two of said Act so as to prevent a licensee from making his reimbursement for the payment thereof, a condition precedent to his participation in the satisfaction of such judgment.

Very truly yours,

FRANK M. HUNTER,
Deputy Attorney General.

**OPINIONS TO THE
COMMISSIONER OF FORESTRY**

OPINIONS TO THE COMMISSIONER OF FORESTRY.

FOREST FIRES.

Measures to prevent forest fires are within the police powers of the state, and to declare a condition which constitutes a special forest fire hazard to be a public nuisance and compel its abatement is a reasonable exercise of that power.

The Chief Forest Fire Warden, under the general authority of the Commissioner of Forestry, has power to declare a property to be a public nuisance, where its condition is such as to render it a special forest fire hazard.

Office of the Attorney General.
Harrisburg, Pa. May 12, 1919.

Honorable Robert S. Conklin, Commissioner of Forestry, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 25th ult., in which you ask to be advised as to the power of the Chief Forest Fire Warden to declare the following cases to be public nuisances and compel the abatement thereof—

First: Where there is a break in what is known as a "safety strip" along the right of way of a railroad.

From your communication it appears that, despite the most approved spark arresters with which locomotives may be equipped, sparks emitted from locomotives along railroads traversing forest lands continue to be a source of forest fires. To further eliminate this risk the railroad companies in many places where there is danger of forest fires establishing safety strips outside and along their rights of way by burning over a strip of land from twenty-five to thirty-five feet in width. This work is being done by the employees and at the expense of the railroads and under the general supervision of some forest warden, and with the permission of the owner of the abutting property. In some instances, however, permission to do this is refused by the owner of the property adjoining the railroad's right of way, and in consequence thereof it is further represented in your communication—

"That the work done upon the property adjoining those who have refused permission to continue the safety strip is practically lost and no protection is afforded to the general forest property back of the right-of-way because a spark may fall upon the unburned

strip at any time and spread to the property immediately back of the strip that has been burned. If the safety strip is to be what it is intended to be, it is necessary that it be complete from one end of the fire hazard to the other and if it is to protect the forests adjoining the right-of-way and extending back probably for miles, it is necessary that the safety strip be complete."

2. Where lumber slashings are left along and against the lines of State owned forest lands.

It appears that in some places the owners of land adjoining State forests have carried on lumber operations and left the slashings from such operations lying along the adjoining State forests.

The determination of the question submitted depends upon the construction to be given certain provisions of the Act of June 3, 1915, P. L. 797. That Act established in the Department of Forestry a Bureau of Forest Protection, and authorized the appointment of a Chief Forest Fire Warden, who is charged with the duty and clothed with power "to take such measures for the prevention, control, and extinction of forest fires as will assure a reasonable protection from fire to woodlots, forests, and wild lands within the State." Among the powers given him are those pursuant to sub-sections (n) and (o) of Section 102, which read as follows:

"(n) He shall have authority to declare a public nuisance any property which, by reason of its condition or operation, is a special forest fire hazard, and, as such, endangers other property or human life.

"(o) He shall notify the owner of the property or the person responsible for the condition declared a public nuisance, and advise him as to the abatement or removal of such nuisance. In the case of a railroad, such notice shall be served upon the superintendent of the division upon which the nuisance exists."

Section 1004 prescribes penalties for failure to comply with an order of the Chief Forest Fire Warden for the abatement of a nuisance.

It is a well settled principle that the Commonwealth may, under its general police power, declare something to be a public nuisance which was not such at common law.

In *Pittsburgh vs. Keech Company*, 21 Super. Ct. 548, it was held:

"It is settled that, within constitutional limits not exactly determined, the legislature may change the common law as to nuisances, and may move the line either way so as to make things nuisances which were not so, or to make things lawful which were nuisances, although by doing it affects the value or use of property."

There is an extensive citation of authorities in point in the case of *Train vs. Boston Disinfecting Company*, 11 N. E. Rept. 929, (Mass.). In the course of the opinion rendered by Judge Devens, it was said:

“But there can be no doubt of the right of the legislature to pronounce, under its police power, certain things or certain acts nuisances in themselves. Nor are such laws obnoxious to any constitutional provision, because they do not provide compensation to the individual whose liberty to keep or do them is restrained. It may forbid entirely the exercise of certain noxious or offensive trades, or trades which it holds to be such, or only under such safeguards as it may prescribe; it may forbid certain articles, as gun-powder, to be stored near habitations; it may regulate the height of buildings; and it may provide that these things may be regulated by ordinance or by-laws of the respective cities or towns, or controlled by their authorities. It may determine when that which is otherwise property shall cease to be such if kept against law. (Citing cases) Where anything is declared a nuisance, by legislation, it is not competent for a party to show that it is not in fact one.”

A measure to prevent forest fires is unquestionably within the police power of a State, and to declare a condition which constitutes a special forest fire hazard to be a public nuisance and compel its abatement is clearly a reasonable exercise of that power. The conservation of our forests is a matter of public concern, affecting the general welfare of the Commonwealth and its people. In recognition thereof the Commonwealth, itself, has acquired an extensive body of forest land and is active in promoting and encouraging reforestation.

It is a matter of common knowledge that fires annually ravage our forest lands inflicting severe loss and incalculable mischief. To prevent this the Commonwealth is expending large sums, the purpose of the foregoing statute being to provide effective means and some efficient instrumentality to safeguard against this recurring scourge. The Act should be given such a liberal construction and vigilant administration as will best effectuate its salutary ends.

In the first of the above stated cases, if any break in a safety strip, as established along railroads, amounts to a condition of “a special forest fire hazard,” the Act, in my opinion, vests in the Chief Forest Fire Warden, under the general control of the Commissioner of Forestry, the power to declare it a public nuisance and compel its abatement. It would be futile to establish such safety zones and then permit any spot or link therein to remain in a men-

acing condition, and consequently render, in a large degree, useless all that had been done elsewhere in that vicinity to prevent the outbreak or spread of forest fires. The same is likewise true of slashings. It scarcely needs to be pointed out that a slashing along adjacent wood land adds a special fire danger to the latter. We may well conclude it was precisely to eliminate dangers arising from just such cases as the above and those kindred thereto that led the Legislature to bestow the foregoing power upon the Chief Forest Fire Warden.

No general rule can be laid down as to exactly what condition amounts to "a special forest fire hazard." That is a fact to be determined and ascertained upon all the conditions of and surrounding each particular case. The duty to find such fact upon a survey of the whole situation rests with the Chief Forest Fire Warden, and whenever he finds that a condition is such as to make it a special hazard, he should proceed promptly to have the owner of the property abate it. It is altogether probable that it will be found that the owner will voluntarily and readily join in this conservation work when the matter is brought to his attention by the Forest Warden. In case of persistent refusal or neglect to remedy in a reasonable and practicable way the condition complained of, the Chief Forest Fire Warden should declare it a public nuisance in the manner prescribed and proceed to have it abated.

As a general proposition, you are accordingly advised that cases such as above stated are within the general scope of the power vested in the Chief Forest Fire Warden, under the general authority of the Commissioner of Forestry, to declare a property to be a public nuisance where its condition is, in fact, such as to render it "a special forest fire hazard."

Very truly yours,

EMERSON COLLINS.
Deputy Attorney General.

STATE FOREST LANDS.

The Act of February 25, 1901, P. L. 11, confers the power to sell and dispose of timber on state forestry lands, not on the Commissioner of Forestry but on the Forestry Commission.

The Commissioner of Forestry has no authority to sell timber on state forest land. Contracts made by him for such sale are void, notwithstanding the fact that purchasers under such contracts have entered on state forest lands and incurred expense pursuant thereto.

Office of the Attorney General,
Harrisburg, Pa., April 19, 1920.

Honorable Gifford Pinchot, Commissioner of Forestry, Harrisburg, Pa.

Sir: There was duly received your communication of the nineteenth ultimo inquiring as to the validity of certain contracts, the same being for the sale of timber from some of the State forest lands, and having been executed on behalf of the State by your predecessor in office without the consent and approval of the Forestry Reservation Commission, now the State Forestry Commission.

The sole legal question involved is the authority of the Commissioner of Forestry to sell timber from the State forest lands. It is a rule of law, universal in its application, that public officers have no powers other than those conferred by law, and that acts done by them without authority so conferred, are void. This rule applies to the making of contracts, as well as to any other act of a public officer and is thus stated in 36 *Cyc.* 873.

“Public officers have and can exercise only such powers as are conferred upon them by law, and a State is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the Constitution, unless such authorized contracts have been afterward ratified by the Legislature; and a State cannot by estoppel become bound by the unauthorized contracts of its officers.”

The Commissioner of Forestry is not a Constitutional officer, and his powers, therefore, are exclusively derived from the Legislature. The only statute authorizing the sale of forest timber is the Act of February 25, 1901, P. L. 11, which creates your Department and generally defines its powers and duties. The first Section of this Act provides, *inter alia*, as follows:—

“Be it enacted, etc., That there be and is hereby established a Department of Forestry, to consist of the Commissioner of Forestry and four other citizens of the Commonwealth, who together shall constitute the State Forestry Reservation Commission; each of whom shall be appointed and commissioned by the Governor, by and with the advice and consent of the Senate; the Commissioner of Forestry for a term of four years, two of the said citizens for a term of two years and two of said citizens for a term of four years; and thereafter all appointments shall be made by the Governor, by and with the advice and consent of the Senate for a term of four years. The persons so appointed, before enter-

ing upon the discharge of their duties shall each take and subscribe to the oath of office prescribed by article seven of the Constitution of Pennsylvania. The Commissioner of Forestry and the Forestry Reservation Commission, so appointed, shall be clothed with all the powers heretofore conferred by law respectively upon the Commissioner of Forestry and the Forestry Reservation Commission, as far as the same are consistent with the provisions of this act, and in addition shall have full power, by and with the consent of the Governor, to purchase any suitable lands in any county of the Commonwealth that in the judgment of said Commission the State should possess for forest preservation: Provided, That in no case shall the amount paid for any tract of land, purchased under the provisions of this act, exceed the sum of five dollars per acre. Said Commission shall also have full power to manage and control all the lands which it may purchase under the provisions of this act, as well as those that have heretofore been purchased and which are now owned by the State under existing laws. Said Commission is also empowered to establish such rules and regulations with reference to control, management and protection of forestry reservations, and all lands that may be acquired, under the provisions of this act, as in its judgment will conserve the interests of the Commonwealth; and wherever it shall appear that the welfare of the Commonwealth, with reference to reforestation and the betterment of State Reservations, will be advanced by selling or disposing of any of the timber on forestry lands, the Commission is hereby empowered to sell such timber on terms most advantageous to the State."

This Section was amended by the Act of July 7, 1919, P. L. 727, but on subjects which have no bearing on the disposition of the question now under consideration.

It is obvious that the language above quoted confers the powers to sell and dispose of timber on forestry lands not on the Commissioner of Forestry, but upon the Forestry Commission. By the provisions of the statute the Department is composed of two different entities; the Commissioner of Forestry, and the Forestry Reservation Commission. Section 1 after continuing the powers which had been by prior enactment respectively conferred upon the Commissioner and the Commission to such extent as they were consistent with the later statute, proceeded to define the authority of the Commission, as contra-distinguished from the Commissioner. Certain powers are conferred on the Commission by express terms, and then the Section continues:—

"And wherever it shall appear that the welfare of the Commonwealth, with reference to reforestation and the betterment of State Reservations will be advanced by

selling or disposing of any of the timber on forestry lands, the *Commission* is hereby empowered to sell such timber on terms most advantageous to the State."

It is followed by other powers expressly conferred on the Forestry Commission. "Expressio unius est exclusio alterius" is a rule well known and often applied in statutory construction. It means that the naming of one person in a statutory provision is an exclusion of any other. Its application to the present statute is irresistible. The Act, having created the office of Commissioner of Forestry and the separate and distinct Forestry Reservation Commission, the conclusion must necessarily follow that powers separately conferred on the one were intended by the Legislature to be denied the other.

This conclusion is further substantiated by a consideration of the Act of 1901 in its entirety, and other Legislation granting rights with regard to the State forests and forest lands.

The plan of the Act of 1901 is apparent, and the subjects contained are clearly demarked. The first Section, with the exception of the clause continuing consistent powers, above quoted, enumerates the authority of the Commission; the third Section contains all the powers of the Commissioner, while the remaining provisions deal with the conduct of individuals with regard to State forests and forest lands, the compensation, expenses and bond of the Commissioner, office supplies, appropriations, and certain details as to lands acquired under the authority of Section one.

Several other statutes authorize the granting of rights with regard to State forests and forest lands, but none confers the power on the Commissioner of Forestry acting alone. Thus the Act of April 15, 1903, P. L. 200, authorizes the granting of certain privileges to Street Railways Companies, but the power is jointly conferred on the Commissioner and the Reservation Commission; the Act of March 27, 1913, P. L. 12, authorizes the leasing of portions of State forests for church, school, health and recreation purposes, but the power is conferred upon the Department, which means the Commissioner and the Commission act jointly; the Act of June 4, 1915, P. L. 816, empowers the granting of rights of way to other State forests, but the authority is likewise conferred on the Department. No statute has been found giving to the Commissioner the authority to grant privileges in, or to dispose of property connected with, the State forests, which is strongly indicative of a policy on the part of the Commonwealth that such authority was intended to be withheld from this officer.

From the foregoing, I am of the opinion that the Commissioner of Forestry has no authority to sell timber on State forest lands, and that contracts made by him for this purpose are absolutely

void, notwithstanding the party or parties who undertook to thus purchase the timber have entered on the forest lands and have incurred expenses pursuant thereto.

I note your statement that the "contractors" have given bonds, proceeded with their work and have made revenue returns to the Department, and also that under the provisions of the purported contracts, which you transmitted with your communication, only such timber can be cut and removed as shall be marked for destruction by the local forester. Unless it clearly appears that these alleged contracts were not made in good faith, and unless the facts disclose it to be absolutely subversive of the welfare of the State, I am of the opinion that it would be consistent with the dignity of the Commonwealth for the State Forest Commission to enter into new and valid contracts with the above parties whereby the latter may be permitted to cut and remove such timber as your local forester shall mark, at least to such an amount as may be necessary to reimburse them for the expenses which they have incurred. Persons who have expended money under an honest belief that the contracts were valid should not be compelled to suffer unless the paramount welfare of the State precludes any relief.

I return the contracts which you submitted.

Yours very truly,

WM. I. SCHAFFER,
Attorney General.

STATE FORESTS.

As an emergency measure, until the legislature has enacted specific provisions in regard to the disposition of unsalable timber, the State Forest Commission may authorize the use of the regular employes the department to render such timber salable, but only after the commission has, in good faith, endeavored to sell the timber in the manner provided by the Act of February 25, 1901, P. L. 11, as amended by the Act of July 7, 1919, P. L. 727.

In ascertaining the net proceeds of the timber operations carried on by the State Forest Commission the cost of preparing the timber for market should be deducted.

Office of the Attorney General,
Harrisburg, Pa., June 16, 1920.

Honorable Gifford Pinchot, Commissioner of Forestry, Harrisburg,
Pa.

Sir: Your letter of May 24th, asking for an opinion as to whether, under the first section of the Act of February 25, 1901, P. L. 11, the State Forest Commission is authorized to adopt a regulation substantially as follows:

"Whenever in the opinion of the Commissioner of Forestry any of the products of the State Forests should be utilized in connection with operations conducted by the Department for the management, protection and development of any State Forest, and the Commissioner cannot find, practicably, private business interests which will pay a reasonable net amount for the right to remove and use or enjoy such products, subject to the conditions required in such operation, the Commissioner is hereby authorized to use the regular employes of the Department to render such products salable, and to that end may procure, use and pay for such plant and labor as may be economically necessary in addition to the regular employes of the Department. The expense of the removal, utilization and manufacture of said forest products shall be paid from the appropriations of the Department of Forestry, but the appropriations shall be reimbursed from the gross amounts paid for the products when sold, to the extent of necessary expenditures over and above the regular employes and equipment of the Department, and the proceeds or net amounts remaining, if any, after payment of said necessary expenditures, shall be paid into the Treasury for the benefit of the State School Fund, as provided by law. Such payments of net proceeds, if any, shall be made promptly after ascertainment."

You also ask whether, under such a regulation, the State Forest Commission would be authorized to carry on logging and primary manufacturing operations or activities on the forests as the Commissioner of Forestry may deem necessary, and if so, can the Commissioner of Forestry use the gross amounts received from operations by the Department itself to meet the expenses of carrying on the operations, provided that the net proceeds therefrom shall be paid into the Treasury for the benefit of "The State School Fund of Pennsylvania." You further request an interpretation of Section 2701 of the School Code of 1911, as amended by the Act of June 4, 1915, P. L. 825.

As amended by the Act of July 7, 1919, P. L. 727, the second clause of Section 1 of the Act of February 25, 1901, P. L. 11, now reads as follows:

"Whenever it shall appear that the welfare of the Commonwealth, with reference to reforestation and the betterment of the State forests, with respect to control, management, protection, and development, will be advanced by selling or disposing of any of the timber on the State forests, the commission is hereby empowered to sell such timber on terms most advantageous to the State."

"The words 'sell' and 'dispose' are synonymous."

Rutledge v. Crampton, 150 Ala. 275.

"The word 'timber' as a generic term, properly signifies only such trees as are used in buildings either business houses or dwellings. *Castilleto v. United States*, 67 U. S. (2 Black) 281, 17 L. Ed. 360; 1 Crabb, Real Prop. Sec. 20; *Burril*, Law Dict. tit. 'Timber'. But its signification is not limited to trees. It applies to the wood, or the particular form which the tree assumes when no longer growing or standing in the ground. It does not include shingles and shingle bolts. *United States v. Schuler* (U. S.) 27 Fed. Cas. 978."

The word "timber" as used in the penal clause of the Act of February 25, 1901, P. L. 11, is defined in the following case to have a broader meaning than it formerly had.

Commonwealth v. LaBar, reported in 32 Pa. Super. Ct. at page 228.

It would therefore follow that the provision to sell and dispose of timber on the State Forest Reservations conferred upon the Commission by the second clause of Section 1 of the Act of February 25, 1901, P. L. 11, as amended by the Act of July 7, 1919, P. L. 727, would authorize the Commission to sell any and all trees, however small, growing upon the State Forest Reservations, when it should appear to the Commission that the welfare of the Commonwealth with reference to the reforestation and betterment of the State forests with respect to control, management, protection and development, would be advanced.

I find that the Attorney General defined the words "to manage" and "to control" in the Act of February 25, 1901, P. L. 11, in an opinion rendered the Forestry Commission on August 7, 1907, as follows:

"The words 'to manage' contained in the statutes defining the powers of the state forestry reservation commission have been held to mean the direction or conducting of its affairs and the words 'to control' as meaning to subject to authority, direct, regulate and govern. State Forestry Reservation Commission (No. 1), 17 Dist. 35, 10 Dauphin 154. In this opinion all the acts are reviewed at length up to and including the Act of April 14, 1905.

In an opinion by the Attorney General the Forestry Commission was further advised as follows: The state forestry legislation does not contemplate the acquisition of property upon which there are buildings used for residence purposes, and without specific legislative authority no such purchase can be made. *Inhabited Forests*, 37 Pa. C. C. 624, 13 Dauphin 92."

The Courts have held that where specific provisions are incorporated in an act of assembly relating to a particular subject, they govern as against any general provisions in the same act. *Kolb v. Church*, 18 Pa. Super. Ct., page 477.

Under the wider meaning now attached by the decisions of the Courts above cited to the word "timber," and under the general power to sell timber conferred on the Commission by the Act of 1901, as amended by the Act of 1919, it would seem, that where the Commission has been unable to sell the growing timber to advantage, that as an emergency measure and for the purpose of advancing the betterment and development of the State forests, the Commission could, as proposed by you, carry on "such logging and primary manufacturing operations or activities on the forests as the Commissioner of Forestry may deem necessary."

The principle upon which we base this opinion is that it is an emergency measure for the benefit of the State forests until the next Legislature can, by specific enactment, confer upon the Commission the power to dispose of such timber as they cannot sell to advantage.

In regard to the disposition of the moneys received from such operations, Section 9 of the Act of February 25, 1901, as amended by the Act of July 7, 1919, P. L. 727, provides:

"The Commissioner of Forestry shall receive the moneys to which the State may be entitled by virtue of the sale of any timber, or by virtue of any leases or contracts relating to the disposition of minerals, as hereinbefore provided, and he shall immediately pay the same over to the State Treasurer as a part of the revenue of the Commonwealth."

Section 2701 of the School Code of 1911, as amended by the Act of 4th of June, 1915, P. L. 825, was construed in an opinion by the Attorney General's Department, dated January 6, 1913, reported in 22 District Reports at page 242 (State School Fund, 22 Dist., Rep. 242, 41 Pa. C. C. 81), in which it was held:

"The phrase '80 per centum,' in section 2701, applies only to the net receipts and proceeds derived from forest reservations."

"Under the Act of April 15, 1903, P. L. 201, it is provided that all proceeds derived from the forest reservations shall be paid into the State Treasury and there held as a special fund for the purposes of assisting in defraying the necessary expenses of protecting and improving forestry reservations, or for the purchase of additional land. The amount to be credited to the State School Fund is eighty per centum of the 'net receipts and proceeds derived in any way from or on account of the forest reservations.'"

In ascertaining the net receipts and proceeds, there should be deducted from the gross receipts and proceeds the costs and expenses of protecting and improving the lands, but not the total expenses of maintaining the Department of Forestry."

Section 2701 of the Act of May 18, 1911, P. L. 309, was amended by the Act of June 4, 1915, Section 1, P. L. 825, as follows:

"The receipts and proceeds derived in any way from, or on account of, the forest reservations, now or hereafter acquired by this commonwealth, together with all waterpowers and waterrights belonging to this Commonwealth in the streams, rivers, lakes, or other waters of this commonwealth, and all real estate owned by this commonwealth which is not used for state or other public purposes, all escheated estates in this commonwealth, and all other property or money which shall in any way accrue to such fund, whether by act of assembly, devise, gift, or otherwise, shall belong to and constitute a fund, to be known and designated as 'The state school fund of Pennsylvania,' which is to be maintained as herein provided: Provided however, That the forest reservations shall continue to be wholly under the control of the state forest reservation commission, as now provided by law."

But while the receipts and proceeds derived in any way from the forest reservations shall accrue to the school fund, the principle laid down in the foregoing opinion that this means only the net receipts and proceeds derived in any way from the forest reservations, and in ascertaining the net receipts and proceeds, there should be deducted from the gross receipts and proceeds the costs and expenses of protecting and improving the lands, but not the total expenses of maintaining the Department of Forestry, applies to the Act as amended.

I am of opinion that in ascertaining the net receipts of the timber operations contemplated by the Commission, the expenses of preparing the timber for market should be deducted from the proceeds, and the balance would constitute the "net proceeds" above mentioned.

You are therefore advised that, as an emergency measure, and until the Legislature has enacted specific provisions in regard to the disposition of unsalable timber on the State forest reservations, the Commission can proceed in the manner proposed in your letter, but only after the Commission has, in good faith, endeavored to sell the timber in the manner provided by the second clause of Section 1 of the Act of February 25, 1901, P. L. 11, as amended by the Act of July 7, 1919, P. L. 727.

Very truly yours,

WILLIAM I SWOOPE,
Deputy Attorney General.

OPINIONS TO THE
DEPARTMENT OF HEALTH

OPINIONS TO THE DEPARTMENT OF HEALTH.

COMMISSIONER OF HEALTH.

The Commissioner of Health does not have statutory authority to create the office of Deputy Commissioner of Health.

Office of the Attorney General,
Harrisburg, Pa., January 29, 1919.

Colonel Edward Martin, Commissioner of Health, Harrisburg, Pa.

Sir: In reply to your request for an opinion as to whether the Act of 1905, creating the Department of Health, delegates to the Commissioner the power to create the office of Deputy Commissioner, I advise you as follows:

Section 6 of the Act creating the Department of Health and defining its powers and duties, approved the twenty-seventh day of April, A. D. 1905, provides that:

"The Commissioner of Health may employ such clerical and other assistants as are necessary for the proper performance of the work of the department, and he may distribute appropriate powers and duties to the employes of the Department of Health, not inconsistent with the Constitution or laws of this State."

This is the only section of the Act of 1905 conferring upon the Commissioner of Health the power to appoint assistants, and, in my opinion, this does not give the Commissioner of Health the power to appoint a Deputy Commissioner. A Deputy Commissioner of Health should have the powers of the Commissioner of Health which are given to him by the Act of Assembly aforesaid, creating the Department; should also have the same qualifications as the Commissioner of Health, and should, therefore, be appointed by the Governor.

To create the office of Deputy Commissioner of Health it would therefore, be necessary to have passed an Act of Assembly supplementing the Act of 1905, above referred to, creating the Department.

Very truly yours,

BERNARD J. MEYERS,
Deputy Attorney General.

DEPARTMENT OF HEALTH.

Money received by the Department of Health from the War Risk Insurance Bureau of the United States, should be paid into the State Treasury and not credited to the State Department of Health.

Office of the Attorney General,
Harrisburg, Pa., May 21, 1919.

Colonel Edward Martin, Commissioner of Health, Harrisburg, Pa.

Sir: Your letter of the 20th inst. requesting an opinion as to the proper disposition of moneys received by you from the War Risk Insurance Bureau of the United States, for the maintenance at Mont Alto Sanatorium of discharged soldiers of the United States Army, is received.

The Act of May 25, 1907, P. L. 259, provides:

"That from and after the beginning of the fiscal year Commencing June first, one thousand nine hundred and seven, the * * * Commissioner of Health * * * shall pay into the State Treasury daily, for the use of the Commonwealth of Pennsylvania, all fees, licenses, fines, penalties, commissions, costs, and all moneys received or collected, on behalf of the Commonwealth, from any source whatever."

I am, therefore, of the opinion that the moneys collected by you from the War Risk Insurance Bureau, as aforesaid, should be paid into the State treasury, and should not be credited to the State Department of Health.

Yours very truly,

BERNARD J. MEYERS,
Deputy Attorney General.

INFECTIOUS DISEASES—VENEREAL INFECTION—QUARANTINE

The Department of Health has authority to quarantine and detain for examination persons who by their vocation or habits are reasonably suspected of venereal infections.

Office of the Attorney General,
Harrisburg, Pa., September 10, 1919.

S. Leon Gans, M. D., Director G-U Division, Department of Health,
Harrisburg, Pa.

Sir: Your request for an opinion in regard to the legal status of persons suspected of venereal infection, has been received at this Department. You ask:

"What is the legal procedure in the detaining for examination persons who by their vocation or habits are reasonably suspected of venereal infection, such as prostitutes? It has been shown that more than 95% of such persons are infected with venereal diseases."

The Act of the General Assembly approved the 17th day of July, A. D. 1919, entitled—

"To safeguard human life and health throughout the Commonwealth by providing for the reporting, quarantining, and control of diseases declared communicable by this act and by regulation of the Department of Health; providing for the prevention of infection therefrom; and prescribing penalties."

being Act No. 400, confers upon the Department of Health, when the Department deems it necessary to safeguard human life and health, the power to declare diseases communicable in addition to those enumerated specifically in the Act. When diseases are declared communicable and quarantinable in accordance with the provisions of that Act of Assembly, they are then in the same category with the diseases specifically set forth in the Act, such as Asiatic cholera, diphtheria, measles, small-pox, scarlet fever, etc.

As you set forth in your request for an opinion, the procedure of the Department of Health with regard to persons suspected of small-pox or other infectious diseases has been to detain the patient until the diagnosis is confirmed, such detention being by quarantine of the suspected person and the premises in which that person is confined. When certain venereal diseases have been declared communicable and quarantinable by the Department of Health in strict compliance with the provisions of the Act of Assembly above referred to, the Department of Health, through its officers, agents and employes, has the same power to detain the person suspected of having such a disease until a thorough examination discloses whether or not the person detained is infected with a communicable disease. This can only be done, however, upon well founded and reasonably certain knowledge that the person detained for examination and quarantine is infected with the disease.

Your communication sets forth that it is a well known medical fact that 95% of all prostitutes are infected with some form or other of venereal disease. If, therefore, the information is certain that the person sought to be detained is a prostitute, or if the officer or agent of the Department has reasonably certain information that such person is a prostitute, the fact that 95% of such persons are infected with venereal disease would be such reasonably certain knowledge as would authorize and empower the officer or agent of

the Department to quarantine or detain such person for further examination. Such reasonably certain knowledge and information might also be gained in various other ways, as for instance,—the marks of the disease might be plainly visible to a physician or some one acquainted with the outward signs thereof.

The quarantining of persons suspected of being infected with a communicable disease should be exercised by the officers and agents of the Department of Health with the greatest care, as the person detained is deprived of his or her personal liberty.

It is my opinion, and you are therefore advised, that the Department of Health has the power and authority to quarantine and detain for examination persons who by their vocation or habits are reasonably suspected of venereal infection, the words "reasonably suspected" being taken to mean that reasonably certain knowledge and information has been received by the officer or agent of the Department that such person is so infected.

Very truly yours,

BERNARD J. MEYERS,
Deputy Attorney General.

PUBLIC HEALTH.

The Act of May 28, 1915, P. L. 462, forbidding the employment in any public eating place of a disease carrier does not apply to political or social clubs.

Office of the Attorney General,
Harrisburg, Pa., September 30, 1919.

Colonel Edward Martin, Commissioner of Health, Harrisburg, Pa.

Sir: There has been referred to me your communication of the twenty-fourth instant requesting an opinion as to whether the provisions of the Act of May 28, 1915, P. L. 462 apply to political and social clubs with a limited membership.

This Act is a police regulation for the protection of public health. It interdicts the employment or keeping in employment in "any hotel, restaurant, dining car, or other public eating place in this Commonwealth" of persons suffering from certain diseases, or the carriers of typhoid fever. It further prohibits certain practices relative to eating and toilet facilities in such public eating houses. A penalty is provided for any violation of the Act.

This statute being penal in its nature, must be strictly construed. The word "public" fixes and determines the character of the place with respect to which the Act applies. A public eating house is one open to and usable by all the public at large without restriction as to individuals or classes. The use of a political or social club is ordinarily limited to the members of the organizations. The public is not free to resort to it upon the payment of a fixed charge. If the Legislature had intended to regulate the operation of all eating places, or even all eating places except strictly private dwelling houses, the word "public" would not have been used. Without doubt the Act applies only to eating houses of a strictly public character, and one maintained by a political or social club is not within its purview. We may remark, however, that if a political or social club should be a mere subterfuge to evade the law and should be open to the public generally, it would then constitute a public eating place, and be subject to the provisions of the Act.

The conclusions herein are in harmony with the opinion of Hon. Francis Shunk Brown, Attorney General, rendered to the Director of Industrial Education on February 29, 1916 in which opinion it was held that a bowling alley conducted by a Y. M. C. A. was not a public bowling alley as referred to under the Act of May 13, 1916, P. L. 286, known as the "Child Labor Law."

You are advised, therefore, that the Act referred to does not apply to political or social clubs not open to the public, but limited to the use of their members in the ordinary understanding of such institutions.

Yours very truly,

Robert S. Gawthrop,
First Deputy Attorney General.

The Act of March 16, 1870, P. L. 39, prohibits druggists or other persons from selling, keeping or giving away any secret drug, purporting to be for the use of females.

Office of the Attorney General.
Harrisburg, Pa., October 22, 1919.

S. Leon Gans, M. D., Director Genito-Urinary Division, State Department of Health, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 16th inst. asking substantially whether any law so operates as to prohibit druggists or other persons from selling, keeping or giving away any secret drug or nostrum purporting to be for the use of females.

I am of the opinion that such a sale, possession or gift is directly within the prohibition contained in Section 2 of the Act of March 16, 1870, P. L. 39, entitled—

“An Act to prevent and punish the publication of obscene advertisements and the sale of noxious medicines.”

This Section, *inter alia*, provides as follows:

“That if any person shall print or publish or cause to be printed or published in any newspaper in this State any advertisement of any secret drug or nostrum purporting to be for the use of females; or, if any druggist or other persons shall sell or keep for sale, or shall give away, any such secret drug or nostrum purporting to be for the use of females * * * * such person or persons so violating any provision of this act shall be deemed guilty of a misdemeanor and shall, upon conviction thereof, be fined in any sum not exceeding One thousand dollars, or be imprisoned in the county jail not exceeding six months or both at the discretion of the court.”

You are accordingly specifically advised that a druggist or other person is prohibited by law, under penalty, from selling, keeping or giving away any secret drug or nostrum purporting to be for the use of females.

Very truly yours,

FRANK M. HUNTER,
Deputy Attorney General.

IN RE VACCINATION.

Osteopaths licensed to practice in Pennsylvania are not “physicians” and have no right to vaccinate nor issue certificates thereof, nor have they the right to issue certificates setting forth that a child has been properly vaccinated or vaccinated in accordance with the regulations of the health department.

Office of the Attorney General,
Harrisburg, Pa. January 16, 1920.

Doctor George K. Strode, Chief, Division of School Health, Department of Health, Harrisburg, Pa.

Sir: Your request of the 5th inst., for an opinion as to whether or not osteopaths licensed under the Act of 1919 have a legal right to vaccinate and to issue certificates thereof, has been received.

In my opinion osteopaths have no right to vaccinate nor issue certificates thereof, nor have they the right to issue certificates setting forth that a child has been properly vaccinated or vaccinated in accordance with the regulations of the Department of Health.

The Act of 1919, P. L. 399, provides that children cannot be admitted to school except upon a certificate signed by a *physician*, setting forth that such child has been vaccinated and that a subsequent examination reveals a scar indicating a successful vaccination, or that vaccination has been performed according to the rules and regulations of the Department of Health. The word "physician," used in the Act, does not include osteopaths. Physicians and surgeons are licensed to practice medicine and surgery by one Board of Examiners and osteopaths are examined by an entirely different Board, and although repeated efforts have been made at various times to accomplish it, no law has ever been passed classifying osteopaths as physicians.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General.

PUBLIC EATING PLACES.

The law makes it the duty of local boards of health to enforce the laws of the Commonwealth and the regulations of the Department of Health.

The proprietor of a public eating place is not required to secure a health certificate showing that persons employed by him are free from diseases specified in the Act of May 28, 1915, P. L. 642. He should, however, make every possible effort to avoid employing persons afflicted with the diseases named in the act.

Office of the Attorney General,
Harrisburg, Pa., February 11, 1920.

Colonel John D. McLean, Deputy Commissioner of Health, Harrisburg, Pa.

Sir: Your request for an opinion as to whether it is proper and lawful for the Commissioner of Health to direct the local boards of health to enforce the act approved the twenty-eighth day of May, A. D. 1915, P. L. 642, relating to public eating-places; and whether the act requires the proprietor of a public eating-place to secure a health certificate showing freedom from the diseases specified by the act in a person before employment, has been received by this Department.

First: The law makes it the duty of local boards of health to enforce the laws of the Commonwealth, and the regulations of the State Department of Health, and in my opinion it is therefore proper for the Commissioner of Health to direct local boards of health to enforce the Act of May twenty-eighth, 1915, P. L. 642, and to require from the local boards of health reports of their activities in the matter. And, it is not necessary for the Advisory Board of the State Department of Health to pass a regulation ordering and directing local boards of health to do what the Act of Assembly makes it their duty to do.

Second: Section 1 of the Act of 1915, P. L. 642, provides, that no person or persons, firm, corporation or common carrier, operating or conducting any hotel, restaurant, dining-car, or other public eating-place in this Commonwealth, shall hereafter employ or keep in their employ, in certain capacities, persons suffering from certain diseases. It nowhere states how the proprietor of such eating-place shall ascertain whether or not a person is suffering from any of the diseases specified in the act, and in my opinion, the proprietor is not required to secure a health certificate showing freedom from the specified diseases; nor, does he have the right to employ a person and await the next periodical medical examination to determine freedom from any of the diseases. It is his duty not to employ a person with any of the specified diseases, and it is also his duty to ascertain, in any way possible, whether or not the person has any of the diseases specified in the act before he employs such person.

The second section of the act, relating to medical inspection, in my opinion, does not relieve the proprietor of an eating-place from the obligation not to employ a person suffering from any of the diseases specified by the act.

Very truly yours,

BERNARD J. MYERS.

Deputy Attorney General.

BOARDS OF HEALTH.

Boards of Health of boroughs and first class townships have no power to arrest violators of their rules and regulations, unless such rules and regulations were duly enacted into ordinances and advertised and promulgated as other ordinances.

Office of the Attorney General,
Harrisburg, Pa., June 4, 1920.

James F. McCoy, Esq., Executive Secretary, Department of Health,
Harrisburg, Pa.

Sir: The request of Dr. Howard L. Hull, Chief Medical Inspector of the Department of Health, for an opinion as to whether or

not Boards of Health of boroughs and first class townships can enforce their rules and regulations by fine and imprisonment of those who violate such rules and regulations without such rules and regulations being enacted into ordinances, has been received by this Department.

Section 6 of the Act of April 14, 1915, P. L. 115, provides:

"The board shall also have the power to make, enforce, and cause to be published all necessary rules and regulations for carrying into effect the powers and functions with which they are invested by law, and the power and authority relating to the public health conferred on the boroughs and townships of the first class. Such rules and regulations, when approved by the borough council and burgess or by the township commissioners, as the case may be, and when advertised in the same manner as other ordinances, shall have the force of ordinances of the borough or township, respectively; and all penalties or punishment prescribed for the violation thereof, as well as the expenses actually and necessarily incurred in carrying such rules and regulations into effect, shall be recoverable, for the use of the borough or township, respectively, in the same manner as penalties for violation of the ordinances of the boroughs or township, and subject to the like limitations as to the amount thereof."

While the Act does not specifically state that all such rules and regulations shall be enacted formally as ordinances by the borough council or township commissioners, it does provide that such regulations shall be approved by the borough council and burgess or by the township commissioners, and when advertised in the same manner as *other ordinances* shall have the force of ordinances of the borough or township.

I am, therefore, of the opinion that Boards of Health of boroughs and first class townships have no power to arrest those violating their rules and regulations and have them punished by fine and imprisonment, unless such rules and regulations are duly enacted into ordinances and advertised and promulgated the same as other ordinances relating to other subjects are approved and advertised.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General

IN RE HEALTH.

A board of health in a borough or township of the first class may, on its own initiative, order its proper officer or employe to institute prosecutions for the violations of the duly promulgated regulations of the State Department of Health.

A board of health in a borough or first class township may abate conditions declared to be nuisances by regulations of the State Department of Health and recover the cost of such abatement from the owner of the premises in the manner provided by Section 8 of the Act of June 12, 1913, P. L. 471.

Office of the Attorney General,
Harrisburg, Pa., September, 30, 1920.

Colonel Edward Martin, Commissioner of Health, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 3d instant, inquiring—

“1. Can a local Board of Health in a borough or township of the first class on its own initiative, institute a prosecution for the violation of a duly promulgated regulation of the State Department of Health?

“2. Can such a Board of Health abate a condition declared to be a nuisance by regulation of the State Department of Health, and recover the cost of such abatement from the owner or occupant of the premises on which the nuisance occurs?”

The violation of a duly promulgated regulation of your Department is an indictable offense, Section 16 of the Act of April 27, 1905, P. L. 312, providing as follows:

“Every person who violates any order or regulation of the Department of Health, or who resists or interferes with any officer or agent thereof in the performance of his duties in accordance with the regulations and orders of the Department of Health, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be punished by a fine of not more than one hundred dollars, or by an imprisonment not exceeding one month, or both, at the discretion of the Court.”

Section 6 of the Act of June 12, 1913, P. L. 471, relating to Boards of Health in boroughs and townships of the first class, amended by the Act of April 14, 1915, P. L. 114, inter alia, provides that—

“The said Board of Health shall have the power, and it shall be their duty, to enforce the laws of the Commonwealth, *the regulations of the State Department of Health*, and to make and enforce such additional

rules and regulations to prevent the introduction and spread of infectious contagious diseases, * * * which they shall deem prejudicial to the public health; * * *."

It conclusively follows from the foregoing that such a local Board of Health can, acting on its own initiative, order a prosecution for violation of a regulation of the State Department of Health to be instituted by an officer or member of the Board having knowledge and information of the particular violation.

As to your second inquiry, Section 8 of the Act of 1913 provides that—

"The Board of Health may inspect house drains, waste and soil-pipes, cesspools, water-closets, slaughter-houses, hog-pens, stables, stable-yards, and any conditions or places whatsoever, in the borough or township of the first class, which may constitute a nuisance or menace to public health; and whenever any condition or place in the borough or township of the first class is found by them to be a nuisance or a menace to the health of the people of the borough or township of the first class, they shall issue a written order of abatement, directed to the owner, or agent of the owner, of the premises, stating that the conditions specified therein constitute a nuisance or a menace to health, and ordering an abatement thereof within such time as may be specified by them in such order. In case such order of abatement is not obeyed within the time specified therein, they shall thereupon issue a further written order to the health officer, directing him to remove or abate the same; which order shall be executed by him and his subordinates and workmen, and the expense thereof shall be recoverable from the owner of the premises upon or from which the nuisance or menace to health is abated or removed, in the same manner as debts of like character are now collected by law; or the said Board of Health may proceed to enforce such other remedy, or inflict such penalty, as may by ordinance of the borough or township of the first class be provided."

I am of the opinion that the term "nuisance" as used in this section, when construed in the light of Section 6 requiring such local Boards to enforce the regulations of the State Department of Health, was intended by the Legislature to include conditions declared to be nuisances by regulations of such State Department; and that, therefore, upon failure to comply with the order of the local Board, the abatement may be made in the manner provided by the 8th Section of the Act of 1913, and the procedure therein contained, invoked for the recovery of the expenses occasioned thereby.

A method of abatement and recovery of expenses as provided in Section 9 of the Act of April 27, 1905, P. L. 312, creating the Department of Health and defining its powers and duties, and which is predicted upon an order of removal by the Commissioner of Health. This is not, however, an exclusive method for the removal of such nuisances, and there is no inconsistency between this procedure and that contained in the Act of 1913.

I am of the opinion that both are available for the abatement of nuisances of the character indicated by your inquiry.

You are, therefore, specifically advised—

1. That a local Board of Health in a borough or township of the first class may on its own initiative its proper officer or employe to institute prosecutions for violations of the duly promulgated regulations of the State Department of Health;

2. That such a local Board of Health may abate conditions declared to be nuisances by regulations of the State Department of Health, and recover the cost of such abatement from the owner of the premises in the manner provided by Section 8 of the said Act of 1913.

Yours very truly,

FRANK M. HUNTER,
Deputy Attorney General.

The Advisory Board of the Department of Health has power to pass and the Department of Health to enforce a regulation relating to the sale and test of clinical thermometers.

Office of the Attorney General.
Harrisburg, Pa., October 6, 1920.

Colonel Edward Martin, Commissioner of Health, Harrisburg, Pa.

Sir: Your request to be advised whether the Department of Health has power to enforce a regulation such as that taken from the Sanitary Code of New York, relating to the sale and test of clinical thermometers, has been received by this Department.

In my opinion the Department of Health has power to enforce such regulation if the same is properly passed and promulgated by the Commissioner and the Advisory Board of the Department of Health in accordance with the statutes relating thereto.

The act approved the 27th day of April A. D. 1905, entitled, "An act creating a Department of Health, and defining its powers and duties," in Section 5, provides as follows:

"It shall be the duty of the advisory board to advise the Commissioner on such matters as he may bring before it, and to draw up such reasonable orders and regulations as are deemed by said board necessary for the prevention of disease and for the protection of the lives and health of the people of the State, and for the proper performance of other work of the Department of Health."

If therefore the sale and test of clinical thermometers are deemed by the Advisory Board to be necessary for the protection of the lives and health of the people of the State of Pennsylvania, the Advisory Board has power to pass reasonable regulations relating thereto, and the Department of Health has authority to enforce such regulations.

I return herewith a copy of New York regulation.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General.

EXAMINATION OF NURSES.

The State Board of Examiners for Registration of Nurses may admit to examination applicants who have fulfilled the qualifications prescribed by the Act of May 1st, 1909, P. L. 321 and its amendments.

Authority is given the Board to refuse examinations to those who have not so qualified.

Office of the Attorney General.
Harrisburg, Pa. October 12, 1920.

Colonel Edward Martin, Commissioner of Health, Harrisburg, Pa.

Sir: Your request for an opinion relative to the examination of nurses by the State Board of Examiners for Registration of Nurses has been received by this Department. Your communication contains two inquiries:

First: Does the State Board of Examiners for Registration of Nurses have authority to admit to examination applicants who are graduates of training schools that are not on the list approved by the Board as passing the necessary requirements for giving a pupil-nurse a full and adequate course of instruction?

Second: What authority does the State Board of Examiners for Registration of Nurses have to refuse to examine applicants who have not taken the preliminary and professional education for nurses which the Board sets forth as needful?

In answer to your queries you are advised as follows:

First: The Act creating the State Board of Examiners for Registration of Nurses, approved the first day of May, A. D. 1909, P. L. 321, as amended by the Act of 1915, P. L. 809, and as amended by the Act approved the twentieth day of June, A. D. 1919, P. L. 545, provides that—

“Every applicant, to be eligible for examination, must furnish evidence, satisfactory to the board, that he or she is twenty-one years of age or over, is of good moral character, and has graduated from a training school for nurses which gives at least a two years course of instruction, or has received instruction in different training schools or hospitals for periods of time amounting to at least a two year course, as aforesaid, and then graduated, and that such applicant, during said period of at least two years, has received practical and theoretical training in surgical and medical nursing * * *.”

The Act further provides:

“That it shall be the duty of the registration board to prepare and make a report for public distribution, at intervals regulated by the by-laws of the said board, of all training schools or combinations of training schools that are approved by the board as possessing the necessary requirements for giving a pupil-nurse a full and adequate course of instruction * * *.”

You will note the Act itself provides that the applicant must have graduated from a training school for nurses which gives at least a two years course of instruction, or that she has received instruction in different training schools or hospitals for periods of time amounting to at least a two years course and then graduated. The test, therefore, is not whether the applicant has graduated from a training school which is on the list approved by the State Board of Examiners for Registration of Nurses, but whether the applicant has graduated from a training school whose course of instruction meets the requirements of the Act of Assembly. If any training school in the Commonwealth of Pennsylvania gives a course of instruction that meets the requirements of this Act of Assembly, it is the duty of the Board to approve such training school and put it on the approved list.

If, therefore, the Board performs its duty as required by the Act and places on the approved list all training schools whose courses meet the requirements of the Act, no applicant who is a graduate of any other than a training school on the approved list would have any standing to apply for examination. If the Board has failed to perform its full duty and place upon the approved list all training schools whose courses meet the requirements of the Act, an applicant who is a graduate of a training school whose course meets the requirements of the Act, but is not upon the approved list, is eligible to take the examination.

Second: Authority to refuse examination to such applicants who have not taken the preliminary and professional education for nurses prescribed by the Act of Assembly is conferred upon the Board by the Act itself, and the Section which I have heretofore quoted provides that no application for registration shall be considered unless accompanied by a fee of ten dollars, and every applicant to be eligible for examination must furnish satisfactory evidence of her previous preliminary and professional training.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General.

OPINIONS TO THE
DEPARTMENT OF PUBLIC INSTRUCTION

OPINIONS TO THE DEPARTMENT OF PUBLIC INSTRUCTION.

A State Normal School does not have power to engage in the mining and selling of coal to the general public.

Office of the Attorney General,
Harrisburg, Pa., January 29, 1919.

Honorable Nathan C. Schaeffer, State Superintendent of Public Instruction, Harrisburg, Pa.

Sir: In reply to your request for an opinion as to whether a State normal school can engage in the mining of coal and sell coal to the general public, where such normal school is a State owned school and has coal on the land owned by it, I beg to advise you as follows:

Section 2032 of the Act of May 18, 1911, P. L. 409, provides:

"In order that the state normal schools may be owned and controlled by the Commonwealth, for the better preparation of teachers, the State board of education is hereby authorized and empowered to inquire into the propriety of purchasing any state normal school, and if it be found that the stockholders, or other owners thereof, are desirous of selling and conveying the property of any such institution to the Commonwealth, it shall be the duty of said state board of education to make the most advantageous arrangements possible for the purchase of the same, and when such negotiations have been concluded, to enter into an agreement, in writing, embodying the terms and conditions upon which the purchase is effected and the property agreed to be conveyed," etc.

Section 2034 of same Act provides:

"Upon the payment of the purchase money to the stockholders of any such state normal school, properly executed deeds of conveyance for all of its real estate, together with all of its other property, shall be delivered to the Commonwealth, and thereafter such state normal school shall be owned, controlled, and maintained as a state institution.

"The corporation of any state normal school, conveying its property to the Commonwealth as herein provided, shall then be dissolved by the stockholders thereof in the manner provided by law."

The stock of the Normal School at Slippery Rock has been purchased by the Commonwealth, in accordance with the Act of May 18, 1911, P. L. 409, and the property is, therefore now owned by the Commonwealth. The question therefore arises—"Can the Commonwealth engage in the business of mining and selling coal through its agency, the Trustees of a State owned normal school?" Ordinarily the Commonwealth can engage in any business or do anything not expressly forbidden or prohibited by the constitution, and the mining and selling of coal is not prohibited by the constitution. It cannot, however, engage in this business or delegate its powers to any agency, except by Act of Assembly, and as there has been no Act of Assembly passed giving the Trustees of State owned normal schools the right to engage in the business of mining and selling coal, or any Act giving the Commonwealth of Pennsylvania, through any agency whatever, the right to engage in the mining and selling of coal, the Trustees of the Normal School have no such power.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General.

PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM.

Medical inspectors employed in school work are not within the benefits of the Public School Retirement System, provided by the Act of July 18, 1917.

Office of the Attorney General,
Harrisburg, Pa., May 21, 1919.

Mr. H. H. Baish, Secretary, Public School Employees' Retirement Board, Harrisburg, Pa.

Dear Sir: Your letter of the 12th instant is at hand.

You ask to be advised whether teachers employed in the Scotland Orphans' School, Huntingdon Industrial Reformatory or the Pennsylvania State College, are eligible for membership in the State School Employees' Retirement Association.

The Act of May 18, 1917, P. L. 1043, "establishing a public school employes' retirement system," provides:

"'Public school' shall mean any class, school, high school, normal school, training school, vocational school, truant school, parental school, and any or all classes or schools within the State of Pennsylvania, conducted under the order and superintendence of the Department of Public Instruction of the Commonwealth of Pennsylvania and of a duly elected or appointed Board of Public Education, Board of School Directors or Board of Trustees, of the Commonwealth, or of any school district or normal school district thereof. * * * 'Employe' shall mean any teacher, principal, or other person engaged in any work concerning or relating to the public schools of this Commonwealth, or in connection therewith."

It is apparent from this language that a school in order to come within the definition, shall also come under the supervision and superintendence of the Department of Public Instruction. This is one of the necessary criteria to determine whether such school is a public school within the terms of this Act.

The Scotland Soldiers' Orphan School, The Huntingdon Industrial Reformatory, and the Pennsylvania State College, are not schools or educational institutions "conducted under the order and superintendence of the Department of Public Instruction."

Therefore, in my opinion, the teachers or employes of these institutions and other similar institutions, are not within the benefits of the retirement system created by the Act of July 18, 1917.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

PUBLIC SCHOOL EMPLOYES' RETIREMENT SYSTEM.

Medical Inspector employed in school work are not within the benefits of the Public School Retirement System provided by Act of July 18, 1917, P. L. 1043.

Office of the Attorney General,
Harrisburg, Pa., May 21, 1919.

Mr. H. H. Baish, Secretary, Public School Employes' Retirement Board, Harrisburg, Pa.

Dear Sir: Your recent favor addressed to the Attorney General was duly received.

You ask to be advised whether medical inspectors employed in school work are within the benefits of the Public School Employes' Retirement System.

The Act of July 18, 1917, P. L. 1043, which creates this system, provides in paragraph 7, Section 1, in part, as follows:

"No person shall be deemed an employe, within the meaning of this Act, who is not regularly engaged in performing one or more of these functions as a full time occupation, outside of vacation period."

I understand the medical inspectors are employed about three hours daily in the work of school inspection. They devote the balance of the day to their private practice. The language of this Act requires persons to be engaged in school work "as a full time occupation." These medical inspectors are not so engaged.

Therefore, in our opinion, they are not "employes" within the definition of that term as contained in the Act creating the retirement system, and are not eligible to its benefits.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

PUBLIC SCHOOL EMPLOYEES.

Under the Act of July 18, 1917, P. L. 1043, creating a Public School Employees' Retirement System, an employe who has attained the age of seventy years, but who has had less than ten years service, is not entitled to retirement with allowance on the ground of super-annuation.

Office of the Attorney General,
Harrisburg, Pa., June 10, 1919.

Mr. H. H. Baish, Secretary, Public School Employees' Retirement Board, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 29th ult. requesting to be advised whether the Public School Employees' Retirement Board is vested with the power to retire an employe for superannuation on a retirement allowance, who has attained the age of seventy years, but has had less than ten years of service.

The Act of July 18, 1917, P. L. 1043, creating a public school employes' retirement system, establishes two forms of retirement entitling a person to receive an allowance as a beneficiary, namely, disability retirement and superannuation retirement. One of the conditions entitling contributor who is an employe to retire upon

disability, as provided for in Section 13, is "that said contributor has had ten or more school years of school service." There is no like express requirement of minimum length of service attached to retirement for superannuation, as defined and provided for in Section 14. That such minimum term of service is made an express condition to permit of disability retirement and not of superannuation retirement might, in the absence of other provisions importing such requirement, lead to the conclusion that it is not necessary in the case of this latter kind of retirement. A careful consideration, however, of all the provisions relative to the superannuation retirement discloses that this is not the true intent of the Act. Section 14 dealing with retirement for superannuation provides, *inter alia*, as follows:

"On retirement for superannuation, a contributor who is an employe shall receive a retirement allowance which shall consist of—

"(a) A teacher's annuity, which shall be the actuarial equivalent of his or her accumulated deductions; and

"(b) A State annuity of one one-hundred-sixtieth ($1/160$) of his or her final salary for each year of service prior to the age of sixty-two; and

"In addition thereto, if a present employe, a further State annuity of one one-hundred-sixtieth ($1/160$) of his or her final salary for each year of prior service, as certified to said present employe in the certificate issued to him or her by the retirement board under the provisions of section ten of this act; but in no event shall the total State annuity exceed fifty per centum of his or her final salary."

It will be seen from the foregoing that the part of the retirement allowance in case of superannuation, consisting of the "State annuity" and "further State annuity" as such "State annuity" is defined in paragraph 20 of Section 1, is based upon the "*final salary*" of the retiring employe. The Act itself fixes the meaning of "*final salary*" and under a well known rule in the interpretation of statutes this legislative definition must govern. It is defined in paragraph 17 of Section 1 as follows:

"'Final Salary' shall mean the average annual salary, not exceeding two thousand dollars, earnable by a contributor as an employe for the ten years of service immediately preceding retirement."

By virtue of this provision there cannot be a "final salary" within the intendment of the Act unless there has been a service of at least ten years. The implication necessarily follows that there must

be a service of that duration to permit an allowance in case of retirement for superannuation, for the reason that it is essential in computing what the retirement allowance shall consist of. Without it the Act cannot be applied. Other provisions of the statute strengthen this construction, for example—in paragraph six of Section 8, relative to “the employes’ annuity savings fund”, it is required that the deductions from the salary of employes shall be sufficient—

“.....To procure for him or her, on superannuation retirement at age sixty-two, an employe’s annuity equal to one one-hundred-sixtieth ($1/160$) of his or her final salary for each year of service after the thirtieth day of June, nineteen hundred nineteen.....”

The conclusion herein reached is in harmony with the spirit and purpose of the Act. It seems unlikely that it had in contemplation a retirement system the benefits of which would extend to those who served in public school work only for some brief period of time.

You are, therefore, advised that it would not be lawful to retire for superannuation with a retirement allowance an employe who has had less than ten years of service.

Yours very truly,

EMERSON COLLINS,
Deputy Attorney General.

PUBLIC SCHOOL EMPLOYES.

A continuation school teacher who is appointed by the local school board and who is under the supervision of the local superintendent of schools, but whose salary is paid by a local manufacturing concern, is not eligible for membership in the State School Employes’ Retirement Association.

A Clerk and stenographer to a County Superintendent of Schools, whose salary is paid by the County Commissioners, is not eligible for membership in the State School Employes’ Retirement Association.

Office of the Attorney General,
Harrisburg, Pa., July 1, 1919.*

Mr. H. H. Baish, Secretary, Public School Employes’ Retirement Board, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 14th ult. requesting an opinion upon the following cases:

First: Is a Continuation School teacher who is appointed by the local school board and who is under the supervision of the local superintendent of schools, but whose salary is paid by a local manufacturing company, eligible for membership in the State School Employees' Retirement Association?

Second: Is a clerk and stenographer to a county superintendent of schools, whose salary is paid by the county commissioners, eligible for membership in the State School Employees' Retirement Association?

These cases may be considered together, as they involve the same question arising under the Act of July 18, 1917, P. L. 1043, creating the Retirement System for public school employees.

In order to entitle any person to membership in the Retirement Association created by the Act his employer must be such a one as therein defined. It is needless, therefore, to discuss whether the above employees are so eligible until it has first been determined whether the said respective employers are to be deemed an "employer" within the intent and meaning of the Act. The deductions which employers are required to make, pursuant to Section 7, from the payroll of employees can only be enforced against, and applied to employers within the meaning of the Act. These deductions are essential in providing the fund from which the retirement allowance is paid. It would be idle to allow membership to an employee in a case where the fund out of which the retirement allowance is to be paid could not be provided as prescribed and required. It is an elementary rule that a statute must be construed from a survey of all its parts.

Paragraph six of Section 1 of the Act, defining the meaning of the term "Employer", reads as follows:

"Employer" shall mean the Commonwealth, school district, normal school district, board, or other committee by which the employee is paid."

While this definition lacks clearness, it is obvious that neither of the above mentioned employers answers its description or fulfils its import. The context plainly shows that it is confined and refers to the Commonwealth and its officials and several agencies charged with the conduct and management of the schools enumerated in Paragraph 5, Section 1. In confirmation of this interpretation, it may further be pointed out that under Section 9, providing for reimbursement to the Commonwealth by the employer of certain portions of the amount paid by the Commonwealth into the funds there-in specified, there is clearly contemplated an employer to whom a

State appropriation has been made for school purposes. Against the County Commissioners who may hire a stenographer for a Superintendent of schools, or against a private concern that may employ a teacher for a continuation school, the Commonwealth would have no such recourse or method of reimbursement.

You are, therefore, advised that the employees in the above stated cases are not eligible for membership in the said Retirement Association.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

EMPLOYEES OF THE DEPARTMENT OF PUBLIC INSTRUCTION.

An employe of the Department of Public Instruction who cannot come within the benefits of the Teachers' Retirement System, may be retired as a State employe, under the Act of June 14, 1915.

Office of the Attorney General,
Harrisburg, Pa., August 26, 1919.

Mr. H. H. Baish, Secretary, Public School Employees Retirement Board, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 16th inst. asking to be advised as to whether employes in the State Department of Public Instruction would come within the retirement provided for State employes, in case they fail to avail themselves of the protection afforded by the public school employes retirement system.

The Act of June 14, 1915, P. L. 973, provided for the retirement of State employes upon the conditions and in the manner therein prescribed. Section 1 thereof, as amended by the Act of June 7, 1917, P. L. 559, extends its provisions to State employes "*except State employes whose retirement has been or shall be otherwise provided for.*"

The Act of July 18, 1917, P. L. 1043, establish "a public school employes' retirement system." As defined in Paragraph (7) of Section 1 the term "employe", as used therein,

"Shall mean any teacher, principal, supervisor, supervising principal, county superintendent, district superintendent, assistant superintendent, any member of the

staff of the State normal schools, or of the staff of the State Department of Public Instruction, or of the staff of the State Board of Education, or any clerk, stenographer, janitor, attendance officer, or other person engaged in any work concerning or relating to the public schools of this Commonwealth, or in connection therewith, or under contract or engagement to perform one or more of these functions."

The employes of that Department, who are also State employes, are consequently thus brought within the scope of the public school employes' retirement system created by the Act of 1917. Since they are given a method of retirement by that Act, they are expressly excluded from the provisions of the Act of 1915, providing for the retirement of State employes, by virtue of the above quoted provision of the Act of 1915, which excepts from its purview State employes "whose retirement has been or shall be otherwise provided for."

The purpose of thus excepting from the Act of 1915 those State employes whose retirement is otherwise provided for is manifest. The Commonwealth did not contemplate or intend that any of its employes should enjoy the benefits of two retirement systems, and thus possibly receive an allowance from both. Furthermore, the decision as to which he would become the beneficiary of was not left to the employe's election. When the State has made other provision for the retirement of one of its employes than that provided by the Act of 1915, such an employe must look to such other system for his protection in this respect, for he is denied that afforded by the Act of 1915.

In accordance with the foregoing, you are, therefore, advised, as a general proposition, that any State employe, such as an employe of the Department of Public Instruction, who is entitled to come within the provisions of the public school employes' retirement system as established by the Act of 1917, is not eligible to retirement as a State employe, pursuant to the provisions of the said Act of 1915. Where, however, an employe of the State Department of Public Instruction for any reason, such as age, cannot possibly come within the benefits of the State teachers' retirement system then in such case I am of the opinion that he would be entitled to retirement as a State employe under the Act of 1915, upon the conditions therein prescribed, since in such instance his retirement would not be provided for otherwise than in that Act.

Very truly yours,

EMERSON COLLINS.
Deputy Attorney General.

PUBLIC SCHOOL EMPLOYES' RETIREMENT BOARD.

By the terms of the Act of July 18, 1917, P. L. 1043, paragraph 3, of Section 3, a retiring contributor is entitled to the benefits whether the retirement be for disability or superannuation. The proper rule to follow in computing the State annuity under clause (b), Paragraph 3 of Section 14 is that the one-one hundred sixtieths of the final salary is for each year of service up to the age of sixty-two, but not beyond that.

Office of the Attorney General,
Harrisburg, Pa., November 18, 1919.

Mr. H. H. Baish, Secretary, Public School Employees' Retirement Board, Harrisburg, Pa.

Sir: This Department is in receipt of your several communications of the 28th ultimo requesting to be advised relative to certain provisions of the Public School Employees' Retirement System Act of July 18, 1917, P. L. 1043. The questions submitted by you may be stated as follows:

First: Does the retirement of a contributor provided for in the concluding sentence of Paragraph 3, Section 3, apply to disability retirement as well as to superannuation retirement?

Second: In computing the "State annuity" in the case of superannuation retirement is the one one-hundred-sixtieth of the final salary to be multiplied by the number of years of service of the retiring employe prior to the age of sixty-two, or by all the years of service at the time of retirement?

Taking these questions up in the foregoing order, you are respectfully advised as follows:

(1) Section 3 of the Act establishes and defines the Employees' Retirement Association.

Under Paragraph 3 thereof provision is made for the merging into this Association of other retirement systems, whereupon such other systems are discontinued and their members become members of the Association established by this Act, upon the conditions and in the manner therein prescribed. The concluding sentence of Paragraph 3 of Section 3 reads as follows:

"Upon the retirement of any contributor of the retirement association established by this act, who has not received back any contributions which he or she made to such discontinued retirement system, there shall be paid from State annuity reserve fund number two into employes' annuity reserve fund the amount of such contributions, and he or she shall receive therefor such annuity or other benefit purchasable therewith as he or she may elect, in addition to the other benefits provided by this act."

Your inquiry, in effect, is whether the retirement of a contributor, pursuant to the above, is restricted to superannuation retirement. The Act defines "disability retirement" and "superannuation retirement", and where the term retirement is used generally, without any qualification, it is, unless the context is repugnant to such construction, presumably to be taken to include and mean both kinds of retirement. I see no reason why this term, as employed in the above quoted provision, should be limited to superannuation retirement. If it had been so intended, the intentment doubtless would have been expressed.

You are, therefore, advised that upon the retirement of a contributor, under the foregoing provision of the Act, such contributor will be entitled to the benefits therein allowable whether the retirement be for disability or superannuation.

(2) By virtue of Section 14 an employe may retire for superannuation at the age of Sixty-two, and at the age of seventy is compulsorily retired forthwith by the Board. The question presented by you is whether in computing that part of the retirement allowance consisting of the "State annuity" the one one-hundred-sixtieth of the final salary of an employe shall be multiplied by the number of years of service prior to the age of sixty-two or by the total number of years of service up to the time of his retirement in cases where an employe may continue in the service after the age of sixty-two.

Paragraph 3 of Section 14 provides as follows:

"On retirement for superannuation, a contributor who is an employe shall receive a retirement allowance which shall consist of—

"(a) A teacher's annuity, which shall be the actuarial equivalent of his or her accumulated deductions; and

"(b) A State annuity of one one-hundred-sixtieth (1-160) of his or her final salary for each year of service prior to the age of sixty-two; and

"(c) In addition thereto, if a present employe, a further State annuity of one one-hundred-sixtieth (1-160) of his or her final salary for each year of prior service, as certified to said present employe in the certificate issued to him or her by the retirement board under the provisions of section ten of this act; but in no event shall the total State annuity exceed fifty per centum of of his or her final salary."

The provision of Clause (b) of the above is so plain that it would seem to leave no reasonable doubt that in computing the said State annuity the multiplier is in all cases only the number of years of service of the employe prior to the age of sixty-two. It is contended, however, that such is not the case, but that by virtue of the provision contained in Section 11 the multiplier is the whole number of

years of service up to the time of retirement, which retirement, as above noted, may occur as late as the age of seventy. The provision in Section 11 cited to sustain this contention reads as follows:

"In computing the length of service of a contributor for retirement purposes, under the provisions of this act, full credit shall be given to each contributor by the retirement board for each school year of service as an employe, as defined in section one, paragraph seven of this act."

In my opinion, the contention that this provision contained in Section 11 operates to make the multiplier of the one one-hundred-sixtieth of the final salary the whole number of years of service up to the time of retirement is untenable. Such a construction would nullify and make meaningless the method of computation as laid down in Clause (b), Paragraph 3 of Section 14. I see no warrant for a departure from the strict letter of that provision.

An examination of Section 11 shows that it relates to "prior service" as that term is defined by the Act. Under Clause (c) of Paragraph 3 of Section 14, above quoted, there is to be a further addition to the retirement allowance in the case of a "present employe" to the amount of one one-hundred-sixtieth of the employe's final salary for each year of "prior service" as "certified under the provisions of Section 10." This reference to Section 10 is clearly an error, Section 11 being evidently intended. Even if Section 11 does not exclusively apply to "prior service" but includes service generally it could not control as to the method of computing the "State annuity" allowable under Clause (b), Paragraph 3 of Section 14 as against the express provision of this clause.

A careful examination of the whole Act tends to strengthen this conclusion. As hereinbefore pointed out, the compulsory contributions cease at the age of sixty-two, and the State fixes that age as the limit of service in computing the State annuity under Clause (b), Paragraph 3 of Section 14. Inasmuch as every employe may exercise his right to retire for superannuation at the age of sixty-two, the plan of retirement allowance in connection therewith was manifestly and necessarily devised to accord with such fact and meet such a situation. We should avoid any strained construction which may disturb it.

You are, therefore, advised that the proper rule to follow in computing the "State annuity" under Clause (b), Paragraph 3 of Section 14 is that prescribed therein, namely, that the one one-hundred-sixtieth of the final salary is for each year of service up to the age of sixty-two, but not beyond that.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

PUBLIC SCHOOL EMPLOYEES.

Under the Act of July 18, 1917, P. L. 1043, deductions should not be made from the salary of a person entering upon public school employment at an age which precludes superannuation retirement.

Office of the Attorney General,
Harrisburg, Pa., December 4, 1919.

Mr. H. H. Baish, Secretary, Public School Employees' Retirement Board, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of October 28th asking to be advised as to whether deductions should be made from the salary of a public school employe, pursuant to the Public School Employees' Retirement System Act of July 18, 1917, P. L. 1043, where the employe enters the school service at an age which will preclude a retirement for superannuation.

Under Section 7 of the Act it is made the duty of any employer "before employing any person to whom this Act may apply" to notify such persons of their duties and obligations thereunder, to certify their names to the Retirement Board, and advise it of withdrawals and removals of employes and changes in their salaries, and to cause to be deducted from the salary of each contributor—

"* * * For each and every pay-roll period * * * such percentum of the total amount of salary earnable by the contributor in such pay-roll period as shall be certified to said employer by the retirement board as proper, in accordance with the provisions of this act."

The amount of the deductions as provided by Paragraph 6* of Section 8, shall be—

"* * * Such per centum of his or her earnable salary, not exceeding two thousand dollars per annum, as shall be computed to be sufficient, with regular interest, to procure for him or her, on *superannuation retirement* at age sixty-two, an employe's annuity equal to one one-hundred sixtieth ($1/160$) of his or her final salary for each year of service after the thirtieth day of June, nineteen hundred nineteen."

with certain exceptions and provisions therein further set forth.

In paragraph 8 of Section 8 it is provided that these contributions shall not be required to continue after the contributor "shall have become eligible for superannuation retirement," which by Section 14 is fixed at the age of sixty-two and made compulsory at the age of seventy.

It will be noted that the aforesaid provisions contained in Section 7, wherein it is made the duty of the employer, inter alia, to cause the deductions from the salary of a contributor to be made, are made

applicable only in case of the employment of a person "to whom this act may apply." In an opinion of this Department to you, rendered by the writer hereof, dated June 10, 1919, it was held that there must be at least ten years service to entitle a person to retire for superannuation, such retirement, as above stated, being compulsory at the age of seventy and optional at sixty-two. It will be seen that only those entering the service after sixty are necessarily prevented by age from being retired for superannuation. For disability retirement there is an express requirement of ten years service. It has been urged, however, that notwithstanding the fact that a person enters upon school employment at an age which will necessarily prevent the required ten years service before the age of compulsory retirement has been reached, yet the deductions from his salary should, nevertheless, be made, and he be given the benefit thereof upon his withdrawal or separation from the service.

After a very careful consideration of this proposition, I am clearly led to the conclusion that the Act does not warrant such a procedure. The plain and express purpose of this measure is to set up a system for the retirement of public school employes as the term "retirement" is therein defined, with an accompanying "retirement allowance" for life, this allowance consisting of "state annuity plus the employes annuity," and the implication necessarily follows that the Act does not apply to a person whose utmost tenure of service prior to the age fixed for compulsory retirement will be too brief to entitle him to such "retirement" and become the beneficiary of the prescribed "retirement allowance" in connection therewith. While it is true that a contributor upon withdrawal from the service is entitled to receive the benefit of his accumulated deductions in manner as prescribed in Section 12, it is not contemplated from the outset of his employment that this is the sole possible benefit he may receive or the only end to which his contributions may lead. If this were the case, it would not be a retirement system, but merely a method of saving.

The number affected by this ruling will be few. As above pointed out, only those entering upon employment after the age of sixty are necessarily excluded by reason of age from superannuation retirement, and compulsory contributions cease at sixty-two. It would serve no useful purpose to exact these deductions for this brief period, and we may safely conclude that the Act does not so intend.

You are, therefore, advised that deductions should not be made from the salary of a person entering upon public school employment at an age which precludes a superannuation retirement.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

PUBLIC SCHOOL EMPLOYEES—RETIREMENT—ACT OF JULY 18, 1917.

Public School employes, who were such at the date of the passage of the Act of July 18, 1917, P. L. 1043, were required by that Act to make application for membership in Employees' Retirement Association, prior to June 30, 1919. Application made subsequent to that date cannot be accepted.

Office of the Attorney General,
Harrisburg, Pa., December 17, 1919.

Mr. H. H. Baish, Secretary, Public School Employees' Retirement Board, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 1st inst. asking to be advised whether applications by school employes for membership in the Retirement Association established by the Act of July 18, 1917, P. L. 1043, can be accepted after June 30, 1919. This request evidently relates to what are known as present employes under the Act.

Paragraph (8) of Section 1 of the Act defines a "present employe" to mean—

"* * * Any employe, as defined in paragraph seven of this section, employed in any capacity in connection with the public schools at the time this bill becomes a law, and any employe who has employed prior to such time and who shall become a contributor within three years from the date of expiration of such employment."

Section 3 provides, inter alia, as follows:

"An employe's retirement association is hereby organized, the membership of which shall consist of the following:—

"1. All present employes, except those specifically excluded by paragraph three of this section, who by written application to the Superintendent of Public Instruction shall elect, before the first day of July, nineteen hundred nineteen, to be covered by the retirement system."

In an opinion delivered by First Deputy Attorney General Keller, under date of March 28, 1918, you were advised that the date distinguishing a "present employe" from a "new entrant" was that of the approval of the Act, July 18, 1917.

On April 30, 1918 in answer to your inquiry of April 29, 1918, whether the Retirement Board "can accept an application for membership in the Retirement Association from a present employe after July 1, 1919," First Deputy Attorney General Keller, after first quoting the above quoted portion of Section 3 of the Act, said:

"This distinctly provides that all present employes, except those specifically excluded by paragraph three of the same section, in order to become members of the Retirement Association, must elect in writing before July 1, 1919, to be covered by the retirement system. The language admits of no misunderstanding and excludes present employes from membership in the Retirement Association unless they elect to make written application to the Superintendent of Public Instruction before July 1, 1919, to be covered by the retirement system."

While this latter ruling was not in the form of a formal opinion it had a like effect as though couched in such form. Its meaning is clear and gives to the provision of Paragraph 1, Section 3, its literal effect, namely, that every "present employe", except those excluded by Paragraph 3, was required to make the prescribed election within the prescribed time in order to become a member of the Association, and, as I understand it, your Board has so understood it.

It is now urged, as appears by the communication accompanying your request, that this ruling or the interpretation thereof to the effect that every "present employe", "except those specifically excluded by paragraph three" of Section 3, was required to file his election to be covered by the retirement system before July 1, 1919, in order to become a member of the Association, should be modified as to that class of present employes embraced within the second part of the definition of the term "present employe", as above quoted and italicized, so as to allow them to file such application later than July 1, 1919, at any time within three years from the expiration of their prior employment.

The difficulty with this proposition is in overlooking that while this provision in the definition of a present employe permits those who had been in the service prior to the passage of the Act to be what is termed a "present employe" upon becoming a contributor within three years from the expiration of such prior employment, there is nowhere any intendment expressed to relieve them of the duty imposed as to filing the application prescribed for present employes electing to be covered by the system. The fact that there was given to this class of employes the right to attain the status of a present employe, upon the prescribed conditions, does not imply the further right to gain membership in the Association contrary to the requirement contained in Paragraph 1 of Section 3. No such implication can prevail as against its express terms. New entrants, except "those specifically excluded by paragraph three" of Section 3, were made members of the Association automatically, but present employes were required to take certain action to become members, and the Act has prescribed the method.

"Where powers or rights are granted, with a direction that certain regulations or formalities shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred; and it is probable that such was the intention of the Legislature. ***It seems that when a statute confers a right, privilege or immunity, the regulations, forms, or conditions which it prescribes for its acquisition are imperative, in the sense that non-observance of any of them is fatal, (upon the principle, application alike to contracts and statutes, that a party cannot claim the benefits conferred and at the same time repudiate the obligations imposed by such.)"

Endlich on Interpretation of Statutes, 433-434.

Paragraph 1 of Section 3 makes but one exception from its purview, viz., "those specifically excluded by paragraph three of this section." This very exception tends to support the construction that no other exceptions were intended under the well known rule, *expressio unius est exclusio alterius*. *Endlich on Interpretation of Statutes*, 397, 398, 399. The provisions of the Act generally fortify this view. "Prior Service" is defined as the service "completed not later than the thirtieth day of June, 1919," such prior service being made the basis of a "further state annuity", under Clause (c), Paragraph 3, Section 14, to a "present employe" upon superannuation retirement, and the system itself by Section 2 was established on July 1, 1919, all harmonious with the requirement that a present employe desiring to enter the Association and be covered by the system must file his election prior to that date. It would seem strange if a more liberal rule of admission to membership in the Association had been afforded those out of the service at the time the law was enacted than that to those in the service.

Paragraph 2 of Section 12 has been cited to support the above contention that a full period of three years was allowable in which to make application for membership in such a case as is here under consideration, but it is plain that that provision relates to those who had been in the Association and seek to regain membership and not to the method of gaining membership originally.

This Department, mindful that a hardship may be visited upon some deserving employes returning to the service within a time allowable to gain the standing of a present employe, but who failed to give notice of their election to enter the Association within the time named in Paragraph 1, Section 3, has given most careful consideration to the question here submitted and to the foregoing ruling made by First Deputy Attorney General Keller, with a view, despite the

great weight attaching to any conclusion of his, to depart or modify the same if consistent with a fair interpretation of the Act. Such consideration, however, has confirmed the opinion that this conclusion was manifestly the correct one, and that it must be adhered to and followed.

It may be noted that the period allowed by the Act for present employes to enter the Association was not unreasonably short, extending from July 18, 1917 to July 1, 1919, and should have afforded ample notice to all. Any relief from, any injustice done by the rigid exaction of Paragraph 1, Section 3, must be sought for in remedial legislation and not in straining the Act to a construction palpably at variance with its express terms. It must be taken as it stands, not as we may think it ought to be.

Reaffirming the above mentioned ruling, you are advised that by virtue of Paragraph 1, Section 3, every "present employe", "except those specifically excluded by Paragraph 3 of this section", in order to become a member of the Association, was required to make his election to be covered by the retirement system, in manner prescribed before July 1, 1919, and that applications therefor cannot be accepted on or after that date.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

PENNSYLVANIA SCHOOL CODE.

Under the Act of Congress, approved March 3, 1919, providing for taking the 14th census, the Director of the Census may officially announce the population of a city separate from the whole State of Pennsylvania for all of its school districts, and thereupon the State Superintendent of Public Instruction may act upon such official announcement, as provided by sections 106 and 107 of the School Code of May 18, 1911, P. L. 309.

If this official report is made in time for the Superintendent of Public Instruction to issue a certificate in the month of April or May that a district of the third class has become a district of the second class, the tax levy may be made as provided for a district of the second class.

The school district of a city which is now a district of the third class cannot anticipate the fact that it will become a district of the second class and levy its taxes upon the city assessment instead of the county assessment, before an official announcement of the population is made, and before the Superintendent of Public Instruction issues the necessary certificate, as required by section 107 of the School Code.

Office of the Attorney General,
Harrisburg, Pa., March 19, 1920.

Dr. J. George Becht, First Deputy Superintendent of Public Instruction, Harrisburg, Pa.

Sir: This Department is in receipt of your request for an opinion as to whether the City of Easton, which now comprises a school district of the third class, may levy its tax upon the theory that it will become a school district of the second class under the census of 1920.

I understand the facts upon which you base your request to be as follows:

The City of Easton, having a population between five thousand and thirty thousand is, under Section 104 of the Pennsylvania School Code of 1911, P. L. 310, a school district of the third class. The census of 1920 will undoubtedly show a population in excess of thirty thousand.

School districts having a population of between thirty thousand and five hundred thousand are of the second class (School Code of 1911, P. L. 310). By Section 106 of the School Code of 1911, P. L. 310, it is provided:

"The last United States census, as set forth in the official report thereof, shall be the basis on which the population of the several school districts shall be computed, and no change shall be made from one class of school districts to another except after the taking of a United States census, showing the population of any school district to be such as to entitle it to be changed from one class of school districts to another."

School districts of the third class levy and assess the school tax upon the property upon which the county taxes are levied and assessed (Section 540, School Code of 1911, P. L. 340). School districts of the second class levy and assess the school tax upon the real estate and personal property contained in the assessment made for city tax purposes (Section 538, School Code of 1911, P. L. 340).

The School Code of 1911, in Section 107, P. L. 310, provides for changing the classification as follows:

"After the taking of each United States census, the Superintendent of Public Instruction shall canvass the same so far as it relates to the population of the several school districts in this Commonwealth, and if it appears that the population of any school district in this Commonwealth, by such census, is such that it should

be included in another class of school districts, the Superintendent of Public Instruction shall issue a certificate to such district to that effect, and such school district shall with the beginning of the first school year after such certificate is issued, become a school district of the class to which it properly belongs.”

By Section 536 of the School Code of 1911, P. L. 339, the fiscal year in all school districts of the second, third and fourth classes begins on the first Monday of July of each year.

In school districts of the second class the city clerk, or other proper official, is required to furnish each school district, on or before the first day of April in each year, the duplicate of the last adjusted valuation of all real estate, personal property and occupations made taxable in such district. In school districts of the third and fourth classes, the county commissioners are required to furnish before the first day of April of each year the same duplicate.

In districts of the second, third and fourth classes all school taxes shall be levied during the months of April or May of each year for the ensuing fiscal year. (Sections 537, 539 and 541, School Code of 1911, P. L. 339 and 340.)

You ask, (1) whether the Superintendent of Public Instruction may accept a promulgation of the enumeration of such districts from the United States Census Bureau, in advance of the general public proclamation regarding the census of 1920, and, (2) whether a board of school directors may anticipate a new classification by basing a tax levy, required to be made in April or May, for the fiscal year beginning the first Monday of July, on the city instead of the county assessment.

The Act of Congress approved March 3, 1919 (Public—No. 325—65th Congress), providing for the fourteenth decennial census, provided, among other things, in Section 33:

“That the Director of the Census be, and he is hereby, authorized, at his discretion, upon the written request of the Governor of any State or Territory or of a court of record, to furnish such governor or court of record with certified copies of so much of the population or agricultural returns as may be requested * * * ; and that the Director of the Census is further authorized, in his discretion, to furnish to individuals such data from the population schedules as may be desired for genealogical or other proper purposes * * *.”

I am advised by the Director of the Census that he has construed Section 33 of the Census Act to apply to special tabulations for particular information that is not contained in the regular reports, and that it does not apply to furnishing statistics of population of

the character that are contained in the general reports of the census. He says, however, that they are giving attention to statistics for various cities, and expect as soon as possible to announce the population of cities.

In the case of *Lewis vs. Lackawanna County*, 200 Pa. 590, where the question involved rested to some extent upon a press bulletin of November 19, 1900, announcing the census of Lackawanna County, the Court said (597):

“ * * * The census bureau submitted to Congress on December 13, 1900, an official bulletin (No. 20) giving the population of the States by Counties. But even that was a provisional statement, subject to correction on final report. In very close cases this feature might become important. Nevertheless as an official act of the department of the Government, in connection with Congress, this was probably part of the public history of which not only the courts but officers of election and electors are bound to take notice. But that is the earliest date at which the fact of population on which the status of Lackawanna county was to be changed, can be considered as legally ascertained in the present case. * * * ”

Section 30 of the Census Act of March 3, 1899, authorized the Director of the Census on request to furnish the Governor of a State, or the chief officer of any municipal government with a copy of the returns of the population of the territory within the jurisdiction of such officer. The Court also said:

“It is probable that in reference to elections the sheriff would be deemed the chief officer of his county so far as to authorize him to procure the information, and that an official statement of the facts from such certificate in his proclamation for the election, would be treated as a legal ascertainment of the facts which would be binding on electors and elected.”

I am, therefore, of opinion that if the Director of the Census officially announces the population of the City of Easton separate from, and in advance of, the general promulgation of census statistics for the whole State of Pennsylvania for all of its school districts, that the State Superintendent of Public Instruction may act upon such official announcement, as provided by Sections 106 and 107 of the School Code. If this official report is made in time for the Superintendent of Public Instruction to issue a certificate that the City of Easton has become a school district of the second class, so that the tax levy may be made as provided for a district of the

second class, no difficulties will arise. The school district of the City of Easton, which is now a district of the third class, can not, however, anticipate the fact that it will become a district of the second class and levy its taxes upon the city assessment instead of the county assessment, before an official announcement of the population is made, and before the Superintendent of Public Instruction issues the necessary certificate as required by Section 107 of the School Code.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

NORRISTOWN TEACHERS RETIREMENT FUND.

The money which had accumulated in the Norristown Teachers Retirement Fund, which merged into the State system, should be transferred to the State Annuity Reserve Fund Number Two for the uses and purposes provided for by the Public School Retirement Act of July 16, 1917, P. L. 1043.

Office of the Attorney General,
Harrisburg, Pa., July 19, 1920.

Mr. H. H. Baish, Secretary Retirement Board, Public School Employes' Retirement System, Harrisburg, Pa.

Dear Sir: This Department is in receipt of your communication of the 1st inst., relative to the disposition of the fund of The Norristown Teachers' Retirement Association whose members joined the State Public School Employes' Retirement System. The question upon which you ask to be advised is: Should the fund accumulated by the said local retirement association, which is now discontinued, be transferred to the State under the provisions of the Public School Retirement Act of July 18, 1917, P. L. 1043.

The material facts, as I gather them from your communication and the correspondence accompanying the same, are as follows:

Under a resolution of the Board of Directors of the Norristown School District and the provisions of the School Code of 1911, the public school teachers of that town organized a retirement association, which organization was in existence at the time the above Act became a law. To this association the employer, that is the said school district, contributed the sum of \$250.00 and the Board of Directors further directed that any amount deducted from the

salary of an absent teacher for whom no substitute was procured should go to said fund, the amount added thereto on this account not appearing. After accumulating a fund of about \$8000.00, which is now in the custody of the said School Board, this local association merged into the State System, none of the members of this local association having retired therefrom prior to its discontinuance and the entrance of its members into the State Association. As shown by the communication of the Secretary of this former local association to you dated June 29, 1920, and accompanying your communication and herewith returned, it is urged that all of the aforesaid fund should be distributed at once to the teachers to the extent of their respective contributions thereto and the balance thereof turned over to the Teachers' Club of that place. As above stated, the question submitted is whether this is permissible, or should the fund be turned over to the State.

The Retirement Act of 1917 created a comprehensive system for the retirement of public school employes applicable throughout the entire Commonwealth. It became effective as of July 1, 1919. It was intended to extend its benefits not only to those engaging in public school service after its passage, but to those then so employed and to open a way to membership to the members of other than existing retirement systems. Possible membership was accordingly made to consist of (1) "present employes," duly electing to become members, (2) "new entrants," as both those terms are defined, and (3) members of certain other systems. The method by which this last mentioned class may gain membership is prescribed in paragraph 3 of Section 3, which reads in part as follows:

"Present employes who are members, and new entrants who become members, of a retirement system, maintained under the laws of the Commonwealth from appropriations or contributions made wholly or in part by any employer, and existing at the time this bill becomes a law, shall be excluded from membership in this retirement association. But should two-thirds of all the members participating in any such retirement system apply for membership in the retirement association, by a petition duly signed and verified, approved by their employer, and filed with the retirement board, all the persons included shall become members of the retirement system shall become members of the retirement association at such time, within three months after the filing of such petition, as the retirement board shall designate. Thereupon the retirement system of which they were members at the time they were included in the retirement association provided by this act shall be dissolved and discontinued, as follows:"

Upon the dissolution of any such retirement system pursuant to the foregoing, the fund which it had accumulated is to be used for the payment of the retirement allowances of any of its members who may have retired before its dissolution, the disposition thereof being further provided for in the concluding part of paragraph 3, Section 3, and reading as follows:

"All present assets of such retirement system at the time of its discontinuance shall be transferred to the employer, to be held and invested as a trust fund and disbursed only in payment to the before-mentioned retired members, except that if the amount of such present assets exceed the present value of the future retirement allowances or other benefits of such retired members, computed on the basis of such tables as the retirement board shall have adopted for similar classes of annuitants, and of regular interest, the amount of the excess shall thereupon be transferred to State annuity reserve fund number two. Upon the retirement of any contributor of the retirement association established by this Act, who has not received back any contributions which he or she made to such discontinued retirement system, there shall be paid from the State annuity reserve fund number two into employes' annuity reserve fund the amount of such contributions, and he or she shall receive therefor such annuity or other benefit purchasable therewith as he or she may elect, in addition to the other benefits provided by this act."

The effect of this provision is both clear in intent and mandatory in effect. It contemplates and requires that all the assets of any association which by due proceedings dissolved and whose members became members of the State Retirement Association, in excess of the sum needed to meet the obligation of the retirement allowances of its members who had retired before this action had been taken, shall be transferred to the "State annuity reserve fund number two," for the uses and purposes specifically designated in the last above quoted portion of the Act. As above mentioned, no members had been retired from the Norristown Association prior to its dissolution, and hence, none of its assets are required to take care of retirement allowances arising in that Association. The whole fund in such case is, therefore, left for transfer to the State. Contention is made that the transfer of the fund of the said Norristown Association is not required for the reason that the employer had not made any regular contribution thereto and only a small one of any kind, the fund being the result chiefly of the contributions of the teachers and various means employed by them to raise the money therefor. I am of opinion that this contention is not well founded. By refer-

ence to the first part of paragraph 3, Section 3, as above quoted, it will be seen that the members of other systems are entitled, in manner prescribed, to become members of the one created by the Act of 1917, where such other system was one "maintained under the laws of the Commonwealth from appropriations or contributions made wholly or in part by any employer." No test is exacted as to the amount of regularity of the contributions of the employer. If it was a system existing at the time of the passage of the Act of 1917 and was organized under the laws of the Commonwealth, and to which the employer gave recognition by any contribution, it fulfills the requirement permitting its members to come into the State Association in accordance with the provisions of paragraph 3, Section 3. The Norristown teachers who were members of the local association and are now members of the State Association, attained membership in the latter by virtue of these provisions. They came in as members of another system, not as "present employes" or "new entrants" under paragraphs 1 and 2 of said Section. The conclusion follows that their membership in the State System partakes of any advantages anuring to those thus entering it and that the status of the assets of the dissolved association is subject to all the conditions imposed in such case. They cannot enjoy the right of membership in the State Retirement System on the one hand, and withhold compliance in strict measure with all the requirements attendant upon and governing in the exercise of this right.

"When a Statute confers a right, privilege or immunity, the regulations, forms or conditions which it prescribes for its acquisition are imperative, in the sense that non-observance of any of them is fatal, (upon the principle, applicable alike to contracts and statutes, that a party cannot claim the benefits conferred, and at the same time repudiate the obligations imposed by such."

Endlich on the Interpretation of Statutes, 434.

It is admitted that the members of the said local association were fully advised before voting for a merger with the State Association that these funds should be turned over to the State. I also understand from your communication that each teacher who was a member of the local association has been credited with the contribution made thereto, and upon retirement from the State System will receive full credit therefor, and that several already retired are receiving allowances computed upon that basis. In view of this and of the knowledge upon which the members of the local association acted in joining the State Association, I fail to see any hardship in the ruling herein laid down. The intendment of the Act of 1917

was to erect a harmonious system and for us to permit exceptions from its provisions not expressly allowed, might and probably would work an unfortunate derangement of the whole scheme, and an unjust discrimination, either against or in favor of some of its members.

From all the facts before me I can see nothing to warrant an exception in favor of the case here under consideration taking it out from the general rule, or relieving it from the literal requirement of the law, as to the disposition of the assets of a discontinued retirement system whose members had duly entered the one created by the Act of 1917, and you are, therefore, advised that in my opinion the said moneys which belong to the said Norristown Association should be transferred to the "State annuity reserve fund number two" as provided for in said Act for the uses and purposes as therein set forth.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

**OPINIONS TO THE
ADJUTANT GENERAL**

OPINIONS TO THE ADJUTANT GENERAL.

SCRANTON ARMORY.

An architect, employed to prepare plans for the repair and preservation of a State Armory, injured by a cavein, should be paid such sum as the Armory Board may determine his services are worth, even though his plans are not used. Such payment is properly made out of appropriation made by the Act of July 25, 1917, P. L. 1204.

Office of the Attorney General,
Harrisburg, Pa., February 12, 1919.

General F. D. Beary, Adjutant General, Harrisburg, Pa.

Dear General: We have before us your letter of the 3d inst., in reference to the claim of Frederick L. Brown for services as an architect in protecting the Scranton Armory from a subsidence.

The facts, as I understand them from your conference and communication, are as follows:

The Scranton Armory was badly damaged by a cave-in of the coal mines under it, and temporary repairs were immediately required, and permanent repairs later on made.

Colonel Louis A. Watres and Major General C. B. Dougherty employed Frederick L. Brown to estimate the immediate repairs necessary and also to prepare plans for a complete restoration of the Armory. Later on they employed John Nelson as an architect and practical contractor, who had restored and protected a number of buildings in Scranton damaged from the same causes. Mr. Nelson supervised the work of shoring and protecting Scranton Armory and was paid a per centage upon the cost of the work.

It appears that Mr. Brown made some preliminary examinations of the Armory and a sketch, together with several suggested improvements for the complete restoration of the Armory. He prepared some specifications for the repair and reconstruction, but never prepared complete working drawings. No contract was let, nor was any work done which was suggested in the tentative plans of Mr. Brown.

Mr. Brown submitted a bill for \$2305.35, which was based on six-tenths of 7½% on \$51,178, which amount he estimated as the cost of the restoration under the tentative plans prepared by himself. Later on Mr. Brown submitted a bill for "professional services on account of 13th Regiment Armory at Scranton, from August 1915 to date, (Dec. 1, 1916)—\$3,000."

You ask to be advised whether it is proper to pay the amount of Mr. Brown's bill or whether some other equitable payment should be made, and whether such payment could be made from the emergency fund appropriated by the Legislature, and from which fund the repairs to the Scranton Armory have been made.

First—As to the payment of Mr. Brown's bill: I am advised that the usual charge suggested by the American Institute of Architects is $1\frac{1}{2}\%$ for preliminary plans and 6% for preparing detailed working drawings and specifications, and also supervising the construction. These suggested charges, to a large extent, govern the practice of architects. Mr. Brown has charged six-tenths of $7\frac{1}{2}\%$ on the estimated cost of restoring the Armory. Why six-tenths was the fraction he used, or why $7\frac{1}{2}\%$ was taken as the basis of a complete charge, is not disclosed.

He subsequently presented a bill for a lump sum of \$3,000 instead of the original bill of \$2305.35. Either bill would appear to be out of proportion to the services rendered, even as gauged by the suggestions of the American Institute of Architects. I am assuming that Colonel Watres and General Dougherty had the authority to act for the Board in the original employment of Mr. Brown, and having employed him, he should be paid such sum as the services which he has performed are reasonably worth. What that sum is, should be determined by the Armory Board, after taking into consideration all the circumstances of the case and the work performed.

I, therefore, advise you that it is not proper to pay Mr. Brown either the amount of \$2,305.35, the amount of his first bill, or \$3,000, the amount of his second bill, but he should be paid a sum which represents a fair compensation for the services actually performed. The Board should determine this amount.

Second—The Act of July 25, 1917, P. L. 1204, in Section 2 makes an appropriation

“to replace or repair armory buildings owned by the Commonwealth of Pennsylvania, and occupied by an organization or organizations of the Pennsylvania National Guard, should such armory buildings be destroyed or damaged in whole or in part by fire, flood, storm, or other unavoidable causes.”

The Scranton Armory was used by the Pennsylvania National Guard. The subsidence owing to the mining of coal under it, was an unavoidable cause. Repair of this Armory comes within the appropriation in this Act of Assembly. An architect's charge is an incident to the cost of the repair or restoration of the Armory, and in Mr. Brown's case, even though the plans prepared were not

used, still he was employed for this work and such sum as the Board after investigation determines should be paid to him, will be properly paid out of the emergency appropriation contained in Section 2 of the Act of Assembly above referred to.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

STATE ARMORY BOARD.

The Board had power to employ and should pay out of the emergency fund the services of engineers to examine the mine workings underneath the Scranton Armory, so as to protect the surface of the ground which held the armory from mine caves.

Office of the Attorney General,
Harrisburg, Pa., February 12, 1919.

General F. D. Beary, Adjutant General, Harrisburg, Pa.

Dear General: We are in receipt of your letter of the 3d instant in reference to the payment to Messrs. Robert A. Quinn and William H. Inglis, for work done as the outcome of the subsidence of the ground upon which the Scranton Armory is located.

The facts I understand to be as follows:

In order to save the Scranton Armory from further damage because of the subsidence of the surface, the interior working of several coal veins underlying the Armory had to be supported by concrete columns and in order to place those concrete columns, a special and careful inspection of the underground workings of the coal veins was necessary. Messrs. Quin and Inglis, expert mining engineers of the Anthracite region, were employed by the advisory committee of the Armory Board. These men explored the underground workings, at some places crawling on hands and knees, to reach the point where proper examinations could be made, and a decision as to future repairs arrived at, their undertaking was hazardous, their services were valuable, and their recommendations were acted upon.

No contract for any specific sum was entered into with them, but the Armory Board feels that they should be reimbursed, and it has recommended that the sum of \$1,500.00 be paid to each for their services.

You ask to be advised whether such payment can be made out of the emergency fund appropriated by the Legislature.

This fund is appropriated by Section 2 of the Act of July 25, 1917, P. L. 1204. The services of Messrs. Quin and Inglis were made necessary by the subsidence of the surface of the ground which held the Scranton Armory.

For the reasons given in the opinion this day given to you concerning the claim of Frederick L. Brown, I have to advise you that the Armory Board are authorized to pay Messrs. Quin and Inglis such sum as in their opinion the Board thinks should be paid, and such payment can legally be made out of the appropriation contained in Section 2 of said Act of Assembly.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

INSURANCE.

The money received by the Soldiers and Sailors Home from the insurance of a boat house which was destroyed by fire must be paid into the State Treasury to be applied to the State Insurance Fund.

Office of the Attorney General,
Harrisburg, Pa., March 18, 1919.

Mr. David C. Gotwals, Secretary-Treasurer, Soldiers' and Sailors' Home, Adjutant General's Department, Harrisburg, Pa.

Dear Sir: We have your favor of the 10th inst., asking what disposition should be made of the money received from an insurance policy covering a boat house located on the ground of the Soldiers' and Sailors' Home.

I understand that a fire occurred November 11, 1918, which destroyed the frame boat house and its contents, and that \$1965.62 has been paid for the insurance thereon.

You ask "whether or not there is any objection to having these funds deposited in the Third National Bank, Philadelphia, with a view of having the money earn interest", inasmuch as the Board does not contemplate rebuilding the boat house.

The title to the Soldiers' and Sailors' Home is in the Commonwealth. The Act of May 14, 1915, P. L. 524, which creates an insurance fund for the purpose of insuring all of the property belonging to the Commonwealth, provides, among other things, that "all

payments hereafter made by any insurance companies on account of loss or damage to property of the Commonwealth, caused by fire or other casualty, or on account of the cancellation of existing policies of insurance", shall be paid into such fund.

The money received from the insurance on the boat house comes within this description.

It, therefore, must be paid to the State Treasurer and applied by him to the said insurance fund and cannot be deposited by the Board of Trustees of the Soldiers' and Sailors' Home at interest.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

STATE PROPERTY.

STATE ARMORIES RENTED FOR PUBLIC DANCES—LICENSE— ACT OF MAY 16, 1919.

State armories, rented out and used as public dance halls, are subject to the provisions of the Act of May 16, 1919, relative to license.

Office of the Attorney General,
Harrisburg, Pa., October 22, 1919.

Mr. Benjamin W. Demming, Secretary, Armory Board of the State of Pennsylvania, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 14th inst., enclosing communication of the treasurer of a local Armory Board, asking to be advised whether a State armory when rented for a public dance is subject to the license fee required by the Act, No. 120, approved May 16, 1919, providing for "the licensing and regulation of public dance halls" etc. in cities of the first, second and third classes. Mention is also made of an additional "one dollar tax assessed against each dance given", but the information forwarded relative thereto is insufficient to advise in regard to it, this opinion covering only the above stated question as to the liability under said Act.

It appears from your communication that the State Armory Board appoints local Armory Boards who administer the affairs of armories and rent them for assemblages. the rental derived from such source being applied to the maintenance of the armory.

The term "dance hall", as used in the foregoing Act, is defined in Section 2 to include "*any room, place or space, in which a public dance or public ball*" is given as "public dance" or "public ball" is defined in the same section. Pursuant to Section 4 it is made unlawful, after June 1, 1919—

"To hold or conduct any public dance or public ball, or to hold or conduct classes in dancing, or to give instructions in dancing for hire, in any hall, ball room, or academy, within the limits of any city of the first, second, and third class, within this Commonwealth, unless the dance hall or ball room or academy, in which the same may be held, shall have been duly licensed for such purpose."

The required license is to be issued by the mayor, for which an annual fee of ten dollars is to be paid in case the hall is used for instruction in dancing, and fifteen dollars in all other cases, this fee to be paid into the general fund of the city. Subsequent sections of the Act provide, inter alia, that no license shall issue for any place unless it "conforms to all laws, ordinances, health and fire regulations, applicable thereto," and is a safe and proper place in which to hold a dance or give instruction in dancing. The place is subject to inspection by the police department of the city. It is further by Section 10 made unlawful to permit any person under sixteen years of age to attend or take part in a public dance after nine o'clock in the evening, and Section 11 provides that all public dances must discontinue and public dance halls be closed on or before one o'clock in the morning, except where the mayor by special permission allows a continuance until two o'clock.

It is well settled that State armories, being State property, are not liable to local taxation. In an opinion of this Department, rendered by Deputy Attorney General Hargest to the State Armory Board, dated December 28, 1910, (Attorney General's Reports 1909-1910, p. 328) it was held that a dwelling house situated on State armory land was exempt from borough taxation upon the principle that—

"It would be an anomaly for a sovereign state to be required to pay tax on its property to one of its boroughs."

12 *Am. & Eng. Ency. of Law*, page 367-369, and *Desty on Taxation Vol. 1, Section 15*, being cited in support of that ruling.

An examination of the foregoing Act of 1919, however, plainly discloses that its primary purpose is not to raise revenue but to regulate public dances in the interest of health and good morals.

It is an exercise of the police power which inheres in the State, and is an attribute of its sovereignty by virtue of which it enacts measures promotive of the health, safety and welfare of society. This Act does not impose a tax upon any property or the income therefrom; it simply requires a license for which a fee is charged for the privilege to use any place for a certain purpose. There is a well recognized distinction between a tax and a license fee.

“A license is a ‘price paid for a privilege.’”

“A tax is ‘an enforced proportional contribution levied upon persons, property or income for governmental needs.’”

Pittsburgh Railways Company vs. Pittsburgh,
211 Pa. 479.

In *Words and Phrases, Second Series, Vol. 4, pp. 851-854*, are to be found numerous cases touching the distinction between a tax and a license fee among them *Town of Phoebus v. Manhattan Social Club*, 52 S. E. 839, 840, from which the following on page 852 is quoted:

“Where the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is a license proper, imposed by virtue of the police power, but where the fee is exacted solely for revenue purposes, and payment of such fees give the right to carry on the business without the performance of any further conditions, it is a tax.”

In *Words and Phrases, Second Series, Vol 3, page 1079*, in pointing out the distinction between the taxing power and the police power, there is cited the case of *Robinson v. City of Norfolk*, 60 S. E. 762, in which it is said:

“That the taxing power is exercised for the raising of revenue and is subject to certain limitations, while the police power is exercised only for the purpose of promoting the public welfare, and, though this may be attained by taxing or licensing occupations, yet the object must always be regulation and not the raising of revenue, and hence the restrictions upon the taxing power do not apply.”

In the light of the manifest object in view in the above Act, and the principles stated in the above cases, I am of the opinion that State armories, where used as public “dance halls” for “public dances” within the definition of those terms as contained in the Act, are subject to its provisions and must take out the license thereby required. The use of an armory as a dance hall is not in any way

connected with, or incident to, the public purpose for which it is erected. When rented out for such private purposes, it, for the time being, in effect loses the character of a State building, and assumes that of other halls of like use. If the regulations prescribed by the Act are essential to safeguard the health and morals of the community in the case of dance halls in general, it would seem they are equally necessary when the dance is in an armory. For example, if it is unsafe for the good of a child under sixteen years of age to be in attendance at a public dance after nine o'clock, if held in other places, it is difficult to see why it would not be equally harmful if held in an armory. The same may be said of the requirement relating to the hour of closing these functions. To exact the conditions laid down by the statute in all other cases, and relieve armories therefrom, would measurably defeat the salutary ends which this law aims to secure. The license fee named is not burdensome or unreasonable, but presumably only fairly commensurate with the cost attendant upon issuing the license and affording the due supervision thereunder.

It may well be presumed that if the Legislature had intended to exempt armories from the scopes of the Act, such intendment would have been expressed, and not left to implication. It is no new thing for the State voluntarily to impose some charge in connection with its own property, as in the case of forest lands for certain local needs and uses. Upon principle and reason and in the interest of the public welfare, State armories where rented out and used as dance halls should strictly comply with, and conform to, the statutory regulations applying to other places used for the same purpose.

You are, therefore, advised that State armories, when rented out for, and used as, public dance halls for public dances as such halls and dances are defined in the Act of May 16, 1919, are subject to the provisions of said Act and must take out the license thereby prescribed.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

STATE ARMORY BOARD—POWER TO CONDEMN PROPERTY

Where, by reason of restrictions in the line of title, owners of land desired by the State Armory Board cannot sell it to the Commonwealth for the use for which it is required, the Board of Public Grounds and Buildings may take such land by condemnation, under the Act of July 15, 1919, P. L. 976.

Office of the Attorney General,
Harrisburg, Pa., November 18, 1919.

Mr. Benjamin W. Demming, Secretary Armory Board, Harrisburg,
Pa.

Dear Sir: This Department is in receipt of your recent request for an opinion relative to acquiring land in the city of Philadelphia for the purpose of erecting stables in connection with the Squadron Armory for the use of the Pennsylvania National Guard.

I understand that the State Armory Board desires to acquire a piece of land facing two hundred feet on Cuthbert Street, and about fifty feet deep, immediately in the rear of the present Armory owned by the Commonwealth, at 32d Street and Lancaster Avenue, in the city of Philadelphia, which additional land is to be used for the erection of stables in connection with the Squadron Armory.

It appears that in the chain of title to the land which the Armory desires to acquire, there are restrictions against the erection of stables upon the property, and it has been suggested that the State condemn the property, in which event it would acquire a complete title, not bound by any restrictions.

Fortunately, an Act was passed July 15, 1919, No. 386, by which it is provided:

"That whenever in the judgment of the Board of Commissioners of Public Grounds and Buildings it becomes necessary to purchase additional land for the purpose of adding the same to any of the public lands, parks, arsenals, hospitals or other public institutions of the Commonwealth, * * * or when such purchase has been authorized by law, and an appropriation has been made for such purpose, the said Board of Public Grounds and Buildings shall have the right to purchase or condemn such lands as hereinafter provided."

The Act of Assembly provides the machinery for such condemnation.

The question is whether the State would acquire a title free from reservations. I am of the opinion that it would.

In *Kemble vs. Railroad Company*, 140 Pa. 16, it is held that "public works authorized by the Legislature cannot be arrested or prevented because someone has entered a covenant that they shall not be built."

In *Brown vs. Corey, et al*, 43 Pa. 504, the court said:

"Nobody will doubt the State might enter and build a railroad on his land—it is equally clear that the State might delegate her right of eminent domain to a corporation or an individual. But then the entry is under the State, and in pursuance of public law. No covenants or private contracts between citizens can possibly be violated in such a case, because none can stand in the way of State authority. It is a presumption by the sovereign of a clear right of sovereignty, in subordination of which the covenants of the deed were made. Had the parties contracted expressly against the exercise of this right, they could not have bound the sovereign—much less can their covenants, made for other purposes, be permitted to have the effect claimed for them."

I am, therefore, of opinion that if the Armory Board certifies to the Board of Commissioners of Public Grounds and Buildings its desire to acquire the land in question, and that the owners cannot sell to the Commonwealth for the purposes for which the land is desired because of restrictions in the title, The Board of Public Grounds and Buildings may under the Act of Assembly above referred to, condemn the property by the method pointed out in said Act of Assembly.

I return herewith the correspondence submitted.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

NATIONAL GUARD.

Re. administering oaths to recruits by "commanding officers," and who may administer such oaths.

Office of the Attorney General,
Harrisburg, Pa., May 26, 1920.

General F. D. Beary, Adjutant General, Harrisburg, Pa.

Dear General: We have your request for an opinion, in which you ask,

(a) Who are the "commanding officers of companies" authorized to administer oaths to recruits "for their respective organizations."

(b) Whether an officer of a company can be detailed by the commanding officer of the company to administer oaths for enlistment purposes.

(c) Whether the Governor may authorize a commissioned officer to administer oaths for such purpose.

Section 16 of the Act of May 3, 1917, P. L. 113, after providing that general, field and administrative staff officers are authorized to administer oaths *in all matters pertaining to the National Guard*, provides:

"The commanding officers of companies are authorized and empowered to administer oaths and affirmations in the enlistment of recruits for their respective organizations."

I understand that either the First Lieutenant or the Second Lieutenant may become the commanding officer of his company, in the absence of the officer of higher rank.

Section 330 of the National Guard Regulations issued by the Militia Bureau of the War Department, provides as follows:

"An officer for each regiment, or for each battalion, squadron, company, troop, battery, or detachment stationed separately, shall be detailed by the Commanding officer thereof to enlist for the regiment, battalion, squadron, company, troop, battery, or detachment."

Section 153 of the National Guard Regulations provides for the recognition of officers who have been appointed by the Governor pending the organization of the command to which they are attached, and provides that "any such officer, who, according to State statute, is authorized to administer oaths, is eligible to administer the oath of office to officers, as prescribed in Section 73, Act of June 3, 1916, and the oath of enlistment prescribed in Section 70 *idem*."

Section 5 of the Act of May 3, 1917, above referred to, authorizes the Governor to make certain changes in the National Guard to conform to the laws of the United States and the rules and regulations promulgated thereunder.

Circular Letter No. 27, from the Chief of the Militia Bureau of the War Department, to the Adjutant General of the States, rules that officers of the organized militia appointed by the Governor can perform their functions before the complete organization of their commands.

Answering your inquiry as to whether the Governor has authority, under Section 5, to confer upon any officer other than those designated in Section 16, the right to administer oaths in the enlistment of recruits, I have to say that the Governor has no such authority. No one can be vested with the right to administer oaths except by the Legislature.

Section 153 of the National Guard Regulations provides that those officers may administer oaths who are so authorized by the laws of the State, and the question, therefore, is confined to an interpretation of Section 16 of the Act of May 3, 1915, above referred to.

Under that Section, a general, field or administrative staff officer could administer oaths to recruits for any organization, but when you come to the class below general, field, or administrative staff officers, this Section gives authority only to "the commanding officers of companies" to administer oaths "*for their respective organizations.*"

Therefore, I advise you that an officer below the rank of general, field or administrative staff officer, could not be detailed under Section 330 of the National Guard Regulations to administer the oaths in the enlistment of recruits for company organizations.

Who, then, are "commanding officers of companies"?

A Second Lieutenant may be a commanding officer in the absence of the First Lieutenant, and Captain. A First Lieutenant is a commanding officer in the absence of the Captain. When an oath is to be administered to a recruit, the officer in command at the time is the commanding officer.

It is not necessary that all oaths in the enlistment of recruits for company organizations should be administered by the Captain. In order that there should be no question as to whether a First or Second Lieutenant is the commanding officer at the time of administering the oath, I suggest that, when the jurat is signed by a First or Second Lieutenant, in addition to indicating his rank, he should add the words "commanding Company F", etc., as the case may be.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

ENLISTMENTS IN THE NATIONAL GUARD.

The Adjutant General is advised as to what constitutes a second or third enlistment, for the purpose of computing the pay of men in the National Guard.

Office of the Attorney General,
Harrisburg, Pa., May 26, 1920.

General F. D. Beary, Adjutant General, Harrisburg, Pa.

Dear General: Some time ago you requested an opinion of this Department as to what constitutes a second or third enlistment for the purpose of computing the pay of men in the National Guard, and you presented a typical case, as follows:

Sergeant Albert Krauss enlisted in the National Guard March 17, 1915, and served on the Mexican Border. He was discharged from the National Guard on August 5, 1917, and drafted by the President as a National Guardsman under the National Defense Act. In the ordinary course his enlistment in the National Guard for active duty would have expired March 16, 1918, and he would have been furloughed to the Reserve for the remaining three years of his enlistment. However, he remained in active service under the Federal Government until May 20, 1919. In September 1919 he re-enlisted in the National Guard and the question is whether the re-enlistment will be his second or third enlistment.

By reason of the war, the National Guard was reorganized in Pennsylvania under the Act of May 3, 1917, P. L. 113. Section 32 of this Act provides, in part, as follows:

"Each enlisted man who, after having served three years with the colors, shall continue in service with the colors, shall be entitled to and receive additional pay, to the rate heretofore named in this section, of twenty-five cents per day while serving with the colors the balance of his original enlistment, and a like amount for the first three years of any re-enlistment."

Section 40 of the Act of April 9, 1915, P. L. 80, which provided for the organization of the National Guard, provided, in part, as follows:

"Each enlisted man, except the chief musician, regimental band, after having served one full term of enlistment of three years, and who re-enlists *within thirty days* from expiration of previous enlistment, shall be entitled to and receive additional pay, at the rate of twenty-five cents per day for his second, and a like amount for his third, term of consecutive enlistment."

I understand that under the regulations of the Federal Government, an enlisted man must re-enlist within thirty days of the expiration of his previous enlistment to get the pay privileges of a re-enlistment.

The Act of 1915 was repealed, in terms, by the Act of 1917, above referred to. Under both the Act of 1915 and the Federal Regulations, it was necessary to enlist within thirty days, in order to secure re-enlistment privileges, but the Act of 1917 strikes out the requirement for re-enlistment within thirty days, and also the requirement for a "consecutive enlistment," in order to secure the additional pay.

I am, therefore, of opinion that it is not necessary to re-enlist within thirty days of the expiration of a previous enlistment to secure re-enlistment privileges.

Sergeant Krauss served "with the colors" his full term of three years, and also served with the colors so much of the reserve period of his enlistment as he could. Upon being discharged from the United States Army, he made an application to re-enlist in the National Guard. Having served from March 16, 1918, to May 20, 1919, "with the colors," which was a part of the period remaining to the reserve in his regular enlistment, I am of opinion that such service should entitle him to the additional pay of twenty-five cents per day, and that he is entitled to an additional amount of twenty-five cents per day under his present enlistment. In other words, his present enlistment should be considered his third enlistment.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

IN RE FEDERAL TAX.

A pool table donated by public-spirited citizens to a state armory which is supported by funds appropriated by the Commonwealth is exempt from a Federal tax.

Office of the Attorney General,
Harrisburg, Pa., July 15, 1920.

Honorable Benjamin W. Demming, Secretary State Armory Board,
Harrisburg, Pa.

Dear Sir: This Department is in receipt of your communication of the 13th instant, inquiring whether a tax of ten dollars upon a

pool table located at the State Armory, at Mount Pleasant, Pa., should be paid to the United States Internal Revenue Department.

I understand that public spirited business men of the community donated a pool table to Company E, Tenth Infantry, Pennsylvania National Guard, for use by the members of the Company; that the table is located in the State Armory, at Mount Pleasant, Pa., title to which Armory is in the Commonwealth of Pennsylvania; that the Armory Board of Pennsylvania, which is charged by law with the care and regulation of all State Armories, acts also as Custodian and Trustee of all furniture and furnishings within them; that the powers and duties of the Armory Board are exercised and discharged in each locality by and through a local Armory Board; that the Local Armory Board is authorized to rent the Armory and to apply the rentals received therefrom, for the purpose of furnishing and of maintaining the furniture therein, accounting quarterly to the Armory Board of Pennsylvania for all moneys so received and disbursed; that moneys for the repair and maintenance of the pool table in question will be provided as and when needed out of the excess rentals in the hands of the Local Armory Board; that the duty of caring for the table is upon the Janitor of the Armory, whose salary is paid out of moneys appropriated by the Legislature for repair and maintenance of Armories, supplemented, if necessary, by rentals received by the Local Armory Board.

The Federal Revenue Act of 1918, approved February 24, 1919, provides in Title X, Section 1001, inter alia, as follows:

"That on and after January 1, 1919, there shall be levied, collected and paid annually, the following special taxes.....(8) Proprietors of bowling alleys and billiard rooms shall pay ten dollars for each alley or table. Every building or place where bowls are thrown or where games of billiards or pool are played, except in private homes, shall be regarded as a bowling alley or a billiard room, respectively."

Regulations No. 59, promulgated and approved by the Commissioner of Internal Revenue on January 3, 1920, provide in Article 28, inter alia, as follows:

"Proprietors of bowling alleys and billiard and pool tables in clubs, Y. M. C. A. buildings, hotels, fraternity houses, lodge rooms, State armories, fire houses, and similar places, are subject to special tax unless the bowling alley or billiard and pool tables are supported out of funds contributed by a State or a subdivision of a StateThe person for the time being in possession or control of a billiard table or bowling alley is prima facie the proprietor of the alley or table and liable to

the special tax even if the property and ultimate control of the table and place where it is located are in someone else."

This Regulation expressly exempts a pool table which is "supported out of funds contributed by a State, or a subdivision of a State." If the pool table in question is so supported, it is, by the terms of the Regulation, exempt from taxation, and such exemption renders unnecessary any consideration of the limitation of the Federal taxing power which prevents the Federal government from laying taxes upon the property, means, agencies, or instrumentalities of a State Government.

The "support" of a pool table consists in providing for its repair and for the replacement of necessary parts or accessories which have been broken or lost; and in providing for the care and attention of a Janitor who shall keep the table covered when not in use, clean it, and prevent unauthorized persons from using it, or malicious and mischievous persons from damaging or destroying it. From what funds is this "support" provided in the present case?

The title to the Armory at Mount Pleasant is in the Commonwealth. Its care and management have been committed to the Armory Board. The Act of May 11, 1905, P. L. 442, provides:

"Section 5. That the Armory Board, hereby appointed, shall also constitute a Board for the general management and care of said armories when established, and shall have the power to adopt and prescribe rules and regulations for their management and government, and formulate such rules, for the guidance of the organization occupying them, as may be necessary and desirable."

Acting under the powers vested in it by the Act just quoted, the Armory Board on February 11, 1916, approved general rules and regulations for the government of State armories, which provide, *inter alia*, as follows:

"2. The control of armories owned by the State shall be entrusted to a Local Armory Board, consisting of the two senior officers of the troops quartered therein, etc."

"10. The Local Armory Board in charge of such armory, subject always to the approval of the commanding officer of the Regiment and the Adjutant General, and under such restrictions as may be prescribed by the Armory Board, may rent out, or lease, any armory owned and controlled by the State of Pennsylvania, providing that such lease or rental shall not in any way interfere with the military usages of such armory; and that all moneys received for rentals, and all expenditures made on account of the maintenance of the armory shall be accounted for quarterly by the Treasurer of the Local Armory Board in like manner as maintenance

moneys are accounted for; the account to be on blank form to be provided by the Armory Board under such further regulations as the Board may prescribe."

The funds received by the Local Armory Board from rentals of the Armory, are State funds and are under the control of the Armory Board. Opinions of the Attorney General, 1909-1910, page 304.

Under the law and the rules and practice of the Armory Board of Pennsylvania, any repairs or replacements to the pool table in question will be provided for when necessary, out of rentals received from the Armory. The services of the Janitor who will care for the table, will be paid out of specific appropriations by the legislature.

It thus appears that the pool table in the State Armory at Mount Pleasant, Pa., is supported by funds contributed by the Commonwealth of Pennsylvania and you are, therefore, advised that under the rulings of the United States Internal Revenue Department, no Federal tax is due or payable thereon.

Very truly yours,

GEORGE ROSS HULL,
Deputy Attorney General.

**OPINIONS TO THE STATE HIGHWAY
COMMISSIONER**

OPINIONS TO THE STATE HIGHWAY COMMISSIONER.

ABANDONED RIGHTS OF WAY.

The Act, of July 18, 1917, P. L. 1040, entitled "An act relating to the assessment and payment of damages to owners of property abutting on State highways in certain counties damaged by a change of the existing lines and location of such State highways," etc., does not apply to the taking over of abandoned rights of way of canal companies or of railroad or railway companies under the Act of July 7, 1913, P. L. 687, as amended by the Act of July 11, 1917, P. L. 811; the State, and not the county, is, therefore, liable for such damages.

Office of the Attorney General,
Harrisburg, Pa., March 4, 1919.

Honorable Joseph W. Hunter, First Deputy State Highway Commissioner, Harrisburg, Pa.

Sir: There has been received by this Department your communication of February 26th, 1919, inquiring whether the provisions of the Act of July 18, 1917, P. L. 1040,

"Relating to the assessment and payment of damages to owners of property abutting on State highways, in certain counties, damaged by a change of the existing lines and location of such State highway; imposing certain powers and duties upon the Highway Commissioner and the county commissioners; and providing for the payment of such damages by such counties."

apply to the taking over of the rights of way of canal companies, and of railroad and railway companies, that have been abandoned or that have not been built upon, for the use of the State Highway Department for the purpose of locating and constructing State highways, under the provisions of the Act of July 7, 1913, P. L. 687, as amended by Act of July 11, 1917, P. L. 811, in so far as a county is liable for the payment of damages ascertained by condemnation proceedings or otherwise.

The first section of the Act of July 7, 1913, P. L. 687, authorizes the State Highway Commissioner to take over, in his discretion, for the use of the State Highway Department (1) any abandoned canal, or any part thereof that is no longer used for the purpose for which it was intended, except where such abandoned canal is used or occupied by a railroad or railway in actual operation; or (2) any abandoned right of way of a railroad or railway, and rights of way of railroads that have not been used, occupied or built upon for a period of not less than five years; for the purpose of relocating public highways, constructing them as State highways, when such abandoned canals and rights of way extend in the same general direction as that of the State highway originally projected.

The second section of the same Act provides the method of procedure to be followed by the Highway Commissioner when he decides to exercise the authority vested in him by the first section of the Act. He must first endeavor to purchase the rights of way by amicable agreement with the owner or owners, and if a fair and reasonable price, which shall be approved by the Governor, for the right of way or part thereof can not be agreed upon, he is authorized to proceed to secure the right or rights of way under the methods provided for in the ninth section of the Act of May 31, 1911, P. L. 468, as amended by the Act of June 1, 1915, P. L. 691, to condemn and take over turnpike roads, toll roads and toll bridges. The Act of July 11, 1917, P. L. 811, merely changes the duration of the abandonment or non-user, which shall be a prerequisite to the right of the Highway Commissioner to take over the canals and rights of way, and has no bearing upon the question herein involved.

The Act of July 18, 1917, P. L. 1040, makes the proper counties, instead of the State, liable for damages resulting from construction, reconstruction or improvement of State highways in cases where a change of existing lines and location is necessary. Its effect is to change the law as declared in the sixteenth section of the Act of May 31, 1911, P. L. 468, popularly known as the "Sproul Act", in so far as it relates to the payment of damages in counties having a population of less than eight hundred thousand inhabitants. From an examination of the Act of July 18, 1917, P. L. 1040, and the sixteenth section of the "Sproul Act", it is obvious that the draftsman of the former Act had this section before him. It is manifest that the purpose of the legislation was to change the liability for damages only in cases within the purview of the sixteenth section of the "Sproul Act". If the Legislature had intended to make a more radical change in the law relating to the payment of damages, and had intended to impose upon counties liability for damages resulting from the taking over of abandoned rights of way of railroads, or canals, it would have said it in language too clear to be misunderstood. The "Sproul Act" established a comprehensive system for the construction, improvement and repair of State highways. The sixteenth section of that Act is not the only section which deals with the subject of damages resulting from the taking or injury of private property. Its ninth section provides for the taking over of turnpikes and toll roads, prescribes a method for condemning the same and imposes liability for payment of the damages upon the State.

The Act of July 7, 1913, P. L. 687, as amended, providing for the taking over of the rights of way of abandoned canals and railways, as well as the "Sproul Act", were in operation at the time of the

passage of the Act of July 18, 1917, P. L. 1040. It is significant that the procedure for the taking over of rights of way of abandoned canals and railways is the same as the procedure for condemning turnpikes under the "Sproul Act". The procedure for assessing damages under the Act of July 18, 1917, P. L. 1040, is the same as that provided in the sixteenth section of the "Sproul Act". The necessary conclusion is that the application of the Act of 1917, P. L. 1040, is limited to cases arising under Section 16 of the "Sproul Act", and that the Legislature did not intend to extend the liability of counties for damages beyond cases covered by the sixteenth section of the "Sproul Act".

You are advised, therefore, that the provisions of the Act of July 18, 1917, P. L. 1040, do not apply to the taking over of the rights of way of canal companies and of railway companies under the Act of July 7, 1913, and its amendment, and that the State and not the county is liable for damages resulting from the taking over of such abandoned canals and railways.

Very truly yours,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

STATE HIGHWAY DEPARTMENT.

Money received by the State Highway Department, in the nature of a refund in diminution of the original payment made by the department for a specific purpose, is not money collected on behalf of the Commonwealth within the meaning of the Act of May 25, 1907, P. L. 259. The fiscal officers should apply money thus collected to the credit of the State Highway Department on the books.

If the State Highway Department collects from a wrongdoer the costs of repairing a state highway, made necessary by his acts, the money belongs to the Commonwealth generally.

Money forfeited by a contractor who failed to execute a road contract belongs to the Commonwealth generally, not to the State Highway Department.

If the State Highway Department furnishes labor or materials, or both, to another department, it cannot collect the money from the other department and have it credited to the State Highway Department funds. Money paid out of the funds of the State Highway Department for labor or materials thus furnished is lost to the department.

Office of the Attorney General,
Harrisburg, Pa., March 19, 1919.

Mr. W. R. Main, Auditor, State Highway Department, Harrisburg,
Pa.

Sir: This Department has received your letter of the 12th instant, asking to be advised "whether or not the State Highway De-

partment is justified in considering cash refunds received by it, which are in nature credits against a former payment and not receipts of cash on behalf of the Commonwealth, as a proper deposit to its advance account and ultimate expenditure for the purpose for which originally appropriated."

As a basis for this request for an opinion you state the facts in eight separate cases in which money has been received by the State Highway Department and paid into the Treasury of the Commonwealth.

Because we entertain the view that the fact in some of these cases require an opinion which would not be applicable to, or controlling under, the facts in the other cases, and in order to enable us to indicate more clearly the reasons for our conclusions and the effect thereof, we briefly state the facts of each case as follows:

No. 1 was a payment of \$316.50 by Coxé Brothers and Company, representing the expense to the State Highway Department in repairing a depression in State Highway Route No. 170; caused by a mining operation of Coxé Brothers and Company.

No. 2 was a refund of \$22.58, representing an overpayment to an employe of your Department.

No. 3 was a refund of \$60.75, representing the value of certain road materials purchased by your Department and lost in railroad transit.

No. 4 was a refund of \$103.75, representing an overpayment for road materials which were short in weight.

No. 5 was a refund of \$25.00 for demurrage charges which were paid twice.

No. 6 was a cash receipt of \$52.80 from the sale of empty sacks which had contained cement bought for road work.

No. 7 was a forfeiture of \$2,000.00 received from a contractor who failed to execute a road contract awarded to him.

No. 8 was a payment of \$453.38 to the State Highway Department by the Board of Commissioners of Public Grounds and Buildings, representing the cost of labor and material furnished at the request of said Board on work which said Board was required to perform on the approaches of an interstate bridge at Morrisville.

Nos. 2, 3, 4, 5 and 6 are cases in which the money received by your Department was strictly in the nature of a refund in diminution of an original payment made by the Department for a specific purpose. In all of these cases when the money was paid back to the Highway Department it came back as it went out, as money which in fact

never had been used for the purpose for which it was appropriated to the Department. The transaction in each case involved the repayment, as well as the original payment, and was not completed until the refund was made. Then, only, it was that the actual cost to the Commonwealth and the proper charge against the funds of the Department could be determined.

When your Department received these refunds the money was not collected on behalf of the Commonwealth within the meaning of the Act of May 25, 1907, P. L. 259, entitled:

"An act providing that the Secretary of the Commonwealth, * * * State Highway Commissioner, (and other officers) shall pay daily into the State Treasury, for the use of the Commonwealth, all fees, licenses, fines, penalties, commissions, costs, and all moneys received or collected, on behalf of the Commonwealth, from any source whatever, and providing for a settlement between each officer and the Auditor General and State Treasurer in reference thereto."

With no disposition to limit the scope of this most salutary statute, we are satisfied, however, that the statute does not apply to the cases above referred to, and does not operate to make the money refunded into the Highway Department in these cases money of the Commonwealth generally. This money was received by the Highway Department and paid into the Treasury ear-marked for the definite purpose for which it was originally appropriated. To hold otherwise would result in depriving unjustly the Department of the use of part of the money appropriated to it.

The Act above referred to was never intended to become the means of unjustly depleting an appropriation made to any Department or of depriving that Department of the use of all of the money appropriated to it. The fiscal officers should therefore apply this money to the credit of the State Highway Department on the books. Otherwise, by mere bookkeeping the Department will be deprived of what belongs to it.

This opinion must not be understood as applying to any case in which the money received by the Department and paid into the Treasury is not in the strictest sense a part of an original payment which has been returned or refunded to the Department.

The facts of cases Nos. 1, 7 and 8 clearly distinguish these cases from the others. In them the money received by your Department and paid into the State Treasury was not part of the original payment which had been returned or refunded. It was not in diminution of an original price or charge.

In No. 1 the Department performed on a State Highway certain repair work made necessary by a wrongdoer. It is the duty of the Department to repair the State Highways whenever they require it. If the Commonwealth has a cause of action against one who causes damage to a highway and recovers the money, or if the Highway Department collects it, the money belongs to the Commonwealth generally. It is in no sense a refund.

In No. 7 where a contractor deposited \$2,000.00 with his bid, and forfeited the same as liquidated damages because of failure to execute a contract with the Commonwealth, the repayment belongs to the Commonwealth generally. It never was part of the money appropriated to the Department, is not in diminution of any original payment by the Department, and to ear-mark such money as State Highway money would have the effect of increasing the appropriation to the Department to the amount of the money thus received.

The facts of case No. 8 bring it clearly within the principle applicable to Nos. 1 and 7. If your Department performs work or furnishes material, or does both, for another Department, and pays the bill, it can not collect the money from the other Department and have it credited by the fiscal officers to the Department funds. There was no obligation upon your Department to perform this work for the Board of Commissioners of Public Grounds and Buildings, and if officers of your Department in their discretion authorized the work, they should have required the Department for which it was done to pay the cost thereof. Any money paid out of the funds of your Department on account of such work is lost to the Department, and upon no principle can the money repaid by the other Department be credited to your account.

The conclusions thus reached accord with the application of sound business methods, and a strict interpretation of the Act of 1907, *supra*. The effect is that appropriations to a Department shall not be unjustly decreased by mere bookkeeping nor increased by the credit of payments clearly covered by the Act of 1907. A careful following of the advice herein contained should enable you to differentiate easily cases falling within the two classes of cases of which you state the facts.

You are advised, therefore, that in cases Nos. 2, 3, 4, 5 and 6 you are entitled to have the fiscal officers of the Commonwealth give your Department credit for the moneys paid into the State Treasury; you are further advised that in cases Nos. 1, 7 and 8 the collections by your Department and the payments into the State Treasury were strictly within the letter and spirit of the Act of 1907, that the money

was collected by your Department on behalf of the Commonwealth, and on payment over became part of its general funds.

Very truly yours,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

STATE HIGHWAYS.

If the construction of a State Highway, re-located under the Act of May 31, 1911, P. L. 468, requires the removal or demolition of a dwelling house in the actual occupancy of the owner, the house may be moved or demolished.

If a dwelling house in the actual occupancy of the owner is within the lines of a State highway, as re-located, under the Act of 1911, and the construction of the highway requires its removal, the State Highway Commissioner should give the owner reasonable notice of his intention to remove and demolish the same, and upon failure of the owner to deliver possession of the house, so that the construction of the highway may proceed, the State Highway Commissioner may remove or destroy the house.

The power lodged in the head of the Highway Department to exercise, subject to the approval of the Governor of the Commonwealth, the right of eminent domain for the Commonwealth is without limitation or condition.

Office of the Attorney General,
Harrisburg, Pa., September 24, 1919.

Hon. Lewis S. Sadler, State Highway Commissioner, Harrisburg, Pa.

Sir: There was duly received by this Department your communication of the nineteenth instant relative to the right of the State Highway Commissioner to remove or demolish a building located within the lines of a State Highway and occupied by the owner thereof as a dwelling house.

The following facts appear:

The house in question is within the limits of the State Highway as re-located in accordance with the provisions of the 8th Section of the Act of May 31, 1911, P. L. 468, and is occupied by the owner thereof as a dwelling house. The road cannot be constructed in the new location without destroying or moving the house. The Commissioners of the County have endeavored to enter into an agreement with the owner of the property as to the amount of damage to be paid to him, and have been unable to make an agreement with him. The Highway Commissioner has proceeded with the construction of the highway, and a contract has been let for the construction of the

portion within the lines occupied by the house. You ask to be advised whether you have the legal right to remove the house.

The answer involves the extent of the sovereign power vested in the Commonwealth to take private property for public use. The power of the sovereign to take property under the right of eminent domain arises from the fact that title to property is always held upon the implied condition that it must be surrendered to the government when public necessity demands it, of which the government must be the judge. The sovereign may not only exercise the right itself but may, and sometimes does, confer the right upon public corporations to be exercised for what constitutes a public use. When the sovereign grants the right to a corporation organized for public purposes it may limit the extent of the power or may exempt certain property from being taken. As an example of such exemption, under the Act of February 19, 1849, P. L. 79, a railroad company cannot take under the right of eminent domain a dwelling house in the actual occupancy of the owner without his consent. But there is no such limitation upon the sovereign itself.

In the absence of a limitation of the right in the fundamental law the Commonwealth may take any private property for its own use, being responsible only for making just compensation for the same. As against the Commonwealth there is no exemption of a dwelling house actually in the occupancy of the owner. In the case of "EXTENSION OF SECOND STREET IN COLUMBIA", 23 Pa., 346, which was an appeal from the confirmation of a report of a jury of view, which laid out a public road through a man's dwelling house, Chief Justice Black said:

"Can a man's house be demolished merely that the public may have the benefit of a highway over the ground? Undoubtedly it may if the road be indispensable and cannot be laid elsewhere. The interests of individuals must yield to an overruling public necessity."

By the 8th Section of the Act of 1911, above referred to, the State Highway Commissioner, with the approval of the Governor, is expressly empowered to divert the direction or course of a State highway. When the legislature has thus expressly lodged in the head of the Highway Department, subject to the approval of the Governor of the Commonwealth, the power to exercise for the Commonwealth the right of eminent domain, the authority is without limitation or condition.

Where by reason of increased business, it becomes necessary for a railroad to widen its road-bed for additional tracks, the Company in building its road may, under the Act of March 17, 1869, P. L. 12, condemn a dwelling house.

SNYDER VS. RAILROAD COMPANY, 210 Pa., 500.

As the discretion vested in the Board of Directors of a Railroad Company in determining the necessity of locating a branch railroad is absolute, and not the subject of judicial review by the Courts,—PRICE VS. RAILROAD COMPANY, 209 Pa., 81,—so is the discretion of the State Highway Commissioner when exercised for the Commonwealth under the authority of Section 8 of said Act of Assembly final and conclusive.

It follows, therefore, that the change of lines and location of a State Highway under the provisions of this Section of the Act may be followed by construction of the highway within the lines as re-located. If the construction requires the removal or demolition of a dwelling house in the actual occupancy of the owner, the house may be moved or demolished.

You are advised, therefore, that you should give the owner of the house reasonable notice of your intention to move or demolish the same, and upon failure of the owner to deliver possession of the house so that the contemplated construction of the highway may proceed, you may move or destroy the house.

Yours very truly,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

AUTOMOBILE LICENSE.

A license to operate automobiles may be issued to a one armed man, provided he has satisfied the State Highway Commissioner of the propriety of granting him a license.

Office of the Attorney General,
Harrisburg, Pa., December 18, 1919.

Mr. Benjamin G. Eynon, Registrar of Motor Vehicles, State Highway Department, Harrisburg, Pa.

Dear Sir: I have your letter of the seventeenth instant asking to be advised whether or not under Section 10 of Act No. 283, approved June 30, 1919, a person with but one arm is construed to be physically incapacitated or whether he can obtain a special license provided for by the said Section.

This Section of the Act referred to provides that certain persons shall not operate any motor vehicle upon any public highway in

this Commonwealth. Among the persons so prohibited are those "physically incapacitated as defined in this Act." The same Section provide further that "any person who has lost the use of one hand or both.....shall be considered physically incapacitated." If the provisions of the Act relative to this character of physical incapacity had ended at this point, persons who had lost an arm might not operate motor vehicles upon the public highways of the Commonwealth. There is in the same section of the Act, however, a saving clause which is as follows:—

"Provided, That the State Highway Commissioner may, at his discretion, issue a special license or permit to a person who has lost the use of one hand only, upon the receipt of such evidence or demonstration as shall satisfy him that such person has had sufficient experience in the operation of a motor vehicle to enable him to do so without endangering the safety of the public."

There arises therefore your inquiry whether a special license or permit may be issued to a person who has lost the use of his arm as well as the use of his hand.

The physical incapacities defined in the Act are in relation to "hands," "feet," "eyesight" and "hearing." The use of these members or senses is made necessary to qualify one to operate a motor vehicle. It is a matter of common knowledge, however, that some persons who have lost the use of an arm are competent operators of motor vehicles. The evident intention of the Legislature was to make it possible for such persons to continue to operate automobiles on the highways of the Commonwealth, and to that end that body lodged in the State Highway Commissioner the discretion of granting a special license or permit to such persons after he has received satisfactory evidence that such persons can operate a motor vehicle without endangering the safety of the public. In referring to this character of incapacity, the Act uses the words "lost the use of one hand" and the word "arm" is nowhere used. There is sound reason for this because the loss of the use of an arm includes the loss of the use of a hand; and if the Act had used the words "loss of the use of an arm," the loss of a hand only would not render one incapacitated. The hand is the important part of the arm in the operation of a motor vehicle. When its use is lost, the use of the arm is substantially destroyed. With this in mind, the Legislature used the word "hand" as including the word "arm" and not as distinguished from it. A construction of this Section of the Act which distinguished between the loss of the use of a hand and the loss of the use of an arm would be narrow and unreasonable and contrary to the intent and spirit thereof. It would be sticking in the bark to hold that the proviso above quoted authorizes the State Highway

Commissioner to issue a special license or permit to one who has lost his hand at the wrist, but does not permit him to issue such license or permit to one who has lost his arm at the elbow.

You are advised, therefore, that a license to operate a motor vehicle on the highways of the Commonwealth may be issued to a person who has lost his arm or any part thereof, provided such person has satisfied the State Highway Commissioner of the propriety of granting him a license.

Yours very truly,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

SPEED WITNESSES.

In proceeding against violators of the speed provisions of the act of 1919, P. L. 678, the testimony of two witnesses is not required, except in cases in which the motor vehicle is timed on a measured stretch of highway.

Office of the Attorney General,
Harrisburg, Pa., February 20, 1920.

Mr. Benjamin G. Eynon, Registrar of Motor Vehicles, State Highway Department, Harrisburg, Pa.

Sir: I have your communication of the 16th instant, asking to be advised whether, under the Act entitled "An Act relating to and regulating the use and operation of motor vehicles, etc.," approved June 30th, 1919, P. L. 678, the testimony of two witnesses is necessary to secure a conviction for the offense of driving a motor vehicle at a rate of speed exceeding that limited by Section 19 of the Act. You refer me to Section 29 of the Act, and ask whether the provisions thereof apply in every case involving the violation of the speed regulations of said Section 19.

Section 19 of the Act provides, *inter alia*, that

"no person shall drive a motor vehicle at a rate of speed exceeding one mile in two minutes."

It further provides for a slower speed for commercial vehicles of different classes. Section 29 of the Act provides as follows:—

"When the rate of speed of any motor vehicle is timed on a measured stretch of any highway for the purpose of ascertaining whether or not the operator of such motor vehicle is violating the provisions of this Act,

such time shall be taken by not less than two (2) persons, one of whom shall have been stationed at each end of such measured stretch, and no convictions shall be had upon the unsupported evidence of one person, and no such measured stretch shall be less than one-eighth ($\frac{1}{8}$) of a mile in length."

The question arises whether this Section applies in all cases of violation of the speed provisions of the Act, or only in cases in which the speed of motor vehicles is timed on a measured stretch of highway. I am of opinion that it applies only in the latter case. The provisions must be interpreted in the light of its manifest purpose, which was to require that evidence of violations of the speed limit upon a stretch of highway measured off for a trap should be thoroughly reliable and accurate. Doubtless the difficulty, if not impossibility, of one witness located at one end of a measured stretch timing with accuracy the speed of a car moving over the same was apparent to the Legislature. The safeguard found in this section of the Act was inserted to meet this difficulty and insure that in such cases convictions should not be secured, except upon the testimony of two witnesses, one of whom was stationed at each end of the measured stretch. But the provisions of the section do not apply where the speed is not taken over a measured stretch. The language thereof is not susceptible of such a construction. It is in the nature of an exception to or a limitation upon the general authority conferred by the Act to punish those who violate its terms. Its effect is merely to declare that, in the specific case referred to, to wit: where speed is timed over a measured stretch, the amount of evidence ordinarily required to secure conviction shall not be sufficient. It is to be strictly construed and limited to that which is fairly within its terms.

This conclusion is consistent with settled principles of construction, and at the same time renders effective the general penal provisions of the Act as they relate to the speed at which motor vehicles may be operated on the highways. It is only in the more thickly populated districts of the Commonwealth that it is practicable to detect violators of the speed limitations of the Act by laying out a measured course and placing a person at each end thereof. The result of requiring this in every case would be that in the more remote sections of the Commonwealth motor vehicles could be operated at an unlawful speed with impunity. There would seem to be no reason why state or local officers using motorcycles or motor vehicles equipped with accurate speedometers, should not detect, make complaints against and secure convictions of violators of the law in this respect. I am clear that Section 29 does not prevent such a method of procedure.

You are advised, therefore, that in proceedings against violators of the speed provisions of this Act of Assembly, the testimony of two witnesses is not required, except in cases in which the motor vehicle was timed on a measured stretch of highway.

Very truly yours,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

MOTOR VEHICLES—LICENSE NUMBER—USED MOTOR VEHICLES.

The Automobile Division of the State Highway Department can assign a maker's number or an engine number to a motor vehicle in the hands of a dealer in used motor vehicles, only when the motor vehicle is registered in the owner's name.

Office of the Attorney General,
Harrisburg, Pa., February 19, 1920.

Mr. Benjamin G. Eynon, Register of Motor Vehicles, State Highway Department, Harrisburg, Pa.

Sir: There was duly received your communication of the 11th instant, asking to be advised whether the Automobile Division of the State Highway Department can assign a maker's number or an engine number to a motor vehicle which is in the possession of a dealer in used motor vehicles without requiring the dealer to register the motor vehicle in his name.

The answer to your inquiry involves the interpretation of Section 3 of the Act of Assembly approved June 30, 1919, P. L. 678, and Section 7 of the Act of June 30, 1919, P. L. 702.

Section 3 of the former Act, entitled—

“An Act relating to and regulating the use and operation of motor vehicles” etc.

provides, inter alia, that no motor vehicle on which the manufacturer's number has been omitted, obliterated or defaced shall be registerable without special permit from the State Highway Commissioner, and that before issuing a registration certificate for any such motor vehicle the Highway Commissioner shall require information as to the date of the purchase of such vehicle, and the name and address of the person from whom it was purchased, together with satisfactory evidence that the number was not removed for the purpose of concealing the identity of such vehicle. It provides further

that the Commissioner shall require that a special number designated by him shall be immediately stamped thereon.

Section 7 of the second Act referred to, and known as the Act regulating the sale and transfer of second-hand motor vehicles, makes it unlawful for any person to have in his possession any motor vehicle with the knowledge that any trade-mark, distinguishing or identification number, manufacturer's number, serial number or mark has been or is removed, defaced, destroyed or obliterated.

The main purpose of this Act was to break up the business of trafficking in stolen motor vehicles, and to that end the Legislature declared an automobile from which the maker's number or identification marks had been removed to the outlawed property, and that it should not become the subject of barter and sale. This Act, however, makes no provision for remarking or renumbering the motor vehicle. The only authority for assigning a new number to a motor vehicle is found in the Act first above referred to. It will be noted that applicants for dealers, license do not ask for, and do not receive, registrations of particular cars. Their license is one permitting them to operate motor vehicles. The only method provided for remarking or renumbering a motor vehicle is that provided in the Act first referred to, which involves the registration of the vehicle and an owner's license therefor.

Under these circumstances you are hereby advised that your Department may assign a maker's number or an engine number only in case application is made for the registration of the car under Section 3 of the Motor Vehicle Act first referred to above. It is only by pursuing this method that a motor vehicle from which the numbers have been obliterated can become again the subject of barter and sale.

Very truly yours,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

AUTOMOBILE DEALERS' LICENSES.

Under section 9 of the Act of June 30, 1919, P. L. 702, a corporation incorporated under the General Corporation Law of Pennsylvania to "buy, sell, handle, lease, repair, build and deal in all kinds of automobiles" is required to take out a license under the Act of 1919, notwithstanding the purpose of its incorporation.

Office of the Attorney General,
Harrisburg, Pa., February 25, 1920.

Mr. Benjamin G. Eynon, Register of Motor Vehicles, State Highway Department, Harrisburg, Pa.

Sir: I have your communication of the 20th instant, asking to be advised whether the Fiat Motor Company is subject to the provisions of the Act of June 30, A. D. 1919, P. L. 702, entitled "An Act regulating the sale, conveyance, transfer, or disposition of second-hand motor vehicles", etc.

It appears that the Fiat Motor Company was incorporated under the General Incorporation Law of this Commonwealth, and that its charter authorizes it to "buy, sell, handle, lease, repair build and deal in all kinds of automobiles".

Section 9 of said Act of 1919 provides as follows:

"That after the first day of July, one thousand nine hundred and nineteen, it shall be unlawful, and it is hereby forbidden, for any person to carry on or conduct in this Commonwealth the business of buying, selling, or dealing in used motor vehicles unless and until he shall have received a license from the Commissioner of Highways of the Commonwealth, authorizing the carrying on or conducting of such business..... Upon making such application the person applying therefor shall pay to the State Highway Commissioner a fee of one hundred dollars (\$100.00)."

Section 10 of the Act provides that a violation of the provisions of the said ninth section shall constitute a misdemeanor, punishable by a fine of not less than three hundred dollars (\$300.00), and not more than one thousand dollars (\$1,000.00), or to imprisonment for not less than one year or more than three years, or both, at the discretion of the Court.

This Act is an exercise of police power of the State. Its regulations are reasonable, and apply uniformly to all persons, whether natural or artificial, engaged in the business undertaken to be regulated. Corporate charters and franchises are granted and accepted in subordination to the police power of the State. As against this power, which finds appropriate expression in the maxim, *salus populi suprema lex*, the doctrine that a corporate charter is a contract, must give way. *Penna. R. R. vs. Braddock Electric Ry.*, 152 Pa. 116. The above mentioned corporation took its charter subject to Section 3 of Article XVI of the State Constitution of 1874, which declares that;

“* * * The exercise of the police power of the State shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the State.”

Section 10 of Article XVI provides thus:

“The general Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revoking at the adoption of this Constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this Commonwealth, in such manner, however, that no injustice shall be done to the corporators.”

The power to annul a charter of a corporation clearly embraces the lesser power to regulate the business of such corporation. Persons and property of all kinds are subject to general restraints and burdens in order to secure the welfare and prosperity of the State at large. The interests of the few must yield to the wants of the many. *Commonwealth vs. Hock Mutual Beneficial Association*, 10 Phila. 554.

The right to subject private corporations to such new regulations as the general welfare demands is discussed in an illuminating and convincing manner in *Cooley's Constitutional Limitations*, 7th Ed. page 836:

“Although these charters are to be regarded as contracts, and the rights assured by them are inviolable, it does not follow that these rights are at once, by force of the charter-contract, removed from the sphere of State regulation, and that the charter implies an undertaking, on the part of the State, that in the same way in which their exercise is permissible at first, and under the regulations then existing, and those only, may the corporators continue to exercise their rights while the artificial existence continues. * * * the rights and privileges which come into existence under it are placed upon the same footing with other legal rights and privileges of the citizen, and subject in like manner to proper rules for their due regulation, protection, and enjoyment.”

It was held in *People, ex rel. Larrabee, vs. Mulholland*, 82 N. Y., 324, that a corporation incorporated under an Act of Assembly was subject to a municipal ordinance requiring licenses for persons engaged in peddling milk in the city. The Court, in their opinion, say that the Act of incorporation did not so much give the right or privilege to sell as it declared the purpose for which the corporation was sought, and awarded to it the right to do as a corporation that which any natural person might do without it. The mere

coming together as corporators gave the persons making the association no more right as a corporate body within the bounds of the city than every one of them already had as individuals.

In view of the principles and decisions referred to there can be no doubt that the Fiat Motor Company, created and formed to carry on a business already lawful and proper to be engaged in by natural persons, is as much subject to, and affected by, the aforesaid Act of 1919 as a natural person. This conclusion is in harmony with the opinion of Deputy Attorney General Collins, rendered February 2, 1916, holding that the Seamen's Boarding House Association of the City of Philadelphia, incorporated by the Act of 1865, P. L. 613, is subject to the Act of 1915, P. L. 888, regulating the business of employment agents.

You are advised, therefore, that the Fiat Motor Company is not exempted by its charter from the provisions of the said Act of 1919, and that your officers should institute proceedings against it if it continues to refuse to take out the license as provided in Section 9 of the Act.

Very truly yours,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

MOTOR VEHICLES.

Under Section 13 of the Act of June 30, 1919, P. L. 678, the power lodged in the Commissioner of Highways, to suspend the license of an owner, operator or paid driver of a motor vehicle, upon the sworn statement of two reputable persons that such owner, operator or paid driver had been involved in an accident resulting in injury to person or property and that such accident had been the result of recklessness or carelessness on the part of such licensee, is discretionary and should be exercised with great care.

Office of the Attorney General,
Harrisburg, Pa., June 22, 1920.

Mr. Benjamin G. Eynon, Registrar of Motor Vehicles, State Highway Department, Harrisburg, Pa.

Sir: I am in receipt of your communication of the 16th instant, asking to be advised whether, under the authority granted to the State Highway Commissioner under Section 13 of the Act of 1919, P. L. 678, entitled—

“An Act relating to and regulating the use and operation of motor vehicles” etc.,

approved the 30th day of June, A. D. 1919, the State Highway Commissioner is obliged to suspend the license issued to any owner, operator or paid driver of a motor vehicle, when he has been furnished with sworn statements of two reputable citizens, reciting that said owner, operator or paid driver has been involved in an accident resulting in injury to person or property, and that such accident was the result of recklessness or carelessness on the part of the licensee.

Section 13 of the Act provides as follows:

"The State Highway Commissioner may refuse to issue a license to any applicant who is shown by proper evidence to be a reckless or careless operator endangering the safety of the public, or an habitual violator of the provisions of this act.

"He may also revoke or suspend the license issued to any such person, upon hearing before the commissioner or his representative, after due notice in writing of the proposed action and the grounds therefor has been mailed to the licensee at the address given in his application.

"The State Highway Commissioner may, upon investigation, suspend the license of any owner, operator, or paid driver, who has been involved in an accident resulting in injury to person or property, upon the sworn statement of two reputable persons that such accident was the result of recklessness or carelessness on the part of such licensee, and, after a hearing before the commissioner or his representative, shall annul the license issued to such person if the evidence justifies such action."

In addition to the power to revoke or suspend a license to operate a motor vehicle after notice had a hearing, the third paragraph of the section lodged in the Commissioner the power to suspend, upon investigation and without a hearing, the license of an owner, operator or paid driver who has in fact been involved in an accident resulting in injury to person or property, provided there has been furnished to him sworn statements of two reputable persons that such accident was the result of recklessness or carelessness on the part of such licensee.

While the power to revoke or suspend a license to operate may be exercised after notice and a hearing, the power to suspend may, and under certain circumstances should, be exercised without a hearing. It is evident that the words "suspend" and "revoke" are used advisedly, and that the word "suspend" does not carry with it the meaning of the word "revoke". To "revoke" is to annul per-

manently, to terminate. To "suspend" is to temporarily take away the right to operate. The greater power of revoking a license may be exercised only after a hearing. The lesser power of suspending a license may be exercised after investigation and the furnishing of the sworn statements, without a hearing.

Specifically answering your question, therefore, you are advised that the Commissioner is not obliged to suspend the license of any owner, operator or paid driver, although an accident of the character described has happened and the sworn statements have been furnished. The power lodged in the Commissioner is a discretionary power. Each case should be decided in the light of its peculiar facts. Because the action is taken without a hearing, it should be exercised with great care and result from a careful investigation and deliberate judgment.

Very truly yours,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

IN RE SALES OF AUTOMOBILES.

The Act of June 30, 1919, P. L. 70, known as the Automobile Act, applies to sales of cars made by a sheriff in obedience to a writ of execution. In such sales, the sheriff may make the "vendor's affidavit,"

Office of the Attorney General,
Harrisburg, Pa., September 16, 1920.

Hon. Lewis S. Sadler, State Highway Commissioner, Harrisburg, Pa.

Sir: This Department is in receipt of your letter of recent date enclosing a communication from the Office of the Sheriff of Philadelphia inquiring whether the provisions of the Act of June 30, 1919, P. L. 702, apply to second-hand motor vehicles sold by a sheriff in obedience to a writ of execution. The specific case before him is this: An automobile owned by A was registered in the name of B. C secured a judgment against A, issued a fi. fa. thereon and directed the sheriff to levy upon the automobile as the property of A. After levy and before sale the sheriff learned that the car had been registered in the name of B. B has not filed with the sheriff any claim of property, Both A and B decline to execute the "vendor's affidavit" required by the Act of Assembly referred to, and C is urging the sheriff to sell.

The sheriff is of the opinion that the Act should be construed so as to exclude from its provisions sales made by him in obedience to a writ of execution, for the following reasons: (1) That he cannot compel either A or B to execute the "vendor's affidavit," and (2) that the sheriff cannot make the "vendor's affidavit." He adds, that owing to the fact that the automobile is registered in the name of a person other than the judgment debtor, he "cannot comply with the act without subjecting himself to greater responsibility than the law should impose upon him."

Notwithstanding these apparent difficulties I am of the opinion that the act applies to execution sales, for four reasons: (1) The words of the statute are clear and leave no room for the creation of an exception by construction, (2) to except execution sales would in a measure defeat the purpose of the act and would afford a means of evading it, (3) the reasons assigned for accepting execution sales would require the exception of sales by bailees having a lien for repairs or storage, by receivers, by trustees in bankruptcy, by executors and administrators, and (4) the difficulties resulting from the application of the act to such sales are apparent rather than real.

(1) The words of the statute are clear. Section 2 defines the transactions to which the act shall apply, in the following words:

"That.....it shall be unlawful for *any person* to *sell, convey, transfer, or pass title* to any used motor vehicle, unless he shall, at or before such sale, conveyance, transfer, or passage of title, deliver to the vendee, buyer, or transferee thereof, a full description of such used motor vehicle, in duplicate."

There can be no doubt that the words "unlawful for any person to sell, convey, transfer, or pass title," in their ordinary meaning include a sale by a sheriff under a writ of execution, and I am of the opinion that they should be literally construed. "When words admit of but one meaning, a court is not at liberty to speculate upon the intention of the legislature, or to construe an act according to its own notion as to what ought to have been enacted." *Endlich on Interpretation of Statutes*, p. 10.

In the application of *First Presbyterian Church*, 107 Pa. 543, there came before the court for the construction of an Act of Assembly which provided that it shall be lawful for the Court of Common Pleas to "change the name, style, and title of *any corporation* within their respective counties," provided that no proceeding for such purpose shall be entertained by the courts until notice of such application is given to the Auditor General. It was contended that this act did not apply to religious corporations for the reason that such corporations were not, under the existing law, required to register with the Audi-

tor General and were not subject to taxation. To apply the act to religious corporations would require the filing with the Auditor General of notice of an amendment to a charter of the existence of which he had no previous knowledge. Notwithstanding the apparent uselessness of the requirement, the Supreme Court were of opinion that the words "any corporation" included religious corporations and they declined to create by construction any exception of a class which clearly fell within the words of the act. Mr. Justice Gordon speaking for the court said, (p.547)

"Whether wise or unwise, such is the statute, and we can neither amend nor disregard it."

In Pittsburgh v. Kalchthaler, 114 Pa. 457, the question was raised whether an act which authorized the city to levy an annual tax upon "goods, wares and merchandise and upon all articles of trade and commerce sold in said city," permitted the imposition of such tax upon a butcher who slaughtered his own cattle and sold the meat at a stall in a public market which he rented at an annual rental from the city. The court below was of the opinion that the idea of including within the act sales made at such stalls was "so inconsistent with the idea of a public market that it is not to be presumed the legislature so intended." The Supreme Court, however, differed in its view. Mr. Justice Green speaking for that court said, (p. 552)

"... We think it is always unsafe to depart from the plain and literal meaning of the words contained in legislative enactments out of deference to some supposed intent, or absence of intent, which would prevent the application of the words actually used to a given subject. Such a practice is really substituting the theories of a court, which may, and often do, vary with the personality of the individuals who compose it, in place of the express words of the law as enacted by the law-making power. It is a practice to be avoided and not followed."

"When a statute makes no exceptions, the courts can make none."
Endlich on Interpretation of Statutes, p. 23. To the same effect is *County of Erie v. Commissioner of Water Works, 113 Pa. 363.*

(2) To except execution sales would, in a measure, defeat the purpose of the act, and would furnish a means whereby its provisions could be evaded. By this act the legislature intended to require that a record be made of all sales of used motor vehicles. This record was designed to prevent thefts by making it more difficult for thieves to dispose of stolen cars and more easy for owners to trace and locate their property. To this end the act provides, in Section 2, that the person transferring title shall make and deliver to the trans-

feree an affidavit in duplicate describing the motor vehicle and stating how he acquired title to it; and in Section 3, that the transferee shall make a similar affidavit in duplicate, shall obtain the duplicate affidavits made by the transferor, and shall file one copy of each in the office of the State Highway Commissioner and the other with the Chief of Police or Clerk of the Court of Quarter Sessions. In addition to recording these affidavits, the State Highway Commissioner is directed to record every report of a stolen motor vehicle in such manner as will enable him to notify the owner immediately if application be made for the registration of that vehicle.

If the act be construed so as to exclude execution sales the records in the State Highway Department will, to the extent of such sales, be incomplete. The very case presented to the sheriff furnishes an example of the mischief of such a construction. Let us suppose that A, the judgment debtor, had stolen the car levied upon from B, who had no knowledge of its whereabouts. If the purchaser at sheriff's sale is required to file a description of the car, together with a statement of the origin of his title, this requirement will probably lead to the restoration of the property to the rightful owner and incidently it will lead purchasers, in advance of such sales, to inquire into the title of the judgment debtor. Both are results which the legislature desired to accomplish. If on the other hand the purchaser is not required to comply with the act, its purpose will to that extent be defeated and the judgment debtor will have succeeded in evading the provisions of the act. Such procedure by a thief is perhaps not probable, but I am of the opinion that the legislature did not intend that it should be possible.

"An interpretation is never to be adopted that would defeat the purpose of the enactment, if any other construction be found which its language will fairly bear and this applies to penal as to other statutes." *Endlich on Interpretation of Statutes*, p. 352. "To carry out effectually the object of a statute it must be so construed as to defeat all attempts to do, or avoid in an indirect or circuitous manner, that which it has prohibited or enjoined." *Id.* p. 192.

(3) The reasons assigned for excluding execution sales would operate also to exclude sales by bailees for storage or repairs. These reasons, as presented to us, are that the judgment debtor will not make the necessary affidavit and that the sheriff cannot. These same objections apply with equal force to sales by bailees. Suppose A leaves an automobile at the B garage for repairs. With used cars this is not an infrequent occurrence. Upon presentation of the bill A is unwilling or unable to pay, or perchance he may find that he will be better off if he forego the pleasure of his automobile than

if he pay the bill. The remedy of the garage keeper is to sell the car. A may decline to make a vendor's affidavit. Is the garage keeper to be excepted from the act so that he may sell the car without furnishing the vendee the required affidavit? Such construction would certainly invite a confederacy between the auto thief and the unscrupulous garage keeper for the purpose of evading the requirements of the act. Furthermore, if the reasons assigned be valid, they would also warrant the exception of sales by receivers, trustees in bankruptcy, executors and administrators. Under the authorities cited and for the reasons given above, I do not believe that the legislature intended that such exceptions to the act should be made.

(4) The difficulties in applying the act to execution sales are apparent rather than real. I am of the opinion that the sheriff himself may make the vendor's affidavit, and that he can furnish all the information required to be stated therein. The act requires that the person passing title -

"Shall deliver to the vendee, buyer, or transferee thereof, a full description of such used motor vehicle, in duplicate. The said description shall include the name of the manufacturer thereof, the horsepower of such used motor vehicle, the number under which it was last registered with the State Highway Department of the Commonwealth of Pennsylvania, or, if not so registered in this Commonwealth, the name of the State wherein it is so registered, and the number of the last register therein, together with a full account of any numbers and marks thereon which may identify or tend to identify the said motor vehicle."

The sheriff having the motor vehicle in his possession can obtain all this information. The section further provides:

" The said duplicate description of such used motor vehicle shall be accompanied by a written statement, also in duplicate, of the name or names and residence or residences of the bona fide owner or owners of such used motor vehicles from whom the person transferring the same derived title thereto or ownership thereof. The residence or residences, so stated, shall be by city, borough, township, or county, together with the street and number or post-office address, if any, of such former owner or owners, or, if there be no such addresses, then by such description, designation, or information as may reasonably fix the place or places, residence or residences, of such former owner or owners, or the place where he, she, or they may be found, with his, her, or their occupation and place of business or employment, if employed by any other person or persons, and the name of such employer, and shall also contain the date and place when and where the ownership of the said used motor vehicle by the person transferring the same began, and whether he acquired title thereto by purchase

from such last owner, or in what manner he did acquire such title; such statement shall further set forth any or all changes and alterations in the finish, design, or appearance of the said used motor vehicle which had been made within the knowledge of the person making the statement, and it shall be verified in duplicate by his oath or affidavit."

If the words "bona fide owner. . . . from whom the person transferring the same *derived title* thereto or ownership thereof" be construed to mean the person from whom the judgment debtor purchased, it would in some cases be difficult for the sheriff to obtain this information. But we believe that in the case of an execution sale, "the person transferring the same" may be construed to mean the sheriff, and the "bona fide owner" to mean the judgment debtor.

The sheriff has a title to the goods levied upon. By virtue of the levy he acquires a special property in them. He is entitled to exclusive possession and he may maintain trespass or trover. *Trevillo v. Tilford*, 6 Watts, 468; *Lytle v. Mehaffy*, 8 Watts, 267; *Walsh v. Bell*, 32 Pa. 12; *Duncan's Appeal*, 37 Pa. 500; *Weidensaul v. Reynolds*, 49 Pa. 73. This title is acquired without the consent of the debtor and by operation of the law, but it is nevertheless *derived from the debtor*. Upon sale the title of the sheriff, together with the title remaining until that time in the judgment debtor, passes to the purchaser, who acquires the absolute property in the goods. This being true our construction does no violence to the language of the act and affords a means of compliance with its terms in a class of cases which, as we have pointed out above, are clearly within its provisions.

I see no reason why the judgment debtor should not execute the "vendor's affidavit" if he be willing to do so, but I am of the opinion that if for any reason an affidavit is not supplied by him, the sheriff may execute it, describe the machine, and name the judgment debtor as the person from whom he acquired title. Affidavits so made should be accepted and filed by the State Highway Department as a compliance with the act.

The remaining question suggested by the sheriff was carefully considered before arriving at the conclusions expressed herein, but inasmuch as this question pertains solely to the conduct of his office, this Department should not express any opinion thereon.

For the reasons given, I am of the opinion (1) that the Act of June 30, 1919, P. L. 70, applies to sales made by a sheriff in obedience to a writ of execution, and (2) that in the case of such sales, the sheriff may make the "vendor's affidavit."

Very truly yours,

GEORGE ROSS HULL,
Deputy Attorney General.

AUTOMOBILE LICENSES.

Under section 7 of the Act of June 30, 1919, P. L. 678, a dealer may, for the *bona fide* purpose of demonstrating to a purchaser or prospective purchaser the qualities and capacity of a motor-truck, load it with merchandise and operate it under the dealer's registration plates, either before or after a contract of sale has been entered into.

Office of the Attorney General,
Harrisburg, Pa., September 29, 1920.

Mr. Benjamin G. Eynon, Registrar of Motor Vehicles, State Highway Department, Harrisburg, Pa.

Sir: This Department is in receipt of your letter of recent date inquiring whether a dealer, in demonstrating a motor vehicle after an agreement for its sale has been entered into, may haul a load of merchandise therein and may operate the truck under dealer's registration plates. This inquiry presents two questions: (1) may a dealer haul merchandise in demonstrating a motor truck under dealer's plates, and (2) may he make such demonstration after an agreement of sale has been entered into?

Section 7 of the Act of June 30, 1919, P. L. 678, provides *inter alia*, as follows:

- "No person or persons shall use or permit the use of the plates issued under a dealer's registration on any motor vehicle other than those owned by such dealer and operated by such dealer or his employes, or for any purpose other than demonstrating said vehicle to a prospective purchaser, or testing, or removing same from storage place, shipping point, or place of delivery, before or after sale."

For the purpose of demonstrating a motor truck, it is doubtless desirable in all cases to demonstrate to the prospective purchaser the capacity of the truck to haul a load of a certain bulk and weight under certain test conditions. Operating the truck under such conditions is the best method of demonstrating it and is the best proof of its capacity. I do not believe that the Legislature intended to restrict a dealer to a demonstration of the truck without any load, nor to require that the load should be composed of any particular material. Doubtless a purchaser intending to purchase a truck for the purpose of hauling ice would like to see it operated with a load of ice; while another, intending to haul furniture, would be desirous of seeing the truck demonstrated with a load of furniture. The portion of the Act quoted ought to be given a reasonable construction, and I am of the opinion that merchandise may be hauled in a truck while it is being demonstrated to a prospective purchaser.

Upon the second question, it seems that the language of the act has left no room for doubt. The words are "*demonstrating said vehicle * * * before or after sale.*" A purchaser may enter into a contract of sale before he has seen any demonstration, or he may have witnessed the demonstration of another truck of the same make. In either case, he may reasonably demand a demonstration of the particular truck offered to him before he accepts delivery of it as a performance of the contract by the dealer. If the dealer were not permitted to make this demonstration under his dealer's registration plates, the truck would be registered by the purchaser who, if the demonstration were unsuccessful, might never become the owner of that truck. I am of the opinion that the Legislature did not intend to forbid the making of such demonstration after sale.

I, therefore, advise you that a dealer, for the bona fide purpose of demonstrating to a purchaser or prospective purchaser the qualities and capacity of a motor truck, may load the same with merchandise and operate it under dealer's registration plates either before or after a contract of sale has been entered into.

Very truly yours,

GEORGE ROSS HULL,
Deputy Attorney General.

IN RE MOTOR VEHICLE FINES.

A justice of the peace having found defendant guilty of violating the Motor Vehicle Act of June 30, 1919, P. L. 678, he has no alternative but to impose a fine. He has no power to remit the fine and collect only his costs.

Office of the Attorney General,
Harrisburg, Pa., September 30, 1920.

Mr. Benjamin G. Eynon, Registrar of Motor Vehicles, State Highway Department, Harrisburg, Pa.

Dear Sir: This Department is in receipt of your recent communication inquiring whether, in a summary conviction for violation of the provisions of the Act of June 30, 1919, P. L. 678 (Motor Vehicle Act), a Justice of the Peace may remit the fine or penalty prescribed by the Act, and discharge the offender upon payment of the costs.

If the Justice of the Peace find the defendant guilty of the offense charged, it is his duty to enter a conviction against him imposing a

fine within the limits fixed by the Act with the alternative of imprisonment therein provided. He has no power to remit the fine and collect only his costs. "A conviction (in a summary proceeding), is equal to a *verdict and judgment*." *Commonwealth v. Irwin*, 3 Pa., L. J. 59; 1 Clark, 408. "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." *Hampton L. Carson*, Attorney General, Official Opinions 1903-04, 106; 6 J. of P. 97.

Yours very truly,

GEORGE ROSS HULL,
Deputy Attorney General.

AUTOMOBILE LICENSES. No. 2.

Under the Act of June 30, 1919, P. L. 678, a duly authorized agent of an automobile manufacturer, who has been supplied with dies for the purpose of stamping numbers upon motors to be used in automobiles of such manufacturer, may remove a damaged motor, destroy the same and replace it with a new motor, stamping thereon the number which appeared upon the old motor, without securing a permit from the State Highway Commissioner.

Office of the Attorney General,
Harrisburg, Pa., September 30, 1920.

Mr. Benjamin G. Fynon, Registrar of Motor Vehicles, State Highway Department, Harrisburg, Pa.

Sir: This Department is in receipt of your letter of recent date inquiring whether, under the provisions of the Act of June 30, 1919, P. L. 678, an authorized agent of an automobile manufacturer, who has been supplied by such manufacturer with dies for the purpose of stamping numbers upon motors to be used in automobiles of such manufacture, may remove a damaged motor, destroy the same, and replace it with a new one, stamping thereon the number which appeared on the old motor, without securing from the State Highway Commissioner a permit under Section 3 of the said Act.

The "manufacturer's number" upon a motor vehicle is a mark of identification. In some cases it is stamped upon a plate attached to the body of the car, and is separate and distinct from the number on the engine or motor. In other cases it is stamped upon the engine and is the only number which appears upon the car. In every case it is the principal mark relied upon by the State Highway Commis-

sioner to identify each car and distinguish it from others of similar manufacture. It is highly important that this number shall not be altered except in the manner provided by law. Accordingly, Section 3 of the Act referred to provides, *inter alia*, as follows:—

“No motor vehicle on which the manufacturer’s number has been omitted, obliterated, or defaced, shall be registerable without a special permit from the State Highway Commissioner.

Before issuing a registration certificate for any such motor vehicle, the Highway Commissioner shall require information as to the date of purchase of such vehicle and the name and address of the person from whom it was purchased, together with satisfactory evidence that the number was not removed for the purpose of concealing the identity of such vehicle. He shall require that a special number designated by him shall be immediately stamped thereon. Such number shall be preceded by the letter S, and followed by ‘Pa.’, and the registration will not be valid until this requirement has been complied with.”

Under these provisions, a motor vehicle which bears no manufacturer’s number cannot be registered until it has been given a number designated by the Highway Commissioner and stamped upon it. Such number then takes the place of the original manufacturer’s number as the mark of identification of that particular vehicle. I am of the opinion that a permit and the designation of a new number are not required in the case which you have before you. In that case, the manufacturer who originally placed his number upon the vehicle has authorized his agent, when replacing the particular part of the machine which bears that number, to stamp the same number upon the new part. Under such circumstances the number stamped upon the new part is still the “manufacturer’s number.” It has not been omitted, obliterated, nor defaced, nor does it appear that any useful end would be subserved by requiring that such vehicle should be given another number by the Highway Commissioner.

I am, therefore, of the opinion that the duly authorized agent of an automobile manufacturer, who has been supplied with dies for the purpose of stamping numbers upon motors to be used in automobiles of such manufacture, may remove a damaged motor, destroy the same, and replace it with a new motor, stamping thereon the number which appeared upon the old motor, without securing a permit from the State Highway Commissioner.

Very truly yours,

GEORGE ROSS HULL,
Deputy Attorney General.

**OPINIONS TO THE DEPARTMENT OF
AGRICULTURE**

OPINIONS TO THE DEPARTMENT OF AGRICULTURE

PAYMENT FOR ANIMALS DESTROYED TO PREVENT SPREAD OF DISEASE.

The Livestock Sanitary Board should not pay institutions operated by the State for cattle belonging to such institutions killed to prevent spread of disease.

Office of the Attorney General,
Harrisburg, Pa., June 11, 1919.

Dr. J. C. Marshal, State Veterinarian, Harrisburg, Pa.

Dear Sir: This Department is in receipt of your favor of recent date.

You ask to be advised whether various State institutions should be paid out of the deficiency appropriations recently made by the present Legislature for animals which have been killed at the instance of the State Livestock Sanitary Board to prevent the spread of tuberculosis.

I understand that during the year 1918 your Board ordered 174 animals belonging to the State, which were in the custody of various State institutions, slaughtered to prevent the spread of tuberculosis. The question now arises as to whether you should pay out of the deficiency appropriation made by the present Legislature to your institution the value of the animals which were killed while in its custody, as provided by the Act of July 22, 1913, P. L. 928.

Section 21 of that Act provides:

"Whenever, to prevent the spread of disease, it shall be deemed necessary by any member, officer, or agent of the State Livestock Sanitary Board, to cause any domestic animal to be killed, the State Veterinarian may cause to be paid *to the owner of such animal* two-thirds of the fair market value thereof," etc.

The owner of the animals involved in this inquiry is the Commonwealth of Pennsylvania. The animals were in the custody of the institutions belonging to the State and maintained by the State. These State institutions are maintained by specific appropriations.

If the money representing the value of these animals were to be paid to the various State institutions, it would necessarily have to be returned to the State Treasury. For these reasons it is impracticable to make a payment out of one fund in the State Treasury into another fund.

I, therefore, advise you that payment should not be made by the Livestock Sanitary Board to these various institutions owned and operated by the State for the cattle which were killed at the instance of the Livestock Sanitary Board.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

DESTRUCTION OF ANIMALS.

The Livestock Sanitary Board should pay the Western Penitentiary for animals which were ordered to be destroyed to prevent the spread of disease.

Office of the Attorney General,
Harrisburg, Pa., July 22, 1919.

Dr. C. J. Marshal, State Veterinarian, Harrisburg, Pa.

Dear Doctor: Your favor of recent date was duly received.

You ask to be advised whether the Livestock Sanitary Board should refund to the Western Penitentiary the amount required under the Act of July 22, 1913, P. L. 928, because of animals ordered to be killed by that Board, to prevent the spread of disease.

I have to advise you that the opinion of this Department of June 12, 1919, stating that the Livestock Sanitary Board should not reimburse various State institutions which were exclusively maintained by the State, applies only to such cases where the owner of the animals destroyed is the Commonwealth, and where such institutions are maintained exclusively by the Commonwealth.

In the letter of Mr. James W. Herron, Assistant Superintendent of Construction, which accompanies your request, it is stated:

"I would respectfully call your attention to the fact that the cattle destroyed by the State Livestock Sanitary Board on account of tuberculosis at the New Western Penitentiary farm at Rockview were not purchased by funds from any appropriation made by the State, and consequently did not belong to the State; but to the contrary are the property of the counties of the Western District of Pennsylvania, having been purchased by the said counties, and also maintained by them."

Assuming this to be the fact, the opinion of June 12, 1919 does not apply to the animals in the custody of the Western Penitentiary,

which were ordered to be destroyed, and you are justified in paying to the Western Penitentiary the amount authorized under the Act of Assembly above mentioned.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

CO-OPERATIVE AGRICULTURAL ASSOCIATIONS.

Under the Act of June 12, 1919, a co-operative agricultural association cannot be incorporated for the purpose of purchasing and distributing electric light to its members, installing and operating a telephone line for the use of its members or operating a store through which its members can purchase agricultural supplies and groceries.

Office of the Attorney General,
Harrisburg, Pa., September 10, 1919.

Mr. Guy C. Smith, Director, Bureau of Markets, Department of Agriculture, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 30th ult. wherein you request an opinion as to whether a co-operative agricultural association may be incorporated pursuant to the provisions of Act No. 238, approved June 12th, 1919, for the following purposes, namely:

First: To erect poles and wires on the lands of the members of the association and by means thereof to distribute to them electric light and power purchased from a light and power manufacturing company, and to install and operate a telephone line for the use of its members.

Second: To operate a store through which the members of the association can buy agricultural supplies, "and, in addition to these supplies, groceries."

The aforesaid Act provides for the incorporation and regulation of co-operative agricultural associations without capital stock, and to be conducted without profit. The incorporators and members thereof are restricted to those engaged in "agriculture", as that term is therein defined. Section 4 requires that the class of services for which such an association may be incorporated shall be among those enumerated in Section 3, which reads as follows:

"An association may, as agent for its members or any of them, perform for them services connected with

the production, preservation, drying, canning, storing, handling, utilization, marketing, or sale, of agricultural products produced by them; and, for the agricultural purposes of such members, may perform for them services connected with the purchase or hiring for use by them of supplies, including livestock, machinery, and equipment, and the hiring of labor, or any one or more of the kinds of service specified in this section."

The determination of the question here submitted consequently depends upon whether the above stated proposed purposes for an association are to be deemed among those enumerated in this Section. The rule of construction that governs in like questions in the case of corporations generally is well settled.

"A corporation cannot be organized for a particular purpose, unless that purpose is authorized by a statute; and when a corporation attempts to assert an existence for a certain purpose, it must show that the statute under which it was organized authorized its creation for such particular purpose."

Thompson on Corporations, Vol 1, Section 44.

The Court cannot grant a charter "where a particular purpose not clearly embraced in the general purpose stated in the Act is specified."

The Pennsylvania State Sportsmen's Association, 11 C. C. 576.

In *Newton Hamilton Oil and Gas Company, 10 C. C. 452*, Attorney General Hensel said:

"Under the Constitution of Pennsylvania and the legislation passed to enforce and make effective that instrument, and especially the Acts providing for the incorporation and regulation of corporations, it is clear that the legislative intention was to distinctly define the objects and purposes for which the charter shall issue."

In an opinion construing the term "mechanical business", as used in the Corporation Act of 1874, and holding that it did not include preparing and mechanically executing designs for decorating and furnishing buildings, it was said by Attorney General Kirkpatrick:

"It is a well recognized rule of interpretation that legislative grants or corporate powers are to be liberally construed in favor of the public and strictly against the grantee. The principle may be regarded as equally applicable to the interpretation of general statutes providing for the incorporation of private corporations, such as the Act of 1874 and its supplements. The statute in question is to be strictly construed, be-

ing a provision for grants of franchises and privileges to private individuals and therefore in derogation of the prerogatives and sovereignty of the Commonwealth."

A careful consideration of this Act of 1919 leads clearly to the conclusion that the proposed purposes above stated are not within the intent and meaning of the services enumerated in Section 3 for which an agricultural co-operative association may be incorporated. The object of the statute is to provide a co-operative agency in corporate form to perform services in the production, preparation for the markets and marketing of farm products, and the purchasing or hiring of farm supplies and labor. The scope of the services contemplated does not extend beyond purposes purely agricultural. It would be giving to the provisions of Section 3 a liberality of construction altogether unwarranted to hold that they include the right of an association to operate electric light and telephone systems for its members. If light and telephone, why not water and other kindred services, and thus open up to its members the whole general domain of the public service utilities by a method exclusively available to those eligible for membership in such an association? Only an unmistakable express provision could sustain a construction to that effect.

Upon the question of the power of a co-operative association to conduct a store through which its members can buy agricultural supplies "and, in addition to these supplies, groceries", it must be kept in view that in dealing in supplies as well as in any other services it renders, the association simply functions as the agent of its members. It does not buy supplies to sell to its members, but performs a service for them in connection with their purchase of supplies. This is not "storekeeping" in the ordinary sense and acceptance of what is meant by storekeeping. Furthermore, the power to purchase supplies is expressly limited by the provisions contained in Section 3 reading "*for the agricultural purposes of such members.*" This denotes a limitation upon the kind of services that may be rendered or supplies purchased, confining the activities of the association strictly to agricultural purposes. The supplies intended by the Act are of the general nature of those enumerated in Section 3, namely, "livestock, machinery and equipment." Groceries cannot properly be classed as something peculiarly agricultural. They are among the common necessities of all classes. It will readily be seen that if the Act were to permit an association to run a store and deal in such merchandise as groceries, there would be practically no limit set upon the mercantile enterprise in which it might engage. It is not so intended.

In accordance with the foregoing, you are advised that the purposes mentioned in your communication, and as above stated, would embrace services not within the purview of those for which an agricultural co-operative association may be incorporated under the aforesaid Act.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

COLD STORAGE EGGS.

Cold storage food, which has been withdrawn from cold storage in Illinois, shipped into this State, and sold while the product is out of cold storage, cannot be returned to a cold storage warehouse in this State.

Office of the Attorney General,
Harrisburg, Pa., November 17, 1919.

Honorable James Foust, Director Bureau of Foods, Harrisburg, Pa.

Dear Sir: This Department is in receipt of your favor of recent date, propounding this question:

Where the owner of cold storage eggs stored in Chicago withdraws a car load in his own name, consigns them in his name to Philadelphia, and then sells them to another firm or individual, can the purchaser place such eggs in cold storage in this State under the provisions of our cold storage law?

Section 10 of the cold storage Act of June 26, 1919, No. 278, provides as follows:

"It shall be unlawful to return to any cold storage house an article of food which has been once released from storage for the purpose of placing it on the market for sale."

The fact that the cold storage goods have actually been sold is very strong evidence that they were withdrawn from the cold storage warehouse for the purpose of sale. This Act of Assembly must be interpreted according to its reason and spirit. If, in order to protect the public health it is found necessary to prohibit the return to any cold storage warehouse of food which has been released for the purpose of placing it on the market for sale, it is certainly within the spirit of the law, that cold storage food which has actually been sold while out of cold storage cannot be placed in cold storage again.

I am, therefore, of opinion that cold storage food which has been withdrawn from cold storage in Illinois, shipped into this State, and sold while the product is out of cold storage, cannot be returned to a cold storage warehouse in this State.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

VIRGINIA DARE WINE.

This wine, if it contains any percentage of alcohol, does not come within the Non Alcoholic Drink Act of March 11, 1909, P. L. 15, as amended by the Act of June 16, 1919, P. L. 480, and is therefore not subject to the supervision of the Director of the Bureau of Foods, Department of Agriculture.

Office of the Attorney General,
Harrisburg, Pa., January 6, 1920.

Honorable James Foust, Director Bureau of Foods, Harrisburg, Pa.

Sir: You have requested an opinion as to whether the drink called "Virginia Dare Wine" comes within the Non-alcoholic Drink Act of March 11, 1909, P. L. 15, as amended by the Act of June 16, 1919, P. L. 480, and therefore subject to your supervision as to adulteration and misbranding, as defined by that Act.

The facts upon which your request is based I understand to be as follows:

The product known as "Virginia Dare Wine" is produced by the usual process of making wine, and it is subjected to a further process of extracting the alcohol. In most instances the alcohol is completely extracted, but it occasionally happens that there is a trace of alcohol remaining, sometimes as much as three-tenths of one per cent., and the sample which happened to be purchased by your Bureau contained that quantity of alcohol.

The chemist's report indicates that this drink "possesses the general properties of light colored, unfermented grape juice and is much superior to some of the beverages which have lately appeared," and that three-tenths of one per cent. is less alcohol than is sometimes found in "unfermented fruit juice, such as grape juice, loganberry juice, apple cider, even when perfectly sweet and put up with the greatest care."

The Act of May 13, 1887, P. L. 108, known as the "Brooks High License Law," prohibits the sale, without a license, of "spirituous, vinous, malt and brewed liquors." In construing this Act of Assembly it has been held that if a liquor is vinous or spirituous a conviction may be sustained, even though there was no evidence that the liquor was intoxicating or had an intoxicating effect, *Commonwealth vs. Reyburg*, 122 Pa. 299; and that if the liquor sold without a license contained any alcohol such sale violated the law, even though the percentage of alcohol was slight. Convictions have been sustained where the drink was admitted to contain 87/100 of one per cent. *Commonwealth vs. Wenzel*, 24 Sup. Ct. 467. It has also been held that it is a violation of this law to sell liquor containing two per cent. of alcohol, even though there be no evidence that the drink was intoxicating. *Hatfield vs. Commonwealth*, 120 Pa. 395; *Commonwealth vs. Burns*, 38 Sup. Ct. 514.

The eighteenth amendment to the Constitution of the United States prohibits—

"The manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes."

Section 2 of this amendment provides:

"The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

The State of Pennsylvania has not passed any legislation designed to enforce this constitutional amendment. Congress, however, has passed the Act of October 28, 1919, Public No. 66, 66th Congress, enforcing the eighteenth amendment.

The question, therefore, to be determined is the effect of this Congressional legislation upon the Brooks High License Law of May 13, 1887.

The proper interpretation of the words "concurrent power" given by Section 2 of the amendment to Congress and the several States is involved in this question. I think the words "concurrent power" are equivalent to "concurrent jurisdiction." If these words mean that, notwithstanding any legislation of Congress, there must also be legislation by the States before this amendment to the Constitution is enforceable, then the rule that when Congress legislates upon a subject within its jurisdiction and covers the field, it supersedes legislation by the States, is not applicable.

If, on the other hand, "concurrent power" means that either the Congress or the States have the power to enforce the amendment, then the question arises as to how far the Act of Congress has superseded the Brooks High License Law.

The cases interpreting "concurrent jurisdiction" are not uniform, and this phase is construed with reference to the situation with which it deals. For instance, concurrent jurisdiction conferred over fishing in boundary rivers has been construed to mean that, where there is a conflict of law, the law of the State which is most restrictive in its character must prevail. In such cases "concurrent jurisdiction" is not joint in the sense that only legislative acts adopted by both States can be effective on boundary waters. *State vs. Nielson*, 95 Pac. 720, 131 Am. St. Rep. 765; *State vs. Moyers*, (Iowa) 136 N. W. 896 41 L. R. A. (N. S.) 366.

It has also been held with reference to the Columbia River that Oregon can not "enact such criminal statutes as are agreed to or acquiesced in by the State of Washington, or as are already in force within its jurisdiction." *Ex parte Desjeiro*, 152 Fed. 1004.

As applied to Courts, "no one has ever pretended that the exercise of such jurisdiction by one Court was dependent upon its concurrent exercise by any other." *Keator vs. St. Croix Boon Corporation*, 72 Wis. 62, 38 N. W. 529.

A familiar application of concurrent power, though not applied at the same time, is the operation of the Acts of Congress on food products which enter into Interstate Commerce, and the subsequent operation of the laws of the State upon such food products.

It would render this Article of the Constitution ineffective if Congressional action in carrying it into effect had to wait the concurrent legislative action of the several States. National prohibition would be a farce, and the matter would still remain within the complete control of the police power of the several States, exercised through its concurrent legislation.

I am, therefore, of opinion that the words "concurrent power" are intended to authorize either the State or the Federal government to carry the eighteenth amendment into effect, and if the State imposes severer restrictions than those imposed by Congress the State laws may, within the confines of the State, be enforced.

When the State does not legislate on the subject, the Act of Congress has, in my opinion, the effect of superseding prior State legislation which is inconsistent with it.

It is a familiar rule that Acts of Congress only supersede State laws in so far as the latter are in conflict with the paramount Federal statute. This rule has been applied in our own State to

the Federal Bankruptcy Acts. *Potts vs. Smith Manufacturing Company*, 25 Sup. Ct. 206; *Hoover vs. Ober*, 42 Sup. Ct. 308.

How does this leave the situation? The Act of Congress has defined intoxicating liquors to be any liquid fit for beverage purposes, by whatever name called, "containing one-half of one per centum of alcohol by volume."

If there were nothing else in the Act of Congress, the conclusion would be irresistible that it legislates only as to vinous, spirituous, malt or brewed liquors which contain more than one-half of one per centum of alcohol by volume, and that it does not cover such liquors if they contain less than one-half of one per centum of alcohol.

The Brooks High License Law having been construed to include liquors containing any percentage of alcohol, and therefore, percentages less than one-half of one per cent. would cover a field that has not been covered by the Act of Congress. It would follow that the Act of Congress has not superseded the Brooks High License Law as to such liquors, but in Section 1 of Title II of the Act of Congress defining "intoxicating liquors" there is this further provision:

"That the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced, if it contains less than one-half of one per centum of alcohol by volume, and is made as prescribed in section 37 of this title, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the commissioners may by regulation prescribe."

Section 37 provides that—

"A manufacturer of any beverage containing less than one-half of one per centum of alcohol by volume may, on making application and giving such bond as the commissioner shall prescribe, be given a permit to develop in the manufacture thereof by the usual methods of fermentation and fortification or otherwise a liquid such as beer, ale, porter, or wine, containing more than one-half of one per centum of alcohol by volume, but before any such liquid is withdrawn from the factory or otherwise disposed of the alcoholic contents thereof shall under such rules and regulations as the commissioner may prescribe be reduced below such one-half of one per centum of alcohol."

This section further provides how the alcohol may be extracted and taxed, and that no tax shall be assessed on dealcoholized wine containing less than one-half of one per centum of alcohol by volume.

Does this provision, which covers the manufacture of dealcoholized wine, so cover its sale as to supersede the Brooks High License Law regulating beverages containing less than one-half of one per centum of alcohol by volume? I do not think it has that effect. The Act of Congress determines how dealcoholized wine may be made, but it is not, in my opinion, intended to regulate the sale thereof. The Brooks High License Law, as interpreted by the Courts, distinctly regulates the sale of dealcoholized wine from which all the alcohol has not been extracted, and prohibits such sale without a license.

I am, therefore, of the opinion that the Act of Congress has not superseded the Brooks High License Law in so far as beverages are concerned which contain less than one-half of one per centum of alcohol by volume, and that a license is required to sell such beverages. This conclusion is consistent with that reached by the Court of Quarter Sessions of Schuylkill County in the matter of the petition of Wilson G. Freeze for the transfer of a retail liquor license, wherein the Court came to the conclusion that a license was still required to sell "vinous, spirituous, malt or brewed liquors, or any admixture thereof" containing less than one-half of one per centum of alcohol by volume, and that such requirement was not affected by the National Prohibition Act.

I, therefore, advise you that "Virginia Dare Wine," if it contains any percentage of alcohol, does not come within the Non-alcoholic Drink Act of March 11, 1909, P. L. 15, as amended by the Act of June 16, 1919, P. L. 480, and is, therefore not subject to your supervision.

Very truly yours,

WILLIAM I. SCHAFER,
Attorney General.

COLD STORAGE BUTTER.

The United States Navy Department cannot legally sell in Pennsylvania butter that has been in cold storage more than twelve months.

Office of the Attorney General,
Harrisburg, Pa., January 20, 1920.

Honorable James Foust, Director, Bureau of Foods, Harrisburg, Pa.

Dear Sir: This Department is in receipt of your request of January 15, 1920, enclosing copies of telegrams in reference to the sale of cold storage butter by the Navy Yard in Philadelphia.

It appears that some of the butter which the Navy Yard proposes to sell has been in cold storage for more than twelve months.

The telegram from Commander J. D. Robenett to you indicates that the butter is of good quality, has passed a chemical test, and compares favorably with first class fresh butter. The Commander says in his telegram:

"All prospective purchasers of cold storage butter are informed that they must conform to the laws of the State in which they are located in the sale thereof,"

and also says:

"Would advise special decision by the Attorney General allowing the use of this butter in Pennsylvania, if possible, in order to reduce the high cost of living."

Section 8 of the Act of June 26, 1913, P. L. 670, provides:

"No person, firm, or corporation shall sell, offer, or expose for sale, any of the herein named foods which shall have been held for a longer period of time than herein specified in a cold-storage warehouse * * *, to wit: * * * butter, twelve (12) months * * *."

This language is plain. There is no uncertainty about it. I do not know what was in the mind of Commander Robenett when he requested a special decision of the Attorney General allowing the use of this butter. The duty of the Attorney General is to interpret and construe the laws of the Commonwealth for the various Departments of the State where there is ambiguity of language or doubt as to construction, but the Attorney General has no power to set aside the plain mandate of the law.

We recognize that it is the duty of every public official to aid in every way possible in endeavoring to reduce the high cost of living, but he can not go to the extent of violating the law which he has sworn to uphold.

In the telegram above referred to it is said:

"All prospective purchasers of cold storage butter are informed that they must conform to the laws of the State in which they are located."

The Navy Department is in the same position as any other vendor of cold storage butter. It must conform to the laws of the State. It would be an anomolous situation if the Navy Department sold cold storage butter, the sale of which was prohibited in this State, to wholesale dealers, and the dealers could not in turn sell it.

The cold storage laws of Pennsylvania are well known. They have attracted from time to time considerable public attention. When the Act of 1913 was passed, after many hearings and discussions, it provided that butter could not be sold in this State if held in cold storage for a longer period than nine months.

In 1917 a strenuous effort was made to extend the time limits on all articles of food to twelve months. This was accomplished by the Act of 1919.

The high cost of butter has existed for some time. It does not appear why the Navy Department has not offered this cold storage butter for sale in Pennsylvania within the time limit fixed by the Pennsylvania law.

The telegram of the Commander says:

“A part of this butter was packed more than a year ago.”

The Navy Department may sell in this State that part of the butter which it has on hand which was packed less than a year ago. If this outlawed butter which has been in cold storage for more than twelve months were permitted to be sold by the Navy Department merely because upon a chemical test it appears to be good, every other wholesale dealer who has butter in cold storage for a period of more than twelve months could claim the same privilege.

There is no exception in the law authorizing the sale of any product which has been in cold storage beyond the limit, if in fact the product may be found upon analysis to be good. The limit has been fixed in no uncertain terms and can not be disregarded.

When the time limit was nine months, the Act of 1913 was attacked upon the ground that it prohibited the sale of butter which had been in storage beyond the legal limit, and which was in fact pure and good, and the Court of Common Pleas of Allegheny County restrained the Dairy and Food Commissioner from interfering with the sale of such butter, but both the Superior Court and the Supreme Court reversed the Court of Common Pleas of Allegheny County and sustained the Act prohibiting the sale of such butter, even though it may be pure in fact. *Nolan vs. Jones*, 263 Pa. 124.

If any change is to be made in the law it must be made by the Legislature, and not by the Attorney General nor by the Director of the Bureau of Foods.

I therefore advise you that the Navy Department can not legally sell, in this State, butter which has been in cold storage for more than twelve months.

Yours very truly,

WM. M. HARGEST,
Deputy Attorney General.

MILK AND CREAM TESTS

The Milk and cream tests required by the Act of May 23, 1919, P. L. 275, may be made under the direct supervision of the certified tester though all of the tests are not made physically by him.

Office of the Attorney General,
Harrisburg, Pa., February 4, 1920.

Honorable Fred Rasmussen, Secretary of Agriculture, Harrisburg, Pa.

Sir: We have your favor of the 29th ultimo, asking for an interpretation of Section 4 of the Act of May 23, 1919, P. L. 275.

The question you propound is whether the tests required by this Act to be made of milk or cream must be made by the "certified tester," in person, or whether such tests may be made by other persons under the immediate supervision of the "certified tester."

Section 4 of that Act provides in part—

"Every person, association, copartnership, corporation, or agent or servant thereof, engaged in the business of receiving or buying milk or cream on the basis of, or in any way with reference to, the amount of butterfat contained therein, as determined by the 'Babcock test,' *shall have the samples taken, and said test or tests made, only by a certified tester, who shall supervise and be responsible for the same.* For the purpose of this act, a 'certified tester' is any person who, having furnished satisfactory evidence of good character, and having passed a satisfactory examination in milk and cream testing conducted by the Dairy Husbandry Department of the Pennsylvania State College, shall have received a certificate of proficiency from the said Department."

The language of the underscored part of this Section is not plain. In the first part it requires the samples to be taken and the tests made only by a "certified tester," but in the next clause it seems to indicate a permission for the "tester" to supervise the taking of such samples and the making of the tests.

Effect must be given to all the language of an Act of Assembly where it is possible so to do. To hold that the samples must be taken and the test made by the "certified tester" alone would be to give no effect to the words "who shall supervise and be responsible for the same." On the other hand, it would seem by construing the language to permit samples to be taken and tests to be made by other persons under the supervision of the "certified tester" is not giving full effect to the language which provides that the tests shall

be made "only by a 'certified tester.'" It is easily conceivable that if a "certified tester" supervises and is responsible for the tests made, the effect is the same as if the tests were made only by such tester.

I am, therefore, of opinion, in view of the conflicting language, that it was the intention of the Legislature to permit the tests referred to to be made under the direct supervision of the "certified tester," even though all of the tests were not physically made by such "tester."

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

DOG LICENSE.

The owner or harbinger of a dog who neglects to take out a license before January 15th cannot be compelled to pay the license fee if the dog be found running at large by the constable, nor if the owner himself kills the unlicensed dog, subsequent to this date.

The only recourse against the owner or harbinger of the dog is a prosecution for the failure to comply with the act of 1917 by taking out a license before January 15th.

Office of the Attorney General,
Harrisburg, Pa., March 10, 1920.

Honorable Fred Rasmussen, Secretary of Agriculture, Harrisburg, Pa.

Sir: I have your communication of the third instant in which you substantially inquire whether a person who procured a 1919 dog license and who was assessed in that year as owning a dog, can be compelled to pay a license fee for the year 1920 if the dog be found running at large after January 15, 1920 without a license tag for the year last mentioned, or if the owner, himself, kills the dog after said 15th day of January.

Section 4 of the Act of July 11, 1917, P. L. 818 substantially provides that on or before the 15th day of January of every year the owner of a dog six months old or over must apply to the County Treasurer for a license for each dog owned or kept by him, accompanying such application with a fee, the amount of which is regulated by the Act.

Section 17 makes it unlawful for any person to own or harbor such a dog unless it is licensed as aforesaid, and Section 35 imposes a penalty on persons who fail or refuse to comply with the provisions of the statute.

Under the provisions of this Act I am of the opinion that the owner or harbinger of a dog, who fails or neglects to take out a license or on before the 15th day of January, cannot be compelled to pay the license fee if the dog be found running at large by the constable, or if the owner, himself, kills the unlicensed dog, subsequent to that date.

I am of the opinion that the only recourse against the owner or harbinger of the dog is a prosecution for the failure or refusal to comply with the provisions of the Act by taking out a license within the time therein prescribed, and you are now accordingly so advised.

Yours very truly,

FRANK M. HUNTER.
Deputy Attorney General.

INDIANA COUNTY DOG LICENSES.

Under the Act of July 11, 1917, P. L. 818, the county commissioners are without power to extend the time fixed by the statute for the payment of dog license taxes.

Office of the Attorney General,
Harrisburg, Pa., March 25, 1920.

Honorable Fred Rasmussen, Secretary of Agriculture, Harrisburg, Pa.

I have your inquiry of the 24th inst. asking substantially whether the County Commissioners of Indiana County have the power to extend the time for the payment of the dog license tax until April 1st of the current year.

The Act of July 11, 1917, P. L. 818, and known as "the Dog Law of One Thousand Nine Hundred and Seventeen", provides in Section 4 as follows:

"On or before the fifteenth day of January, one thousand nine hundred and eighteen, and on or before the fifteenth day of January of each year thereafter, the owner of any dog six months old or over shall apply to the county treasurer, either orally or in writing, for a license for each such dog owned or kept by him."

Section 5 provides, *inter alia*, that—

"All licenses shall be void upon the fifteenth day of January of the following year."

Section 17 of statute substantially enacts that on and after the fifteenth day of January, 1918, it shall be unlawful for any person

to own or keep any dog six months old or over unless the dog is licensed by the treasurer of the county in which the dog is kept.

Section 35 provides that any person violating or refusing to comply with any provisions of the Act shall be guilty of a misdemeanor, and upon conviction shall be sentenced to pay a fine not exceeding one hundred dollars, or to undergo an imprisonment not exceeding three months at the discretion of the Court.

Under the foregoing provisions the owner of a dog six months old or over must have it continuously licensed. All licenses which were issued during the year 1919 became void on the fifteenth day of January, 1920. Owners of dogs who failed to take out licenses subsequent to that date are guilty of a violation of the Act and subject to prosecution. Neither the County Commissioners nor any other authority except the Legislature itself has the right to change the date at which the old licenses expire, and on or before which new licenses must be obtained. The County Commissioners of Indiana County should be advised that they have acted without authority of law in extending the time for license applications to April 1st, 1920, and you should proceed with your enforcement of the statute without regard to their unwarranted action.

Yours very truly,

FRANK M. HUNTER.
Deputy Attorney General.

COUNTY FAIR PREMIUM.

A sum paid by a County Agricultural Association to induce an exhibitor to make an exhibit at the Fair cannot be treated as a "premium" as the term is used in the Act of July 25, 1917, Section 1, P. L. 1195.

A premium paid to a single exhibitor is within the said Act of Assembly.

Office of the Attorney General,
Harrisburg, Pa., March 26, 1920.

Honorable Fred Rasmussen, Secretary of Agriculture, Harrisburg, Pa.

Sir: This Department is in receipt of your favor of the 20th instant, asking for an interpretation of the word "premiums," as used in Sections 1 and 2 of the Act of July 25, 1917, P. L. 1195.

The facts which make this request necessary I understand to be as follows:

Under the Act of July 18, 1919, Appropriation Acts 227, before any association may receive an appropriation under this Act and the Act of July 25, 1917, its report must be approved by the Secretary of Agriculture, and transmitted to the Auditor General.

The Act of July 25, 1917, in Section 1, provides, in part, as follows:

"That, for the purpose of encouraging agriculture and the holding of agricultural exhibitions of farm products, an incorporated agricultural association, conforming to the requirements of this act, is entitled to receive from the Commonwealth an annual sum, not exceeding one thousand dollars, equal to the amount paid by such association as premiums for exhibits at its annual exhibition, exclusive of premiums paid on trials of speed,
* * *"

It appears that the Allegheny County Agricultural Association made a report to you, as Secretary of Agriculture, showing premiums paid of \$1,061.55, at the exhibition held in Imperial Pennsylvania, on October 7, 8 and 9, 1919. Of this amount, \$136.50 was disallowed because the premiums appeared to be paid for art and needle work, which is not contemplated by the Act of Assembly above referred to. Upon investigation, it appeared that those in charge of the Fair, in advance of the time when it was to be held, made specific contracts with certain exhibitors to pay to those exhibitors specified sums of money in order to induce them to exhibit, and the sums so paid are reported as premiums. It also appears that in one or two instances there was only one exhibitor in a certain department.

The questions you propound are, first, whether the sum of money paid on a contract made with an intending exhibitor in advance of the exhibition is to be considered a premium, and, second, whether a sum of money paid to a single exhibitor where there is no contract in advance can be considered a premium, so as to authorize the payment to the Agricultural Association of the amount of money expended in such premiums, under the Act of 1917 above referred to.

In the ordinary acceptance the word "premiums," as used in connection with fairs, implies a reward depending upon competition. The Act of July 25, 1917, used the word in its usual and ordinary meaning. "Premiums" do not, in any ordinary acceptance of the term, mean sums paid pursuant to contracts. It would do violence to the language of this Act of Assembly to hold that a weak agricultural association could bolster up its exhibits by going around and making contracts, in advance, with exhibitors to pay such exhibitors for making exhibits, and then treat the payments so made as premiums.

I, therefore, advise you that any payments made, pursuant to contracts made with exhibitors to pay such exhibitors for making exhibits, can not be treated as premiums, and there is no authority to reimburse an agricultural association under the Act of July 25, 1917, for any sum paid out in that way.

The question as to a single exhibitor presents an entirely different proposition.

If an agricultural association advertises and promises to pay to exhibitors certain premiums or prizes for the best exhibit in any department, and there happens to be but one exhibitor, who has, in good faith, and upon the strength of the promised premium, made a meritorious exhibit at the Fair, there is no reason why such exhibitor should not be awarded a proper prize or premium.

I return herewith the correspondence and documents submitted.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

MILK TESTERS.

A certificate of licensure, as a milk tester, issued by another state, pursuant to examination under its laws, cannot be accepted in this state in lieu of the examination, provided by the Act of May 25, 1919, P. L. 275.

Office of the Attorney General,
Harrisburg, Pa., May 26, 1920.

Honorable Fred Rasmussen, Secretary of Agriculture, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 14th inst. requesting to be advised as to whether a license as a milk tester, under the provisions of the Act of May 23, 1919, P. L. 275, may be issued without an examination to one who had been duly licensed as such milk tester, after examination, under the laws of another State.

The said Act sets up a new system in our Commonwealth regulating the weighing and testing of milk and cream, and requiring that the tests as therein prescribed shall be made only by a certified tester. It is provided in Section 4, inter alia, that for the purpose of the Act—

“A ‘certified tester’ is any person who having furnished satisfactory evidence of good character, and having passed a satisfactory *examination* in milk and cream testing conducted by the Dairy Husbandry Department

- of the Pennsylvania State College, shall have received a certificate of proficiency from the said department. Each applicant for such certificate shall pay a fee of three dollars (\$3.00) to said department, in such manner as its regulations may prescribe, to defray the cost of the required examination and of the certificate. * * * This certificate shall be forwarded by the said department to the Secretary of Agriculture, who shall issue a license to said applicant, good for one calendar year, on the payment of a fee of two dollars (\$2.00) to the Secretary of Agriculture. This license shall be renewed **annually**, without further examination, at the discretion of the Secretary of Agriculture, upon the payment of two dollars."

The Act is silent as to any right to issue such a certificate of competency or license otherwise than as above stated. It contains no provision authorizing reciprocal relations between this Commonwealth and other States, and we can not imply the power to establish such. Various laws dealing with the licensing of persons to practice professions or pursuits in this Commonwealth specifically provide for reciprocal relations with other States, in the manner and upon the conditions as set forth in the respective statutes. The Acts relating to the right to practice medicine, to pharmacy and to optometry may be cited as instances of this.

We must presume had it been the legislative intent to authorize this in the case of "certified testers," as provided for by this Act, that such intendment would likewise have been express. The method it sets up to determine the competency of an applicant for a license as such tester and the issuing of a certificate of licensure must be strictly followed. The provision that there shall be a "satisfactory examination * * * *conducted by the Dairy Husbandry Department of the Pennsylvania State College*" is mandatory, and clearly contemplates such an examination as an essential prerequisite entitling a person to a license.

I see no valid reason why reciprocal relations with other States should not be allowed upon properly guarded conditions, but the law as it now stands does not so permit, and it will take legislative action to effect such end.

In accordance with the foregoing, you are, therefore, advised that a certificate of licensure as a milk tester issued by another State, pursuant to an examination conducted under its laws, can not be accepted in this Commonwealth in lieu of the examination prescribed by the aforesaid Act.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

STATE HOSPITAL FOR THE INSANE AT FARVIEW.

The goods and products manufactured by the inmates of the Hospital cannot lawfully be sold to the public.

Office of the Attorney General,
Harrisburg, Pa., August 26, 1920.

Honorable Fred Rasmussen, Secretary of Agriculture, Harrisburg, Pa.

Sir: This Department is in receipt of your letter of recent date inquiring whether the State Hospital for the Insane at Farview may engage in the manufacture of tile for drainage purposes and sell the same to the public for use in draining farm lands. I note that if this could be done the farmers in the vicinity of this Hospital could develop lands which would otherwise lie idle because of the prohibitive cost of transporting tile from other manufactories.

The State Hospital for the Insane at Farview is an Institution maintained wholly or in part by the State. The employment of its inmates and the sale or exchange of the products of their labor are regulated by the Act of May 28, 1907, P. L. 290, as amended by the Act of June 19, 1913, P. L. 530, which provide as follows:

"Section 1. That from and after the passage of this act, all inmates of any institution or hospital, which is wholly or in part maintained by the State for the care and treatment of the insane, feeble-minded, and epileptic persons, may make, manufacture, or produce such supplies, manufactured articles, goods, and products as may be used in any of the State hospitals or institutions.

"Section 3. Supplies, manufactured articles, goods, products, so made, manufactured, or produced, shall not be sold or exchanged to any person, firm, copartnership, unincorporated association, or corporation, except as otherwise herein provided; but the same may be made, subject to sale or exchange to any institution within the confines of the Commonwealth which is maintained by the State, wholly or in part, wherein the insane, feeble-minded, and epileptic persons are confined; and articles the product of the individual skill and labor of the inmates of any such institution or hospital, and the produce of such small individual plots of ground as may be assigned to such inmates and cultivated by them, may be sold and the proceeds given to such inmates, or used for their benefits, or paid at their request to their families."

Section 4 of this Act makes it a misdemeanor for any person in control of such an institution to permit any manufactured articles

to be sold or exchanged in any other manner than is provided in the Act.

The purpose of the Legislature in restricting the sale of the products of labor at such institutions is the same as that which prompted the enactment of the Act of June 1, 1915, P. L. 656, regulating prison labor.

The mandate of these Acts is binding upon the institutions to which they severally apply. Attorney General Brown having been asked, during the war, whether the inmates of our correctional institutions might lawfully be employed in the manufacture of supplies for the Federal Government, said (October 25, 1918):

"Doubtless it would be a great advantage to enlarge at this time the scope of the purposes of the employment of inmates of our correctional institutions. It must be borne in mind, however, that this is a matter that is beyond the authority of the executive officers of the Commonwealth, who are bound by the legislative mandate on the subject."

I must, therefore, advise you that the goods and products manufactured by the inmates of the State Hospital for the Insane at Farview could not lawfully be sold to the public.

Very truly yours,

GEORGE ROSS HULL,
Deputy Attorney General.

PURE FOOD LAW.

Candy is a food, within the meaning of the Act of May 13, 1909, P. L. 520.

Chocolate candy bars that, upon examination, are found to contain live worms, bugs and worm dirt and are filthy and contaminated are adulterated, within the meaning of the Act of May 13, 1909, P. L. 520.

A sale of adulterated food is a violation of the Act of May 13, 1909, P. L. 520, even though it is made with distinct notice to the purchaser that it is adulterated.

Officers and agents of the United States Government, selling adulterated candy in Pennsylvania, in pursuance of orders of their department of the Federal Government, are not liable to prosecution for violation of the Pure Food Act of May 13, 1909, P. L. 520, although the sales thus made by them would otherwise constitute violations of the act.

Office of the Attorney General,
Harrisburg, Pa., October 28, 1920.

Honorable James Foust, Director, Bureau of Foods, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of October 18th containing a statement of the following facts: Army

officers or civilian agents of the War Department of the United States Government acting under orders from their Department at Washington, have recently sold a number of tons of chocolate candy bars packed in two pound boxes. The blank forms of bidders' proposals upon which bids for its purchase were made contained in capital letters the following:

"NOTE: THE ABOVE CHOCOLATE CANDY BARS
HAVE BEEN CONDEMNED BY SURVEY TO BE
UNFIT FOR HUMAN CONSUMPTION."

Unscrupulous persons who have purchased this candy have resold it at large profits to retail dealers through whom it has found its way to the retail market. Upon examination these candy bars have been found to contain numerous live worms, bugs and worm dirt, and are filthy and contaminated. You inquire whether under the provisions of the Act of May 13, 1909, P. L. 520 United States Army officers may sell this candy by stating to the purchaser that it has been condemned by survey to be unfit for human consumption.

Your inquiry presents three questions:

(1) Whether the candy in question in "adulterated food" within the meaning of the Act cited; (2) Whether adulterated food may be sold with a distinct notice to the purchaser that it is not fit for human consumption; and, (3) Whether an officer or agent of the United States Government making such sales in pursuance of orders from his Department of the Federal Government may be prosecuted for violation of the Act cited.

(1) Section 2 of the Act of May 13, 1909, P. L. 520 provides:

"That the term 'food' as used in this Act shall include * * * every article used for food by man * * *".

and Section 3 of the Act provides:

"That for the purpose of this Act an article of food shall be deemed to be adulterated, * * *"

"Sixth: If it consists of * * * a contaminated, filthy or decomposed substance, either animal or vegetable."

That candy is a "food" within the meaning of that Act has been settled. *Commonwealth vs. Pflaum*, 236 Pa. 294. "Filthy" is defined as "foul, dirty, noisome, nasty", Century Dictionary; and "contaminated" is defined as "polluted, defiled, tainted, corrupt"; *Id.* There can be no question that the candy bars which you describe were contaminated and filthy, and that they were "adulterated food" within the Statutory definition.

(2) May such adulterated food be sold if the purchaser be given distinct notice that it is not fit for human consumption?

"Pure food laws are enacted as a means of protecting the people against the fraud and imposition of manufacturers and venders of inferior and unwholesome food and medicinal products. Such Statutes are of great public interest, and should be so interpreted, if possible, within sound canons of construction, as to secure to the public the benefit intended by the Legislature." 11 *Ruling Case Law* 1101.

Of the particular Act under consideration, our Supreme Court in *Commonwealth vs. Pflaum*, 236 Pa., 294, said at P. 298:

"The Statute under consideration is a police regulation. It has to do with the public health, which is one of the chief objects of government and a proper subject of legislative control. The power of the legislature to promote the general welfare is extensive, and it may exercise a large discretion in determining how that power shall be employed. What the interests of the public require and what measures are necessary to protect them are subjects for the exercise of this discretion. Whether in a given instance the manufacture and sale of an article intended for human consumption is deleterious to health, and whether the public welfare demands that such business be prohibited, are questions of fact and policy exclusively for the determination of the legislature. It is an elementary proposition that all property in this State is held under the implied obligation that the owner shall not use it to the injury of the community."

Section 1 of the Act provides:

"That it shall be unlawful for any person * * * to sell * * * any article of food which is adulterated * *".

Under the plain words of this enactment, it is the sale which is interdicted, without regard to the motives or intent of the seller, the belief of the purchaser, or other circumstances attending the sale. I am of the opinion that this is precisely what the legislature intended.

If it had been intended to permit the sale of such food upon notice to the purchaser that it was adulterated, it would have said so. A reading of Section 5 indicates that contracts for the sale of food from wholesalers to retailers were the subject of special consideration by the legislature. That section provides that a prosecution shall not be sustained against a retailer who has received from his vendor a guaranty that the food is not adulterated. If it had been

so intended the Legislature would have expressly provided that a prosecution should not be sustained against a vendor if he prove that he notified the vendee of the adulteration.

Again, if the Legislature had intended to permit the sale of such food under any circumstances it would doubtless have prescribed a method whereby the food should be denatured, as it did by the Act of May 23, 1919, P. L. 267 relating to the sale of eggs unfit for food.

Furthermore, the protection of the public health against adulterated food, like the protection against contagious diseases, is most easily and effectively accomplished if the center of contagion or distribution be restricted. If adulterated food may be sold at will, and the seller render himself immune from prosecution by stating to the purchaser that the food is adulterated, such food may be spread broadcast over the State, reach the stores of a thousand dealers, and be placed in the hands of ten thousand heedless and unsuspecting children. Not until the last sale in this commercial chain be made, could a prosecution be begun. To accomplish the purpose of the Act, the protection of the public health, a thousand investigations and as many prosecutions might be necessary. I am advised since the receipt of your inquiry that this is what has actually occurred in Philadelphia with the candy in question, and that a number of retail dealers have been prosecuted. The Legislature could not have been ignorant of the difficulties which would attend the enforcement of the Act if a seller were thus permitted to relieve himself from responsibility.

Considering the purpose of the Act, the evident intent of the Legislature and the plain words of the enactment, I am of the opinion that a sale of adulterated food is a violation of the Act, even though it be made with distinct notice to the purchaser that the food is adulterated.

(3) May an officer or agent of the United States Government, selling adulterated food in pursuance to the order of his Department of the Federal Government be prosecuted for a violation of this Act?

This must be answered in the negative.

It is a general rule that an officer of the United States Government who, in the strict performance of his official duty, does an act which constitutes a violation of the law of a State, is not punishable for the commission of such Act.

This rule has been established and adhered to in a long line of decisions in the Federal Courts, of which the following are selected as illustrative of the varying circumstances under which it has been applied.

In re *Thomas*, 82 Fed. 304, the Governor of the Central Branch of the National Military Home for Disabled Volunteer Soldiers at Dayton, Ohio, served oleomargarine to the soldiers at that home without complying with the requirements of an Act passed May 16, 1894 entitled:

"An Act to prevent fraud and deception in the manufacture and sale of oleomargarine and promote public health in the State of Ohio."

On petition to the Circuit Court of the United States for a writ of habeas corpus, the petitioner was discharged. Mr. Justice Taft said, p. 309:

"The jurisdiction of the State Government in such a case is excluded * * * * * because that which is being done is the business of the United States, and such business is as completely beyond the influence and control of the State Government as if it were not done within the territory of the State."

And on p. 310:

"No State can pass a law which shall in any manner interfere with or prevent the due exercise of its constitutional function by the United States Government through its officers and agents."

On appeal the order of the Circuit Court was affirmed by the Circuit Court of Appeals, 87 Fed. 453, and by the Supreme Court of the United States, 173 U. S. 276; 43 L. Ed. 699. That Court, speaking through Mr. Justice Peckham said (L. ED. 701):

"The government is but claiming that its own officers, when discharging duties under Federal authority pursuant to and by virtue of valid Federal laws, are not subject to arrest or other liability under the laws of the State in which their duties are performed * * * * *"

"We are of opinion that the governor (of the Soldiers Home) was not subject to that law, and the Court had no jurisdiction to hear or determine the criminal prosecution in question, because the act complained of was performed as part of the duty of the governor as a Federal officer, in and by virtue of valid Federal authority, and in the performance of that duty he was not subject to the direction or control of the Legislature of Ohio".

In re *Waite* 81 Fed. 359, an agent of the Federal pension department engaged in investigating pension frauds in the State of Iowa did an act which amounted to a violation of section 3871 of the Code of Iowa, which provided for the punishment of one who maliciously threatened to accuse a person of a crime in order to compel him to

do an act against his will. He was tried and convicted in the State Court and upon error the Supreme Court of the State affirmed the judgment (*State vs. Waite* 70 N. W. 596). Upon petition to the District Court of the United States for a writ of habeas corpus he was discharged. Upon error to the Circuit Court of Appeals (*Campbell vs. Waite*, 88 Fed. 102) this decision was affirmed. Mr. Justice Thayer, speaking for that Court said (pp. 106-7) :

"It was also decided in re Neagle, 135 U. S. 1, 75, 10 Sup. Ct. 658 (34 L. Ed. 55, 75), where most of the foregoing cases were cited and approved, that no act done in pursuance of a law of the United States lawfully enacted can be an offense against the laws of a State, and that an act done in obedience to rules or regulations lawfully prescribed by one of the executive departments of the government or in obedience to the directions of one of the heads of such departments, acting within the scope of his authority, is to be regarded as an act done in pursuance of a law of the United States, although no Statute of the United States has in express terms directed the doing of the act."

In *Cunningham vs. Neagle*, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55, Neagle, a special deputy marshal of the United States, while protecting Mr. Justice Field of the United States Supreme Court from a murderous assault by Judge Terry, shot and killed the latter. He was indicted for murder in the Court of San Joaquin County, California. Upon petition to the United States Circuit Court for writ of habeas corpus, he was discharged, which actions was affirmed by the United States Supreme Court. Upon the argument in the latter Court the Attorney General of California urged "that if the habeas corpus order can deliver the relator from prosecution under the laws of California, then it exempts him from all liability to trial anywhere". To this contention Mr. Justice Miller, speaking for the Supreme Court said (p. 75) :

"To the objection made in argument, that the prisoner is discharged by this writ from the power of the State Court to try him for the whole offense, the reply is, that if the prisoner is held in the State Court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of California. When these things are shown, it is established that he is innocent of any crime against the laws of the State, or of any other authority whatever, There is no occasion for any further trial in the State Court, or in any Court."

To the same effect are *Tennessee vs. Davis*, 100 U. S. 257, 25 L. Ed. 648, where an internal revenue officer, while engaged in the course of his official duty, killed a man; In re *Lewis*, 83 Fed. 159, where a marshal was charged with robbery; In re *Turner*, 119 Fed. 231 where an army officer engaged in building a sewer for an army post was arrested for contempt in violating an injunction issued by a State Court; and *Hunter vs. Wood*, 209 U. S. 210, 52 L. Ed. 754, where a ticket agent, acting under authority of the order of a United States Court charged for a railroad ticket a rate in excess of the rate established by a State law.

It is true that where it is claimed by the officer that his act was performed in the course of his official duties, but it does not clearly appear that such was the fact, the United States Court may, in its discretion, refuse to discharge him upon habeas corpus and allow him to be tried in the State Court and to establish his claim to immunity before a jury in that Court. Such a case was *Castle vs. Lewis*, 254 Fed. 917. Without discussing the facts or the law of this or other similar cases, it is sufficient to say that the facts which you present do not make such a case.

The Constitution of the United States, Article I, Sec. 8, provides:

“The Congress shall have power * * * * * to declare war * * * * * to raise and support armies * * * * * to make rules for the government and regulation of the land and naval forces * * * * * and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States or in any Department or officer thereof.”

Neither the power of Congress to authorize the purchase of supplies for the use of the army, nor the power to authorize the sale of excess supplies, can be doubted. Congress has enacted many laws in the exercise of these powers. Perhaps the most recent is the Act of July 9, 1918, c. 143, as amended by the Act of Feb. 25, 1919, c. 39, which authorized the President, through the head of any executive department to sell, upon such terms as he shall deem expedient, war supplies, etc. This power and authority existing, I must assume that the Army officers, concerning whose acts you inquire, were acting pursuant to it. It follows from what has been said that these officers are not answerable for their acts to the laws of the State of Pennsylvania.

I, therefore, advise you that officers or agents of the United States Government, selling adulterated candy in pursuance of orders from their Department of the Federal Government, are not liable to prosecution for violation of the Pure Food Act of May 13, 1909, P. L.

520, although the sales thus made by them would otherwise constitute a violation of the provisions of that Act.

I have written to you at some length believing that if the Department of the Federal Government which directed the sale of this candy be advised that the acts of its officers constitute a violation of the State Law, and that prosecution is prevented solely because of the fact that the acts are done in pursuance of its order, it will arrange for the disposal of this candy in another manner or in another place.

Yours very truly,

GEORGE ROSS HULL,
Deputy Attorney General.

IN RE OLEOMARGARINE.

A dealer in oleomargarine having warehouses at Altoona, Wilkes-Barre and Philadelphia, who receives and accepts, at Philadelphia, all orders from his salesmen and then directs that the same be filled by setting apart and delivering to the several purchasers oleomargarine from the warehouse nearest the point of destination, is required, under the Act of May 29, 1901, P. L. 327, to have each such warehouse licensed.

Office of the Attorney General,
Harrisburg, Pa., December 30, 1920.

Honorable James Foust, Director of the Bureau of Foods, Harrisburg, Pa.

Dear Sir: This Department is in receipt of your letter of recent date stating the following facts:

A wholesale dealer in oleomargarine carries stocks of that commodity in warehouses at Wilkes-Barre, Altoona and Philadelphia, Pa. His salesmen solicit orders which are forwarded to Philadelphia where they are accepted by him. He then directs the orders to be filled by shipments from the warehouses nearest to the point of destination. The warehouses at Altoona and Wilkes-Barre are maintained in order to expedite deliveries and reduce transportation charges, but no orders are accepted at these points. You ask whether this dealer is required to secure wholesale licenses for all of his warehouses, or whether a license for his place of business at Philadelphia is a sufficient compliance with the oleomargarine Act of May 29, 1901, P. L. 327, as amended by the Act of June 5, 1913, P. L. 412. These Acts provide as follows:

"That no person, firm or corporation shall.....selloleomargarine.....unless such person, firm or corporation shall have first obtained a license.....as hereinafter provided."

"Every person, firm or corporation.....desiring to sell oleomargarine shall make application for a license so to do which application shall contain an accurate description of the place where the proposed business is intended to be carried on."

"Such license shall not authorize the sale of oleomargarine at any other place than that designated in the application and license."

The intent of the Legislature, as expressed in these provisions, is that any place where oleomargarine is sold shall be licensed in the manner provided by the Act. (Opinion of Deputy Attorney General Hargest, February 3, 1916, Official Opinions 1915-1916, page 497).

The question you present is whether, under the facts stated, the sales take place in Philadelphia, where the orders are accepted by the dealer, or in Wilkes-Barre or Altoona, where the goods are set apart and marked for delivery to the purchaser, or to a common carrier for transportation to him.

A complete sale consists of several distinct acts, namely, (1) an offer to purchase; (2) an acceptance of the offer; (3) a transfer of property in the goods purchased, and (4) payment of the purchase price.

These several acts may be performed successively or contemporaneously. The first and last are the acts of the purchaser. The second and third are the acts of the seller. Upon acceptance of the offer the executory contract of sale is complete. Upon transfer of the property in the goods, the contract is executed by the seller, and upon payment of the purchase price is executed by the buyer. At what point does a "sale" take place, within the meaning of the oleomargarine Act of May 29, 1901?

The Act cited is a police regulation designed to protect the public health and to prevent fraud and imposition. The Legislature by its enactment intends to regulate and supervise the transfer of property in oleomargarine from vendor to vendee; i. e., the execution of the contract of sale by the vendor; and in my opinion the time when the sale takes place within the meaning of the Act is the time when the contract of sale is executed by the vendor.

In *Garbrecht vs. Commonwealth*, 96 Pa. 449, it appeared that a wholesale liquor dealer duly licensed to sell liquor in the city of

Erie sent a salesman into Mercer County. The salesman secured orders for whiskey, mailed them to the dealer, who shipped the whiskey so ordered from his place of business at Erie to the purchaser by freight or express. The salesman having been indicted for selling liquor without a license in Mercer County, defended upon the ground that the sales took place at Erie. This contention was sustained by the Supreme Court, Mr. Justice Sterrett saying (page 452):

“The place of sale is the point at which goods ordered or purchased are set apart and delivered to the purchaser, or to a common carrier, who, for the purpose of delivery represents him.”

This ruling was followed in *Commonwealth vs. Fleming*, 130 Pa. 138, and *Commonwealth vs. Hess*, 148 Pa. 48. See also *Clohesy vs. Rodelheim, Bing & Co.*, 99 Pa. 56, *Pearlman vs. Sartorius & Co.* 162 Pa. 320, *Braun & Pitts vs. Keally*, 146 Pa. 519, *Lowrey & Co., vs. Ulmer*, 1 Super. Ct. 425.

In the case before you the goods while stored in the several warehouses are the property of the dealer, and a sale of them takes place at the warehouse where the goods ordered are set apart and delivered to the purchaser or to a common carrier who, for the purposes of delivery, represents him.

I advise you, therefore, that a dealer in oleomargarine having warehouses at Altoona, Wilkes-Barre and Philadelphia, who receives and accepts, at Philadelphia, all orders from his salesmen and then directs that the same be filled by setting apart and delivering to the several purchasers oleomargarine from the warehouse nearest the point of destination, is required, under the Act of May 29, 1901, P. L. 327, to have each such warehouse licensed.

Very truly yours,

GEORGE ROSS HULL,
Deputy Attorney General.

**OPINIONS TO THE DEPARTMENT OF
LABOR AND INDUSTRY**

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OPINIONS TO THE DEPARTMENT OF LABOR AND INDUSTRY.

EMPLOYMENT AGENTS.

The publication of a weekly pamphlet devoted exclusively to advertisements of employers seeking employes and sale and rent advertisements, does not constitute engaging in the business of an employment agent, within the meaning of the Act of June 7, 1915, P. L. 888.

Office of the Attorney General,
Harrisburg, Pa., March 11, 1919.

Honorable Walter McNichols, Acting Commissioner of Labor & Industry, Harrisburg, Pa.

Sir: There was duly received your communication of the 5th inst., to the Attorney General, requesting an opinion relative to the following stated case:

There is being issued in this Commonwealth, weekly, a certain publication in pamphlet form under the name or title of "Jobs". According to the statement of the Director of the Bureau of Employment and from an examination of the copy of this publication accompanying your communication, it appears to be exclusively an advertising one, containing, at stipulated rates, advertisements of various prospective employers advertising for employes and also for sale and rent advertisements.

The question submitted by you is whether the issuing of this publication constitutes engaging in the business of an employment agent within the meaning of the Act of June 7, 1915, P. L. 888.

Section 2 of this Act defines the term "employment agent", as therein used, to "mean every person, co-partnership, association or corporation engaged in the business of assisting employers to secure employes, and persons to secure employment, or of *collecting and furnishing information regarding employers seeking employes, and persons seeking employment.*"

The true import of this definition is to be read in the light of, and sought in, the Act taken as a whole. In my opinion, it would be giving the above quoted provision an unwarranted construction to hold that the mere issuing of a publication containing advertisement of an employer seeking employes, and popularly called "want advertisements" would in itself be deemed the business of an employ-

ment agent. It is a matter of common knowledge and every-day observation that newspapers carry such advertisements extensively, and which are for the precise purpose, to use the words of the Act, "of furnishing information regarding employers seeking employes." This is an important part of the business of a newspaper. Certainly it could not be contended that this requires a license as an employment agent. I see no distinction in principle between the case of a newspaper carrying advertisements of that class and that of a publication which is exclusively an advertising medium carrying such. The fact that in one instance it is only a part of the business and in the other the whole thereof would not be material in the legal aspect.

Every advertisement wherever published or however issued having for its object the bringing together of employers and employes is furnishing information to those seeking employers or employes, and might literally be held to fulfill what the Act defines as an "employment agent", but it is obvious that this is not what is meant by the term "collecting and furnishing information" as the same is used therein. While the Legislature may fix its own definition in a statute, yet it is a settled rule that "general words and phrases, however wide or comprehensive in their literal sense" must be construed as strictly limited to the object of the Act. *Endlich on the Interpretation of Statutes*, 113. The intent is to be followed, although contrary to the letter.

You are therefore advised that the above stated case does not in itself constitute engaging in the business of an employment agent under the above cited Act of 1915.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

REHABILITATION.

Act No. 418, approved July 18, 1919, establishing a Bureau of Rehabilitation in the Department of Labor and Industry applies to those who fulfill its terms, whether the capacity to earn a living was destroyed or impaired by an industrial accident occurring prior to or after the passage of the Act.

Office of the Attorney General,
Harrisburg, Pa., November 25, 1919.

Honorable Clifford B. Connelley, Commissioner of Labor & Industry,
Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 11th inst. requesting an opinion as to whether Act No. 418, approved July 18, 1919, applies to persons injured prior to its enactment.

This Act establishes a Bureau of Rehabilitation in the Department of Labor and Industry and bestows certain powers upon the Commissioner of Labor and Industry to assist in rendering physically handicapped persons fit for remunerative employment. Clause (c) of Section 1 defines the persons who are within the purview of the Act's benefits, reading as follows:

"The term 'physically handicapped person' or 'persons', wherever used in this act, shall mean any resident or residents of the Commonwealth of Pennsylvania whose capacity to earn a living is in any way destroyed or impaired through industrial accident occurring in the Commonwealth."

This provision is plain upon the point here in question, there being nothing in its language restricting the application of the Act alone to persons suffering from industrial accidents that occurred subsequent to its enactment. It embraces within its terms any resident of the Commonwealth whose "capacity to earn a living in any way" fulfills the definition therein laid down, viz., that it *"is destroyed or impaired through industrial accident occurring in the Commonwealth,"* regardless of the time when the accident happened causing such incapacity. To extend the contemplated benefits of the Act to one incapacitated by an injury occurring after its passage, and to withhold the same from one continuing to suffer incapacity from an injury occurring prior thereto would be a discrimination utterly unfounded in reason. This legislation is not directed to the accident causing the injury, but to the relief of any present or existing condition of destroyed or impaired capacity to earn a living resulting therefrom. Such broad scope to the benefits arising under this statute is in full harmony with its whole spirit and purpose, as well as warranted by the letter of its above quoted provision. Being remedial in nature, it should generally be given that liberal interpretation as will best tend to advance its salutary ends. I understand from your communication that the construction here given accords with your own view.

You are, therefore, advised that the above Act applies to persons who otherwise fulfill its terms, whether the capacity to earn a living was destroyed or impaired by an industrial accident occurring prior to or after the date of its passage.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General,

MOVING PICTURE MACHINES.

Both the party managing or controlling a moving picture theatre and the person actually operating the motion picture machine, used in connection therewith, are liable for violations of the Safety Standards governing the operation of motion picture machines.

Office of the Attorney General,
Harrisburg, Pa., January 19, 1920.

Mr. John H. Walker, Acting Chief, Bureau of Inspection Department
of Labor & Industry, Harrisburg, Pa.

Sir: There was duly received your communication of the 2nd inst. asking to be advised as to against whom the proceedings should be instituted for a violation of Section 1 of Safety Standards No. 27, relating to the operation of motion picture machines. Section 1 of the said Code of Safety Standards, governing the "operation of motion picture machines using inflammable films", effective on and after March 1, 1918, reads as follows:

"No motion picture machine using inflammable films shall be operated at any gathering or assembly of persons in this State unless the operator of the machine is at least eighteen years of age, and is an operator licensed as hereinafter described in Section 2.

"Any person under eighteen years of age and over sixteen years of age, who prior to the time of the enactment of this Standard, has been engaged for at least one year in the projection of motion pictures, shall be granted an operator's license, if after special inquiry and examination by the examining committee they are assured he is entirely competent."

Subsequent sections of this Code contain various regulatory provisions. The operator may be licensed either by a board or bureau created by law or ordinance or by the Department of Labor and Industry. The license is to be displayed prominently in the booth in which the machine is installed, or in other suitable manner as the local ordinance shall direct. Persons under a certain age are forbidden to be in the booth while the pictures are being projected before an audience, and also all other persons excepting those present for certain mentioned purposes.

Section 5 of the Code enumerates numerous rules to be observed by the operator, inter alia, that—

"All requirements of Act No. 96, approved by the Governor on the 10th day of May, 1917, and commonly known as the Motion Picture Booth Act, shall be complied with."

The Code also sets forth the rules for the examination of applicants for a license.

The specific question submitted in your inquiry is whether in case of a violation of Section 1 the proceedings for such violation should be brought "against the unlicensed operator or against the proprietor of the theatre for employing an unlicensed operator."

By a reference to the provisions of this section it will be seen that its prohibition is leveled against the operation of a machine by any one other than a duly licensed operator above a certain age. The offense arises from the machine being operated in a manner contrary to that prescribed, and would be chargeable against any one responsible therefor, including not only the operator himself but those in the management, control and direction of the establishment. The duty rests upon the party conducting a theatre, and who causes or procures the machine used in connection therewith to be operated, to see that the qualifications of its operator conform to the standards prescribed in the said Code.

The object of this Industrial Board rule is to insure competent handling of motion picture machines in the interest of safety, and presumably is a reasonable and necessary one to effect such purpose. Those engaged in running moving-picture places have a vital concern in all measures tending to safeguard the patrons and employes of the place, and should readily zealously lend themselves to a strict observance of this rule as promotive of that end.

You are accordingly advised that the party managing or controlling a moving-picture theatre, as well as the person actually operating the motion picture machine used in connection therewith, is subject to the foregoing rule of the Industrial Board prohibiting the operation of such machines using inflammable films by any person unless above the prescribed age and duly licensed, and would be liable for its violation.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

MANUFACTURE OF ETHER.

If any employe of a plant manufacturing ether refuses to be searched for matches or other flame producing device, in accordance with the ruling of the Industrial Board, the remedy is discharge, not forcible search.

Office of the Attorney General,
Harrisburg, Pa., January 26, 1920.

Honorable Clifford B. Connelley, Commissioner of Labor & Industry,
Harrisburg, Pa.

Sir: There was duly received your communication to the Attorney General of the 14th inst., asking to be advised relative to the "Ruling of Industrial Board on Ether."

It appears that the Industrial Board recently adopted and promulgated a Ruling prohibiting the carrying of matches or other flame producing devices into places where ether is manufactured or handled, providing, inter alia, as follows:

"No person shall be allowed to carry any match or other flame producing device into any work room or other portion of a building wherein people are employed and where ether is manufactured, rectified or handled daily in quantities exceeding one-half gallon or more

"A search for matches shall be made by some authorized person at least once a week, at regular intervals. The finding of a match or other flame producing device on the person of any employe not authorized to have matches in his possession, shall be cause for instant dismissal, and the fact shall be reported to the Commissioner of Labor and Industry."

It further appears from your communication that a certain plant manufacturing or handling ether "has raised the question whether or not they have the legal right to physically search the employe for matches and express their fear that should they make the attempt to physically search the employe, the employe might bring an action against the plant on the grounds of assault."

An opinion of this Department cannot bind or determine the respective rights of employer and employe in such an action as above stated. That would be a matter for the Courts. The proper course for the management of an ether plant to follow in regard to the question here raised presents no real difficulty. The aforesaid Ruling of the Industrial Board forbids persons to carry matches or the like into establishments where ether is being manufactured or handled, and requires a search to be made for its due and effective enforcement. It makes it not merely a cause for dismissal from service

where a match or other flame producing device is found on the person of any employe without authority, but, in effect, makes such dismissal a duty. Those operating ether plants should not employ any person to work therein who is unwilling or refuses to submit to the required search as a condition of his employment. The Ruling requires it to be made, and no one should be permitted to enter the plant who declines to subject himself to its requirement. It would be no defense on the part of an employer for a violation thereof to allege that an employe refused to undergo the search. The remedy in the case of an obdurate employe is not to attempt to enforce a search of his person against his will, to ascertain whether he is carrying the interdicted article, but at once to discharge him from employment if he withholds consent that it be made.

No person, through ignorance, or indifference to the danger which this Ruling seeks to guard against, or from any motive, should be allowed to imperil the lives of his fellow employes. It may be confidently believed where employers carefully and intelligently explain the said Ruling, its mandatory character, its need and purpose, and apply it reasonably, that employes very generally will gladly lend themselves voluntarily to its strict observance, and few will be found to resist it.

You are, therefore, advised that it is incumbent upon those engaged in manufacturing and handling ether in places where people are employed to comply with the foregoing Ruling of the Industrial Board to the point of discharging an employe who will not voluntarily and in good faith submit to the search thereby prescribed.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

HOSPITAL EXPENSES.

The Commissioner of Labor and Industry should not certify for payment the bill of a State Hospital for treatment of a State employe, injured in the course of his employment.

Office of the Attorney General,
Harrisburg, Pa., January 27, 1920.

Hon. Clifford B. Connelley, Commissioner of Labor and Industry,
Harrisburg, Pa.

Sir: I am in receipt of a communication from your Department stating that a bill has been received from the State Hospital at

Ashland, Pennsylvania, for board and surgical services furnished to a State employee injured in the performance of his duties, and in which communication the advice of this Department is asked as to whether you should certify the bill for payment.

The State Hospital for Injured Persons of the Anthracite Coal Regions of Pennsylvania, sometimes called the State Hospital at Ashland, Pennsylvania, was erected under the authority of the Act of June 11, 1879, P. L. 157. This hospital is a State institution owned and wholly supported by the Commonwealth.

The State does not insure its officers and employes against the compensation and medical expenses contemplated by the Workmen's Compensation Law, the policy of the Commonwealth being to appropriate biennially a specific amount for the payment thereof. By act No. 389A of the Sessions of 1919, the sum of \$75,000 was appropriated for this purpose for the two fiscal years beginning June 1, 1919, payments to be paid on warrant of the Auditor General and upon certificates furnished by the Commissioner of Labor and Industry.

Any payment out of this appropriation to the above institution would but constitute a transfer by the State Treasurer of State moneys from one account to another, and I am of the opinion that this should not be done.

A similar question was disposed of by Deputy Attorney General Hargest in an opinion rendered June 11, 1919, wherein it was held that the State Veterinarian could not authorize the payment of damages for the destruction of certain diseased livestock owned by a State institution. It was there said -

"The owner of the animals involved in this inquiry is the Commonwealth of Pennsylvania. The animals were in the custody of the institution belonging to the State and maintained by the State. These State institutions are maintained by specific appropriations.

If the money representing the values of these animals were to be paid to the various institutions, it would necessarily have to be returned to the State Treasury. For these reasons, it is impracticable to make a payment out of one fund of the State Treasury into another fund."

You should not, therefore, certify for payment the bill hereinbefore referred to, and you are now accordingly so advised.

Very truly yours,

FRANK M. HUNTER,
Deputy Attorney General,

REHABILITATION ACT.

Accidents occurring in agriculture are to be deemed industrial accidents within the intent of the Act of July 18, 1919, P. L. 1045.

Industrial accidents—Persons injured on way to place of employment.

An injury occurring to a person going from his home to his place of employment, or returning from his place of employment to his home, is not within the intent of the act.

Office of the Attorney General,
Harrisburg, Pa., February 17, 1920.

Honorable Clifford B. Connelley, Commissioner of Labor and Industry, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 9th inst. asking to be advised as to the meaning and scope of the term "industrial accident," as used in the Act of July 18, 1919, P. L. 1045, providing for the rehabilitation of physically handicapped persons.

The general questions, as I understand from your communication, upon which you ask to be advised are as follows:

First: Whether accidents occurring in agriculture are to be deemed industrial accidents within the intent of the Act.

Second: Whether an injury occurring to a person enroute from his home to the place of employment or vice versa is within the intent of the Act, the specific cases mentioned in your communication being -

(a) A young man who lost his leg while attempting to board a train at his home town while on his way to work at a town a number of miles distant. The victim was a daily commuter to and from his work; but the circumstances of the accident did not entitle him to workmen's compensation benefits.

(b) A man who, after leaving his employment, on his way home, lost a leg by being run over by a train, off the premises of his employer, and under circumstances not entitling him to workmen's compensation benefits.

Paragraph (c) of Section 1 of the said Act reads as follows:

"The term 'physically handicapped person' or 'persons,' wherever used in this act, shall mean any resident or residents of the Commonwealth of Pennsylvania whose capacity to earn a living is in any way destroyed or impaired through industrial accident occurring in the Commonwealth."

The Century Dictionary defines "industrial" as -

"Pertaining to industry or its results; relating to or connected with productive industry or the manufacture of commodities,"

and "industry" as

"Productive labor; specifically, labor employed in manufacturing."

In the cases cited in *Words and Phrases*, Vol. 4, page 3570, it is said that -

"The term 'industrial pursuit' is a very broad expression,"

and that acts permitting persons to associate themselves together in corporate bodies "for mining, manufacturing and other industrial pursuits" were held as embracing such pursuits as the express business, mercantile business, etc.

I am of the opinion that it would be giving too narrow a construction to the term "industrial accident" to hold that it does not include accidents occurring in agriculture.

While the word "industrial" may be more commonly thought of as applying to manufacturing, yet as used in this Act, in view of the remedial purpose sought, it must be given a wide rather than a restricted and special meaning. Mention has been made that the Workmen's Compensation Laws do not apply to agriculture. Inasmuch, however, as that is by virtue of a specific act to that effect, it would strengthen the conclusion here reached that agriculture is within the terms of the Act here under consideration. We must presume that, if it had been the legislative intent to exclude accidents occurring in agriculture, such intendment would have been expressed. Only in consequence of an unmistakable intent should we withhold to those engaged in this great industry the benefits of this Act.

You are accordingly advised that accidents occurring in agriculture are within the purview of the Act.

By an "industrial accident," as this term is used in the Act, is evidently contemplated an accident occurring to one in the work of, or connected with, his employment in some industry. The test is not whether it happened to one engaged in industrial pursuits, but whether it happened to him in the operation of the industry in which he was engaged, or in the line of his work therein or in his furtherance of its activities. A passenger on a railroad train injured in a wreck of the train would not commonly be spoken of as having sustained an "industrial accident," but a trainman employed on the train and injured in the wreck would be so spoken of. We must assume that the term as used in the Act was intended to have the meaning and import of its ordinary usage and understanding. Modern industry is attended with many perils to its operatives, and the plain purpose of the Act is to extend the aid provided by it to those injured in industrial operations, but its relief does not apply

to all injuries regardless of wherever or however received. In view of both the humane and economic purposes of this statute, it may well be that there is no such distinction in reason between an accident occurring to one in the work of the particular industry in which he is employed, and one occurring to him in any way, so as to allow the benefits of this law to apply to him in the one case and withhold it in the other, but, if so, the matter is one for legislative correction.

I am, therefore, of the opinion that the specific cases stated in your communication are not within the scope of the Act, and that as a general proposition an accident occurring to a person while going from his home to his place of work, or returning therefrom to his home, is not within its provisions. It may be that the special circumstances of some case might be such as to bring it within the provisions of the Act, and consequently no general rule can be safely laid down which will be applicable to every case, as each must be determined upon its own particular facts.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General,

REHABILITATION ACT OF JULY 18, 1919, P. L. 1045.

The cost of books or tuition of a physically handicapped person pursuing a course of training as arranged for by the Bureau of Rehabilitation is a maintenance cost within the meaning of the Act.

Maintenance costs may be paid directly to the beneficiary thereof or to the one furnishing the maintenance.

Office of the Attorney General,
Harrisburg, Pa., March 3, 1920.

Honorable Clifford B. Connelley, Commissioner of Labor and Industry, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 1st inst. requesting an opinion upon the hereinafter stated questions arising under the Rehabilitation Act of July 18, 1919, P. L. 1045. The questions submitted by you are:

First: Whether the cost of tuition and books is a maintenance cost within the meaning of the Act.

Second: Whether maintenance costs should be paid directly to the physically handicapped person for the payment of his bills, or to the person to whom such maintenance costs may be owing.

The Chief of the Bureau of Rehabilitation is vested with extensive powers and duties, to be exercised subject to the approval of the Commissioner of Labor and Industry, as enumerated in Section 5 of the aforesaid Act, among them being to "arrange" with the Superintendent of Public Instruction, educational institutions, public or private organizations, and industrial establishments for "training courses" for physically handicapped persons registered with the Bureau.

The intent of this is to secure for those suffering incapacity arising from industrial injuries such special types of training as are best adapted to help them regain a fitness for some remunerative employment, and the duty rests with the Chief of the Bureau to proceed to make arrangements for such courses for such persons so registered. Sub-section (i) of Section 5 reads as follows:

"To provide maintenance costs during the prescribed period of training for physically handicapped persons registered with the chief of the bureau: Providing, That when the payment of maintenance costs is authorized by the chief of the bureau, with the approval of the Governor, it shall not exceed fifteen dollars (\$15.00) per week, and the period during which it is paid shall not exceed twenty weeks, unless an extension of time is granted by the commissioner; said payments to be made by the State Treasurer on the warrant of the Auditor General on requisition of the Commissioner of Labor and Industry."

The first question submitted by you, as above stated, turns upon the point whether the term "maintenance costs" as contained in this provision warrants the payment of such an item of expense as tuition and the books used in a school. The word "maintenance" is defined by the Century Dictionary as meaning, inter alia, "the act of maintaining, keeping up, supporting or upholding." In the case of *Patterson vs. Read*, 9 Atl. 579, (cited in Words and Phrases, First Series, Vol. 5, page 4282) it was held that the words "support and maintenance" used in a will authorized an expenditure for education at a private school.

In this present case we must interpret the term in question in the light of what the Act sets out to accomplish. As said in former rulings construing certain of its provisions, it should generally be given that liberal construction as best to effectuate its purpose. Its primary object is not to provide subsistence or a livelihood for incapacitated persons during any given period, but to assist and relieve them by a restoration of their earning capacity. Their schooling in some suitable and helpful course of training is of the very essence of its aim. It would seem strange if it had been intended that these maintenance costs should extend to the payment of the tailor or the boarding-house keeper of some incapacitated person while pursuing

a course of training as provided and arranged for by the Bureau, but not to the payment of his teacher or books, a cost so intimately connected with, and essential to, his training, or that his boarding bill at the school wherein such training was being taken might be paid, but not the tuition. We must presume that the Act does not contemplate any such groundless distinction. The reasonable interpretation is that it was intended that these maintenance costs may include any expense necessarily incident to, or attendant upon, the course of training which a physically handicapped person is pursuing, as provided and arranged for by the Bureau pursuant to the Act, as well as his living expenses while so doing.

It is likely that only in exceptional instances will it be found necessary to pay any tuition costs in this rehabilitation work, this commonly being had without charge at some public school or institution, or private industrial establishment. In order to make the fund at its disposal reach as many cases of relief as possible, every effort should be made by the Bureau to have this help so carried on in free courses.

You are accordingly advised that the cost of tuition or books of a physically handicapped person pursuing a course of training as arranged for by the Bureau, pursuant to the provisions of the afore-said Act, is to be deemed a maintenance cost within its intent and meaning and may be paid in the amount and manner as therein prescribed.

Upon the second of the above stated questions it will be noted that the Act authorizes the Bureau "to provide maintenance costs." In the absence of any provision as to whether such costs shall be paid directly to the beneficiary thereof or to the party furnishing the maintenance, it is to be presumed that they may be paid to either and you are so advised. If the Bureau made the arrangement with any school or itself in any way contracted with any one to furnish maintenance, then the payment should unquestionably be made to such party with whom such arrangement had been made. In case the money is paid to the beneficiary, care should be taken to see that it is actually and in good faith applied to the proper purposes. The better method to follow is to pay directly to the party furnishing the maintenance, and wherever practicable should be followed. In all cases there should be an itemized bill of the costs, duly verified by affidavit. As will be further noted, this payment of maintenance costs authorized by the Bureau is to be approved by the Governor and such approval should in all cases be obtained, and every other requirement of the Act in such disbursement strictly complied with.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

BUREAU OF OCCUPATIONS FOR TRAINED WOMEN.

The Bureau of Occupations for Trained Women of Philadelphia, an unincorporated association which makes no profit from its work, and was organized and is operated from wholly charitable motives, is required to take out a license as an employment agency under the Act of June 7, 1915, P. L. 888.

Office of the Attorney General,
Harrisburg, Pa., March 16, 1920.

Hon. Clifford B. Connelley, Commissioner of Labor and Industry,
Harrisburg, Pa.

Sir: I have your communication of the ninth instant in which you inquire as to whether the Bureau of Occupations for Trained Women of Philadelphia is subject to the Employment Agency Law of June 7, 1915, P. L. 888.

The Bureau filed a license application and a bond and paid the license fee prescribed by the Statute, under protest, claiming it was not within the intent of the law and hence, not subject to licensure under its provisions.

Counsel for the Bureau has presented his contentions orally and by written brief. He has pressed the point that the Bureau is composed of many charitably inclined persons of the City of Philadelphia, was not organized for profit; that its purpose was to aid trained women in securing positions; that the amount of money received from the fees has not been sufficient to pay the expenditures of the Bureau; and that the money derived from the dues of the several classes of members has been necessary to meet the expenses of operation.

Section 1 of the Statute enacts that:

"No employment agent shall hereafter conduct business for profit unless licensed to do so in accordance with the provisions of this Act."

And Section 2 provides:

"The term 'employment agent' as used in this Act shall mean every person, co-partnership, association or corporation engaged in the business of assisting employers to secure employees and persons to secure employment and of collecting and furnishing information regarding employers seeking employees and persons seeking employment; Provided, that no provisions of any section of this Act shall be construed as applying to agents procuring employment for school teachers exclusively; nor to registries or any incorporated association of nurses; nor to departments or bureaus main-

tained by persons, firms or corporations or associations, for the purpose of obtaining help for themselves where no fee is charged the applicants for employment."

The Bureau of Occupations for Trained Women is an unincorporated association, and its objects, according to its Constitution, are to "place women with special training in suitable positions"; to "supply employers with efficient employes" and to "collect information concerning business and professional opportunities; to investigate and develop new occupations for women; to secure accurate data as to the necessary requirements for various occupations, and in general to act as a clearing house of vocational information for schools, colleges, employers and applicants." The management of the Bureau is vested in a Board of twenty-five directors. The actual conduct of the business is in charge of a manager who acts in conjunction with an executive committee composed of the Bureau and the Chairman of the standing committees. According to its pamphlets, the Bureau undertakes to find employments of a secretarial or clerical character, library, literary, social and economic work, specialized teaching, arts and crafts, household economics, including catering, restaurant and laundry management, business and professions, and many other kinds of employment.

I am of the opinion that this Bureau is an "employment agency" and conducts business for profit within the meaning of the Act, and must, therefore, be licensed in accordance with its provisions. The fact that the fees received have not been sufficient in amount to meet the operating expenses of the Bureau is immaterial, as it is quite possible that they may increase over the maintenance expenditures. It has been argued that if any profits be made the Bureau will enlarge the scope of its work, and that it is the intention that no such moneys would be distributed as profits. I accept this as the intention of those governing the operation of the Bureau, and yet, being an unincorporated association, there is nothing to prevent the members of the Bureau from changing their minds at any time, or in consuming the excess in salaries and in other ways.

I am of opinion that it is not the intention of the members who at any particular time are in control, but it is the plan of business which determines the question as to whether or not any group of persons is to be deemed an employment agency, and conducting a business for profit. It is my conclusion that, under the plan of business, profits are possible from fees charged to applicants for employment, and that that is determinative of the matter and the association is within the provisions of the statute. Any other interpretation would defeat the purpose of the Act, for it is readily conceivable how persons seeking to evade its regulatory provisions might form an organization whereby they could insure profits to themselves in an indirect way.

Much stress has been laid upon the personnel of this Bureau and the cause of public spirit which has characterized those who have organized and helped direct its activities. As before indicated, the question must be decided on the possibilities under the plan of business without regard to the character of membership which controls its activities. It has been contended that the Act was designed to protect the uneducated, those who are easily misled and most liable to be imposed upon; that, therefore, the Bureau is not within the Legislative intendment as it deals with "trained" women, those possessed of mental qualifications to such a degree that they are able to look out for themselves and to guard themselves against unfair bargains and unjust impositions. If this were the Legislative purpose, then those agencies which charged no fee to one seeking employment would not be subject to licensure. The contrary has been expressly ruled by this Department in an opinion rendered by Deputy Attorney General Collins under date of December 7, 1915, wherein it was held that employment agencies which collected nothing from the employe, but looked solely to the employer for compensation were comprehended by the terms of the Act and so subject to its provisions.

The case of *Huntsworth vs. Tanner, Attorney General*, 87 Wash., 670, has been relied upon as ruling this question. That case simply decided that the term "employment agency" as used in a law somewhat similar to the Pennsylvania statute under consideration was restricted by a preamble which recited that the impelling necessity for the passage of the Act was the protection of the "workers" of the State of Washington from imposition and astortion; that a worker was a laborer or artificer and that, therefore, an employment agency which confined its activities to the placing of school teachers was not within the Act because school teachers were not "workers" as the term was therein defined.

The distinction between that case and the question at issue is apparent. The Pennsylvania statute contains no such preamble and the question is simply whether the plan of business upon which the Bureau functions makes it a business for profit, and an employment agency within the Act.

I have expressed my views with some degree of detail, being impelled so to do by the earnestness with which counsel for the Bureau has pressed his case and the many papers which he has filed substantiating his statements that the Bureau is not making a profit, does not intend to make a profit and was initiated and operated by women wholly influenced by altruistic motives. He has considered the question from the standpoint of this particular institution and not from the viewpoint of the State at large.

Specifically answering your inquiry, you are now advised that the Bureau of Occupations for Trained Women of Philadelphia is an employment agency within the meaning of the Act approved June 7, 1915, P. L. 888, and is subject to all the provisions of the statute.

Yours very truly,

FRANK M. HUNTER,
Deputy Attorney General

PUBLICATION OF REPORTS.

DEPARTMENT OF LABOR AND INDUSTRY.

The report of the Bureau of Statistics and Information may be summarized and included in the report to be published by the Bureau in the Department of Internal Affairs.

- Office of the Attorney General,
Harrisburg, Pa., March 18, 1920.

Honorable Clifford B. Connelley, Commissioner of Labor and Industry, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 2d instant asking to be advised relative to the publication of a report of the Bureau of Statistics and Information by the Department of Labor and Industry covering the year 1916.

The Act of June 2, 1913, P. L. 396, creating the Department of Labor and Industry, in Section 4 provided for a Bureau of Statistics and Information, and by Section 11 defined the duties thereof, among them being

“This Bureau shall also be required to collect, compile, and publish annually, the productive statistics of manufacturing, commercial, and other business interests of the State.”

The Act of April 18, 1919, P. L. 80, establishes a Bureau of Statistics and Information in the Department of Internal Affairs, and repeals the above mentioned provisions contained in the Act of 1913, the effect being to transfer said Bureau from the Department of Labor and Industry to that of Internal Affairs.

Section 3, of the Act of 1919, inter alia, makes it the duty of the Bureau as established in the Department of Internal Affairs to compile and publish industrial and commercial statistics in manner as therein prescribed and directs that

"All records, files, work in course of completion * * * now in the possession of the production division of the Bureau of Statistics and Information in the Department of Labor and Industry, are hereby transferred to the bureau hereby established,"

to be delivered to the Secretary of Internal Affairs when the Act went into effect.

It appears from your communication that, owing to delays arising from certain causes therein mentioned, there has not been any publication of the report required under the Act of 1913 for any year since 1915; that the printer's copy for the report covering the year 1916 was placed in the printer's hands December 31, 1918, but that the same has not yet been set in type, and will embrace some five or six hundred pages. It is further stated as being your understanding that the said Bureau, as now established in the Department of Internal Affairs, intends to publish in a single volume a comparative statement of the productive industries of Pennsylvania for the years 1917, 1918 and 1919, with full details for the year 1919. You further state as your belief that it would be better that a summary of the productive details for the year 1916 be included in the said volume to be issued by the Bureau in the Department of Internal Affairs, rather than to proceed to have the Department of Labor and Industry publish the above mentioned separate volume containing the statistics in detail.

You ask to be advised whether the order for the publication of the 1916 production report by your Department may be cancelled and a summary thereof turned over to the Bureau of Statistics and Information in the Department of Internal Affairs, to be used in a single volume by that Department.

It will be noted that the length or fullness of the publication of the productive statistics as directed by the Act of 1913 was within the discretion and under the supervision of the Commissioner of Labor and Industry. A summary thereof contained in the report of the present Bureau, such as proposed would fairly be deemed as fulfilling the requirement. The continuity of these reports would thus not be broken. It is altogether probable that the inclusion of such a summary of the statistics for the year 1916 in the report of the existing Bureau would be more valuable and afford a better and more useful source of information than a detailed publication at this late day of these statistics by your Department.

In view of the expense involved in publishing this elaborate separate volume, its belated character and that the Bureau of Statistics and Information in the Department of Internal Affairs has now superseded that formerly in the Department of Labor and Industry

and will publish statistics pursuant to the duty imposed under Section 3 of the Act of 1919, your proposal to abandon the publication by the Department of Labor and Industry of the report covering the year 1916, and that a summary thereof be included in the report to be published by the Bureau in the Department of Internal Affairs seems wise and expedient. I see no legal obstacle to such a course, and to the cancelation of the order for the publication of the 1916 production report by your Department.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General,

DEPARTMENT OF LABOR AND INDUSTRY.

The wire glass Act of May 20, 1913, P. L. 272, and the fire and panic Act of May 3, 1909, P. L. 417, as amended, are each in full force and effect, so that a violation of either may be proceeded against as respectively provided. The Department is justified in taking measures to enforce either Act.

Office of the Attorney General,
Harrisburg, Pa., April 5, 1920.

Honorable Clifford B. Connelley, Commissioner of Labor and Industry, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 19th ult. asking to be advised relative to the Act of May 20, 1913, P. L. 272, and the Act of May 3, 1909, P. L. 417, as amended. The specific questions, as stated in your communication, upon which an opinion is requested are as follows:

"(a) Must the Wire Glass Act of May 20, 1913, be applied to buildings not covered in the Fire and Panic Act, if an external fire escape be erected on said building?

"(b) Are the Acts (the Fire and Panic Act of May 3, 1909, as amended, and the Wire Glass Act of May 20, 1913) to be read together or as two distinct Acts, each carrying its individual application?

"(c) Is the Department of Labor and Industry justified in assuming the enforcement of this Act, Wire Glass, as has been the case since 1913?"

The aforesaid Act of 1913, known as the Wire-glass Act, regulates "the openings of buildings, upon, over, or under external fire-escapes." Section 1 thereof reads as follows:

"That all exits to external fire-escapes shall be by means of doors of fire-proof construction, in which doors there may be placed wire-glass, if glass is required for lighting the interior; and all windows, hereafter opening upon, over, or under external fire-escapes, shall be of fire-proof construction, with wire-glass therein, and with metal fire-proof frames around the windows."

Section 2 makes a violation of the Act a misdemeanor and contains the proviso that "nothing in this act shall interfere with fire-escapes, now in use, approved by the proper authorities."

The aforesaid Act of 1909, known as the Fire and Panic Act, was amended in its several sections by the Act of July 18, 1917, P. L. 1074, and as to Sections 1 and 2 again amended by the Act of June 7, 1919, P. L. 406. It is an elaborate measure providing for proper ways of egress for escape from fire, fire-escapes and various preventives of fire in certain buildings, not in cities of the first and second classes, and vests jurisdiction in the Department of Labor and Industry for its enforcement.

In the case of *Alexander vs. Porter*, 42 C. C. 210, the Court, in refusing a mandamus against the Director of Public Safety in the City of Philadelphia to compel him to issue a fire-escape permit which had been refused because it showed a plan failing to comply with the provisions of the aforesaid Act of 1913, sustained the constitutionality of the Act, Judge Audenreid saying in the course of the opinion:

"The Act of May 20, 1913, P. L. 272, has reference only to external fire-escapes. It directs that all doors and windows opening upon, over or under such fire-escapes shall be of fire-proof construction, and that in all lights in such doors or windows wire-glass only shall be employed. A penalty is provided for the violation of this mandate; and the act ends with the proviso that nothing therein 'shall interfere with fire-escapes now in use, approved by the proper authorities.'

"We think that, when this statute is considered as a whole, it is clear that all the legislature meant to say was that the windows or doors in proximity to fire-escapes thereafter to be erected or theretofore erected without the approval of the proper authorities must be of the fire-proof construction therein described."

An examination of the foregoing Act of 1913 and that of 1909, as amended, shows that, although they are kindred in purpose and have the identical object of safeguarding persons from the danger of fire, they direct and require distinct means and expedients to promote that end. The one of 1913 prescribes a certain specific type of door as a means of exit to, and a certain type of window opening

upon, over or under, external fire-escapes. The requirements extend to all such door and window openings, upon whatever building such fire-escape may be erected or wherever the building may be located, other than fire-escapes embraced within the proviso contained in Section 2 as above quoted.

The said amended Act of 1909 enumerates certain buildings and classes of buildings subject to its provisions, and provides for and requires the installation and maintenance therein of ways of egress, fire-escapes, safeguards against fire and conditions of safety. Only the buildings and classes of buildings expressly mentioned therein are within its purview. As above noted, it does not extend to cities of the first and second classes, while the said Act of 1913 is State-wide in scope.

It is manifest from a comparison of these statutes that the provisions of the one of 1913 may and do apply in some cases to which the one of 1909 does not apply. Their requirements are not inconsistent with each other; those of both are in full force and are to be complied with and may be without conflict with each other. As above pointed out, the Act of 1913 exacts a specific kind of door as a means of exit to, and a specific kind of window opening upon, over or under, external fire-escapes, and is to be deemed another and added safeguard in addition to those prescribed or required by the said amended Act of 1909, or other enactment relating to this subject of fire protection. Each of these measures is to be enforced according to the methods respectively prescribed. A violation of that of 1913 is made a misdemeanor and is to be proceeded against accordingly, while a violation of that of 1909 is punishable in a summary criminal proceeding.

You are accordingly advised, in answer to your first and second questions as above stated, as follows:

That the said Act of 1913 regulates and applies to the door and window openings in connection with external fire-escapes as therein mentioned and specified (other than such as are excepted by virtue of the proviso contained in Section 2), whether the building upon which the fire-escape is erected is or is not among those within the purview of the said amended Act of 1909.

That the provisions of the Act of 1913 and of that of 1909, as amended, are each in full force and effect and to be so complied with and that a violation of either is to be proceeded against in the manner therein respectively prescribed.

The Act of 1913 is silent as to whose duty it is to proceed to enforce its provisions. It follows that any one may properly institute such proceedings. It is to be regretted that it does not expressly place

this duty somewhere, as laws of this character are apt only to be enforced by some authority acting in the public interest. Presumably the intention was and it was contemplated that, its enforcement should be exercised by and rest upon the authorities charged with the duty of seeing that the laws relating to fire-escapes are observed. Inasmuch as the Department of Labor and Industry is such an authority, you are advised, in answer to your third above stated question, that it is entirely warranted and justified in having proceeded to enforce this measure and that it should continue to exact and require compliance with its provisions.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

REHABILITATION

The funds appropriated by Section 7 of the Rehabilitation Act of July 18, 1919 cannot be applied to the payment of costs of therapeutic treatment, transportation for such treatment and incidental expenses in connection therewith.

Office of the Attorney General,
Harrisburg, Pa., April 19, 1920.

Honorable Clifford B. Connelley, Commissioner of Labor and Industry, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 5th inst. asking to be advised whether the funds appropriated under Section 7 of the rehabilitation Act of July 18, 1919, P. L. 1045, can be applied to pay the costs of therapeutic treatment, transportation for such treatment, maintenance during the period of the same or other incidental expenses in connection therewith.

Under Section 5 of the Act above mentioned the Chief of the Bureau of Rehabilitation, with the approval of the Commissioner of Labor and Industry, is empowered, *inter alia*—

“(d) To arrange for such therapeutic treatment as may be necessary for the rehabilitation of any physically handicapped persons who have registered with the chief of the bureau.”

Section 7 of the Act appropriates \$100,000, or so much thereof as may be necessary, to carry out the purposes of the Act.

The term “arrange”, as used in the above quoted provision of Section 5, can not of itself be interpreted as giving to the said Bureau the power to pay for therapeutic treatment and other expenses incident thereto in the rehabilitation of physically handicapped

persons. This term as used in reference to various services to be performed by the Act, pursuant to the provisions contained in Section 5, such as to arrange for courses of training in educational institutions and industrial establishments, and for certain social service during the period of treatment and training. It is not synonymous with, and in common usage does not import the meaning of, the word "pay", and we must presume that it was used in the Act in its ordinary meaning. There is furthermore nowhere in the Act any express provision vesting the Chief of said Bureau, with the approval of the Commissioner of Labor and Industry, with the authority to pay the costs of such treatment. Costs in connection with certain other services to be rendered by the Bureau pursuant to the provisions of Section 5 are expressly allowed to be paid.

In Subsection (i) there is specific authority to provide maintenance costs during the period of training in the courses which are to be arranged for under Subsections (f), (g) and (h). In Subsection (e) there is a specific authorization in certain cases to pay for artificial limbs "and other orthopedic and prosthetic appliances."

We must conclude that if there had been an intention to clothe the Chief of the Bureau, with the approval of the Commissioner, with the power to pay for therapeutic treatment it would likewise have been bestowed in express terms. The enumeration of certain things which may be paid for presumably excludes the right to do so in the case of things not within the enumeration, under a well known principle in the construction of statutes.

*Endlich on Interpretation of Statutes,
Sections 397, 398.*

What was evidently intended by the provisions of Subsection (d), was that the Chief of the Bureau should make arrangements with hospitals, physicians and other agencies, where and by whom there may be provided or afforded services specially directed to the work of rehabilitation,—to arrange for places and specialists where and to whom the physically handicapped persons seeking rehabilitation may go for help to that end. It is altogether probable that the Chief of the Bureau will be able in many cases to secure such services gratuitously, or at such reasonable cost as to be within the means of all.

I am, therefore, of the opinion, and so advise you, that the funds appropriated under Section 7 of the Act can not be used to pay the expenses of therapeutic treatment, transportation for such treatment, maintenance during the period thereof, or other like expenses incident thereto.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

REHABILITATION ACT.

An inmate of the Huntingdon Reformatory who was injured while at work under the direction of the Prison Labor Commission is within the provisions of the Rehabilitation Act of July 18, 1919, P. L. 1045.

Office of the Attorney General,
Harrisburg, Pa., June 22, 1920.

Honorable Clifford B. Connelley, Commissioner of Labor and Industry, Harrisburg, Pa.

Sir: There was duly received your communication to the Attorney General of the 9th inst. asking to be advised whether the following case comes within the provisions of the Rehabilitation Act of July 18, 1919, P. L. 1045. The facts therein appear to be as follows:

B., now a resident of Philadelphia, while an inmate of the Pennsylvania Industrial Reformatory, at Huntingdon, suffered amputation of two fingers and a thumb of his left hand in consequence of an injury received while operating a rimming machine making automobile tags. This work was being done under the direction of the Prison Labor Commission, pursuant to the Act of June 11, 1915, P. L. 656. He made claim for compensation for this injury under the Workmen's Compensation Law, which after a hearing de novo was disallowed by the Compensation Board in an opinion delivered by its Chairman, in which it was said:

"Under any aspect of the Pennsylvania Compensation Act of 1915, before the relation of employer and employe can be established, there must be a meeting of minds in a contract of employment. We cannot find in the case at bar any element of contractual relationship between the Prison Labor Commission and the inmate who was forced, by correctional methods into an employment, notwithstanding the fact that a small daily stipend was set apart for his future use.

"Compensation is accordingly disallowed."

Department Reports, Vol. 6, page 1409.

He has now made application for the benefits of the Rehabilitation Act as a physically handicapped person within its definition. The principle governing in the rejection of his claim for compensation under the Workmen's Compensation Law does not rule the question here submitted. Its answer turns upon the point whether the accident which befell the claimant is to be deemed an "industrial accident" within the intent of the Rehabilitation Act of 1919. By virtue of subsection (c) of Section 1 thereof, its benefits extend to physically handicapped persons residing in Pennsylvania "whose capacity to earn

a living is in any way destroyed or impaired through industrial accident occurring in the Commonwealth.”

It will be seen that of these requisites the only one in the claimant's case about which there could be a possible question is as to its being an “industrial accident”, and I am of the opinion that it also fulfills that criterion. Although his status was not that of an employe within the intendment of the Workmen's Compensation Law, his work was industrial in nature. It was being performed under the provisions of the Prison Labor Commission Act of 1915, pursuant to which, under the supervision of the said Commission, industries may be carried on in certain penal institutions, using the labor of the inmates of these institutions, who are credited with some wages therefor in manner prescribed by that Act. In accordance with this authority there was being carried on the manufacture of automobile tags at the Huntingdon Reformatory. It was an industrial operation in which the claimant was an operative. That he was required to do this without his own option as part of the correctional discipline and instruction used by the Reformatory for his reformation did not alter the character of the work being done by him in which he received his injury, and its character fixes that of the accident.

It would be a harsh rule to hold that while the Reformatory where he was confined could and rightly did for his own betterment set him at this work, yet the State should deny to him the assistance to render him again fit for a remunerative occupation from an injury suffered by him while so working, which it would afford to another likewise injured while engaged at precisely the same kind of work outside its walls. The purpose of the Rehabilitation Act was to train those incapacitated by industrial accident to a self-supporting condition, and both its spirit and letter are consonant with the conclusion that such a case as is here under consideration is not outside its benefits.

You are, therefore, advised that the said party is entitled to receive the benefits of the said Act of 1919 as a physically handicapped person, in consequence of the injury sustained by him while an inmate of the Pennsylvania Industrial Reformatory.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

CHILD LABOR—STRIPPING TOBACCO.

Under the Child Labor Act of May 13, 1915, P. L. 286, it is unlawful for a minor under the age of sixteen years to be employed or permitted to work in stripping tobacco, whether the work be done in a tobacco factory or in the minor's home.

Office of the Attorney General,
Harrisburg, Pa., June 22, 1920.

Honorable Clifford B. Connelley, Commissioner of Labor and Industry, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 24th ult. requesting an opinion in interpretation of the hereinafter mentioned provision of the Child Labor Law. The precise question submitted, as I understand it, may be stated as follows:

Can a minor under sixteen years of age be lawfully employed in "stripping" tobacco where the work is not done in a tobacco factory, but the tobacco is given the minor to take home and the work done there?

Section 1 of the Child Labor Act of May 13, 1915, P. L. 286, defines an establishment within its meaning as—

"Any place within this Commonwealth where work is done for compensation of any kind, to whomever payable: Provided, That this act shall not apply to children employed on the farm, or in domestic service in private homes."

By virtue of Section 2 minors under fourteen years of age can not be employed or permitted to work in any establishment or in connection therewith. Section 5 further forbids the employment of minors of given ages in various occupations. The first paragraph thereof contains an extensive enumeration of occupations in which no minor under sixteen years of age shall be "*employed or permitted to work*", among them being "*stripping, assorting, or manufacturing tobacco*". The purpose of this interdiction of these several employments to minors of said age is to safeguard them against the harmful effects attendant upon, or the dangers incident to, such work when performed by those of immature years.

In the case of *Commonwealth vs. Wormser*, wherein the constitutionality of this Act was sustained by the Superior Court and on appeal therefrom by the Supreme Court, Judge Henderson in delivering the opinion for the Superior Court said:

"The statute in question was enacted under the general police power of the Commonwealth. Its object is declared to be 'to provide for the health, safety and welfare of minors' and it is too clear for discussion that

this is an appropriate subject for legislative action not only in the exercise by the Commonwealth of its authority as *parens patriae* but also of the inalienable power to enact such laws as promote the health, morals and general welfare of the people. * * * In *Crouse Case*, 4 Whar. 9, the court held that the right of parental control was a natural but not an inalienable one; that the public had a paramount interest in the virtue and knowledge of its citizens and that of strict right the business of education belongs to it. This doctrine has not been departed from as is abundantly shown in the numerous statutes affecting the status not only of children but of adults with respect to hours of labor, the character of the employment and the education of the youth of the Commonwealth."

Commonwealth vs. Wormser, 67 Super. Ct. 444, *Idem* 260 Pa. 44.

The provision here in question forbidding the employment of minors under sixteen years of age in stripping tobacco manifestly does not refer to the work of the grower of the article, in harvesting or putting it in shape for marketing, but to the process after it has left his hands to which it is subjected in the course of its preparation and manufacture for its final usable forms. Although, as I understand, this stripping is largely done in tobacco factories, it is also to a considerable amount done at the homes of persons employed for that purpose. It will be noted that this inhibition against employing or permitting minors under said age to strip tobacco is not limited in its application or scope to any particular place, and consequently it applies to any and every place. The danger against which it was leveled and from which it seeks to protect the child is evidently not something arising from the place where the work is to be carried on, but against the danger to the health of the young inherent in the nature of this occupation. It is quite likely that the sanitary conditions surrounding this employment in tobacco factories are in some cases superior to those at the homes of operatives engaged thereat. To afford the safeguard of the law in one place and withhold it at another is something we may surely conclude is contrary to its contemplation. The enactment has in view not merely the welfare of some of the minors of the Commonwealth under the prescribed age, but that of all of them.

In an opinion rendered by First Deputy Attorney General Keller to the Commissioner of Labor and Industry, dated October 27, 1915, (Attorney General's Reports 1915-1916, page 347) it was held to be contrary to the letter and spirit of the Female Labor Law of 1913 for an establishment to give its female employes additional work to be done at home where they had already worked the full time allowable under the law, the permissible hours of employment not being

enlarged by the work being done at the home. The principle there stated is analogous to the one governing in this present case, an interdiction upon some particular employment not being escaped merely by having the minor take the work to the home to do instead of at a factory. While it has been held in former opinions of this Department that the Child Labor Act of 1915 is to be given a strict construction in respect to what occupations are within the interdiction of some interdicted class, yet, on the other hand, as to any restriction or condition pertaining to an employment clearly within its intent it must be given such liberal interpretation as will most fully effectuate its salutary ends. Stripping tobacco is explicitly forbidden to minors under a certain age and the provision relative thereto is to be given a force and effect to the extent of its literal terms, such liberal construction furthermore being in complete harmony with the spirit and purpose of this law.

For the reasons above stated, I am of the opinion and so advise you that it is unlawful for a minor under sixteen years of age to be employed or permitted to work in stripping tobacco whether it be done at a tobacco factory or the tobacco be taken to the home of the minor and the stripping done there.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

REHABILITATION.

The extension of time for the payment of maintenance costs beyond the period of twenty weeks does not require the approval of the Governor, but is subject solely to the approval of the Commissioner of Labor and Industry.

Office of the Attorney General,
Harrisburg, Pa., June 22, 1920.

Honorable Clifford B. Connelly, Commissioner of Labor and Industry, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 21st ultimo, asking to be advised whether an extension of the time of the payment of maintenance costs in rehabilitation cases is subject to the approval of the Governor.

Subsection (1) of Section 5 of the Rehabilitation Act of July 18, 1919, page 1045, authorizes the payment of the cost of maintaining physically handicapped persons during their training to the extent and in manner as follows:

"Providing, That when the payment of maintenance costs is authorized by the chief of the bureau, with the approval of the Governor, it shall not exceed fifteen dollars (\$15.00) per week, and the period during which it is paid shall not exceed twenty weeks, unless an extension of time is granted by the commissioner; said payments to be made by the State Treasurer on the warrant of the Auditor General on requisition of the Commissioner of Labor and Industry."

Pursuant to this provision the approval of the Governor is required in every authorization to pay the cost of maintaining a physically handicapped person during his training. Whether any case shall be entitled to receive this benefit is thereby made dependent upon his determination. Subject to and with such approval the Chief of the Bureau of Rehabilitation can authorize, with the approval of the Commissioner of Labor and Industry, the payment of maintenance costs, but only for a period not to exceed twenty weeks, unless the Commissioner grants an extension of time therefor. The Act recognizes that this period may be insufficient to carry out the work of rehabilitation, of which fact the Commissioner is made the sole judge by clothing him with the power to extend the time during which maintenance costs may be paid. His authority in this respect is unrestricted since, as will be noted, no limit is set upon the duration of the extension. I am of the opinion that it is the intent of the Act that once the Governor has placed the stamp of his approval upon an authorization to pay maintenance costs in any case then an extension of the period during which the same may be paid beyond the twenty weeks is wholly within the control of the Commissioner of Labor and Industry.

In accordance with the foregoing, you are, therefore, advised that an extension of time for the payment of maintenance costs beyond the period of twenty weeks, pursuant to the above quoted provision of said Act, does not require the approval of the Governor, such extension being subject solely to the approval of the Commissioner of Labor and Industry.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General,

REHABILITATION.

An injury caused while picking fruit is not an industrial accident entitling the injured person to the benefits of the rehabilitation Act of July 18, 1919, P. L. 1045.

Office of the Attorney General,
Harrisburg, Pa. July 12, 1920.

Honorable Clifford B. Connelley, Commissioner of Labor and Industry, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 29th ultimo, asking to be advised whether the following stated case comes within the purview of the Re-habilitation Act of July 18, 1919, P. L. 1045:

M, a resident of Pennsylvania, employed as a coachman and gardener, while picking fruit for his employer received an injury which resulted in an amputation of his leg.

By virtue of sub-section (c) of Section 1 of said Act a physically handicapped person entitled to receive the aid thereunder is defined as one residing in Pennsylvania, whose capacity to earn a living is in any way destroyed or impaired through "industrial accident occurring in the Commonwealth."

In a former opinion of this Department, rendered to you by the writer hereof, construing this Act, it was said:

"By an 'industrial accident,' as this term is used in the Act, is evidently contemplated an accident occurring to one in the work of, or connected with, his employment in some industry."

The work in which the above mentioned person was engaged when injured is manifestly of a domestic nature. The injury was not received while he was working in an industry, as that term is commonly understood, or in the furtherence of an industrial operation. It consequently follows that the accident in question cannot be deemed an industrial one, within the intent of the Act. We have, in the several opinions rendered touching the aforesaid Act, given it the most liberal interpretation consistent with its terms in order to extend its benefits wherever possible, but it would be giving it an altogether unwarranted construction to hold that an injury sustained while doing work such as this person was doing when injured is an "industrial accident."

In accordance with the foregoing, you are advised that the aforesaid injury does not render the said person eligible to the benefits of the said Act.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General

FEMALE LABOR.

The Female Labor Law of Pennsylvania does not apply to postal clerks.

Office of the Attorney General,
Harrisburg, Pa., August 30, 1920.

Honorable Clifford B. Connelley, Commissioner of Labor and Industry, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 26th ult., requesting an opinion as to whether the Female Labor Law applies to railway postal clerks. It appears from your communication that a complaint had been made relative to the working hours of railway postal clerks employed at a certain Philadelphia Terminal, and that upon investigation the point was raised by those in charge of these employes as to whether your Department "had any jurisdiction over employes of the Federal Government."

The Act of July 25, 1913, P. L. 1024, commonly known as the Female Labor Law, regulates the employment of females in any establishment, which is defined as any place in this Commonwealth where work is done for compensation of any sort, to whomever payable, excepting work in private homes and farming. It is an enactment under the police power of the State.

In an opinion by Attorney General Brown to the Commissioner of Labor and Industry of December 11, 1918, 28 District Reports 356, it was held that it applies to women engaged in Interstate Commerce, upon the well known principle that until Congress assumes the exclusive regulation of the subject, in such a case, a State statute, enacted under the police power, may apply. It is too plain, however, to require elaborate discussion that a State statute can not interfere with the agencies and instrumentalities of the Federal Government acting within the scope of its constitutional authority. For example, since *M'Culloch vs. State of Maryland*, 4 Wheaton, 316, it has been definitely settled that a State government has no right to tax any of the constitutional means employed by the Government of the United States to exercise its constitutional powers.

The Constitution of the United States confers upon the Federal Government the function of establishing and operating a postal system. It is the sovereign in that domain. The power of Congress over the post offices embraces the regulation of the entire postal system. *U. S. vs. Loring*, 91 Federal Reporter, 881. "In respect of the mails the United States is certainly not a common carrier; it is pursuing a high governmental duty." *Masses Publishing Co. vs. Patten*, 245 Federal Reporter, 102; *Searight vs. Stokes*, 3 Howard,

151. There is vested in the Federal Government the exclusive power to prescribe the conditions of employment of its agents, servants and employes engaged in the postal service, and it consequently follows that the Pennsylvania Female Labor Law does not apply to them.

In cases where Federal postal officials, employes or instrumentalities employ wholly on their own account and at their own expense other persons to assist them in the furtherance of their work in the postal service, the employment of such latter persons may come within the scope of said Act upon the ground that they are not the employes of the United States, but simply the servants of its servants over whom it exercises no control and for whose employment or the conditions thereof it is not responsible. Before any attempt is made to enforce the Act in this respect care should be taken to see that the person in whose behalf it is invoked is in no sense a Federal employe.

I understand from your communication that, acting under the counsel of the former special attorney of your Department, the said Act has been administered heretofore along the lines of the ruling herein laid down, and you are hereby advised to continue to so administer it.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

REHABILITATION.

An injury to a State policeman while in the performance of his duty is not an industrial accident within the meaning of the Rehabilitation Act of 1919.

Office of the Attorney General,
Harrisburg, Pa., September 1, 1920.

Honorable Clifford B. Connelley, Commissioner of Labor and Industry, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 24th ult., asking to be advised whether the following stated case comes within the Rehabilitation Act of July 18, 1919, P. L. 1045.

C. a State policeman, while on motor-cycle patrol was injured by the collision of his car with another car, resulting in the amputation of his foot.

The benefits of the aforesaid Act extend to physically handicapped persons as that term is defined in Subsection (c), Section 1, of the Act, which reads as follows:

"The term 'physically handicapped person' or 'persons', wherever used in this act, shall mean any resident or residents of the Commonwealth of Pennsylvania whose capacity to earn a living is in any way destroyed or impaired through industrial accident occurring in the Commonwealth."

By virtue of this provision, the incapacity for which a person is entitled to the aid provided for by the Act must have been caused by an *industrial* accident. That is an essential test in every instance. As pointed out in former opinions rendered by this Department construing this statute, an "industrial accident", within its intent and contemplation, is one occurring in connection with the work or operation of some industry. In view of the remedial nature of this measure, we have given, and should continually give, the word "industrial", as here used, its most liberal and widest possible meaning. It is obvious, however, that the accident causing the injury in the above stated case does not fulfill the requirement of the Act in this respect. It was a casualty sustained in the course of the performance of his duty as a policeman, and can not in any sense of the term be deemed or classed as an industrial accident.

You are accordingly advised that an injury to a State policeman occurring in the line and performance of his duty does not constitute an industrial accident so as to bring him within the definition of a physically handicapped person under the Rehabilitation Act of 1919, and consequently no power is vested in the Bureau created by it to extend its benefits in relief of an incapacity so incurred.

It is to be regretted that the rehabilitation service afforded by the State under the aforesaid Act does not reach a case so altogether worthy as the one here under consideration, but it is too clearly outside its plain purview as it now reads to make this possible. It remains for the Legislature by appropriate amendment to so broaden its scope as to bring within its provisions persons injured in accidents of this class. We can not do this by mere construction of the existing law, however meritorious the case.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

IN RE REHABILITATION.

The Rehabilitation Act of July 18, 1919, P. L. 1045, does not apply to dependents of those injured in industrial accidents. Only persons actually injured can receive any benefit from the act.

Office of the Attorney General,
Harrisburg, Pa., October 6, 1920.

Honorable Clifford B. Connelley, Commissioner of Labor & Industry,
Harrisburg, Pa.

Sir: This Department is in receipt of your communication requesting a ruling as to whether the hereinafter stated cases come within the Rehabilitation Act of July 18, 1919, P. L. 1045.

L's brother and B's father were killed in industrial accidents. Neither L. nor B. personally suffered any incapacity to earn a living by reason of industrial accident, but upon the assumption that, as dependents of their said relatives who were so killed, they would have received assistance from them in their education can they now be afforded the educational assistance provided in Subsection (1) of Section 5 of the Act.

Only persons who are "physically handicapped", as that term is defined by the Act, are within its relief. In Subsection (c) of Section 1 this is defined to be one "whose capacity to earn a living is in any way destroyed or impaired through industrial accident occurring in the Commonwealth." Its purpose is to restore to such persons a capacity to earn a livelihood. While it is no doubt true that the rehabilitation contemplated rendering persons again fit for remunerative employment would be beneficial to those dependent upon them, and that this was among the ends in view in the enactment of this measure, we can not imply therefrom any authority for the Bureau of Rehabilitation to assist such dependents directly, by affording to them the educational advantages provided by the Act, or to assist the dependents of those killed in industrial accidents. The relief and assistance allowable can be made only to the person to whom the accident actually befell, for the purpose of rehabilitating him from the injury sustained in consequence thereof.

You are, therefore, advised that the Bureau of Rehabilitation has no authority to extend the benefits of said Act to cases such as above stated.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

EMPLOYMENT AGENCY.

An advertising service company which writes letters for an applicant for employment, setting forth his fitness and qualifications for the employment he seeks, distributes same for the applicant, and collects and furnishes a list of names for such letters makes the company an employment agency within the meaning of the Act of June 7, 1915, P. L. 888, and is required to take out a license as prescribed by that Act.

Office of the Attorney General,
Harrisburg, Pa., October 12, 1920.

Mr. Jacob Lightner, Chief, Division of Licensed Agencies, Bureau of Employment, Department of Labor and Industry, Harrisburg, Pa.

Sir: This Department duly received your communication of the 5th inst. asking to be advised whether a business conducted in the manner hereinafter stated would constitute that of an employment agent within the meaning of the Act of June 7, 1915, P. L. 888, regulating the business of employment agents.

The facts, as I gather them from the communication accompanying yours, in the special case occasioning your inquiry may be stated as follows:

A certain advertising service company write letters for any person seeking employment and "get up a list of concerns in his particular line and sell him the clerical service necessary to put these letters in the hands of * * * * prospective employers." Usually the latter is directed to communicate with the applicant, but in some instances the service agency "put the concern interested in touch with the applicant—merely handing the worth while letters over to him as they came in." It is further stated that no fees have been collected "for actually getting a man a position."

Section 2 of the said Act defines the term "employment agent", as used therein, to mean "every person, copartnership, association or corporation engaged in the business of assisting employers to secure employes, and persons to secure employment, or of collecting and furnishing information regarding employers seeking employes, and persons seeking employment," with certain exceptions therefrom not pertinent to the question here under consideration.

I am of the opinion that a business carried on in the manner above stated is within the meaning and intent of this definition of an "employment agent". Merely to write letters for persons seeking employment and supply the clerical services to send out or distribute the same would not, standing alone or of itself, be sufficient to bring the case within the Act. This would be, on the part of one

desiring to secure employment, simply the hiring of an expert to write a letter for him describing his fitness for the kind of work he seeks to obtain, in order that it might be couched in a style and form most likely to bring a favorable response, and the hiring of clerical help to put in shape and send it out. But in the above stated case something essentially different from that is done in addition thereto by the service company. The company got up a list of prospective employers in the particular line of employment sought by the applicant, and it is to this list that the letter so prepared is sent. This is fairly to be deemed collecting and furnishing information relative to employers seeking employes within the plain spirit and intent of the law. It is information of a very definite and valuable character, providing the one desiring employment with the precise knowledge where his peculiar kind of ability may be wanted, and points to the places where his application may be most hopefully or successfully made, and thus becomes assistance in obtaining employment of a most useful and effective nature, and an important part of the whole transaction. It is obvious that the possession or collection of such a list by the service company would in many cases be the chief inducing cause leading an applicant for a position to resort to their services.

Furthermore, while it appears that in most instances the prospective employer communicates directly with the applicant for employment, yet in some instances the agency will "put the concern interested in touch with the applicant,—merely handing the worth while letters over to him". In such cases it would seem that the letters describing the applicant's merits go directly from the agency to the prospective employer, the agency receiving and passing upon the replies, passing the ones worthy of consideration on to the applicant. This is so clearly rendering assistance in getting employment as to need no comment, and hence expressly within the Act. The fact that no additional charge is made for this is immaterial; it is in connection with a transaction for which a consideration was paid. The fact that this additional service was offered to be rendered by the company may have led the applicant to accept their terms and services.

You are, therefore, advised that to write letters for an applicant for employment setting forth his fitness or qualifications for the position or work he seeks to obtain, and to supply the clerical help required to put such letter in proper shape and distribute the same for the applicant and collect and furnish, in addition thereto, a list of prospective employers to whom such letter would be sent, or for an agency to send out from itself such letter, receiving and passing upon the replies thereto in the manner as set forth in the above

mentioned case, would bring the case within the Act and render it encumbent upon any one so conducting a business to take out a license as such in accordance with its provisions.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

IN RE REHABILITATION.

A girl residing in this Commonwealth, who is now 16 years of age, while working on her father's farm in the hay field about four years ago had her leg cut off by a mowing machine, is entitled to compensation under the Rehabilitation Act of July 18, 1919, P. L. 1045.

Office of the Attorney General,
Harrisburg, Pa., November 23, 1920.

Honorable Clifford B. Connelley, Commissioner of Labor and Industry, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 16th inst. asking to be advised whether the following stated case is within the benefits provided in the Rehabilitation Act approved July 18, 1919, P. L. 1045. The facts, as they appear from the duplicate records accompanying your communication and which are retained with our files, are as follows:

A girl residing in this Commonwealth, who is now sixteen years of age, while working on her father's farm in the hay-field had her leg cut off by a mowing machine, the accident occurring in this Commonwealth about four years ago.

The Adjuster of the Bureau of Rehabilitation who investigated the facts in this case recommends that the Bureau pay the entire cost of an artificial limb for her.

A physically handicapped person, as defined in Sub-section (c) of Section 1 of the Act, is one "whose capacity to earn a living is in any way destroyed or impaired through industrial accident occurring in the Commonwealth." Pursuant to the provisions of Sub-section (e) of Section 5 the entire cost of an artificial limb for a physically handicapped person may be paid out of the funds appropriated for rehabilitation purposes.

In an opinion of this Department to you, under date of November 25, 1919, it was held that the Act applies to accidents occurring prior to its passage as well as to those occurring thereafter. In an opinion under date of February 17, 1920, it was further ruled that accidents

happening in connection with farm labor are to be considered as "industrial accidents" within the intent of the law.

It will be seen, therefore, as a general principle, that an accident of the character and occurring as of the time of that above stated brings one whose capacity to earn a living has been thereby destroyed or impaired within the definition of a physically handicapped person, and consequently entitled to receive the assistance provided in Sub-section (e) of Section 5. Under the facts as given in the particular case here in question, I see nothing which would take it out of the general rule. The immature years of this girl at the time she sustained the injury would not operate to deprive her of the aid afforded by the Act, if in fact she was actually engaged in farm labor when injured and the accident occurred in connection therewith. We have uniformly ruled that in view of the remedial ends which this measure has for its object it should be given a liberal construction.

You are, therefore, advised that the aforesaid case is within the purview of the Rehabilitation Act of 1919, and that the aid provided under Sub-section (e) of Section 5 thereof may be allowed therein.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General,

OPINIONS TO THE DEPARTMENT OF MINES

OPINIONS TO THE DEPARTMENT OF MINES.

MINES.

The Bituminous Mine Code, of June 9, 1911, P. L. 756, must be enforced, without regard to difficulties existing in particular localities.

Office of the Attorney General,
Harrisburg, Pa., March 5, 1919.

Honorable Seward E. Button, Chief of Department of Mines,
Harrisburg, Pa.

Sir: Your favor of the 26th ult., is at hand.

You ask whether the opinion of this Department given August 29, 1916, in reference to the application of Section 14 of Article 4 of the Bituminous Mine Code of June 9, 1911, P. L. 756, may be modified so as to hold that this section should apply only to mines that are gaseous in character.

In support of your request you quote the letter of Inspector T. A. Mather, which indicates that it is difficult to enforce the provisions of this Section of the law in mines in the Broadtop Coal Field which are not gaseous. The opinion to which you refer was prepared and promulgated after careful consideration by this Department.

We cannot recede from the views therein expressed. It often happens that legislation, general in its character, may work hardship in particular instances, and that its enforcement in special cases is difficult and impracticable. The remedy for such a situation is with the Legislature. The courts cannot construe legislation so as to make it applicable or inapplicable, according to the ease or difficulty with which it may be enforced, and the Attorney General is bound by the same rules of construction that apply to the courts.

I am, therefore, compelled to advise you that notwithstanding the abnormal conditions in the Broadtop Coal Field, and the difficulty of enforcing the provisions of the law as heretofore construed, this Department is unable to place any other construction upon it than that indicated in the opinion of Deputy Attorney General Collins, dated August 29, 1916.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

MINES AND MINING—HOISTING MACHINERY.

It is not necessary for a mining company to keep an engineer constantly in charge of the hoisting machinery when the regular mine labor is suspended.

Office of the Attorney General,
Harrisburg, Pa., May 9, 1919.

Honorable Seward E. Button, Chief of Department of Mines,
Harrisburg, Pa.

Dear Sir: This Department is in receipt of your recent letter and accompanying correspondence, with reference to a complaint that an engineer has not been kept in constant charge of the hoisting machinery of No. 16 Slope of the Beaver Brook Colliery, Charles M. Dodson & Company.

The facts, as I understand them to be, are as follows:

That prior to March 15, 1919, the company had three engineers at No. 16 Slope, but at that time the working at the Slope was suspended and there are only two pumpmen on duty at a time, during the period of suspension, working in two shifts of eight hours each, the third shift being dropped completely; that on idle days there is only one shift of engineers at No. 16 Slope. The pumpmen on the day shift are let down and the pumpmen on the night shift hoisted up at that slope, but the day pumpman on idle days walks to No. 11 Slope to be hoisted, and the night pumpman is let down at No. 11 Slope; that it would be necessary for these men to walk the same distance between No. 11 and No. 16 Slope on the surface if they did not walk in the mines. All other men on certain days are hoisted up and let down at No. 16 Slope during the time when the one shift of engineers is at work in the usual way.

The rule upon this subject is Rule 20, Article XII of the Act of June 2, 1891, P. L. 197.

It provides, in part:

"An engineer who has charge of the hoisting machinery by which persons are lowered or hoisted in a mine, shall be in constant attendance for that purpose during the whole time any person or persons are below ground."

Attorney General Brown, in an opinion to your predecessor, dated April 12, 1915, said:

"I cannot construe the said Rule 20 literally so as to require the company to maintain an engineer in constant charge of the hoisting machinery when the regular mine labor is suspended. It would be unreasonable to require an engineer to remain in charge of the hoisting machinery, through the entire working day, during a suspension of labor, and when no coal is being hoisted to the surface.

The few officials and employes, whose presence is required in the mine during a temporary suspension of labor in order to inspect the workings and to make necessary repairs, can and should use the traveling way, which is in daily use during working hours for the ingress and egress of employes. This way affords a safe and convenient entrance to and exit from the mine.

I therefore construe the words 'engineer who has charge of the hoisting machinery' to mean the engineer who, during the regular hours of labor and while the mine is in regular operation, has been placed in charge of the hoisting machinery, and by the terms of the said Rule he is required not only to be in constant attendance, but he should not allow any person, except such as are deputed by the owner or operator, to handle or meddle with the engine or machinery in his charge."

After further consideration; we find no reason to change the conclusion arrived at in this opinion, and therefore advise you that under the facts as we understand them, it is not necessary to keep an engineer at No. 16 Slope of the Beaver Brook Colliery of Charles M. Dodson Company, when the regular mine labor thereat is suspended.

Very truly yours,

WM. M. HARGEST.
Deputy Attorney General.

MINES AND MINING—FIREBOSS.

A man who came to this country with his parents while he was a minor, whose father died and whose mother married a citizen of the United States, while he was a minor, is a citizen of the United States and is eligible for a certificate as mine fireboss.

Office of the Attorney General,
Harrisburg, Pa., June 4, 1919.

Honorable Seward E. Button, Chief of Department of Mines, Harrisburg, Pa.

Sir: We have your letter of the 16th inst., enclosing the letters of Mine Inspector Bell of the 22nd Bituminous District, dated May 8, and 13, which letters are herewith returned.

You ask to be advised whether Horace Brown, who is an applicant for a fireboss certificate is a citizen.

I understand that Horace Brown came to this country with his parents. His father having died, his mother married an American

citizen while he was still under the age of twenty-one years. There seems to be no doubt that this makes him a citizen of the United States without naturalization.

The leading case on this subject is that of *United States vs. Keller*, 13 Fed. Rep. 82. Justice Harlan of the Supreme Court of the United States wrote the opinion, in which it was held:

“Upon the marriage of a resident alien woman with a naturalized citizen, she, as well as her infant, so dwelling in this country, become citizens of the United States as fully as if they had become such in the special mode prescribed by the naturalization laws.”

In *Kreitz vs. Behrens and Myers*, 17 N. E. 232, it is held:

“Minor children of foreign parents whose mother, after the death of the father, remarries a citizen, become citizens.”

There are many other cases to the same effect.

I therefore advise you that Horace Brown is a citizen of the United States.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

MINES AND MINING—BARRIER PILLARS.

The Attorney General is not vested with any authority to determine whether a barrier pillar is necessary in a coal mine. The determination of that question rests with the tribunal created by the Act of June 8, 1891, P. L. 176.

Office of the Attorney General,
Harrisburg, Pa., July 21, 1919.

Honorable Seward E. Button, Chief of Department of Mines, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 7th inst. asking to be advised whether a barrier pillar can be demanded between the property of Mary H. Ayers and the property of the Lehigh & Wilkes-Barre Coal Company, pursuant to the Act of June 2, 1891, P. L. 176, providing for the safety of persons employed in anthracite mines. Section 10, Article III, of the Act reads as follows:

"It shall be obligatory on the owners of adjoining coal properties to leave, or cause to be left, a pillar of coal in each seam or vein of coal worked by them, along the line of adjoining property, of such width, that taken in connection with the pillar to be left by the adjoining property owner, will be a sufficient barrier for the safety of the employes of either mine in case the other should be abandoned and allowed to fill with water; such width of pillar to be determined by the engineers of the adjoining property owners together with the inspector of the district in which the mine is situated, and the surveys of the face of the workings along such pillar shall be made in duplicate and must practically agree. A copy of such duplicate surveys, certified to, must be filed with the owners of the adjoining properties and with the inspector of the district in which the mine or property is situated."

As shown by the correspondence accompanying your communication, the said Mary M. Ayers on June 17, 1919, notified Mr. Thomas J. Williams, Mine Inspector of the Eleventh District, in writing, that she is the owner of four and one-half acres of coal located in the City of Wilkes-Barre, and that as the owner thereof she requested that a barrier pillar be established between this property and that of the Lehigh & Wilkes-Barre Coal Company surrounding it, as provided in the above Act, and that she had given notice to that effect to the said Company and asked for a meeting, of which time and place she would notify her Engineer. In response thereto, on June 24th, 1919, the said Company advised the said Inspector that it felt—

"No obligation to act in this matter for the reason that the statute providing for barrier pillars was passed as a protection to men working in an adjacent mine. There is no mine on Mrs. Ayer's property, nor is it possible to open a mine on a tract less than 5 acres in extent and on which the upper vein is 500 feet or more below the surface."

In passing upon the question of leaving barrier pillars for the mutual protection of adjoining coal properties, as required by the above quoted provision of the Act of 1891, Deputy Attorney General Elkin in an opinion dated April 15, 1897, said:
(Attorney General's Report 1897, page 19)

"The language of this section is mandatory and requires the owners of adjoining coal properties to leave or cause to be left a pillar of coal in each seam or vein of coal worked by them along the line of the adjoining property. This mandate of the law must be obeyed whether the coal in the adjoining property is worked at the same time or at a later date. As the inspector of the district you are required, under the provisions of

the law, to aid in the determination of the width of the pillars left for the mutual protection of the adjoining property owners."

The question as to who is charged with the duty to determine the necessity for a barrier pillar between adjoining coal properties has been the subject of judicial construction in many cases and may now be regarded as definitely settled.

In *Curran vs. Delano*, 235 Pa. 478, the Supreme Court, speaking through Mr. Justice Mestrezat, in construing the above quoted Section of the said Act, says:

"The statute, therefore, not only makes it obligatory upon the owners of the adjoining properties to leave a boundary pillar, but provides the tribunal by which the width of the pillar is to be determined. The jurisdiction of that tribunal is exclusive, and the court is without authority to determine the question. It is settled both at common law and under our act of March 21, 1806, 4 Sm. Laws 326, 1 Purd. 271, that where a statute creates a right or liability or imposes a duty, and prescribes a particular remedy for its enforcement, such remedy is exclusive and must be strictly pursued. * * * The purpose of the act was not only to require the owners of adjacent collieries to leave a boundary pillar, if necessary, but also to create a tribunal for the purpose of determining the necessity of the pillar and the width thereof."

In *Mill Creek Coal Company vs. Curran*, 244 Pa. page 496, it is further said upon this point—

"At all events, the legislature had the power and authority to provide for determining the width of the pillar, and having done so, the courts must recognize the tribunal and enforce its findings. The authority to fix the width of the pillar necessarily includes the authority to determine whether the safety of the employees in the mine required a pillar of any width. If in the judgment of the inspector and engineers no pillar was needed, it would be idle, as suggested in *Commonwealth vs. Plymouth Coal Company*, 232 Pa. 141, for them to fix the width of the pillar at, say, one foot, for the sake, merely, of literal compliance with the statutory obligation of leaving a pillar of some width."

It will be seen from the foregoing that the Attorney General is not vested with any authority to decide whether a barrier pillar in any given case is needed, the determination of that question resting with the tribunal created by law for that purpose. It was the evident intent that its members, composed of experts, after due considera-

tion and with full knowledge of the physical situation of the property and all relevant facts in connection therewith, are best fitted to reach the right conclusion.

In the case of *Sterrick Creek Coal Company vs. The Dolph Coal Company, Ltd.*, 11 *Lackawanna Jurist* 219, it was held that the duty of enforcing the provision of the Mine Law relating to barrier pillars rests in the first instance upon the mine inspector of the proper district; but if the mine inspector fails for one reason or another to proceed in the premises as provided by the Act of Assembly, either adjacent mine owner may appeal to a court of equity for relief.

Inasmuch as one of the above named owners of adjoining coal land has requested that steps be taken to establish a barrier pillar between her property and that of the adjoining owner, it will be proper for your Department to institute the proceedings contemplated by the Act to ascertain the necessity for such a pillar.

You are, therefore, advised that the Inspector of the district should give notice to the respective owners of the aforesaid properties of a meeting to be held, at some appointed time and place, by him with the Engineers for the owners of the properties, to determine whether a barrier pillar is necessary and, if so, the proper width thereof.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

MINE INSPECTOR.

It is a necessary qualification for a candidate for mine inspector to have a certificate of a successful examination under the Act of June 1, 1901, P. L. 535, and an old certificate, or one used for the purpose of qualifying at a previous election is not sufficient.

Office of the Attorney General,
Harrisburg, Pa., April 20, 1920.

Honorable Seward E. Button, Chief, Department of Mines, Harrisburg, Pa.

Sir: This Department is in receipt of your recent letter, asking for an opinion as to whether one can be a candidate for the election of Mine Inspector, unless he has taken an examination within four years.

I understand that some persons who have taken the examination years ago intend to become candidates this year without taking the examination.

The term of Mine Inspectors was fixed by Section 11 of the Act of June 8, 1901, P. L. 535, at three years, but upon the amendment of the Constitution in 1909, the general Act of March 2, 1911, P. L. 8, extended the terms of all public officers fixed at an odd number of years, one year, so that now Mine Inspectors are elected for a term of four years.

The Act of June 8, 1901, P. L. 535, amended the Act of June 2, 1891. Section 5 of Article II of the first mentioned Act provides that notice of examinations of candidates for the office of Mine Inspector shall be published, that examiners shall be sworn, and that—

“at least four of them shall sign a certificate, setting forth the fact of the applicants having passed a successful examination, and who have answered ninety per centum of the questions; * * * and shall give such certificate to only such applicant as has passed the required examination.”

Section 8 of Article II of the Act of 1901 provides that—

“Candidates for the office of Mine Inspector shall file with the county commissioners a *certificate from the mine examining board*, as above set forth, before their names shall be allowed to go upon the ballot * * * the name of no person shall be placed upon the official ballot except such as has filed the certificate as herein required; and no persons shall be qualified to act as such Mine Inspector unless such certificate has been previously filed with the county commissioners of his county.”

The Act of 1901 has been variously amended, but no amendment has made any change in the qualification of candidates for Mine Inspectors nor in the character of the examination nor the certificate required to be given to the successful applicants.

In the case of *Moore et al. vs. Durkin*, in the Court of Common Pleas of Lackawanna County, No. 1, November Term, 1911, the precise question which you present was before the Court. It arose on a motion for an injunction to restrain the County Commissioners from furnishing ballots for the election containing the name of one Evan C. Davis, for the office of Mine Inspector for the Second District. Davis had passed the examinations in April and May, 1902, and in the Fall of 1911 petitioned the County Commissioners to have the name placed upon the primary ballot as a candidate for the office of Mine Inspector without having passed an examination other than the one nine years before. The Court, on October 18, 1911, after

hearing, continued the preliminary injunction. Davis, apparently, acquiesced in the decision because the case was not proceeded with further and is not listed.

I find no reported case upon this question, but Attorney General Carson, in an opinion dated February 13, 1903, reported in 12 Dist. Rep. 320, held that under the Act of 1901, *supra*, a Mine Inspector, in order 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 the Act.

Attorney General Carson therein said:

"* * * 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 June 8, 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.*"

We adopt the conclusion of Attorney General Carson, and advise you that it is a necessary qualification for a candidate to have a certificate of a successful examination under the provisions of the Act of June 1, 1901, P. L. 535, and that an old certificate, or one used for the purpose of qualifying as a candidate at a previous election, is not sufficient to entitle the holder to become a candidate for the office this year.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

MINES AND MINING.

Mining laws are violated when one person unlawfully mines the coal of another. The state is entitled to the same protection as any other owner of coal in place.

Mine inspectors, acting under the authority of the Chief of Department of Mines, have full authority to determine whether a mining company is encroaching upon the property of the Commonwealth.

Office of the Attorney General,
Harrisburg, Pa., April 21, 1920.

Hon. Seward F. Button, Chief of Department of Mines, Harrisburg, Pa.

Sir: This Department is in receipt of your favor asking the extent of your authority when advised that there is a probability, through oversight or error, of mining coal under the property of the Commonwealth.

The facts which call forth this request, I understand, to be as follows:

The Commonwealth owns forest lands in Tioga County. In the neighborhood thereof, the Fall Brook Coal Company owns coal in place and the right of mining the same. You have been advised by the Department of Forestry that—

“At present the Coal Company is actively mining coal and is driving towards the State land. The belief is that there are workable coal veins under the State land and that by error or oversight the foregoing might result in a trespass on State holdings and the removal therefrom of valuable coal deposits.”

The Department of Forestry, therefore, requested your co-operation to protect the interests of the Commonwealth.

Section 2, Article II of the Act of June 9, 1911, P. L. 756, 758, provides, in part—

“When the workings of a mine are within three hundred feet of the boundary lines between such mine and any adjoining mine or mines, application shall be made by the operator or the superintendent to the inspector for information as to the proximity of the workings of such adjoining mine or mines, and if the workings of such adjoining mine or mines are, at their nearest point, within three hundred feet of such boundary line, the inspector shall so notify the said operator or the said superintendent, who shall have such portion of the workings of said adjoining mine or mines surveyed and shown on the map of the mine first mentioned. For the purpose of making only the survey herein required, the engineer or surveyor of any mine shall have the right of entry into any adjoining mine, on the written authority of the inspector.”

Section 3 provides, in part, that—

“A true copy of the said map shall be kept in the mine office at the mine, for the use of the mine officials and the inspector.”

Section 4 provides, in part, that—

“At least once every six months the operator or the superintendent of every mine shall cause to be shown accurately on the original map of said mine, and on the copy of the map in the mine office, all the excavations made therein during the time that has elapsed since such excavations were last shown thereon.”

Section 5 of said Act of Assembly provides, in part—

“The operator or the superintendent of every mine shall furnish the inspector of the district with a true and correct copy of the aforesaid original map of said mine, on tracing cloth, and at the end of every six months thereafter the inspector shall return said copy to the operator or the superintendent, who shall place or cause to be placed thereon all the extensions made, and all portions of the mine worked out or abandoned, during the preceding six months, as provided for in section four of this article, and shall forward the map to the inspector within thirty days from the time of receiving it * * * The copies of the maps of the several mines, as hereinbefore required to be furnished to the inspector, shall remain in the care of the inspector of the district in which said mines are situated, as official records pertaining strictly to the office of said inspector, etc.”

Section II of Article XIX provides, in part, at page 312, with reference to the inspector—

“It shall be his duty to thoroughly examine each mine in his district as often as possible (but at least once every four months), * * * and to see that all the provisions of this act are observed and strictly carried out. * * *”

The Department of Mines was established by the Act of April 14, 1903. It provides, in Section 4, that—

“It shall be the duty of the Chief of the Department * * * to see that the mining laws of the State are faithfully executed; and for this purpose he is hereby invested with the same power and authority as the mine inspectors, to enter, inspect and examine any mine or colliery within the State.”

The Mining Laws are violated when one person unlawfully mines the coal of another. The State is like any other owner and is entitled to the same protection as any other owner of coal in place.

In my opinion, you have the right to examine and determine whether mining operations are trespassing upon the property of another, even though there is no mining in the property supposed to be trespassed upon.

I therefore advise you that you and the inspectors under your direction have full authority to determine whether the Fall Brook Coal Company is, in fact, encroaching upon the property of the Commonwealth.

The letter of your Inspector which accompanies your request says that he will have to have higher authority than a Forestry Inspector to give him the information upon which to act. The Commissioner of Forestry is the custodian of the State lands and the Commissioner of Forestry stands in the place of the Commonwealth. When the complaint was brought to your inspector's attention, through you, it was complete so far as the preliminary steps were concerned, and it the duty of the inspector to act upon such complaint.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

OPINIONS TO THE GAME COMMISSION

OPINIONS TO THE GAME COMMISSION.

GAME PROTECTORS AND DEPUTY GAME PROTECTORS.

A game protector cannot collect witness fees in prosecutions instigated or instituted by him for violation of the game laws, either for himself or for the use of the Commonwealth, as the conduct of such prosecutions is within his statutory duties, for the performance of which he receives, under the Act of May 21, 1901, P. L. 266, a fixed compensation or salary; on the other hand, a deputy game protector, under the Act of April 11, 1903, P. L. 163, is paid for his services by fees, and is, therefore, entitled to collect witness fees in such prosecutions as his personal property.

Office of the Attorney General,
Harrisburg, Penn'a. January 13, 1919.

Dr. Joseph Kalbfus, Secretary of Game Commission, Harrisburg, Pa.

Sir: This Department is in receipt of your recent communication, relative to the right of a game protector, or deputy game protector, to receive witness fees in prosecutions instituted by such protectors for violation of the game laws. Separate consideration as to each officer is necessary because the provisions of law differ.

The office of game protector was created by Section 3 of the Act, of June 25, 1895, P. L. 273, which, as amended by the Act of April 22, 1915, P. L. 168, provides for the appointment of sixty competent men to be known as game protectors. They are empowered to enforce the game laws of the State; to execute all warrants and search warrants issued for the violation of the game law; to serve subpoenas issued for the examination, investigation or trial of all offenses against such laws, and by the Act of May 21, 1901, P. L. 266, are empowered to make certain searches and examinations without warrants; and to seize game hunting appliances for the purpose of securing convictions. By the fifth section of the Act of 1901, it is provided that -

"the game protectors, so appointed, shall receive salary or pay per day, as may be agreed upon by the Game Commission, with expenses not to exceed two dollars per day outside of traveling expenses; said expense account to be itemized and presented under oath. All moneys coming to any game protector as his part of any fine or penalty, under existing law, wherein he is the prosecutor, shall belong to the Game Commission and shall be surrendered by said protector to the secretary of the said commission for its use."

and by the Act of July 25, 1917, (app. Acts page 194) the legislature appropriated a specific amount for the payment of their salaries.

It being the duty of the game protectors, as employes of the Game Commission, to prosecute persons violating the game laws, and to this end to secure evidence to sustain a conviction, and these protectors receiving a stipulated salary, or compensation for the performance of these duties, I am of the opinion that they cannot collect witness fees in those prosecutions instituted or instigated by them, either for their own use or for the use of the Game Commission. This question was directly ruled in *Walsh v. Luzerne County*, 36 Pa. Super. Ct. 425. While the officer, in that case, was a member of the State Police, the rule laid down is equally applicable to a game protector. Under that decision, the game protector cannot recover the witness fee for himself, because he receives a salary or fixed compensation for the very duties for which such a fee would be paid; and he cannot receive the fee for the use of the Commonwealth, because there exists no statute which authorizes the protector to collect such fees for the use of the State, and this power cannot be implied as, in the absence of such a statute, the rights of the Commonwealth to the fee, rise no higher than that of the protector.

As to a deputy game protector, the situation is somewhat different. This office was created by the Act of April 11, 1903, P. L. 163, which enacted as follows, that

"The Board of Game Commissioners shall have the power and authority to appoint one competent man in each and every county of the Commonwealth of Pennsylvania, to be called and designated as a deputy game protector, who shall have the same power and perform the same duties as the present game protectors, authorized by law, now have and perform, and receive the same compensation that constables now receive for similar service."

The compensation allowed constables for enforcing the game law was prescribed by the Act of March 22, 1899, P. L. 17, which, after making such constables ex-officio fire, game and fish wardens, provided in Section 4 as follows:

"Any constable or warden, upon the arrest and prosecution of any offender to conviction under the provisions of this act, shall, in addition to the fees to which he may be entitled under existing laws, be paid for his services the sum of ten dollars on a warrant drawn by the county commissioners on the county treasurer, one-half of said reward 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, etc."

Under the foregoing section, it is clear that the compensation of a constable for enforcing the game law consists of the fees which he might collect, and in addition, the sum of Ten dollars, if the prosecution instituted by him resulted in a conviction. The Act of July 14, 1897, P. L. 266, entitled

“An Act to regulate the remuneration of policemen and constables employed as policemen throughout the Commonwealth of Pennsylvania, and prohibiting them from charging or accepting any fee or other compensation, in addition to their salary, except as public rewards and mileage for traveling expenses.”

has no application because constables acting as game wardens are not “employed as policemen” within the meaning of that statute.

These fees are not collected for the use of the Commonwealth, but as before stated, belong to the Deputy Game Protector as part of his remuneration in prosecutions leading to conviction, and his whole compensation for prosecutions which do not result in conviction

You are accordingly advised that

First - A game protector cannot collect witness fees in prosecutions instigated or instituted by him for violation of the game laws either for himself or for the use of the Commonwealth.

Second A deputy game protector may collect fees as a witness in such prosecution, which fees are not collected for the use of the Commonwealth but constitute a personal property of such deputy game protector.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General,

ALIEN SOLDIERS.

Within six months after an alien is honorably discharged from the United States Army, he may file his declaration and petition and be immediately naturalized, but until he has done this, he is still an unnaturalized foreign-born resident, and is prohibited by the Act of May 8, 1909, P. L. 466, from carrying a shot gun or a rifle.

Office of the Attorney General,
Harrisburg, Pa., February 12, 1919.

Honorable Joseph Kalbfus, Secretary of the Game Commission,
Harrisburg, Pa.

Sir: Your letter of the 10th inst., in regard to a gun belonging to an unnaturalized alien, discharged soldier, duly received.

In reply to your inquiry, as to the status of the unnaturalized discharged soldier, would say that the Statutes of the United States, Section 4 of the Act of Congress of May 5, 1918, provide that within six months after an alien is honorably discharged from the U. S. Army, he may file his declaration and petition, and may be immediately naturalized. But until he has done that, by the plain meaning of the Act of Congress, he is still an unnaturalized, foreign-born resident, and therefore is prohibited by the Act of May 8, 1909, P. L. 466, Section 1, from carrying a shot-gun or rifle.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

GAME LAW—SPECIAL AND LOCAL LAWS—REPEAL.

The local Act of March 16, 1872, P. L. 417, regulating the disposition of fines in Monroe County is not repealed by later general statutes.

Office of the Attorney General,
Harrisburg, Pa., May 19, 1919.

Dr. Joseph Kalbfus, Secretary, Board of Game Commissioners,
Harrisburg, Pa.

Sir: Your letter enclosing one of the District Attorney of Monroe County asking for the opinion of the Attorney General as to whether the local law of March 16, 1872, P. L. 417, regarding the payment of fines in Monroe County was repealed by any of the later statutes, duly received.

In reply would say that the local law of March 16, 1872, P. L. 417, Section 1, provides:

"That all fines, amercements and penalties imposed by the courts of Monroe County, and all recognizances declared forfeited by said courts, which under the existing laws are not payable to the commonwealth of Pennsylvania for its own use, are hereby directed to be paid to the committee hereinafter named, for the establishment and maintenance of a law library, to be kept in the court house or other county house of said county, for the use of the court and bar thereof"

Under Section 5 of the Act of May 21, 1901, P. L. 266,—

"All moneys coming to any game protector as his part of any fine or penalty, *under existing law*, wherein he is the prosecutor, shall belong to the Game Commission."

The amendment to the Game Law of April 17, 1913, enacted on July 11, 1917, P. L. 796, as to the disposition of fines and penalties, does not mention the bounty law of April 15, P. L. 126.

Section 7 of the bounty law of April 15, 1915, P. L. 126, as to fines and penalties, provides as follows:

"Each and every person who shall wilfully or fraudulently collect, or attempt to collect, any reward or bounty provided for by this act, to which he or they are not legally entitled under the provisions of this act; or shall aid or abet or assist in any capacity, official or otherwise, in an attempt to defraud the State through the collection or payment of any reward or bounty provided for by this act, shall be guilty of a misdemeanor, and, upon conviction thereof, shall, in addition to the penalty that may be imposed for perjury where a false affidavit is made, be sentenced to pay to the Commonwealth of Pennsylvania a fine of not less than one hundred dollars or more than five hundred dollars; or, in default of the payment thereof, with costs, shall suffer an imprisonment in the common jail of the county in which the affidavit is made, for a period of one day in jail for each dollar of fine imposed and unpaid."

This Act does not state that the fines and penalties collected for the violation of its provisions are to be payable to the Game Commission.

It has been decided by our Supreme Court that a local or special act is not repealed by implication by a subsequent general statute containing inconsistent provisions on the same subject, in the absence of a clear and manifest legislative intent disclosed by the general act to repeal the local act.

Parkway Opening, 249 Pa. 367.

"A local law is presumably passed to meet local and exceptional conditions, and a general statute is passed to meet general conditions, but this does not imply that the local conditions are changed, or that the legislature intended to change the law previously deemed necessary or appropriate to such local conditions."

Commonwealth vs. Brown, 210 Pa. 29.

"Where a prior law is local and particular, and the later law is general, there is no presumption of intention to repeal the prior law by the later one, but, on the contrary, this is a very strong presumption that no such intent existed."

Commonwealth vs. Brown, 25 Super. Ct. 269.

"A general repealing clause is not to be interpreted, when standing alone, as evidence of any intention to re-

peal prior local laws, unless there is something else in the act to evidence such intention."

Starr vs. Caldwell, 17 Dist. Rept. 669.

"A local statute is not repealed or affected by a subsequent general act, where neither interferes with the other and both may be enforced."

Pittsburgh Legal Journal vs. Bruff, 19 Dist. Rept. 591.

As the Act of July 11, 1917, P. L. 796, under which the fines and penalties collected for violation of the game laws are payable to the Game Commission, does not mention the bounty law of April 15, 1915, P. L. 126, and there is no provision in the bounty law for the payment of the fines and penalties collected thereunder to the Game Commission, we advise you that fines collected for the violation of the bounty law are payable as in other cases of misdemeanor. Therefore, as there is nothing in the Acts quoted to repeal the special law of March 16, 1872, P. L. 417, Section 1, in regard to the payment of fines and amercements in Monroe County to the law library therein, it follows that the District Attorney of Monroe County is correct in his decision that fines collected for violation of the bounty law of 1915 in Monroe County are payable to the law library and not to the Game Commission.

Yours respectfully,

WILLIAM I. SWOOPE,
Deputy Attorney General.

IN RE BOUNTIES.

Fines collected under the Bounty Acts of 1915 and 1919 must be paid to the county in which the offense is committed. The Game Commission is not entitled to receive them.

Office of the Attorney General,
Harrisburg, Pa., July 9, 1919.

Dr. Joseph Kalbfus, Secretary, Game Commission, Harrisburg, Pa.

Sir: Your letter of July 2d, asking for an opinion from the Attorney General as to the disposition of fines collected under the Bounty Acts of 1915 and 1919, has been referred to me.

In reply would say that the Bounty Act of April 15, 1915, P. L. 126, provides in the last part of Section 7—

"Each and every person who shall wilfully or fraudulently collect, or attempt to collect, any reward or bounty provided for by this act, to which he or they are not legally entitled under the provisions of this act or shall aid or abet or assist in any capacity, official or otherwise, in an attempt to defraud the State through the collection or payment of any reward or bounty provided for by this act, shall be guilty of a misdemeanor, and, upon conviction thereof, shall, in addition to the penalty that may be imposed for perjury where a false affidavit is made, be sentenced to pay to the Commonwealth of Pennsylvania a fine of not less than one hundred dollars or more than five hundred dollars * * *,"

and this provision is re-enacted in the Act of the 23d of May, 1919, Section 7, which provides as follows:

"Every person who shall wilfully or fraudulently collect, or attempt to collect, any reward or bounty provided for by this act, to which he or they are not legally entitled under the provisions of this act; or shall aid or abet or assist, in any capacity, official or otherwise, in any attempt to defraud the State through the collection or payment of any reward or bounty provided for by this act, shall be guilty of a misdemeanor, and, upon conviction thereof, shall, in addition to the penalty that may be imposed for perjury where a false affidavit is made, be sentenced to pay to the Commonwealth of Pennsylvania a fine of not less than one hundred dollars or more than five hundred dollars * * *."

Neither of these Acts states that the fines or penalties collected thereunder are to be paid over to the Game Commission. It would, therefore, follow that the fines and penalties collected for the violation of these Acts are to be disposed of as in other cases of misdemeanor.

By Section 78 of the Act of March 31, 1860, P. L. 427—

"All fines imposed upon any party, by any court of criminal jurisdiction, shall be decreed to be paid to the Commonwealth; but the same shall be collected and received, for the use of the respective counties in which such fines shall have been imposed as aforesaid, as is now directed by law."

Under this provision of the Criminal Code, the fines collected for violation of these two Bounty laws must be paid to the county in which the offense is committed. The Game Commission is, therefore, not entitled to receive them.

Yours very truly,

WILLIAM I. SWOOPE,
Deputy Attorney General.

INCOMPATIBLE OFFICES.

The office of member of the Legislature and a clerkship in the Board of Game Commissioners is not incompatible.

Office of the Attorney General,
Harrisburg, Pa., October 29, 1919.

Mr. Seth E. Gordon, Acting Secretary, Game Commission, Harrisburg, Pa.

Sir: I have your communication of the 28th inst. stating that on the 15th inst., W. O. Bowman, of Lemoyne, Penna. was appointed by the Board of Game Commissioners to a clerical position, at a salary of \$150 per month; that Mr. Bowman's duties consist of handling correspondence, checking up records, and other purely clerical work. It appears that the Auditor General has not honored the requisition of your Department for the payment of Mr. Bowman's salary for the last half of October. It appears further that Mr. Bowman was elected a member of the Legislature from Cumberland County at the General election in November 1918, for two years, and was duly qualified and is still holding such office. You ask to be advised whether there is any legal objection to the appointment of Mr. Bowman and the payment of his salary.

Doubtless the Auditor General was prompted to withhold payment of Mr. Bowman's salary in view of Section 6 Article II of the Constitution, which 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", etc.

and in view of Section 15 of the Act of May 15, 1874, P. L. 186, which incorporates the above constitutional provision relative to the appointment of Senators or Representatives to any civil office in the Commonwealth, and adds the following:

"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."

There is a well recognized difference between an "officer" and a mere clerk or employee. Said the Superior Court in *Ritchie vs. Philadelphia*, 37 Superior Court 190:

"It is no doubt true that there are many persons engaged in the public service in subordinate positions exercising functions of such an inferior character that they could not be properly considered public officers

within the meaning of the constitution. * * *. Where, however, the officer exercises important public duties and has delegated to him some of the functions of government and his office is for a fixed term and the powers, duties and emoluments become vested in a successor when the office becomes vacant such an official may properly be called a public officer. The powers and duties attached to the position manifest its character."

The matter has been the subject of discussion and definition in the following opinions of this Department: Opinion of Attorney General Carson, rendered July 31, 1903, and reported in 12 District Reports 587; opinion of Attorney General Bell, rendered December 13, 1911, and reported in the Official Opinions of the Attorney General for 1911-1912, page 195, and opinion of Deputy Attorney General Collins, rendered May 17, 1917, and reported in 20 Dauphin County Reporter 161.

Concurring in the views expressed in these opinions, elaboration is unnecessary. It is common knowledge that members of the Legislature are appointed to various positions which do not arise to the dignity of civil officers. This has been done from time immemorial.

See *Commonwealth ex rel. vs. Binns*, 17 S. & R 219.

Believing that the constitutional prohibition above quoted, and the Acts of Assembly upon the subject of incompatible offices do not apply to the case of Mr. Bowman, you are advised that there is no legal reason why his compensation for the services he is performing should not be paid.

Very truly yours,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

LAND PURCHASED BY GAME COMMISSION.

Under the Act of June 20, 1919, P. L. 533, only general warranty deeds, in fee, without conditions or restrictions should be accepted for lands purchased by the Game Commission.

Office of the Attorney General,
Harrisburg, Pa., May 5, 1920.

Honorable Seth E. Gordon, Secretary, Game Commission, Harrisburg, Pa.

Sir: Your letter of the 27th instant, requesting that this Department advise you as to the form of deed for lands purchased by the

Game Commission under the Act of June 20, 1919, P. L. 533, has been referred to me.

In reply would say that Section 3 of the Act of June 20, 1919, P. L. 533, provides as follows:

"The title to any such land shall be taken by the Board of Game Commissioners or the Conservation Commission in the name of the Commonwealth. * * * "

Section 5 of the said Act provides:

"Any land, when so acquired, shall be used for the purpose of creating, protecting, and maintaining perpetually a game-preserve. * * * "

The uniform practice of the Commonwealth has been to accept only deeds in fee without any restrictions or conditions. It is provided in the last clause of Section 1 of this Act that the Commonwealth can accept a deed containing a mineral reservation. The provision is in these words:

"The land which may be purchased hereunder shall include land from which underlying minerals are excepted or have been excepted or conveyed, and land subject to the right to mine such minerals."

Section 5 of this Act provides that the land purchased shall be used perpetually for a game-preserve, and lands purchased under this Act can not be used for any other purpose.

It is not possible to anticipate what a future Legislature may do, and no provision of the deed should restrict its action.

You are, therefore, advised that under this Act of Assembly you should accept only general warranty deeds in fee without restrictions or conditions therein.

The title, under Section 3 of the Act, should be made to the Commonwealth of Pennsylvania, its successors and assigns. The ordinary form of warranty deed used in the purchase of forestry reservation lands prepared by the same company whom you have employed to examine your titles for the lands to be purchased under this Act would be the form of the deed to be made to the Commonwealth for such lands.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

FOX BOUNTY.

The act of May 1, 1913, P. L. 131, which protects foxes in Delaware county, is to be read as if the amendment of 1919, P. L. 793, which adds Chester and Montgomery counties, had always been in, and the exception in § 3 of the act of 1913 applies to foxes killed in all three counties.

When the secretary of the Game Commission is satisfied that the foxes killed in any of said three counties have been destroying the property of the person who shoots them and that they were shot when destroying the property; the person shooting them is entitled to the bounty under §1 of the general act of 1919, P. L. 270.

Office of the Attorney General,
Harrisburg, Pa., July 7, 1920.

Honorable Seth E. Gordon, Secretary of the Game Commission,
Harrisburg, Pa.

Sir: Your communication of the 3d instant, asking an opinion as to the payment of bounties on foxes that may be killed in Chester, Delaware or Montgomery counties, in which counties foxes are protected by the Act of May 1, 1913, P. L. 131, as amended by the Act of July 9, 1919, P. L. 793, duly received.

The general bounty law of May 23, 1913, P. L. 270, in Section 1, provides that a bounty of two dollars shall be paid by the Commonwealth for the killing of foxes and the other animals therein enumerated.

But the Legislature of 1913 enacted a law protecting foxes in Delaware County, (Act of May 1, 1913, P. L. 131) which reads as follows:

"Section 1. That it shall be unlawful for any person to shoot or trap or snare or poison any fox within the limits of Delaware County.

Section 2.

Section 3. Provided, however, that nothing in this Act shall be construed to prevent any person or persons from shooting a fox, or foxes, destroying their property."

This Act was amended by the Act of July 9, 1919, P. L. 793, the title of which states that it is to extend the provisions of the Act of May 1, 1913, to Chester and Montgomery Counties. It cites Section 1 to be amended, and makes Section 1 read as follows:

"Section 1. Be it enacted, etc., That it shall be unlawful for any person to shoot or trap or snare or poison any fox within the limits of Delaware County, *Chester County, or Montgomery County.*"

The title of this amendatory Act shows that it was the intention of the Legislature to extend all the provisions of the Act of May 1, 1913, P. L. 131, to Chester and Montgomery counties, and to prohibit the killing of foxes in those counties by shooting, trapping, snaring or poisoning the same. While only the first Section is cited for amendment, the title of the amendatory Act shows plainly the intention of the Legislature.

"If an Act does not change the original Act, but merely adds something, it does not repeal it."

Breitung vs. Lindauer, 37 Mich. 217.

"The statute which has been amended, is to be construed as if the amendments had always been there."

Endlich on the Interpretation of Statutes, Sec. 294.

"The Act is merged in the amendments."

Ibid Sec. 196.

Applying these principles to the two Acts in question, we read the Act of 1913 as if the amendment of 1919 had always been in, and the exception in Section 3 of the Act of 1913 applies to foxes killed in Chester and Montgomery counties, as well as to those killed in Delaware County.

The exception in Section 3 of the Act of May 1, 1913, provides that nothing in this Act shall be construed to prevent any person or persons from shooting a fox, or foxes, destroying their property. Therefore, when you are satisfied by sufficient evidence that the foxes killed in Delaware, Chester or Montgomery Counties, have been destroying the property of the person who shoots them, and that they were shot when they were destroying the property, the person shooting them would be entitled to the bounty under Section 1 of the general Act of May 23, 1919, P. L. 270.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

WEASEL SKINS.

The Secretary of the Game Commission is advised as to the disposition of weasel skins sent in for the claim of bounty, under the provisions of the Act of May 23, 1919, P. L. 270.

Office of the Attorney General,
Harrisburg, Pa., August 17, 1920.

Honorable Seth E. Gordon, Secretary, Game Commission, Harrisburg, Pa.

Sir: Your letter of the 17th inst. requesting an opinion from this Department as to the disposal of weasel skins left in your hands after the payment of the bounty under the Act of May 23, 1919, P. L. 270, was duly received.

Section 3 of the Act of May 23, 1919, P. L. 270, provides as follows:

"Upon the receipt of such affidavit and skins or pelts in proper form, the Secretary of the Board of Game Commissioners, being satisfied that the skins or pelts presented to him are the skins or pelts of animals for the killing of which a bounty is offered by this act, and that such claims are in all respects legitimate, shall split the face of the skin from between the eyes through the end of the nose; and shall as quickly as may be, forward his check to the claimant for the amount found to be due, and shall return all such skins or pelts, at the expense of the bounty fund, to such address as the owner may direct; and shall, at least once a month, render an accounting to the Auditor General, in such form as he may prescribe, of all claims paid, giving the name and address of the payee, the number of the check given, and the amount so paid."

Under this Section the duty of your Department is to return such skins or pelts at the expense of the bounty fund to such address as the owner may direct. Where the owner has not directed the return of the skins or pelts, and where you are satisfied that he does not wish them returned by his own direction to that effect, the skins or pelts would become the property of the Board of Game Commissioners and could be disposed of in the manner most advantageous for the interests of your Department. You are, therefore, advised that where you are satisfied the skins or pelts are not to be returned to the person sending them in, you could salvage them in the manner suggested in your letter of August 17 and dispose of them to the best advantage.

Under Section 5 of the said Act of 1919 all funds realized in the enforcement of the Bounty Act shall be disposed of in the manner pointed out in that Act, in which it is provided that the office expenses, clerk hire, postage, etc., necessary for the performance of the extra duties imposed by this Act upon the Board of Game Commissioners shall be a charge against the fund created by this Act.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

BANDING BIRDS.

The Board of Game Commissioners can grant ordinary and special certificates under the provisions of Sections 3 and 4 of the Act of June 7th, 1917, P. L. 572 only to residents of Pennsylvania, or to agents of a public museum located in Pennsylvania for the purpose specified in the Act.

Office of the Attorney General,
Harrisburg, Pa., October 12, 1920.

Hon. Seth E. Gordon, Secretary, Game Commission, Harrisburg, Pa.

Sir: Your letter of the 7th of October, 1920, asking for an opinion from this Department, as to whether or not under the provisions of Sections 3 and 4 of the Act of June 7, 1917, P. L. 572, the Board of Game Commissioners may authorize agents of the Biological Survey, Department of Agriculture at Washington, D. C., to capture and band birds in Pennsylvania for educational purposes, duly received.

The provisions of the Act of Assembly provide, *inter alia*:

"Section 3. The game laws of this Commonwealth shall not be construed to apply to any public zoological garden of the State, or to any public institution of the State wherein animals or birds may be maintained alive, for educational purposes or for the purpose of scientific study or experiment."

This provision by its express terms applies only to institutions located within the State of Pennsylvania.

The next clause of this Section is in these words:

"or to the Board of Game Commissioners, or to its duly authorized agent acting for the State; and no law shall be held to prevent the Board of Game Commissioners, through its duly authorized agent, from destroying birds or animals destructive to game, in such manner as they may direct."

This provision permits the Board of Game Commissioners only to destroy birds and animals destructive to game, and not to take such birds or animals alive.

The provisions in regard to certificates are confined to persons who are residents of the Commonwealth of Pennsylvania, or who are agents of a public museum located within the Commonwealth. These provisions cannot apply to agents of any institution located beyond the boundaries of the Commonwealth of Pennsylvania.

You are, therefore, advised that the Board of Game Commissioners can grant ordinary and special certificates, under the provisions of

Sections 3 and 4 of the Act of the 7th of June, 1917, P. L. 572, only to residents of the Commonwealth of Pennsylvania, or to agents of a public museum located within the said Commonwealth for the purpose specified in the Act.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

BANDING OF BIRDS.

The Board of Game Commissioners can appoint and authorize agents to band birds for scientific purposes, provided such birds are not to be kept in captivity or injured.

Office of the Attorney General,
Harrisburg, Pa., November 17, 1920.

Honorable Seth E. Gordon, Secretary, Game Commission, Harrisburg, Pa.

Sir: Your request for an opinion from this Department as to whether the Board of Game Commissioners can authorize agents acting for the State to band birds for scientific purposes, under the third clause of Section 3 of the Act of June 7, 1917, P. L. 572, duly received.

The third clause of Section 3 of the Game Law of 1917 reads as follows:

"The Game Laws of this Commonwealth shall not be construed to apply....to the Board of Game Commissioners, or to its duly authorized agents acting for the State."

I understand that birds are banded for scientists, and marked in a way not injurious to the birds, stating the day and place where found, and then let go for the purpose of determining the extent of their annual migrations. The birds so marked are not maintained or kept in captivity but immediately liberated after being marked.

Under the above clause of the Act of June 7, 1917, P. L. 572, Section 3, the Board of Game Commissioners are empowered to appoint agents to act for the State, and such agents when duly authorized by the Board of Game Commissioners are not subject to the provisions of the Game Laws.

You are, therefore, advised that the Board of Game Commissioners can appoint and authorize agents to act for the State to band birds for scientific purposes, provided that such birds are not to be kept in captivity or injured.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

OPINIONS TO COMMISSIONER OF FISHERIES

OPINIONS TO THE COMMISSIONER OF FISHERIES.

PAYMENT OF FINES AND COSTS.

By the provisions of the Act of May 17, 1917, P. L. 199, an alderman may allow payment of a fine or costs by instalments; this justifies him in granting leave to pay both fine and costs in that manner. But he is without authority to deduct his whole costs from any one or more instalments before remitting the payments to the officer entitled to them. He is limited in his deductions to a proportionate part of his costs only, viz., such proportion of the costs as the total amount of the payments bears to the total fine and costs imposed.

Office of the Attorney General,
Harrisburg, Pa., January 13, 1919.

Honorable Nathan R. Buller, Commissioner of Fisheries, Harrisburg, Pa.

Sir: This Department is in receipt of your recent Communication enclosing a transcript of the Alderman's docket in the case of Commonwealth vs. Peter Gineko, Casimer Lift Chels and Walter Neubedaski. These defendants were found guilty of a violation of the Fish laws, and, as appears from the Alderman's docket,

"each is sentenced to pay a fine of \$20.00 and cost of prosecution or in default twenty days in jail, defendants being unable to pay fines are released on their own recognizance each in the sum of \$200.00 and promise to pay \$5.00 each pay day until the whole amount be paid."

After paying on three different occasions sums aggregating Eleven Dollars (\$11.00), Neubedaski disappeared. The Alderman remitted to you the balance, after deducting all the costs from the amount paid by the said Neubedaski.

Upon the foregoing facts you ask to be advised whether the Alderman was authorized to deduct the whole amount of the costs imposed on Neubedaski or only such proportion thereof as the amount paid by Neubedaski bore to the whole amount.

By the provisions of the Act of May 17, 1917, P. L. 199, an alderman may grant leave to pay a fine or costs by instalments, which in my opinion, justifies leave to pay both fine and costs in that manner.

Section 2 of this Act provides as follows:

"In giving leave under the foregoing section, the sentencing authority shall fix the amount of each instalment and the dates of payment; but no order giving

such leave shall prescribe a period longer than twelve months for the completion of payment of the entire fine or costs."

The terms of the sentence entered by the Alderman in this particular case indicate that he granted leave to pay by instalments not only the amount of the fine but the costs of the prosecution. This being the case, the Alderman is without authority to deduct his whole costs from anyone or more instalments. He is limited in his deductions to a proportionate part of his costs only, and you are therefore accordingly advised.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

POLLUTION OF STREAMS.

The Commissioner of Fisheries cannot take any action to restrict the operation of coal operators so as to avoid the pollution of streams, unless expressly authorized so to do by the legislature.

Under the Act of July 26, 1917, the Commissioner of Fisheries has the right to notify mining companies to take any reasonable and practicable means to prevent the pollution of streams.

Office of the Attorney General,
Harrisburg, Pa., February 12, 1919.

Honorable Nathan R. Buller, Commissioner of Fisheries, Harrisburg, Pa.

Sir: This Department is in receipt of your letter of February 3d, 1919, inquiring as to the method of procedure to follow to prevent the pollution of Scar Run in Sullivan County by water from a coal mine thereon.

On July 14, 1892 Deputy Attorney General Stranahan rendered an opinion that the Commissioner of Fisheries cannot take any action to restrict the operations of coal operators as to avoid the pollution of streams, unless expressly authorized so to do by legislation.

The late Act of July 26, 1917 prohibits the pollution of streams in these words; Section 100:—

"No person shall put or place in any waters of this Commonwealth any electricity, explosives, or any poisonous substance whatsoever, for the purpose of catching, injuring, or killing fish. No person shall allow any

substance of any kind or character, deleterious, destructive or poisonous to fish, to be turned into, or allowed to run, flow, wash, or be emptied into, any waters within this Commonwealth, unless it be shown to the satisfaction of the Commissioner of Fisheries or to the proper Court that every reasonable and practicable means has been used to abate and prevent the pollution of waters in question by the escape of deleterious substances."

Under the second clause in this Section, the Department suggested that you send an investigator to investigate the facts in relation to this matter. The report made has been received and by it we find that no sulphur water is discharged from the mine on Scar Run, and the water coming from the mine has been discharged through a two inch pipe and has been used in the boilers for the past two years. These boilers are cleaned twice a year and no residue is found therein.

Under the third clause of this Section, you have the right to notify the Mining Company to take any reasonable and practicable means to prevent the pollution of the stream, and this you have done by notifying it to install a filter plant before enlarging its operations.

You are therefore advised that no further procedure is necessary at this time or until you have information that the stream will be polluted.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

FISHING LAWS—ALIENS—ACT OF APRIL 21, 1915.

A foreign-born resident of Pennsylvania who has taken out his first papers, but has not been naturalized, is prohibited by the Act of April 21, 1915, P. L. 160, from fishing in this State, and from being employed by another to fish in this State.

Office of the Attorney General,
Harrisburg, Pa., July 23, 1919.

Honorable Nathan R. Buller, Commissioner of Fisheries, Harrisburg, Pa.

Dear Sir: In answer to your request of this date, asking this Department if an alien who has declared his intention of becoming a citizen by filing what are known as his first papers, but who has not yet been naturalized, can fish in Pennsylvania or be employed by another to fish in this State, would say that a man who has

taken out his first papers, but has not yet been regularly naturalized, is still an unnaturalized foreign born resident, under the laws of the United States and the State of Pennsylvania.

By the Act of April 21, 1915, P. L. 160, Section 1, it is provided as follows:

"That from and after the passage of this act, it shall be unlawful for any unnaturalized foreign-born resident to go fishing for, or capture or kill, in this Commonwealth, any fish of any description. Each and every person violating any provisions of this section shall, upon conviction thereof, be sentenced to pay a penalty of twenty dollars for each offense, or undergo imprisonment in the common jail of the county for the period of one day for each dollar of penalty imposed."

It therefore follows that no person who has not yet been naturalized by a court having jurisdiction, is entitled to fish in the State of Pennsylvania, or to be employed by any other to fish in this State.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

APPEALS FROM JUSTICES OF THE PEACE.

Under the Constitution, art. v. § 14, and the Acts of April 17, 1876, P. L. 29, and July 11, 1917, P. L. 771, in cases where there has been a full hearing before a justice of the peace, and the defendant has been acquitted and discharged, the case is ended and the Commonwealth has no appeal.

A prosecution for violation of the Act of July 28, 1917, § 100, P. L. 1213, forbidding the pollution of streams, is a criminal proceeding and governed by the Acts of April 17, 1876, P. L. 29, and July 11, 1917, P. L. 771.

In a prosecution before a justice of the peace for a violation of the Act of July 28, 1917, § 100, P. L. 1213, if the justice finds from the evidence that every reasonable and practicable means has been used to prevent the pollution of the waters in question, he has a right to discharge the defendant.

Office of the Attorney General,
Harrisburg, Pa., July 28, 1920.

Honorable Nathan R. Buller, Commissioner of Fisheries, Harrisburg, Pa.

Dear Sir: Your letter of the 23d instant, asking to be advised as to whether the Commonwealth can appeal from the acquittal of the defendant in a prosecution before a Justice of the Peace, for pollution of waters, under Section 100 of the Act of July 28, 1917, P. L. 1215, duly received.

In reply would say that Judge Bromall, in the case of *Commonwealth vs. Mitchell*, 23 Dist. Rep. 496, stated the principles applicable to appeals from summary proceedings before justices of the peace, as follows:

“Where an act of assembly provides a fine or penalty for the violation of it, to be collected as fines and penalties are now collected by law, it is a criminal proceeding and not a civil one; *Com. v. Peaco*, 19 Dist. R. 880, per Hassler, J.

.....
The third reason presents a question of more difficulty. Can the Commonwealth appeal from an acquittal of the defendant? Art. V. § 14, of the Constitution declares: ‘In all cases of summary conviction in this Commonwealth, or of judgment in a suit for penalty before a magistrate or court not of record, either party may appeal to such court of record as may be prescribed by law, upon allowance of the appropriate court or a judge thereof upon cause shown’. The Act of April 17, 1876, P. L. 29, was passed for the purpose of prescribing the court to which appeals shall be had. It could not enlarge or restrict the right of appeal as described in the Constitution. It must be construed in harmony with the Constitution. It says: ‘In all cases of summary conviction....either party may, within five days after such conviction, appeal.... and either party may also appeal from the judgment of a magistrate.... in a suit for a penalty.’ In the Constitution the words summary conviction are used to designate by definition a class of cases, and as to such class either party is given a right of appeal. In the act a literal reading gives to the words ‘summary conviction’ the restricted sense of those cases wherein a conviction takes place. This is not in harmony with the Constitution. A liberal reading gives to the words summary conviction the signification of defining a class, and to the words ‘after such convictions’ the meaning after the question of such conviction has been determined. This is in harmony with the Constitution. This liberal interpretation was adopted by Judge Biddle in *Com. v. Messinger* 13 Dist. R. 621. The same conclusion was reached by Judge McClure in *Com. v. Jolly*, 15 Dist. R. 305. A different conclusion moved Judge Patton in deciding *Com. v. Hudson*, 17 Dist. R. 1013, who held that no appeal lies from acquittal in summary conviction proceedings.”

Sections 147 and 148 of the Act of July 28, 1917, P. L. 1215, provide for prosecutions for the violation of the different provisions of this Act, including Section 100, for polluting streams. The parts of these sections applicable to the questions submitted are as follows:

"Sec. 147. Any alderman, magistrate, or justice of the peace, upon information or complaint, made to him by affidavit of one or more persons, charging any person with having violated any of the provisions of this act, or any of the rules and regulations adopted and promulgated by the Commissioner of Fisheries pursuant to this act, is hereby authorized and required to issue his warrant.

Sec. 148. If convicted, such person shall be sentenced to pay the fine provided in this act for such violation, together with the costs of suit. The person so convicted shall, on failure to pay such fine, be sentenced by such alderman, magistrate, or justice of the peace, to undergo imprisonment in the county jail of the county in which such conviction takes place, for a period of one day for each dollar of fine so imposed, unless the person so convicted shall give notice of an intention to procure a writ of certiorari or appeal;

These provisions of the Act of 1917 make the proceeding a criminal one, and it is subject to the general rules of criminal law. Further, a new law was passed by the Legislature of 1917, approved July 11, P. L. 771, in reference to appeals in cases of summary proceedings before a Justice of the Peace, which is in these words (Sec. 1):

"That in all cases of summary conviction in this Commonwealth, before a magistrate or court not of record, either party may within five days after *such conviction*, appeal to the court of quarter sessions of the county in which such magistrate shall reside or court not of record shall be held, upon allowance of the said court of quarter sessions, or any judge thereof, upon cause shown; and either party may also appeal from the judgment of a magistrate or a court not of record, in a suit for a penalty, to the court of common pleas of the county in which said judgment shall be rendered, upon allowance of said court, or any judge thereof, upon cause shown", etc.

This section gives an appeal to either party from the conviction of the defendant before the Justice of the Peace.

Where the case has been fully heard by the Justice and witnesses examined, and after full hearing the Justice of the Peace has acquitted the defendant and discharged him, the Commonwealth, under the Act just cited, has no appeal.

In the case in which you raise this question, it would appear that witnesses were examined and the Justice decided that "every reasonable and practicable means had been used to prevent and abate the pollution" of the waters in question. Under Section 100 of the Act of July 28, 1917, P. L. 1215, it is provided that it shall be a defense

“if it be shown to the satisfaction of the Commissioner of Fisheries or to the *proper court* that every reasonable and practicable means has been used, etc.”

In the case you mention, the Justice of the Peace was “the proper court” and if he was satisfied that every reasonable and practicable means to abate the pollution had been used by the defendant, he had a right to discharge him.

You are, therefore, advised that in cases where there has been a full hearing before the Justice of the Peace, and the defendant has been acquitted and discharged, the case is ended and the Commonwealth has no appeal.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

**OPINIONS TO BOARD OF COMMISSIONERS OF
PUBLIC GROUNDS AND BUILDINGS**

OPINIONS TO BOARD OF COMMISSIONERS OF PUBLIC GROUNDS AND BUILDINGS.

The State Workmen's Insurance Fund is not required by law to requisition or procure its supplies, or rent the offices it may need, through the Board of Public Grounds and Buildings, or its Superintendent.

Office of the Attorney General,
Harrisburg, Pa., January 30, 1919.

Honorable George A. Shreiner, Superintendent Board of Public Grounds and Buildings, Harrisburg, Pa.

Sir: There was duly received your communication of the 15th inst., to the Attorney General, requesting an opinion upon the following questions, viz:

Whether the State Workmen's Insurance Fund is required under the law to procure or requisition its supplies, and to rent such offices as it may need, through the Board of Public Grounds and Buildings, or the Superintendent of said Board, pursuant to the Act of March 26, 1895, P. L. 22, and the Act of June 7, 1911, P. L. 700.

The said Act of 1895 vested in said Board authority to contract for all the supplies needed by the several departments, boards and commissions of the State government. It has been supplemented and amended, but it is not necessary to review or discuss this in connection with the question here under consideration. The said Act of 1911 vested said Board with the authority to rent such offices as any of the aforesaid governmental departments, boards or commissions may need for their accommodation outside the Capitol Buildings. The question here submitted consequently turns upon the point whether the State Workmen's Insurance Fund is to be deemed such a department, board or commission of the State government, within the intent of the Act creating it, as to bring it within the purview of the aforesaid Acts in the matter of such supplies, or offices, as it may need.

The Act of June 2, 1915, creating the State Workmen's Insurance Fund and therein called the "Fund", provided that the expenses of its organization and administration until July 1, 1919, should be paid out of an appropriation of \$300,000 thereby made for that purpose. This appropriation was supplemented by another of \$200,000 made by the Act of July 25, 1917. (Appropriation Acts 1917, page 193). The Act of July 20, 1917, P. L. 1139, amended the said Act of 1915 to the effect that the expenses of the Fund might

be paid out of the receipts from the subscribers thereto, after January 1, 1918, whenever there were sufficient funds from that source available for that purpose. In Section 3 of the said Act of 1915 it was provided, *inter alia*, as follows:

"Such Fund shall be administered by the Board, without liability on the part of the State, except as hereinafter provided, beyond the amount thereof, and shall be applied to the payment of such compensation."

In an opinion by Deputy Attorney General Hargest to the State Treasurer, dated December 9, 1915, it was held that—"No part of the Fund belongs to the State." Report of Attorney General, 1915-1916, page 189. In an opinion of this Department, rendered by the writer hereof, to Mr. William J. Roney, Manager of said Fund, under date of October 23, 1918, it was held that the said Fund, should carry its own insurance on its furniture, supplies and equipment against loss by fire, and that in case of such loss it could not look for replacement to the State Fire Fund under the Act of May 14, 1915. In the course of this latter opinion it was said:

"Since the Fund is not State money, the conclusion follows that any office furniture or other equipment purchased therefrom, and used in the administration thereof, would not be the property of the State, but that of the Fund. * * * It rests with the Fund to supply, replace and maintain whatever furniture or other office equipment it may require in its administration, being a part of the expenses thereof. It can not look to the State therefor beyond that provided out of said appropriations."

I see no reason to depart from the principle laid down in the above cited rulings of this Department, and it clearly governs this present case. It is unnecessary to restate at length the reasons in support thereof. The said Fund was established by the State as an instrumentality to further its system of Workmen's Compensation. It is intended to be wholly self-supporting, and, as above pointed out, its receipts are not public funds, but are for the uses and purposes set forth in the said Act creating it, and to be distributed in the manner therein prescribed. Expenditures for supplies and rents are administrative expenses, to be paid from the receipts of its subscribers and in their benefit. Under the provision of Section 3, above quoted, the State expressly exempts itself from liability on account of said Fund other than that provided in the Act. There is no provision whatever in it directing that its supplies or equipment be requisitioned for or supplied through the Board of Public Grounds and Buildings or its Superintendent, or that it shall rent the offices it may need through that medium. We can not imply such require-

ment against the plain intention that it be a self-supporting and self-administering agency.

In accordance with the foregoing, you are therefore advised that the State Workmen's Insurance Fund is not required to requisition or procure its supplies, or rent the offices it may need, through the Board of Public Grounds and Buildings, or the Superintendent of that Board, pursuant to the aforesaid Act of 1895, or its supplements and amendments, and the said Act of 1911.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

INSURANCE ON STATE BUILDINGS.

As to any property owned by the state at the Valley Forge Park, at the date of the approval of the Act of May 14, 1915, on which insurance was then carried, insurance may now be taken out, not to extend beyond December 31, 1920, and in an amount to conform to the requirements of the Act.

Neither the Board of Public Grounds and Buildings nor the Valley Forge Park Commission can place any outside insurance on any buildings or property which the state owns in connection with the Valley Forge Park, where no insurance was carried thereon at the date of the passage of the Act of May 14, 1915, nor upon any buildings or property acquired since that date.

Office of the Attorney General,
Harrisburg, Pa., March 12, 1919.

Hon. George A. Shreiner, Superintendent of Public Grounds & Buildings, Harrisburg, Pa.

Sir: There was duly received your communication of the 1st inst. to the Attorney General, asking to be advised whether outside insurance could lawfully be procured on the buildings owned by the Commonwealth located on the lands of the Valley Forge Park, and if so, whether any part of the cost of such insurance can be paid from the funds appropriated to the Board of Public Grounds and Buildings for insurance purposes. From a communication to you of Mr. John W. Jordan, Secretary of the Valley Forge Park Commission, dated the 7th inst., and transmitted to this Department in your further communication of the 10th inst., I understand that certain of these buildings have been acquired by the State since the passage of the hereinafter mentioned act of assembly, and that insurance was carried on those then owned by the State, but which insurance has since lapsed, there being no insurance on any of them at the present time.

[The Act of May 14, 1915, P. L. 524, created an Insurance Fund and establishes a comprehensive system providing for the payment therefrom of the cost of rebuilding, restoring, or replacing any property of the Commonwealth damaged or destroyed by fire or other casualty. Its purpose is to have the State carry its own insurance. The property owned by the Commonwealth in connection with the Valley Forge Park, is within the purview of this Act, and hence subject to its limitations in the matter of insurance and entitled to its benefits in the event of any loss thereto caused by fire or other casualty. Section 7 of the Act provides as follows:

“That, from and after the adoption and approval of this act, it shall be unlawful for any department, bureau, commission, or other branch of the State Government; or any board of trustees, overseers, managers, or other person or persons, or custodians of State property; to purchase, secure, or obtain any policy of insurance on any property owned by the Commonwealth, the term of which policy of insurance shall extend beyond the thirty-first day of December, Anno Domini one thousand nine hundred and twenty; or to purchase, obtain, or secure any such policy of insurance for any amount in excess of the amount of insurance outstanding at the date of the approval of this act, after deducting from such amount twenty per centum thereof for each calendar year which shall have elapsed from and after the thirty-first day of December, Anno Domini one thousand nine hundred and fifteen, to the date of purchasing, securing, or obtaining such policy of insurance.”

By virtue of the above provisions no insurance can lawfully be placed upon any State-owned property for a term extending beyond December 31, 1920, nor in an amount in excess of the amount thereon at the time of the approval of the above Act, less the reductions thereby specifically required. The continuance of insurance is permissible only in cases where there was “*outstanding insurance at the date of the approval*” of the Act, and upon the prescribed diminishing scale which will operate to effect its complete expiration not later than December 31, 1920.

In an opinion of this Department rendered by Deputy Attorney General Hargest, dated June 14, 1916, to the Superintendent of the Board of Public Grounds and Buildings, it was said—“no provision is made for insuring new buildings erected since the passage of the Act.” Attorney General’s Reports 1915-1916, page 459. The further conclusion follows that no insurance can be taken out on any property acquired by the Commonwealth subsequent to that date. The general rule would therefore be that where no insurance was

carried on State-owned property at the time of the approval of this Act, none could thereafter be placed thereon, and none can be placed on property acquired by the State after that time.

In accordance with the foregoing, you are therefore advised as follows:

First—As to any property owned by the State at the Valley Forge Park at the date of the approval of the above Act, namely: May 14, 1915, on which insurance was then carried, insurance may now be taken out on said property not to extend beyond December 31, 1920, and in an amount as will conform to the requirement of the Act. Since three full calendar years have elapsed since the thirty-first day of December, 1915, it will be seen that the amount of insurance that now could be taken out in such case must be 60% less than the amount carried at the time of the passage of the Act. If taken out, the cost thereof must be borne by the Valley Forge Park Commission out of any funds it may have available for such purpose. This cost cannot be paid by the Board of Public Grounds and Buildings out of the funds appropriated to it by the General Appropriation Act of 1917, since the appropriation to it for insurance purposes was limited to insurance upon State property "which may be properly under the control and supervision" of said Board. (Appropriation Acts 1917, p. 57).

Second—Neither the Board of Public Grounds and Buildings nor the Valley Forge Park Commission can lawfully place any outside insurance on any buildings or property which the State owns in connection with the Valley Forge Park where no insurance was carried thereon at the time of the passage of the above cited Act, or upon any buildings or other property there acquired by the State since that time, protection against loss by fire or other casualty being afforded pursuant to the provisions of said Act.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

REPAIRS TO BUILDINGS LEASED TO COMMONWEALTH.

The lessor of a building leased to the Commonwealth is not bound to make repairs unless he specifically covenants to do so.

Office of the Attorney General,
Harrisburg, Pa., August 14, 1919.

Honorable Thomas W. Templeton, Superintendent of Public Grounds
and Buildings, Harrisburg, Pa.

Sir: I am in receipt of your letter of the 4th instant, requesting an opinion as to whether the lessor or lessee of a building is liable for repairs to the exterior of the building, or to the interior that has been damaged by water on account of a roof that leaks.

The circumstances which prompt your inquiry I understand to be as follows:

The Commonwealth of Pennsylvania has rented from Norman D. Gray the property, located at the corner of Second and Chestnut Streets, Harrisburg. The roof of the building is in a bad condition, and the question arises whether the lessor, or the Commonwealth of Pennsylvania, the lessee, is liable for the cost of repairing the roof.

I have examined the lease, and also the authority to sublet given by the owner of the building to the lessor, and find that they contain no covenant or stipulation with regard to the cost of repairs or the liability for such costs, which would take the present case out of the operation of the general rule of law governing the subject.

The Courts of this State have uniformly held that the landlord is not liable for repairs unless he specifically covenants to make the same. The decisions are numerous.

In *Moore vs. Weber*, 71 Pa. 429, Justice Sharswood held that—

“* * * In the absence of an express agreement there is no implied obligation on the landlord to repair demised premises, nor does he impliedly undertake that they are fit for the purposes for which they are rented—that they are tenantable or shall continue so. If they burn down he is not bound to rebuild. The rule here, as in other cases, is *caveat emptor*. The lessee’s eyes are his bargain. He is bound to examine the premises he rents, and secure himself by covenants, to repair and rebuild.”

In *Holidaysburg Seminary Company vs. Gray*, 45 Superior Ct. 426, it was held that—

“Where a lease contains no specific covenant on the part of the landlord to repair the roof of the building leased, the landlord will not be liable for such repairs.”

In *Levine vs. McClenathan*, 246 Pa. 374, Justice Elkin said:

“* * * The tenant takes the property as it is and he must be the judge of its tenantable condition. If the tenant wants the landlord to make repairs, he must require such a covenant to be inserted in the lease; and failure to so provide by a covenant in the lease, relieves the landlord from any such duty. * * * there can be no recovery against the landlord if the damage resulted from failure to make repairs, or because of the untenable condition of the demised premises. The tenant took the premises as they were and is bound by his bargain.”

A recent case to the same effect is that of *Cessa vs. Rozzi, Appellant*, in 68 *Superior Ct.* 593.

If the Commonwealth of Pennsylvania desires to be relieved from the cost of making repairs to buildings which it leases, it will be necessary to change the present form of lease and insert a covenant whereby the lessor shall be required to make all necessary repairs and keep the property in a tenantable condition.

I am, therefore, of the opinion that inasmuch as Mr. Gray, the lessor, occupying the position of landlord to the Commonwealth, did not specifically covenant to make repairs in the lease jointly executed by him and the Commonwealth, he is not liable for the cost of repairing the roof of the building in question.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

LICENSE TO PRACTICE MEDICINE.

The Bureau of Medical Education and Licensure has no authority to re-license a physician who has already been licensed to practice medicine in this state, unless he complies with all the requirements of the Board as at present promulgated.

Persons who served in the army or navy of the United States may enter the examinations for license to practice medicine, if they take a license under the Act of Assembly authorizing them to take such license without examination.

Office of the Attorney General,
Harrisburg, Pa., August 14, 1919.

Dr. J. M. Baldy, President, Bureau of Medical Education and Licensure, Philadelphia, Pa.

Sir: Your request for an opinion as to whether the Bureau of Medical Education and Licensure may re-license a physician who has already been licensed to practice medicine in this Commonwealth has been received by this Department.

In my opinion, the Bureau of Medical Education and Licensure has no authority to re-license a physician who has already been licensed to practice medicine in this Commonwealth, unless such physician complies with all the requirements of the Board as at present promulgated. It is true that certain physicians have been licensed many years ago when the preliminaries and the medical education were not those required by the Bureau at the present date. Such physicians can be re-licensed by the Bureau of Medical Educa-

tion and Licensure by complying with the requirements as laid down by the Bureau at the present time and by passing the examination. Their former licenses need not be revoked, and if they fail to pass the examination, they are still licensed physicians for the purposes as contained in the original Act, under which they were licensed.

You also ask whether persons licensed under the recent Act of Assembly, "providing for the granting of certificates of licensure to practice medicine and surgery to certain persons who served in the army or navy of the United States or any branch or unit thereof", may in future enter the Pennsylvania examinations if they now take a license under this Act without an examination.

You are advised that there is nothing in the recent Act to prevent persons who secure this privilege of licensure, by reason of the fact that they have served in the Army or Navy of the United States, from entering the examinations in the future; and you are further advised that it is the duty of your Bureau, having issued a license without an examination under that Act of Assembly, to admit such licensee to an examination subsequently upon his application therefor.

Yours very truly,

BERNARD J. MYERS,
Deputy Attorney General.

DESTRUCTION OF NOXIOUS ANIMALS.

Only additional office expenses, clerk hire and postage, made necessary by the Act of May 23, 1919, are chargeable to the fund for the payment of bounties.

Telephone tolls and extra telephone rentals made necessary by the Act of May 29, 1919, are office expenses within its meaning.

Office of the Attorney General,
Harrisburg, Pa., August 7, 1919.

Honorable T. W. Templeton, Superintendent Public Grounds and Buildings, Harrisburg, Pa.

Dear Sir: Your favor of recent date asking for a construction of Act No. 44, approved May 23, 1919, is at hand.

You ask whether the telephone rentals and other matters necessary for compliance with this Act should be charged to the Fund created by it.

This Act of Assembly creates a reward or bounty for the destruction of noxious animals killed within this Commonwealth and provides a method for the payment of such rewards or bounties.

Section 5 of this law provides that there shall be a fund designated and known as the "Fund for the Payment of Bounties", to be made up of one-half of the hunters' license fees, fines, and penalties, provided by the Act of April 17, 1913, P. L. 85, and of all other fines and penalties set apart under any other laws of the Commonwealth for the payment of bounties.

This Section provides, among other things:

"That the office expenses, clerk hire, postage, etc., necessary to the performance of the extra duties imposed by this Act upon the Board of Game Commissioners, shall be a charge against the fund created by this Act, and shall be paid upon requisition of the Secretary of said Board, and in the same form and manner as requisitions for bounty are paid."

It is plain from this provision that any additional office expenses, clerk hire and postage which are made necessary in carrying out this Act of Assembly are chargeable to, and should be paid out of, the "Fund for the Payment of Bounties." Telephone tolls and extra telephone rentals required by this Act, are "office expenses", within the meaning of the language above quoted.

The ordinary office expenses, clerk hire, postage, telephone tolls and rental necessary in performing the ordinary duties of the Board of Game Commissioners are not chargeable to this Fund, but only those additional expenses, telephone tolls, rentals, clerk hire and postage which are made necessary by performing the duties imposed under this Statute.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

PURCHASE OF SUPPLIES.

The Department of Agriculture should purchase the material necessary for scientific investigations which was not in the schedule of materials provided by the Board of Public Grounds and Buildings.

Office of the Attorney General,
Harrisburg, Pa., August 21, 1919.

Honorable Thomas W. Templeton, Superintendent, Board of Public Grounds and Buildings, Harrisburg, Pa.

Sir: This Department is in receipt of your favor of recent date asking to be advised whether the Superintendent of the Board of

Public Grounds and Buildings is required to furnish photograph material, books and other articles, equipment and supplies for use of the Bureau of Plant Industry of the Department of Agriculture, which are used in scientific investigations.

Your inquiry is prompted by Section 13 of the Act of May 8, 1919, reorganizing the Department of Agriculture. This section provides in part:

"It shall be the duty of the Board of Public Grounds and Buildings to furnish all supplies and equipment necessary to carry out the work of the said department and its bureaus."

The Board of Public Grounds and Buildings furnishes the usual and ordinary supplies for all of the departments of the State government. This rule, however, does not apply where the departments are supplied with a specific appropriation of the purchase of equipment and supplies. In order to enable the Board of Public Grounds and Buildings to carry out its duty in this respect, the several departments are required to indicate to that Board what articles they may require, so as to enable the Board to prepare a proper schedule upon which to obtain bids, and it would seem that under the duty imposed by Section 13 of the Act reorganizing the Department of Agriculture the Board of Public Grounds and Buildings should supply all of the necessary supplies and equipment required by the Department of Agriculture and its bureaus, unless there is a specific appropriation made to that Department for this purpose.

In the General Appropriation Bill of 1919 is found this item:

"For the payment of supplies, including scientific apparatus, chemicals, books, postage and other materials not obtainable otherwise, including maintenance of field laboratories of the Bureau of Plant Industry of the Department of Agriculture, for two years, the sum of ten thousand dollars (\$10,000)."

It, therefore, appears that there is a specific appropriation for the purchase of "scientific apparatus, chemicals, books, postage and other materials not obtainable otherwise." I am of the opinion that the words "not obtainable otherwise" must be held to mean through the ordinary requisition upon the Board of Public Grounds and Buildings, in other words, that if "scientific apparatus, chemicals, books, postage and other materials" are on the schedule for which bids have been received and contracts let they are obtainable by requisition through the Board of Public Grounds and Buildings, but if such "scientific apparatus, chemicals, books, postage and other materials" are not obtainable from a subcontractor with the State, but must be purchased especially by the Board of Public Grounds and Build-

ings, instead of having the Board of Public Grounds and Buildings purchase such apparatus and supplies they should be purchased directly by the Bureau of Plant Industry out of this appropriation.

A similar question arose in 1913, when your Department was advised that "drugs, chemicals and scientific instruments" for the Chemical Laboratory of the Agricultural Department should be purchased out of a specific appropriation therefor, and should not be furnished by the Board of Public Grounds and Buildings. We adhere to that opinion and advise you that the Bureau of Plant Industry of the Department of Agriculture must purchase any "scientific apparatus, chemicals, books, postage and other materials" which are not on your schedule, and for the furnishing of which no contracts are let, but you are to furnish such scientific apparatus, books and other materials which have been provided for in the schedule, and for the furnishing of which contracts have already been made.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

BOARD OF PUBLIC GROUNDS AND BUILDINGS.

The Board of Public Grounds and Buildings is not required to contract for the rent of rooms outside of the capitol building, for the meetings of the Trustees of the Soldiers' and Sailors' Home at Erie.

Office of the Attorney General,
Harrisburg, Pa., September 23, 1919.

Honorable T. W. Templeton, Superintendent, Board of Public Grounds and Buildings, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 2nd inst. inquiring whether the Board of Commissioners of Public Grounds and Buildings is compelled to pay for the rental of office rooms outside of the Capitol Building for holding meetings of the Trustees of the Soldiers' and Sailors' Home at Erie, Pennsylvania.

Your inquiry, I apprehend, is occasioned by Section 41 of the Act approved June 16, 1919, No. 243, which provides:

"In all cases where it has become or may become necessary for the proper discharge of the duties of any department, board, bureau, division, or commission, to occupy offices or rooms (excepting rooms or buildings

used as dispensaries for the treatment of indigent tuberculosis persons under the supervision of the State Department of Health) in any city or places other than where the Capitol is located, the said board may contract in writing for the rent of all such offices, rooms, and accommodations. It shall be unlawful for any department, board, bureau, division or commission, other than the Board of Commissioners of Grounds and Buildings, to enter into any such contracts."

The Soldiers' and Sailors' Home at Erie, Pennsylvania, was established under authority of the Act of June 3, 1885, P. L. 62. By its first section the Governor, State Treasurer, Auditor General, certain representatives of the General Assembly, and a committee of honorably discharged soldiers were constituted a commission to locate and establish this Home, and by section 7 of the act the commission and their successors was constituted a board of trustees to manage and govern the institution, to employ the necessary officers and employees and to formulate rules for the admission of disabled and indigent soldiers.

In the absence of clear legislative authority to the contrary, the proper place for the Board of Trustees of the Soldiers' and Sailors' Home at Erie, to meet, is at the institution itself, the place concerning which the duties of the Board exclusively relate. Meetings outside the Home cannot, therefore, be necessitated by the character of the business to be transacted.

I am of the opinion that the Board may meet in the Capitol Building at Harrisburg or elsewhere in cases where the nature of the business to be transacted does not necessitate the presence of the trustees at the institution. Such meetings, however, could only be occasioned by a desire to serve the convenience of the members of the Board, and the Commonwealth cannot be put to the additional expense of renting a room for this purpose.

You are, therefore, specifically advised that the Board of Commissioners of Public Grounds and Buildings is not required to contract for the rent of rooms outside the capitol building for the meetings of the Board of Trustees of the Soldiers' and Sailors' Home at Erie, Pennsylvania.

Very truly yours,

FRANK M. HUNTER,
Deputy Attorney General,

BRIDGES.

The Cowanesque River bridge, near Knoxville, Pa., was destroyed within the meaning of the Act of April 28, 1903, and its supplements, so as to require rebuilding by the Commonwealth.

Office of the Attorney General,
Harrisburg, Pa., October 16, 1919.

Honorable Thomas W. Templeton, Superintendent, Public Grounds
and Buildings, Harrisburg, Pa.

Sir: We have your request, dated October 9, 1919, for an opinion as to whether the bridge over the Cowanesque river near Knoxville, Tioga County, was "destroyed" by the flood of May 6, 1919, so as to require it to be rebuilt at the expense of the State.

It appears that a bridge across this river at this precise point was destroyed by flood and high water on or about June 17, 1916, and, pursuant to proceedings for the purpose, it was rebuilt at the cost of the State.

It now appears that there was a flood in the river on May 6, 1919; the result of which was to undermine and completely destroy the south abutment and one of the wingwalls thereof.

The report of Charles E. Covert, who made an examination at your instance, says:

"The east wingwall is still standing but the west wingwall and face wall have failed completely. The concrete footing is cracked and broken, showing the heads of the timber piles in several places. The bottom of this footing is just at the level of the water, which is 6 to 8 feet deep at this point. The east truss of the south span is still in place but is badly warped and bent. The south end of the west truss has dropped several feet and rests on the debris of the abutment. Most of the members of this truss are badly bent, the end members being severely damaged. The concrete floor is broken at the first panel point and rests partly on the damaged steel work and partly on the abutment. The bridge is closed to traffic, except pedestrians."

Mr. Covert's conclusions are:

"It would not be advisable to attempt to make use of the present damaged span, except perhaps some of the floor stringers, because of the twisting and bending of the members when the west truss fell. While some of the members could probably be straightened it would not be safe to rely on their strength in a new structure."

Mr. Willis Whited, the Bridge Engineer of the State Highway Department, in his report, says:

"The west truss of the south span is considerably damaged, the steel work in the floor is only slightly damaged, the east truss is almost intact and the floor slab is badly cracked..... It will be necessary to rebuild the south abutment completely and also the floor of the bridge and repair whatever damage has been done to the steel work in doing so..... In the meantime the bridge is absolutely impassable to vehicles and with difficulty even by foot passengers."

The river curves where this bridge crosses it, and the current, in normal stages of the water, passes close to the south abutment. The high water, with the current carrying it in that direction and against the abutment, caused its undermining. This is the same cause which destroyed the bridge at the same place in 1916.

At that time a question arose whether this bridge was actually destroyed. Upon exceptions to the report of the viewers, that question was passed upon by Judge McCarrell. *In re Bridge over Cowanesque River in Nelson Township, Tioga Co., 20 Dau. Co. Rep. 305.*

The condition of the bridge as it was left by the flood of June 17, 1916, as described by Judge McCarrell in the case just cited, does not show any greater destruction than that caused by the flood of May 6, 1919. It is apparent that this structure cannot now be used as a bridge and in view of the reports above referred to, it is doubtful whether any portion of one span can be utilized.

In the case of the rebuilding of the *Catawissa River Bridge over the Susquehanna River*, 7 *Dau. Co. Rep. 258*, the flood carried away two spans in the center, somewhat damaged the abutments and moved the remaining two spans out of alignment. It also forced one pier bodily down the stream a distance of about 5 feet. The Court held that the bridge was destroyed.

In that case Judge Kunkle said:

"To hold that there must be a total carrying away or a total destruction of the bridge would be in effect to nullify the Act.

On the other hand the county claims that the bridge is destroyed within the meaning of the act when it is so damaged by the flood or storm as to be rendered unfit for use. We cannot adopt this view of the act. If the flooring of the bridge is carried away, or so affected by the flood or storm as to make it unsafe for use, or any other part of the bridge is so damaged that the bridge cannot be used, we do not think that the bridge could necessarily be said to be destroyed

The true interpretation of the act we think is to be found between these two extreme views.....

When interpreted in the light of their association with the word rebuild the true meaning of the words 'carried away or destroyed' is ascertained. Thus interpreted we are of the opinion that a bridge may be said to be carried away or destroyed within the meaning of the act when the effect of the flood or storm upon it is such as to require or necessitate practically a rebuilding or reconstruction as distinguished from repairs."

It seems apparent that about one-half of this bridge will have to be rebuilt, and in order to build any bridge which will stand, the south abutment will have to be placed about thirty-five feet back of the one destroyed.

I am, therefore, of opinion that the bridge is destroyed within the meaning of the act of April 28, 1903, and its supplements, so as to require its rebuilding at the cost of the Commonwealth.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General,

WAPASEENING CREEK BRIDGE.

In letting the contract for the bridge, the Board of Public Grounds and Buildings should avoid the type of construction which is presumably covered by the Luten patents, and which would invite litigation.

Office of the Attorney General,
Harrisburg, Pa., December 2, 1919.

Honorable T. W. Templeton, Superintendent Public Grounds and Buildings, Harrisburg, Pa.

Dear Sir: Some time ago you advised this Department that the Board of Public Grounds and Buildings had awarded a contract for building a bridge over the Wapaseening Creek, on the William Penn Highway, Route No. 15, in Windham Township, Bradford County, to Messrs. Whitaker & Diehl, Manufacturers, Harrisburg, Pa., who were the low bidders.

It appears that in submitting their proposition there were two kinds of construction, one plan being the standard type of concrete construction, and the other known as the Luten Patent.

You state that "in order to use the type of construction known as the Luten Patent, a royalty must be paid by the Contractor to the Patentee, of ten per cent of the contract price."

I understand the Contractor agrees to furnish either type to the Commonwealth at the same price, and you desire to be advised as to whether the Board can make a contract to build the bridge under the Luten Patent without involving the Commonwealth in any legal entanglements over patent rights.

We have delayed answering your communication in order to get some information concerning the so-called Luten Patent which we understood was available.

It appears that Daniel B. Luten has, from time to time, obtained approximately fifty patents covering reinforced concrete arches for bridge construction. Many of these patents have covered features which have been used in brick and stone arches for bridge construction for very many years, and many of said patents cover features which are merely the ordinary application of simple mechanical skill which any mechanic would employ.

Luten has been bringing suits against contractors since 1911 for the purpose of collecting royalties. His suits have practically amounted to a legal scandal; so much so, that at the meeting of the Association of Attorneys-General in Chicago, in 1914, this scandal was made the subject of a paper prepared and read to that association by the Assistant Attorney General of Iowa. Many of his suits have been settled out of Court. Many of them are against small contractors who are financially unable to fight a protracted infringement suit and who preferred to pay Mr. Luten money rather than pay the great expense of expert witnesses, and lawyers, which are necessary in patent cases. In some cases, where the defendant showed a disposition to contest the case, Luten did not pursue his claims.

I am advised that the railroads, and some State Highway Departments, and large contractors, are now apparently ignoring all of the Luten patents under the advice of counsel.

In order that the Board of Public Grounds and Buildings may have something of the history of Luten's methods, I will refer to some of these suits.

In the case of *Luten vs. Dover Construction Company*, 189 Fed. Rep. 405, decided May 1, 1911, Luten brought a suit for royalty growing out of the construction of a concrete bridge in Dover, Delaware, and claimed an infringement of five different patents, but the validity of the patents were not involved in that case.

In the case of *Luten vs. Rhoads & Knisely*, 194 Fed. Rep. 169, Luten brought suit against contractors for a royalty upon a patent growing out of the construction of a bridge in Centre County, Pennsylvania.

In the case of *Luten vs. Sharp, et al*, 200 Fed. Rep. 151; 217 Fed. Rep. 76, and 234 Fed. Rep. 880, Luten claimed that the contractor had infringed nine different patents by the construction of a bridge in Kansas. After fighting the case through the Court of Appeals, it was dismissed by the Court and Luten was not permitted to recover.

The case of *Luten vs. Bearce*, 219 Fed. Rep. 237; 229 Fed. Rep. 291, illustrates Luten's methods. The contractor built a bridge under a contract which provided that he was to pay Luten a royalty on the completion of the work, but Luten brought suit for infringement before the work was completed.

In the case of *Luten vs. Camp*, 221 Fed. Rep. 424, suit was brought against the contractor for the infringement of a patent. The case went off on a demurrer and the validity of the patent was not considered.

In the case of *Luten vs. Whittier*, 251 Fed. Rep. 590, suit was brought for infringement and the Court held that the patent which Luten claimed was infringed, was void for lack of invention.

In the case of *In re Luten*, 32 D. C. Rep. 599, the Court expressed doubt as to the patent ability of Luten's claims, but the case went off on other grounds.

In the case of *In re Luten*, 37 D. C. Rep. 379, it was held that what Luten claimed to be an infringement of his patent was a construction by the exercise of the simplest mechanical skill and was the performance of functions long known and anticipated by prior patents.

In *In re Luten vs. Washburn*, 253 Fed. Rep. 950, which was a suit for infringement, a number of Luten's patents were declared invalid. The Court said:

"All that appellant did was to put together by the exercise of the simplest mechanical skill things old in art to perform functions long known in a manner anticipated in prior patents we can see no invention in the case in suit."

In *Luten vs. Allen*, 254 Fed. Rep. 587, a suit for infringement was defended by the Attorney General of Kansas and one of Luten's patents was held void for lack of invention. The Court said:

"Any mechanic of ordinary skill in the doing of the work, would have developed the method employed from his understanding of such matters and in dealing with them."

In *Luten vs. Wilson Reinforced Concrete Company*, 254 Fed. Rep. 107, the suit was defended by the Attorney General of Nebraska

and several of Luten's patents relating to concrete arch bridges were declared void for lack of invention.

In the case of *Luten vs. Young*, 254 Fed. Rep. 591, the suit was defended by the Attorney General of Kansas, and one of Luten's patents held void for lack of invention.

In the case of *Luten vs. March*, 254 Fed. Rep. 701, the case was defended by the Attorney General of Iowa and several of Luten's patent's held void for lack of invention.

I have not attempted to refer to all of the litigation which Mr. Luten has brought, but I have referred to enough to indicate that he brings suit upon the slightest provocation, and that to make a contract involving any of his so-called patents, whether valid or not, would be inviting litigation.

I am, therefore, of opinion that no agencies of the Commonwealth of Pennsylvania should have anything to do with any construction which involves any of these alleged patents, and that in letting the contract for the bridge to which you refer, the Board of Public Grounds and Buildings should avoid the construction presumably covered by the Luten patents.

Very truly yours,

WM. I. SCHAFFER,
Attorney General

AUTOMOBILE INSURANCE.

No insurance, outside of that covered by the State Insurance Fund, should be placed upon State owned cars.

Office of the Attorney General,
Harrisburg, Pa., December 3, 1919.

Honorable T. W. Templeton, Superintendent of Public Grounds and Buildings, Harrisburg, Pa.

Sir: This Department received your communication of October 30, 1919, asking to be advised as to "just what specific insurance may be placed on automobiles outside the State Fire Insurance Fund."

In answer to the above stated inquiry an opinion was rendered to you by the writer hereof, dated November 18, 1919, which was recalled by letter to you dated November 25, 1919, and which opinion is superseded and overruled by the one hereby rendered.

The Act of May 14, 1915, P. L. 524, creates a fund—

“For the rebuilding, restoring, and replacing buildings, structures, equipment, or other property of the Commonwealth of Pennsylvania, damaged or destroyed by fire or other casualty.”

In an opinion of this Department to the Highway Commissioner, rendered by First Deputy Attorney General Keller, under date of October 4, 1916, holding that “theft” of an automobile is not a “casualty” within the intent of the Act, it was said:

“The Act applies to the State Highway Department and covers all property of the Commonwealth. This includes automobiles and trucks purchased for the use of your Department. The fund is intended to cover the replacement of such property damaged or destroyed by any casualty, such as fire, explosion, etc. If an automobile or truck belonging to the Commonwealth, in the control or custody of the State Highway Department is damaged or destroyed by fire, explosion, collision, or other accident or casualty, you will be entitled to have it replaced out of the insurance fund created by the Act of 1915, by complying with its provisions. If you deem it necessary to provide against theft of such automobiles and trucks, you will have to take out a special policy of insurance covering such risks, the prohibition in the Act of 1915 against obtaining a policy of insurance being necessarily limited to the kinds of insurance provided for by the fund which it is created.”

Attorney General's Reports, 1915-1916, page 268.

In an opinion of this Department to the Superintendent of Public Grounds and Buildings, dated August 5, 1918, rendered by Deputy Attorney General Hargest, it was ruled that damage to a building caused by boiler explosion, even though unaccompanied by fire, is covered by the State Fund.

The principle stated in the foregoing opinions governs in the determination of the question submitted by you, and it is unnecessary to restate the same at length. The State Fund covers all damage or loss to State owned automobiles resulting from fire or any other casualty. It does not relate to or cover damage done by State owned and operated automobiles to persons or non-state owned property. Inasmuch, however, as the State is not liable for the torts or negligent acts of its servants and employees, no insurance should be taken out or carried to cover the casualty or insure against the damage to persons or non-state owned property caused or occasioned by State owned and operated automobiles. As previously ruled, outside insurance may be taken out to insure State owned automobiles against theft.

You are accordingly advised that casualties to State owned automobiles, whether from fire or any other cause, are covered by the State Insurance Fund, and loss by reason of such casualty is replaced from said Fund, and consequently that no outside insurance against such casualty should be placed, and further that no insurance should be taken out against casualties or damage to persons or non-state owned property caused by State owned and operated automobiles.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

COMMISSION ON CONSTITUTION REVISION—SUPPLIES.

Supplies for the Commission on Constitutional Amendment and Revision should be paid for out of the appropriation made by Section 7, of the Act of June 4, 119, P. L. 388.

Office of the Attorney General,
Harrisburg, Pa., January 27, 1920.

Hon. Thomas W. Templeton, Supt. Board of Commissioners, Public Grounds and Buildings, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the thirteenth instant asking whether you are required to furnish supplies to the Commission on Constitutional Amendment and Revision, created by the Act of June 4, 1919, P. L. 388. I understand your inquiry is prompted by the receipt of a requisition for certain leather binders to be used for holding the proceedings of the Commission, and on the outside of which binders is printed the title of the Commission and the nature of the material, to be, from time to time, filed therein.

I am of the opinion that these binders and other supplies of the Commission should be paid for out of the appropriation made by Section 7 of the Act referred to.

The preceding section requires your Board to provide suitable quarters at the State Capitol for the use of the Commission and its employes; and the fifth section makes it the duty of all Departments, Boards and Commissions to cooperate with the Commission, but I am of the opinion that these sections do not contemplate that your Board should furnish and pay for the supplies requested by the Commission.

You should cooperate with it as far as possible, and lend it such things of a permanent character, such as desks, typewriters, etc., as you are able to do, without interfering with the work of the Several Departments and Bureaus of the State. Where, however, it is necessary to purchase supplies for the Commission, the same should be paid for out of the moneys specifically appropriated to its use, and you are now accordingly so advised.

Very truly yours,

FRANK M. HUNTER,
Deputy Attorney General.

**OPINIONS TO THE DEPARTMENT OF STATE
POLICE**

OPINIONS TO THE DEPARTMENT OF STATE POLICE.

EMPLOYEES RETURNING FROM WAR.

The Acting Superintendent of Police is informed that those in the employ of the State who have gone to war, should have the right to return to the positions which they held in the State Government when they are mustered out of the United States service, provided such return be made within a reasonable time.

Office of the Attorney General,
Harrisburg, Pa., May 16, 1919.

Captain George F. Lumb, Acting Superintendent of State Police,
Harrisburg, Pa.

Dear Sir: Your favor of the 9th inst., addressed to the Attorney General, was duly received.

I will answer your questions seriatum:

1. You ask what the status of the Acting Superintendent will be upon the conclusion of the war.

The war will not be concluded until the peace treaty is approved and the President formally promulgates the fact. Those in the service of the United States will have the right to return to the positions which they hold in the State Government when they are mustered out of the service of the United States, provided such return be made within a reasonable time. The war may be concluded while some of the employees of the State or of your Department are still in France. As to such persons, they should have an opportunity to resume their positions when they are mustered out of the Federal service.

This applies to the Superintendent, as well as to the other officers and employees, and the return of the Superintendent will, of course, determine the status of the Acting Superintendent.

2. The Acting Superintendent and other employees of your Department who are filling the positions of persons in the Federal service, will continue to draw their salaries until those persons return.

3. In the event that an officer should be mustered out of the Federal service and does not return to your Department, the position should not be held open beyond a reasonable time. In that event you will be justified in giving such officer notice that unless

he returns to the service of the State within ten days after the receipt of notice, his position will not be held open for him.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

ARRESTED CARS.

An officer who seizes a motor vehicle under § 7 of the act of June 30, 1919, P. L. 702, must himself keep possession of the machine until the true owner is ascertained in the proceedings in the criminal court.

If such officer wishes to relieve himself of the care of the machine he should store it in the nearest garage and secure a nonnegotiable warehouse receipt for the same under the act of March 11, 1909, P. L. 19.

As the act of 1919 gives such officer the right to seize the motor vehicle he becomes by act of the law the agent of the owner and therefore can act for the owner in making a proper disposition of the machine.

Office of the Attorney General,
Harrisburg, Pa., February 28, 1920.

Captain William E. Mair, Department of State Police, Harrisburg, Pa.

Sir: Your letter of the 18th instant, requesting an opinion from this Department "in regard to who is the proper authority and the procedure to dispose of a motor vehicle seized by police under the provisions of Section 7, Act 284, P. L. 1919," has been referred to me.

In reply would say that the Act of the 30th of June, 1919, P. L. 702, (Act No. 284) Section 7, provides as follows:

"Section 7. That it shall be unlawful, and it is hereby prohibited, for any person to have in his possession any motor vehicle, or any part or parts thereof, with the knowledge that any trademarks, distinguishing or identification number, manufacturer's number, serial number, or mark has been or is removed, defaced, destroyed, or obliterated, or so covered as to be concealed, or where such trademark, distinguishing or identification number, manufacturer's number, serial number, or mark has been or is altered or changed in any manner whatsoever. Any person having in his possession any motor vehicle, or part or parts thereof, from which such trade-marks, distinguishing or identification number, manufacturer's number, serial number, or mark has been so removed, defaced, destroyed, or obliterated,

covered altered, or changed, shall be prima facie presumed to have knowledge thereof, and the burden of proof shall rest upon such person to show that he had no such knowledge.

“It shall be the duty of every sheriff, deputy sheriff, constable, or police officer, having knowledge of any motor vehicle on which the manufacturer’s number or identification mark has been defaced, altered, or obliterated, to seize and take possession of the same, and to arrest the owner or custodian thereof, and make information against him for violation of this act, and to notify immediately the State Highway Commissioner.”

Under the latter provision of this act, the officer has the right and must seize and take into his possession any motor vehicle on which the manufacturer’s number or identification mark has been defaced, altered, or obliterated and make information before a Justice of the Peace against the person having the same in his possession. This procedure does not in any way divest the legal title of the true owner.

“In the absence of facts tending to estop the true owner from asserting his rights, no title is acquired by one who purchases in good faith from a mere bailee, or from a thief, borrower, or finder.”

Rapp v. Palmer, 3 Watts, 178.

Hegeman v. McCall, 1 Philadelphia, 529.

McMahon v. Sloan, 12 Pa. 229.

Hicks v. Weaver, 1 Yeates, 478.

Under these decisions, therefore, this seizure by the officer of the motor vehicle under Section 7 of the Act of June 30th, 1919, P. L. 702, in no way prevents the true owner from asserting his title to it in any legal matter. But this act unfortunately does not provide any method or procedure by which the true owner of the motor vehicle can recover possession thereof. When seized by the officer under this Section of the Act, the motor vehicle is *in custodia legis* and is therefore not subject to be replevied. In the case of *Cunningham v. Wilmerding Boro.* 38 P. Superior Ct. at page 20, Judge Rice said:

“The Act of April 3, 1779, Sm. L. 470, provides as follows: ‘That all writs of replevin granted or issued for any owner or owners of any goods or chattels, levied, seized or taken in execution, or by distress or otherwise, by any sheriff, naval officer, lieutenant or sub-lieutenant of the city of Philadelphia or of any constable, collector of public taxes; or other officer acting in their several offices under the authority of the State, are irregular, erroneous and void; and that all such

writs may and shall, at any time after the service, be quashed (upon motion) by the court to which they are returnable, the said court being ascertained of the truth of the fact, by affidavit, or otherwise.' As shown by the preamble, the purpose of the act was to remedy an abuse which had prevailed in granting writs of replevin for goods and chattles taken in execution, and for fines and penalties due the Commonwealth, to the delay of public justice and to the great vexation of the officers concerned in taking or levying the same. 'The least reflection will serve to show the mischief to which such a practice must necessarily lead; so much so, that it is impossible to foresee the extent to which a creditor may be delayed in his just demands, by a litigious and fraudulent debtor. An execution, which is the end of the law, would be only the commencement of a new lawsuit, and so, toties quoties, as his goods were taken in execution by a public officer?' *Shaw v. Levy*, 178. & R. 99. See also *Taylor v. Ellis*, 200 Pa. 191, where the purpose of the act is very fully discussed by Mr. Justice Brown. The statute being remedial is to be construed liberally: *Pott v. Oldwine*, 7 Watts, 173. Accordingly, it was held in that case that property taken by distress for non-payment of a militia fine could not be replevied by the alleged delinquent. So in *McJunkin v. Mathers*, 158 Pa. 137, it was held that a constable who, in obedience to a borough ordinance, impounded cattle found straying in the streets, was, in respect of such act, an officer acting under the authority of the State within the meaning of the act of 1779, and therefore replevin would not lie by their owner against the constable for the cattle so impounded. Upon the same principle it was held in *Elkins v. Criesmer*, 2 Penny. 52, that an inspector of oils appointed under the act of 1874, who seized oils as being below the fire test, was therein an officer acting under the authority of the State, and therefore the oils were not repleviable by the owner. But on the other hand Judge Pearson in a well-considered opinion refused to quash a writ of replevin under the act of 1779 for goods that were levied on for school taxes by a constable acting under a warrant from the tax collector, such warrant being issued without authority, and the constable not being a regularly appointed deputy collector: *Shoemaker v. Swiler*, 2 Pears. 114. This decision is not in conflict with the other decisions above cited. It is not sufficient that the goods for which the replevin issues were seized by and are in the custody of an officer of the law. He must in seizing and holding them be acting under the authority of the State. If he has no process issued by some court, magistrate or tribunal having jurisdiction to issue such process, he must be able to point to some law of lawful ordinance authorizing him

to seize private property without process, and hold it for a particular lawful purpose, and must satisfy the court that he seized and held it for that purpose."

On the termination of the prosecution begun by the officer under Section 7 of the Act of June 30th, 1919, P. L. 702, it would likely appear in the proceedings who is the true owner of the seized motor vehicle. In such case, if the officer was satisfied, he might deliver the motor vehicle to the true owner. Moreover, the evidence in the prosecution for the violation of this law of 1919, might justify the prosecution of the wrong-doer disclosed by such evidence for larceny or receiving stolen goods, and in case of conviction the court could, under Section 179 of the Criminal Code of March 31st, 1860, sentence the defendant to make restitution to the true owner of the motor vehicle. Mr. Justice Trunkey in *Huntzinger v. Commonwealth*, 97 Pa. page 336, said:

"The 179th section of the Crimes Act of 1860 is very broad, requiring in almost every criminal offence, including in its perpetration the obtaining of money or other valuable thing, in addition to the prescribed punishment, that the defendant shall be adjudged to restore to the owner such money or property, or pay him the value thereof. But the indictment must show that property was taken or obtained. It does this, of course, in robbery, larceny, false pretences and other crimes, which are not committed unless property be taken."

As regards the powers of the District Attorney in the premises, which your subordinate officers inquires about, would say that I cannot find any Act of Assembly conferring upon a District Attorney the right to pass upon the title of property seized by an officer under authority of the law of 1919. The officer, however, who seizes a motor vehicle under this Act should, of course, be guided by the advice of the District Attorney in prosecuting the wrong-doer.

But, while there seems to be no law providing a method by which the officer seizing a motor vehicle under the Act of 1919 can relieve himself of the responsibility therefor, there is a practical way by which the officer can place the motor vehicle in a place where it can be secure and under a law which affords a method by which the rights of all the claimants thereto can be legally ascertained. This law is what is known as the Warehouse Law of the 11th of March, 1909, P. L. 19, and its supplements. To invoke the protection of this law, the officer, who has seized a motor vehicle under the Act of 1919, should take it to the nearest reliable garage, and leave it there for storage. And under Section 5 of the said Act of 1919,

he should take from the person in charge of the garage, what is styled in said Act a non-negotiable warehouse receipt, stating that the motor vehicle shall be delivered only to the person who shall establish his right to the same by a judgment of a court having jurisdiction. In case the officer does this, the true owner and all other claimants of the motor vehicle could assert their rights under Sections 20 and 21 of the Act of 1909.

While it has been held by the Superior Court in a late case that a warehouseman has no lien for storage charges as against the real owner of goods deposited by the stranger without the owner's consent, (*Williams v. Miller*, 69 *Superior Ct.* 551), the same court has also held in a later case that one who receives, stores and repairs autos is an agent of the owner.

Sutton v. Gemehl, 72 *Super. Ct.* 177.

As the Act of 1919 gives the officer the right to seize the motor vehicle, he becomes by act of the law the agent of the owner, and, therefore, can act for the owner in making a proper disposition of the machine.

You are therefore advised that an officer who seizes a motor vehicle under Section 7 of the Act of June 30th, 1919, P. L. 702, must himself keep possession of the machine until the true owner is ascertained in the proceedings in the Criminal Court, above mentioned, or, if he wishes to relieve himself of the care of the machine, he should store it in the nearest reliable garage and secure a non-negotiable warehouse receipt for the same under the Act of the 11th of March, 1909, P. L. 19.

Yours truly,

WILLIAM I. SWOOPE,
Deputy Attorney General.

FIRE PROTECTION.

The Bureau of Fire Protection may adopt and enforce rules and regulations in regard to the transportation of gasoline, naptha, blasting powder, dynamite and other combustibles, such regulations not to conflict or interfere with those of Allegheny County or of any City or County where by law the position and duties of a fire marshal are provided for.

Office of the Attorney General,
Harrisburg, Pa., August 25, 1920.

Mr. C. M. Wilhelm, Chief, Bureau of Fire Protection, Department of State Police, Harrisburg, Pa.

Sir: Your letter of August 21, 1920, requesting an opinion from this Department as to whether Section 1 of the Act of July 1, 1919,

adoption of regulations governing explosives and combustible materials, the transportation thereof, particularly with reference to regulating the transportation of such materials upon motor trucks and other vehicles through congested or built up sections of cities and boroughs, duly received.

In reply would say that the fourth paragraph of Section 1 of the Act of July 1, 1919, P. L. 710, provides as follows:

"The department may adopt and enforce rules and regulations governing the having, using, storage, sale, and keeping of gasoline, naphtha, kerosene, or other substance of like character, blasting powder, gun-powder, dynamite, or any other inflammable or combustible chemical products or substances or materials. The department may also adopt and enforce rules and regulations requiring the placing of fire-extinguishers in buildings."

This provision of the Act is subject to the exceptions provided in Section 15, which reads as follows:

"Section 15. This act shall not be construed to repeal an act of the General Assembly, entitled 'An act to provide for the appointment of a fire marshal for Allegheny County,' approved the eighteenth day of April, Anno Domini one thousand eight hundred and sixty-four (Pamphlet Laws, four hundred and sixty-five). It is further hereby declared to be the true intent and meaning of this act that the same shall not apply or be operative in any city or county of this Commonwealth where, under existing laws, whether special or general, the position and duties of a fire marshal are provided for."

The former Act of June 3, 1911, P. L. 658, in Section 5, provided that when the Fire Marshal shall find in any building combustible or explosive matter, etc., he shall order them removed. Under this provision of the Act of 1911, it would certainly follow that the Fire Marshal could prescribe the manner in which these explosives were to be removed.

The words used in the Act of July 1, 1919,—“having”, “using”, “storage”, “sale”, and keeping of the explosives therein mentioned, have well defined meanings. The word “have”, according to the Century Dictionary, is one of the synonyms of “possess” and may apply to a temporary or to a permanent possession of a thing: *State v. Lowry*, 77 N. E. page 728, and the Supreme Court of Maine has held in *Anderson v. Parker*, 101 Maine, page 416, that

“In a vote of a municipality by which those voting decided ‘to have’ a townhall, the term ‘to have’ was a comprehensive term, including, not only the meaning of the phrase ‘to build’, but any other method which

might have been proposed for the establishment of a townhouse."

In the Century Dictionary, the word "have" is defined—"To hold for use or disposal, actually or potentially; hold the control over or right to."

It would seem from these definitions that the words used in the Act of July 1, 1919, are sufficiently broad to cover the transportation of the explosives therein mentioned, and that under the authority conferred by this Act, your Department may adopt and enforce rules and regulations governing the "having" of the explosives therein mentioned for the purpose of transporting the same.

But under the exception in Section 15 of the Act, such regulations would not apply to transportation through Allegheny County or through any city or county of the Commonwealth where, under existing laws the position and duties of a fire marshal are provided for.

You are therefore advised that your Department may adopt and enforce rules and regulations governing the transportation of gasoline, naphtha, kerosene, or other substance of like character, blasting powder, gun-powder, dynamite, or any other inflammable or combustible materials, such regulations not to conflict or interfere with the regulations adopted in Allegheny County under the Act of April 18, 1864, or with the regulations adopted in any city or county of this Commonwealth where, under existing laws, whether special or general, the position and duties of a fire marshal are provided for.

Yours respectfully,

WILLIAM I. SWOOPE,
Deputy Attorney General.

FIRE PROTECTION.

No municipality can legally pass ordinances providing inconsistent or less stringent regulations than those provided by the Bureau of Fire Protection, governing the storage and handling of volatile inflammable liquids.

Office of the Attorney General,
Harrisburg, Pa., July 16, 1920.

Honorable Lynn G. Adams, Superintendent of State Police, Harrisburg, Pa.

Sir: This Department is in receipt of an inquiry of the Chief of the Bureau of Fire Protection, enclosing a copy of regulations promulgated by your Department governing the storage and handling

of volatile inflammable liquids, and asking substantially whether a municipality may legally pass ordinances containing regulatory provisions on the same subject. It is implied that some of these ordinances are more stringent than your regulations, while other ordinances are less exacting.

The power of your Department to pass such regulations is contained in Section 1 of the Act of July 1, 1919, P. L. 710, *inter alia* providing as follows:

“The department may adopt and enforce rules and regulations governing the having, using, storage, sale and keeping of gasoline, naphtha, kerosene, or other substance of like character, blasting powder, gunpowder, dynamite, or any other inflammable or combustible chemical products or substances or materials.”

Regulations promulgated under the authority of this Section have the force of a law, and no municipality can legally pass ordinances providing inconsistent or less stringent regulations. Whether a municipality can require compliance with regulations additional to, but not inconsistent with those adopted by your Department, is a matter with which your Department need not concern itself. You should see that your regulations are fully complied with, and leave the question of the right of the municipality to impose additional regulations for the determination of a court on an issue between the municipality and the company subjected to the particular ordinance.

Very truly yours,

FRANK M. HUNTER,
Deputy Attorney General.

**OPINIONS TO THE DEPARTMENT OF
PUBLIC PRINTING AND BINDING**

OPINIONS TO THE DEPARTMENT OF PUBLIC PRINTING AND BINDING.

STATE PRINTING.

Paper supplied by the Commonwealth to the State Printer, and which represents the difference between the spoilage allowance and the paper actually spoiled, belongs to the State and not to the State Printer.

Office of the Attorney General,
Harrisburg, Pa., July 24, 1919.

Honorable R. C. Miller, Superintendent of Public Printing and Binding, Harrisburg, Pa.

Sir: The press of certain matters incident to the Session of the Legislature just closed has occasioned some delay in answering your communication of the 25th ultimo.

From your letter and from certain conversations which I have had with you, it appears that in an adjustment now pending between W. S. Ray, the former State Printer, and your Department, Mr. Ray asserts a right to balance certain claims admittedly due by him to the Commonwealth, with the value of the paper which was deposited with him by the State, and which represents the difference between the amount allowed by law for spoilage and the quantity which was actually spoiled. You inquire whether the right thus asserted has the sanction of law.

Mr. Ray's contention is not sound. It is based upon the erroneous supposition that in depositing paper with the printer for the doing of State work, including the spoilage allowance, the Commonwealth parts not only with the possession of the paper but also the legal title thereto.

The Act of February 7, 1905, P. L. 3, amended by the Act of May 11, 1911, P. L. 210, regulates the public printing and binding for the Commonwealth. The statute contemplates in the main two separate and distinct contracts, one for the purchase of paper and supplies and the other for the State printing on the paper so purchased and for binding. Section 10 of the Act expressly provides that—

“* * * The Commonwealth shall supply all paper required for such work, and, when the superintendent makes an order on the contractor or contractors for any work, he shall at the same time make a requisition on the person or persons to whom the contract for fur-

nishing the Commonwealth with paper and other supplies shall be awarded, as hereinafter provided, for the amount and quality of paper necessary for the said work."

This does not mean that the State relinquishes its legal title to the paper so supplied; that it sells the paper which it has purchased to the printer, who, after the necessary printing, sells it back to the Commonwealth plus his contract charge for such printing. It does not contemplate that paper supplied for any particular work beyond the actual requirements therefor belongs to the printer. The word "supply", as used in the Section, means "provide", and the legislative intent is clear that the Commonwealth, in providing the printer with paper, parts with nothing other than the possession, and this only temporarily, and for a particular purpose.

Viewed in this light, Section 23 of the statute, upon which Mr. Ray supports his contention, is free from confusion. It provides that when the Superintendent of Public Printing and Binding makes an order on the State Printer, he shall at the same time make an order on the person who has contracted to furnish the State paper for an amount required for each order of printing, including—

"five per centum in excess of the amount actually required for runs of five thousand or less, and three per centum for runs exceeding five thousand; said per centum to be allowed the contractor or contractors for spoiled sheets. Where paper is to be ruled, two per centum additional to above is to be allowed for spoiled sheets."

The relation of the printer with regard to this percentage for spoilage is precisely the same as his relation to any other paper supplied by the State. His right thereto is one of possession only and for a particular purpose. He may spoil the entire allowance in the execution of any piece of work because the possession was vested in him with that intent, but that portion of the allowance which is not so spoiled remains as much the property of the State after the completion of the work as immediately before such work was commenced. At no time does the right of the printer rise to the right of ownership.

This conclusion is not affected by the practice of depositing paper in car-load lots with the person having the contract for the State printing and which seems to be justified under certain other provisions of Section 23 of the Act of 1905.

Specifically answering your inquiry, you are now advised that paper supplied by the Commonwealth to the State Printer and which represents the difference between the spoilage allowance and the

paper actually spoiled, belongs to the State, and that its value can not be set off by the printer against other claims of the Commonwealth against him, and which he admits to be due.

Very truly yours,

FRANK M. HUNTER,
Deputy Attorney General.

IN RE PRINTING.

The Act of February 1, 1905, P. L. 1, as amended by the Act of May 11, 1911, P. L. 210, deals with technical printing terms, so that their proper interpretation is for those skilled in the printer's trade. It may be stated, however, as applicable to printing done by the State that all printing which is not bound and covered as a book, except legislative bills, calendars, reports, blank books, data and food bulletins without covers, and books, pamphlets and bulletins with covers, journals, official documents, Smull's Hand Books, and lithographic work, should be included in the term "miscellaneous printing."

Office of the Attorney General,
Harrisburg, Pa., August 1, 1919.

Honorable Robert C. Miller, Superintendent of the Department of
Public Printing and Binding, Harrisburg, Pa.

Dear Sir: We have your favor of the 17th inst., enclosing the letter of John L. L. Kuhn, State Printer, upon which you request an opinion.

The questions submitted, as I understand them, are as follows:

1. Are the "Digest of the Mining Laws", Legislative Directories, and other printed work, samples of which you submit, miscellaneous work or book composition, within the meaning of the Act of February 1, 1905, P. L. 1, as amended by the Act of May 11, 1911, P. L. 210?
2. Is the list of banks, trust companies and savings institutions, samples of which you submit, a blank book within the meaning of said law?

I understand that all of the printed matter, such as the Digest of the Game, Fish and Forestry Laws, the Legislative Directories, etc., involved in the first question just stated, are publications which have been printed from time to time in the same form for a number of years.

The present State Printer, John L. L. Kuhn, whose present contract began on July 1, 1917, was the State Printer for four years,

up to July 1, 1913. Mr. W. S. Ray was State Printer from July 1, 1913, to July 1, 1917. In an opinion given to your predecessor, February 28, 1918, it was said:

"This act of Assembly deals with technical printing terms, but its application to what is included in book composition or in the term 'miscellaneous printing' is so doubtful, that those who are skilled in the use of such terms, like yourself and the State Printer, seem-unable to construe it. Since the construction of the act is doubtful, the course of conduct and the interpretation which has heretofore been put upon it, should be controlling. The State Printer submitted his bid in view of the interpretation which he put upon it, under his former contract, and under the contract in force at the time his bid was presented."

In this opinion we came to the conclusion that:

"All printing which is not bound and covered as a book, except legislative bills, calendars, reports, blank books, data and food bulletins without covers, and books, pamphlets and bulletins with covers, journals, official documents, Smull's Hand Books, and lithographic work, should be included in the term 'miscellaneous printing.'"

We see no reason to change this conclusion. I think the law should be interpreted under this contract as it has heretofore been interpreted, and the printing paid for under that interpretation.

2. The list of banks, trust companies and savings institutions, samples of which is submitted, is bound in flexible leather. It contains six names equally spaced, on the left page. The right page is blank and ruled, so that memoranda may be made opposite each name.

A blank book, as the term is generally understood, is a book in which the caption or headings of the pages are identical and the blank spaces left below. The book in question is printed on one page, with the blanks on the opposite page and the printing is not identical. It consists of the lists of banking institutions in the State.

I am, therefore, of opinion that it is not a blank book. It could hardly be considered miscellaneous printing, and inasmuch as there has been but one list heretofore printed, there has been no course of conduct or no interpretation of the contract under which the State Printer is acting, established with reference to this work. It should be considered as special work and a price agreed upon in keeping with the character of the work.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

**OPINIONS TO THE BOARD OF OPTOMETRICAL
EDUCATION EXAMINATION AND LICENSURE**

OPINIONS TO THE BOARD OF OPTOMETRICAL EDUCATION EXAMINATION AND LICENSURE.

IN RE OPTOMETRY.

July 1, 1918, was the last date upon which a person was entitled to take a limited examination to practice optometry pursuant to the provisions of the Act of March 30, 1917, P. L. 21.

Office of the Attorney General,
Harrisburg, Pa., January 29, 1919.

Mr. Chester H. Johnson, Secretary, Board of Optometrical Education, Examination and Licensure, York, Pa.

Sir: There was duly received your communication of the 14th inst., to the Attorney General, asking to be advised as to whether a person is entitled to take a "limited examination" for a license to practice optometry on or after January, 1919.

The Act of March 30, 1917, P. L. 21, relating to optometry, provides for two classes of examinations, namely limited examinations and standard examinations

Pursuant to Section 5 a "limited examination" may be taken by—

"Any person who has been engaged in the practice of optometry in this Commonwealth for two full years prior to the passage of this act, or, for one year in this, and for the year preceding it in another, State, and is of good character, shall be entitled to take a limited examination covering the following only."

Section 6 provides, *inter alia*:

"In case of failure at any limited examination, the applicant shall have the privilege of continuing the practice of optometry, and of taking a second examination without the payment of an additional fee. *But, in the event of his failure to pass the second examination on or before July first, one thousand nine hundred and eighteen, he shall thereafter cease to practice optometry in this Commonwealth.*"

The plain purpose of a limited examination was to afford to persons who had had, prior to the passage of the Act, at least two years experience in the actual practice of optometry, as defined by the Act, the right to continue such practice without being subject to the more rigid requirements of a standard examination. It was not in-

tended that it should be a continuing method to obtain a license, but only one for such a reasonable period of time as would give fair opportunity to all who wished to avail themselves of it.

As appears from the above quoted provision of Section 6, one who took a limited examination and failed to pass the same was given the right to take a second examination, if taken on or before July 1, 1918. Since one who had promptly and diligently taken a first examination, in which he failed, was only given until July 1, 1918 a chance to take a second examination, it could not be well contended that one who had failed or neglected to take any examination whatever should be vouchsafed a longer time in which to exercise the privilege of such limited examination. The clear conclusion follows from the above provision of Section 6 that the Act contemplated that all limited examinations should be taken not later than July 1st, 1918. This construction accords alike with the manifest intent of the aforesaid provision of the Act, and with the whole spirit of the entire enactment.

You are therefore advised that July 1, 1918 was the last date upon which a person was entitled to take a limited examination to practice optometry, pursuant to the provisions of the aforesaid Act of March 30, 1917.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

PRACTICE OF OPTOMETRY.

Optometrists from other States, applying for license to practice optometry in Pennsylvania since July 1, 1918, must take the standard examination unless they can present a certificate of licensure from another state as required by the Act of March 30, 1917, P. L. 21.

Office of the Attorney General,
Harrisburg, Pa., November 6, 1919.

Mr. Chester H. Johnson, Secretary, Board of Optometrical Education, Examination and Licensure, York, Pa.

Sir: Your letter of the 30th ult., addressed to the Attorney General, asking to be advised as to whether or not optometrists from other States now applying for examination can take the "limited examination" as provided in Section 5 of the Act of March 30, 1917, P. L. 21, was duly received.

In reply would say that this Department, under date of January 29, 1919, in an opinion rendered by Emerson Collins, Deputy Attorney General, advised you as follows:

"The Act of March 30, 1917, P. L. 21, relating to optometry, provides for two classes of examinations, namely, limited examinations and standard examinations.

Pursuant to Section 5 a "limited examination" may be taken by—

'Any person who has been engaged in the practice of optometry in this Commonwealth for two full years prior to the passage of this act, or, for one year in this, and for the year preceding it in another, State, and is of good character, shall be entitled to take a limited examination covering the following only.'

Section 6 provides, *inter alia*:

'In case of failure at any limited examination, the applicant shall have the privilege of continuing the practice of optometry, and of taking a second examination without the payment of an additional fee. *But, in the event of his failure to pass the second examination on or before July first, one thousand nine hundred and eighteen, he shall thereafter cease to practice optometry in this Commonwealth.*

The clear conclusion follows from the above provision of Section 6 that the act contemplated that all limited examinations should be taken not later than July 1st, 1918. This construction accords alike with the manifest intent of the aforesaid provision of the act, and with the whole spirit of the entire enactment.

You are therefore advised that July 1, 1918, was the last date upon which a person was entitled to take a limited examination to practice optometry, pursuant to the provisions of the aforesaid Act of March 30, 1917."

It is plainly the purpose of the Act of March 30, 1917, to confer upon all persons who were practicing optometry at the date of the approval of the act, viz: March 30, 1917, a special privilege of taking less severe examinations providing they applied for them before July 1, 1918, as provided in Section 6 of said act. This privilege was conferred by the act upon all persons practicing optometry whether or not they were residents of the State of Pennsylvania. The limitation also applies to all persons whether they reside in this Commonwealth or in some other State.

It follows, therefore, and we so advise you that optometrists from another State who now apply for examination must take the standard examination required by Section 5 of the act, unless such applicant for licensure can present the certificate of licensure by the State Board of Optometrical Examiners of another State as required by Section 10 of the Act of March 30, 1917, P. L. 21, which provides as follows:

"An applicant for a certificate of licensure who has been examined by the State Board of Optometrical Examiners of another State, which through reciprocity similarly accredits the holder of a certificate issued by the Board of Optometrical Education, Examination, and Licensure of this Commonwealth to the full privileges or practice within such State, shall, on the payment of a fee of twenty-five dollars to the said board, and on filing in the office of the board a true and attested copy of the said license, certified by the president or secretary of the State board issuing the same, and showing that the standard of requirements adopted and enforced by said board is equal to that provided for by this act, shall, without further examination, receive a certificate of licensure: Provided, That such applicant has not previously failed at an examination held by the Board of Optometrical Education, Examination, and Licensure of this Commonwealth."

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

OPTOMETRY.

The Proviso at the end of Section 5 of the Act of 30th of March 1917, P. L. 21 does not apply to those from other States, who were not practicing optometry in this Commonwealth on March 30, 1917.

Office of the Attorney General,
Harrisburg, Pa., November 22, 1919.

Mr. Chester H. Johnson, Secretary, York, Pa.

Dear Sir: Your letter of November 20th, 1919, requesting an opinion from this Department as to the meaning and effect of the proviso at the end of Section 5 of the Act of the 30th of March, 1917, P. L. 21, and desiring to know:

"Whether this proviso entitles a person to take the standard examination at any time merely upon proof that he was practicing Optometry prior to the passage of this Act,"

has been referred to me.

In reply would say that the proviso in Section 5 of the Act of 30th of March, 1917, P. L. 21, is in these words:

"That any person, not less than twenty-one years of age,, who is actually engaged in the practice of optometry at the time of the passage of this act, shall be entitled to take the standard examination, merely upon proof to the board that he is of good moral character and is not addicted to the intemperate use of alcohol or narcotic drugs."

Further, Section 6 provides as follows:

"In case of failure at any standard examination, the applicant, after the expiration of six months and within two years, shall have the privilege of a second examination by the board, without the payment of an additional fee. In case of failure at any limited examination, the applicant shall have the privilege of continuing the practice of optometry, and of taking a second examination without the payment of an additional fee. But, in the event of his failure to pass the second examination on or before July first, one thousand nine hundred and eighteen, he shall thereafter cease to practice optometry in this Commonwealth."

This Act was approved on the 30th day of March, 1917, and was binding on all persons practicing or who wished to practice optometry in the Commonwealth of Pennsylvania at the date of its approval. The intent of the Legislature is to be gathered from the whole Act.

"It is a fundamental rule of statutory construction that courts in seeking for the legislative intent must find it in the statute itself; that unless good grounds can be found in the statute for restraining or enlarging the meaning of its words, the court cannot subtract therefrom or add thereto. Where the words of a statute are plain and clearly define its scope and limit, construction cannot extend it."

Grayson vs. Aiman, 252 Pa. 461.

"The language of any portion of a statute must be understood in the light of the whole of it, giving due effect to every portion, and by reference from one to the other, explaining, and, if need be, restraining the generality of one so as not to conflict with the other, thus harmonizing all and assigning to each its proper meaning and legitimate field of operation."

Commonwealth vs. Marks, 248 Pa. 518, affirming 7 Berks, 116.

"The title of an act is part of it, and a guide to its construction."

Bushong vs. Wyomissing Boro., 8 Berks 47, 30 York 86, 25 District 690.

Applying these principles of construction to the statute in question, we find that the title of the Act states its purpose to be:

“Defining optometry; and relating to the right to practice optometry in the Commonwealth of Pennsylvania, and making certain exceptions.”

The intent of the Act was to regulate the practice of optometry in the Commonwealth of Pennsylvania and all exceptions and provisos in the Act took effect at the date of its approval, to-wit, March 30th, 1917. The Act specifically requires all persons who wish to practice optometry in the Commonwealth of Pennsylvania to apply for the standard examinations and to set forth that they have the qualifications required in the second paragraph of Section 5, unless they come under the exceptions in the first paragraph of Section 5, or were engaged in the actual practice of optometry in the Commonwealth of Pennsylvania at the time of the passage of this Act. It, therefore, follows that the requirements of this proviso apply only to persons who were practicing optometry in the Commonwealth of Pennsylvania at the date of the approval of the Act, to-wit, March 30, 1917. Consequently, persons from other states, who, subsequent to March 30, 1917, apply for license to practice optometry in this Commonwealth must set forth the qualifications required in the second paragraph of Section 5, or bring themselves within the provisions of Section 10 of this Act, which applies to those holding certificates issued by other states of the Union.

The Act requires all persons after March 30, 1917, who wished to begin or continue the practice of optometry in Pennsylvania *immediately* to apply for a Standard or a Limited examination. If they failed to pass the first Standard examination they could apply again within two years. But those who now apply to practice optometry after the date of this Act can secure a license only by setting forth all the requirements of the second paragraph of Section 5 or the certificate required by Section 10. The proviso at the end of Section 5 does not apply to those from other states, who were not practicing optometry in this Commonwealth on March 30, 1917.

Yours truly,

WILLIAM I. SWOOPE,
Deputy Attorney General.

OPTICAL ESTABLISHMENTS.

The Act of March 30, 1917, P. L. 21, does not require an advertisement that the practice of optometry is being carried on in a store or other establishment to contain the name of the optometrist employed therein to do the work.

Office of the Attorney General,
Harrisburg, Pa., March 1, 1920.

Mr. Chester H. Johnson, Secretary, Board of Optometrical Education, Examination and Licensure, York, Pa.

Sir: This Department is in receipt of your communication of the 21st inst., asking to be advised whether "it is lawful for the owner of a store to establish an optical department, and although he employs licensed optometrists, he is not licensed himself but advertises the business under his own name," and whether in such a case the law requires that "the name of the optometrist be given in the advertising."

The Act of March 30, 1917, P. L. 21, defining and regulating the practice of optometry, by Section 2 thereof makes it unlawful—

"For any person in this Commonwealth to engage in the practice of optometry or to hold himself out as a practitioner of optometry, or to attempt to determine by an examination of the eye the kind of glasses needed by any person, or to hold himself out as a licensed optometrist when not so licensed, or to hold himself out as able to examine the eyes of any person for the purpose of fitting the same with glasses, excepting those hereinafter exempted, unless he has first fulfilled the requirements of this act, and has received a certificate of licensure from the Board of Optometrical Education, Examination and Licensure created by this act."

It will be seen from the foregoing that it would not only be unlawful for one to engage in the practice of optometry, but likewise to hold himself out as such practitioner unless first duly licensed in accordance with said Act. The mere maintenance, however, by a person of a store or establishment, or department thereof, wherein the practice of optometry is carried on by an employe who had been duly licensed as an optometrist, would not of itself constitute an offense, although the business be conducted and advertised alone under the name of the unlicensed proprietor. This would not amount on the part of the proprietor to holding himself out as a licensed optometrist.

There is nothing in the Act which would compel an advertisement of the business to contain or show the name of the optometrist so employed. This employe would, of course, be subject in all respects to the Act, and be guilty of its violation if he failed to conform to

its requirements. Pursuant to Section 6 each person to whom a certificate of licensure is granted is obliged to keep the same conspicuously displayed "in the office or place of business wherein said person shall practice optometry." This provision is mandatory and must be rigidly followed, and in such a case as is here under consideration would afford any one seeking optometrical service in the store or establishment in question the actual notice of and the means to know precisely who the optometrist is who is practicing therein.

Inasmuch as the declared purpose of the Act is to safeguard the public against incompetent optometrists, it would be commendable and apparently to the advantage of any business place wherein the practice of optometry is carried on to give all reasonable publicity of the name of the regularly licensed optometrist employed therein, but we can exact nothing in this respect beyond what is specifically provided in the Act.

In accordance with the foregoing, you are advised that the law does not require that an advertisement that the practice of optometry is being carried on in a store or other establishment must contain or set forth the name of the optometrist employed therein to do this work.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

DISPLAY OF OPTOMETRIST CERTIFICATE.

Where an optometrist has more than one office, the Board of Examination and Licensure should issue a certified copy of the certificate of licensure for display in the additional office.

Office of the Attorney General,
Harrisburg, Pa., March 15, 1920.

Mr. Chester N. Johnson, Secretary, Board of Optometrical Education, Examination and Licensure, York, Pa.

Sir: Your communication of the 6th inst., to the Attorney General, was received, in which you ask to be advised as to the proper practice to be followed in regard to displaying the certificate of licensure issued an optometrist in cases where he maintains more than one office.

It is provided, inter alia, in Section 6 of the Act of March 30, 1917, P. L. 24, relating to optometry, as follows:

"Each person to whom a certificate shall be issued by said board shall keep said certificate displayed, in a conspicuous place, in the office or place of business wherein said person shall practice optometry, together with a photograph of said person attached to the lower right-hand corner of said certificate, and shall whenever required exhibit the said certificate to any member or agent of the said board. * * * Whenever any person shall practice optometry outside, or away from his office or place of business, he shall deliver to each person fitted with glasses by him a certificate, signed by him, wherein he shall set forth the amount charged, his post-office address, and the number of his certificate."

The manifest purpose of the requirements of the foregoing provisions is to afford to any one being served by an optometrist definite information that the optometrist has been duly licensed according to law. The intent is that every person who is fitted with glasses by an optometrist shall thus have ready means of ascertaining the competency of the practitioner and guarding against deception by an unlicensed one. The above mentioned certificate to be given by the optometrist himself where the practice is carried on by him away from his office or place of business would not apply as to practice carried on in a branch office.

The obvious method to pursue in cases where more than one office is maintained is for the Board to issue to the practitioner a certified copy of the certificate of licensure, and for him to display such a copy in each branch office or place of business. This is the practical way to effect the object of the above provision requiring the display of the certificate of licensure, and would be a substantial compliance therewith.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

OPTOMETRISTS.

The year of study in the office of a licensed optometrist, required by the Act, of May 30, 1917, P. L. 24, may be pursued with an optometrist licensed under the laws of another state, whose standard of qualifications for the practice of optometry is equal to the standard in Pennsylvania.

Office of the Attorney General,
Harrisburg, Pa., May 14, 1920.

Mr. Chester H. Johnson, Secretary, Board of Optometrical Education, Examination and Licensure, York, Pa.

Sir: This Department is in receipt of your communication of the 4th inst., and that of the 10th inst. supplemental thereto, asking to be advised upon the question which may be stated as follows:

Whether the year's study in a licensed optometrist's office as one of the prerequisites to the taking of a standard examination for a certificate of licensure to practice optometry must be with an optometrist licensed under the Pennsylvania Act, or may be with optometrist licensed under the laws of another State.

The Act of May 30, 1917, P. L. 24, regulating the practice of optometry in this Commonwealth, in Section 5 thereof, prescribes the qualifications entitling a person to take what is known as the standard examination, among which are that the applicant has graduated from a school or college of optometry maintaining a two years course and approved by the Board of Optometrical Education, Examination and Licensure, "and has afterward studied optometry for at least one year in a *licensed optometrist's* office."

The object of this last mentioned requirement, being the one under consideration, is to exact a certain amount of practical training in and applied knowledge of the subject. This provision is neither, on the one hand, to be so loosely construed as in any degree to defeat this end, nor, on the other hand, so strictly as to work hardship or needlessly deny to any one the right to take an examination where this contemplated office preparation essentially measures up to that which the Act has in view as one of the conditions of such right. The Act does not expressly say that the licensee in whose office the required study is carried on must be one licensed thereunder, and I am of the opinion that it would be an interpretation too narrow and pointless to hold that this is implied, and consequently that this year's work must in all cases be taken with an optometrist holding a Pennsylvania certificate of licensure. The school or college of optometry of which the applicant must be a graduate is not limited to a Pennsylvania institution, and I understand that the Board has approved a number of such located in other States. Why should the year's post-graduate course necessarily be here? There is nothing in the knowledge or practice of optometry peculiar or appertaining to any particular locality. It can be gained as amply and readily in one place as another and then applied elsewhere.

We must assume that the Act did not intend to impose a vain condition, but rather that its only concern was to require the applicant to bring to the examination a certain modicum of preparation. We are aided in arriving at a conclusion in this question by turning to the provisions of Section 10. It allows a licensed optometrist of another State with which ours has reciprocal relations in this respect, and in which the standard of requirement to get a license is equal to

and in which the standard of requirement to get a license is equal the standard of this State, to receive a certificate of licensure in this State without any examination in the manner therein provided. In such case the certificate of the home State is deemed the sufficient credential of fitness. It would be unreasonable to admit to practice here, without examination, an optometrist of another State, because the standard by which his competency had there been tested out was as high as that set up by our law, and yet say that to study optometry in such a foreign licensee's office for a year did not meet the requirement of our Act sufficiently to allow the student to take an examination merely to test out his qualifications. As the purpose of the year's study is to afford the opportunity to acquire a practical working knowledge of optometry, so the requirement that it be with a licensed optometrist is to assure the competency of this office instructor, and, in the absence of express words to the contrary, we may fairly presume it was intended that this is met by one whose license in another State is recognized as full evidence of his qualification for admission to practice here.

While, for the reasons above stated, I am of the opinion that the year's study as required by the above provision of the said Act may be carried on with a licensed optometrist of another State, it is, as above indicated, upon the strict proviso that such optometrist must be one whose license was regularly obtained pursuant to a standard equal to that existing in Pennsylvania. It would be violative of the spirit of the Act to permit this office instruction to be taken with one whose license had been issued under a requirement substantially lower than that prevailing in our own State, and which might, in such instance, create a discrimination favorable to an applicant for examination from another State.

You are accordingly advised that the year's study in the office of a licensed optometrist, as constituting one of the prerequisites to take a standard examination for a certificate of licensure to practice optometry, is not absolutely limited to study with one licensed under the Pennsylvania Act, but may be pursued with one duly licensed under the laws of another State in which the Board has ascertained the standard of requirement by which a license may be obtained is equal to ours, and of which fact, and that the applicant has studied in the office the required time, there has been furnished to the Board satisfactory proof.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

OPTOMETRY.

As a general rule, a holder of a certificate of licensure to practice optometry in another State is entitled to the benefits of Section 10, only, of the Act of March 30, 1917, P. L. 21.

Persons who passed a limited examination in another State equal in requirement to the Pennsylvania Act, may come within the terms of Section 10 thereof, where the prerequisite practice of two years was had prior to the date of the passage of the Act, but not where based upon any practice thereafter.

Office of the Attorney General,
Harrisburg, Pa., September 22, 1920.

Mr. Chester H. Johnson, Seceretary, Board of Optometrical Education, Examination and Licensure, York, Pa.

Sir: This Department is in receipt of your communication of the 14th inst. asking to be advised upon the following questions arising under the Act of March 30, 1917, P. L. 21, regulating the practice of optometry in this Commonwealth, viz.:

Is a holder of a certificate of licensure to practice optometry issued by another State entitled to the reciprocal right provided in the Act, where he had taken what is known as a "standard examination", but "was not obliged to give proof that he had attended high school or optometrical college"?

Does the reciprocal right of the Act extend to those who had taken what is known as a "limited examination"?

The answers to these questions involve substantially the same principle and will be considered together.

Section 10 of the Act dealing with the subject of reciprocal relations between this and other States reads as follows:

"An applicant for a certificate of licensure who has been examined by the State Board of Optometrical Examiners of another State, which through reciprocity similarly accredits the holder of a certificate issued by the Board of Optometrical Education, Examination and Licensure of this Commonwealth to the full privileges or practice within such State, shall on the payment of a fee of twenty-five dollars to the said board, and on filing in the office of the board a true and attested copy of the said license, certified by the president or secretary of the State Board issuing the same, and showing that the standard of requirements adopted and enforced by said board is equal to that provided for by this act, shall, without further examination, receive a certificate of licensure: Provided, That such applicant has not previously failed at an examination held by the Board of Optometrical Education, Examination and Licensure of this Commonwealth."

These provisions must be given a strict construction. The Board has no power to widen their scope or to grant a license thereunder unless all the requisites are met. Among these is one to the effect that the standard of requirement in the State where the examination was held must be equal to that under our Act. This provision, although not doubtful as to meaning, presents some difficulties in its practical application for the reason that the Act provides several kinds of requirements. Pursuant to Section 5 there are what are called a "limited examination" and a "standard examination", with different requisites therefor, the requisite for a standard examination being further of twofold character. Persons who had practiced optometry for two years in this Commonwealth or one year here and the preceding year in another State prior to the passage of the Act were made eligible to take the limited examination. For the standard examination the applicant must have had certain high school education or its equivalent, and be a graduate of an optometrical school or college maintaining a two years course, excepting that, by virtue of the proviso in the concluding paragraph of Section 5, those "actually engaged in the practice of optometry at the time of the passage of this Act" could take a standard examination without the aforesaid prescribed preliminary training.

It will thus be seen that the right to take a limited examination was restricted to a certain definite class, and likewise the right to take a standard examination without the prescribed preparatory education. There can be no additions to these classes beyond those existing at the time of the passage of the Act, and consequently the requirements applying to them were essentially of a temporary nature exhausting their force with the classes to which they alone were applicable. A careful consideration of the Act clearly shows that it contemplates a "standard examination" with the prescribed schooling and collegiate course as prerequisites therefor as the continuing and general requirement for a person to practice optometry in this Commonwealth,—a "limited examination", and a "standard examination", without the aforesaid preparatory course of study, substantially amounting only to exceptions of a temporary nature,—and, as above noted, applicable alone to such as had had two years practice before the passage of the Act or were actually engaged therein at that time, and hence passing with the passing of these classes.

It follows as a general rule that a person who took, in another State, what is known as a standard examination is only entitled to be licensed in this State without examination under the provisions of Section 10, if there had been required as a prerequisite to such examination a preparatory course in school and college equal to what is here exacted as a condition to take this examination, and all this must be shown and appear in connection with the applica-

tion for the license here. Inasmuch, however, as persons who were engaged in the actual practice of optometry at the time of the passage of our Act were here allowed to take a standard examination without any prescribed previous training. I am of the opinion that any person who at that time was so engaged in any other State and took a standard examination would be entitled to come within the provisions of Section 10 without showing or having had such prior preparation. But this right only extends to those in actual practice at the time of the enactment of our law.

In analogy to this last stated rule, I am further of the opinion that one who had taken in another State a limited examination such as prescribed in our Act comes within the provisions of Section 10, provided such examination was based upon a prerequisite practice of two years, which had all been had prior to the date of the passage of our Act, but not where such examination is based upon a practice occurring thereafter. To hold that a standard examination in another State without an equal preliminary course to that prescribed by our Act in the case of all who were not engaged in the practice of optometry at the time of its enactment, or that a limited examination based upon a practice pursued subsequent to that date, entitles the holder of a certificate of licensure issued pursuant to such examination to be licensed in this State without examination would be to continue indefinitely a standard of requirement for those coming here from elsewhere which terminated, as above noted, for any taking an examination under our Act with certain classes existing at the time it was enacted and to whose ranks there could be no recruits thereafter. Such a construction would manifestly be contrary to the spirit of the Act and the intent of the provision relating to reciprocal privileges which contemplates a complete equality of requirement for those examined elsewhere and those examined here.

Specifically answering your several questions, you are, therefore, advised as follows:

1. That as a general rule a holder of a certificate of licensure to practice optometry issued by another State, who had there taken a standard examination, is only entitled to the benefits of Section 10 of the said Act, if a school preparation and college course were required as prerequisites for such examination equal to what is required under this Act as a requisite therefor, and all this must be shown in connection with the application for a license here, excepting, however, that any who were actually engaged in the practice of optometry at the date of the passage of the Act and who took the prescribed standard examination need not show that they had such previous school and college training.

2. That persons who passed a limited examination in another State equal in requirement to that under the aforesaid Act may come within the terms of Section 10 thereof in cases where the examination was based upon a prerequisite practice of two years had prior to the date of the passage of the Act, but not where based upon any practice thereafter.

The Board should be vigilant to see that the reciprocal privileges provided in Section 10 should only be allowed where clearly shown to exist, as it was not intended that the licenses of other States should be afforded the right to practice optometry here without examination, unless all the requirements pursuant to which they had been issued licenses in such other States measure up in all respects to those imposed by the Pennsylvania statute.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

OPTOMETRY.

Where a person has passed the limited examination prescribed by the Act of March 30, 1917, P. L. 21, and holds a certificate of licensure duly issued pursuant thereto, the Board of Optometrical Education, Examination and Licensure, has no authority to examine him for a standard examination.

Office of the Attorney General,
Harrisburg, Pa., October 19, 1920.

Mr. Chester H. Johnson, Secretary, Board of Optometrical Education, Examination and Licensure, York, Pa.

Sir: This Department is in receipt of your communication of the 12th inst. requesting an opinion upon the following question arising under the Act of March 30, 1917, P. L. 21, regulating the practice of optometry in this Commonwealth, viz.:

Whether a person who had taken a limited examination and been licensed pursuant thereto may now take a standard examination.

It appears that certain persons who had taken a limited examination under the Act have been refused reciprocal privileges by other States for the reason that a standard examination therein is the only basis upon which such privileges will be allowed.

The power of the Board to examine applicants for a license to practice optometry is only such as was given to it by the Act, which power so delegated is to be given a strict construction. *Endlich on*

the interpretation of Statutes, 352. The Act vests no express power in the Board to do what is here proposed to be done, and its provisions, in my opinion, can not be construed so as to imply such authority. The implication is clearly the other way. Section 5 provides that—

“Every person desiring to commence the practice of optometry, or, if now in practice, to continue the practice thereof after January first, one thousand nine hundred and eighteen, except as herein otherwise provided, shall take the examination provided in this act, and satisfy the other requirements hereof as here provided.”

and prescribe the requisites entitling any one to take a limited or standard examination. It is provided in Section 6 that—

“Every person *desiring to be licensed*, as in this act provided, shall file with the Secretary of said board, upon appropriate blank to be furnished by said secretary, an application, verified by oath, setting forth the facts which entitle the applicant to examination and licensure under the provisions of this act.”

These provisions contemplate an examination for a person *not yet licensed but desiring so to be, and not for one already holding a certificate of licensure* under an examination duly taken in manner prescribed by the Act. Other provisions confirm this conclusion. It is made the duty of the Board to issue a certificate of licensure to any one passing either a limited or standard examination and otherwise complying with the Act's provisions. This certificate is to be kept posted in the office where the practice is carried on, and recorded in the office of the prothonotary of each county where the optometrist proposes to practice. If a person already holding a certificate consequent upon an examination duly taken before the Board were to take another examination and another certificate were to issue in pursuance of this second examination, we would have the anomalous situation of such person holding two licenses to do the same thing. The Board has the power to revoke a license for the causes enumerated in the Act, but not simply for the purpose of issuing a new one. Having conducted an examination in any case in compliance with the requirements of the Act and regularly issued a certificate of licensure thereupon, the Board has performed its function in this respect and its authority relative thereto is exhausted.

The only conceivable purpose of allowing a present holder of a certificate of licensure under a limited examination to now take a standard examination would be to enable such licensee to come within the reciprocal requirements of some other State. The Board has,

however, no direct concern with that, its duty being to examine those desiring to practice here, not to examine any one for the mere purpose of aiding him to obtain a license elsewhere. This ruling can work no real hardship since we may assume that a person who could successfully pass the standard examination in this State could likewise pass it in any other State with which we may enjoy reciprocal relations.

You are, therefore, advised that where a person passed the limited examination in this Commonwealth, as prescribed by the said Act, and holds a certificate of licensure duly issued pursuant thereto, the Board of Optometrical Education, Examination and Licensure has no authority to examine him for a standard examination. The examination is open for those desiring to become licensed under the Act, not for those who are already so licensed.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

**OPINIONS TO PENITENTIARIES AND
REFORMATORIES**

OPINIONS TO PENITENTIARIES AND REFORMATORIES

AUDIT WESTERN PENITENTIARY.

Unless there are unusual circumstances, such as a defalcation, or an exigency of that kind, which might require an immediate or special audit, to be performed by auditors employed by the Board of Inspectors of the Western Penitentiary, the Board is protected by relying upon the audit made by the Auditor General.

Office of the Attorney General,
Harrisburg, Pa., February 1, 1919.

Mr. John Francies, Warden, Western Penitentiary, Pittsburgh, Pa.

Dear Mr. Francies: Your favor of the 27th ult., addressed to the Attorney General, was duly received.

You state that the Board of Inspectors of the Western Penitentiary has been requested to propound to the Attorney General the following question:

"Is the audit made by the Auditor General's Department of the expenditures of moneys appropriated to the penitentiary sufficient, and has the Board authority to employ outside auditors at the expense of the State to audit the accounts?"

This inquiry, as I am advised, is prompted by a desire on the part of the Board of Inspectors to know whether the Board is discharging its full duty and is fully protected in accepting the audit made by the Auditor General, or whether there is any duty on the part of the Board to have a further audit made of the accounts of the penitentiary.

The Auditor General, as his title indicates, is the auditing officer of the Commonwealth. It is his duty to audit the accounts of the various agencies to which the State funds are appropriated. When the Auditor General performs that duty, it is performed in the only way, and by the only official, contemplated under the laws of the Commonwealth for its performance. It must be assumed that it is correctly performed.

There is, therefore, no obligation on the part of the Inspectors of the Western Penitentiary, to require any other audit than that made by the Auditor General, to ascertain the proper application of the moneys appropriated to the Western Penitentiary by the State of Pennsylvania.

There may be unusual circumstances, such as a defalcation, or an exigency of that kind, which might require an immediate or a special audit, and if such a situation arose, the Board of Inspectors would have authority to employ auditors for that purpose; otherwise, the Board is abundantly protected by relying upon the audit made by the Auditor General.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

INSURANCE.

The Warden of the Western Penitentiary is advised as to the amounts of Insurance to carry under the terms of the Act of 1915, P. L. 524, Seventh Section.

Office of the Attorney General,
Harrisburg, Pa., April 8, 1919.

John Francies, Esq., Western Penitentiary, Pittsburgh, Pa.

Sir: Receipt is acknowledged of your letter of March 29th, 1919, in which you request an opinion as to whether your estimates for an appropriation to cover insurance of the Western Penitentiary property for the appropriation period from June 1st, 1919 to June 1st, 1921, should be based upon a reduction of sixty per cent. in valuation for the period from July 1st, 1919 to July 1st, 1920, and a reduction of eighty per cent. in valuation for the period from July 1st, 1920 to December 31st, 1920.

This question is governed by the seventh section of the Act of 1915, P. L. 524, which reads as follows:

“That, from and after the adoption and approval of this act, it shall be unlawful for any department, bureau, commission, or other branch of the State Government; or any board of trustees, overseers, managers, or other person or persons, or custodians of State property; to purchase, secure, or obtain any policy of insurance on any property owned by the Commonwealth, the term of which policy of insurance shall extend beyond the thirty-first day of December, Anno Domini one thousand nine hundred and twenty; or to purchase, obtain, or secure any such policy of insurance for any amount in excess of the amount of insurance outstanding at the date of the approval of this act, after deducting from such amount twenty per centum thereof for each calendar year which shall have elapsed from and after the thirty-first day of December, Anno Domini one

thousand nine hundred and fifteen, to the date of purchasing, securing, or obtaining such policy of insurance."

You will notice that the Act plainly states that the deductions contemplated by the Act shall be for each "calendar" year elapsing after December 31st, 1915. Accordingly, irrespective of the fiscal year of your institution, it will be necessary in arriving at your estimates to contemplate the renewal for the year 1919 of but forty per cent. of such insurance as was in force on May 14, 1915; and the renewal for the year 1920 of but twenty per cent. of such insurance as was in force on May 14, 1915. As you state that all your insurance expires July first 1919, it will be necessary for you to renew twenty per cent. of the amount in force on May 14th, 1915 for a term of eighteen months, elapsing December 31st, 1920; and to renew twenty per cent. of the amount in force on May 14th, 1915 for a term of six months, elapsing December 31st, 1919. This course of procedure will strictly accord with the provisions of the Act of 1915.

With reference to the question raised at the meeting of the committee of the Board of Inspectors, namely that the Act of 1915, in providing for reductions of twenty per cent. per year in the amount of insurance between the dates December 31, 1915 and December 31st, 1920, would necessarily provide for no reduction at all in the calendar year 1916; or no insurance at all in the calendar year 1920.

This result must necessarily follow, as a process of simple arithmetic.

A careful examination of the wording of the section above quoted discloses however that there is no inconsistency in the act. The twenty per cent. deductions are to begin for each calendar year which "shall have elapsed from and after the thirty-first day of December, Anno Domini one thousand nine hundred and fifteen." As to the period up to December 31st, 1916, no calendar year did in fact "elapse" after December 31st, 1915, and consequently a renewal for the year 1916 of the full amount of insurance carried on May 14th, 1915 would have been proper.

Yours truly,

EDMUND K. TRENT,
Deputy Attorney General.

The provisions of Section 3, of the Act of March 30, 1911, P. L. 32, requiring the Governor's approval to the action of the Board of Inspectors of the Western Penitentiary in fixing the compensation of persons employed, or making contracts for the construction of buildings provided for under said Act, is not affected or repealed by Act No. 67 of April 18, 1919.

Office of the Attorney General,
Harrisburg, Pa., September 26, 1919.

Mr. John Francies, Warden, Western Penitentiary, Pittsburgh, Pa.

Sir: This Department is in receipt of your communication of the 17th inst., asking to be advised as to the effect of Act No. 67, approved April 18, 1919, defining the duties of the Governor with regard to the approval of warrants, etc., upon Section 3 of the Act of March 30, 1911, P. L. 32, providing for the erection of buildings for the Western Penitentiary.

Section 3 of the Act of 1911 reads as follows:

"A superintendent of construction for the building of said penitentiary shall be appointed by the Governor, and the Board may employ such other persons as they may deem necessary to secure the speedy and economical construction of the buildings; but, so far as practicable, the work shall be performed by the inmates of the Western Penitentiary. The compensation of the said superintendent of construction, as well as of such other persons as may be employed by the Board, shall be fixed by the Board, subject to the approval of the Governor.

All contracts for material, as well as contracts for such portions of the work as cannot be done by the said inmates, shall be made by the Board, subject to approval by the Governor and the Attorney General; and any contract involving an expenditure of more than five hundred dollars shall only be made after advertisement and competitive bidding."

Section 1 of the Act of 1919 reads as follows:

"That hereafter the Governor of the Commonwealth shall not be required to approve any warrant voucher, or claim, for the expenditure of public moneys; nor shall he be required to approve any account, agreement, or contract, to which the Commonwealth is a party, except such contracts as require, his approval under section twelve, article three of the Constitution."

It is clear that the Act of 1919 does not operate to relieve the Board of Inspectors of the Western Penitentiary from the duty of submitting to the Governor for his approval the fixing of the compensation of the persons employed in connection with the construction of the buildings provided for in said Act of 1911, as required in Section 3 thereof.

The only possible question as to the effect of the said Act of 1919 upon said section of the Act of 1911 is as to whether the contracts made by the Board of Inspectors shall continue to be "subject to approval by the Governor", as required by the Act of 1911, or whether

that is no longer necessary in consequence and by virtue of the provision contained in the Act of 1919 that the Governor need not approve a "contract to which the Commonwealth is a party." The question, therefore, turns upon the point whether a contract made by the Board of Inspectors of the Western Penitentiary is to be deemed a contract to which the Commonwealth is a party within the intent of the Act of 1919.

This Department has consistently and steadily ruled that the employees of the Western Penitentiary and kindred institutions are not State employees, and has pointed out the distinction between the government of such institutions as agencies of the State, and that of the Commonwealth proper.

In an opinion of First Deputy Attorney General Keller to the Chairman of the State Workmen's Insurance Board, dated December 9, 1915, in interpretation of Section 103 of the Workmen's Compensation Act of June 2, 1915, P. L. 736, it was pointed out that there had been a statutory recognition of the distinction between "the Commonwealth and governmental agencies created by the Commonwealth."

In an opinion by Deputy Attorney General Davis, dated March 9, 1917, to the Governor, it was held that the term "State employee", as used in the Act of June 14, 1915, P. L. 973, providing for the retirement of State employees, did not include the employees of the Western Penitentiary and other like State agencies.

In an opinion rendered by the writer hereof to the Secretary of the Western Penitentiary, dated November 28, 1917, reported in 27 District Reports, 137, it was ruled that the Act of June 7, 1917, P. L. 600, relating to State officers and employees entering the military service, did not apply to the employees of penitentiaries and other institutions similarly operated by the Commonwealth.

In the case of the law relating to the retirement of State employees the Legislature by the Act of June 7, 1917, P. L. 559, extended its scope to include the employees of "reformatories and other institutions operated by the Commonwealth," thus evidencing a like construction of the general rule.

The principle followed in the foregoing rulings of this Department is, in my opinion, decisive of the question here under consideration. While the Act of 1919 is to be given a liberal construction as tending to relieve the Governor from an unnecessary burden, I am of the opinion that a contract made by the Board of Inspectors of the Western Penitentiary cannot be regarded as one to which the Commonwealth, in the strict sense, is a party.

You are, therefore, advised that the provisions of Section 3 of the Act of 1911 requiring the Governor's approval of the action of the

Board of Inspectors of the Western Penitentiary in fixing the compensation of persons employed, or making contracts in connection with the construction of buildings provided for under said Act are not affected or repealed by the said Act of 1919, but continue to remain in full force and effect.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

PAROLE.

The Board of Inspectors Eastern Penitentiary is informed that a prisoner who has been paroled, and while on parole commits a crime outside of Pennsylvania, and has been returned to the penitentiary may not be re-paroled.

Office of the Attorney General,
Harrisburg, Pa., October 1, 1919.

Mr. I. J. Horstmann, Secretary Board of Inspectors Eastern State Penitentiary, Philadelphia, Pa.

Dear Sir: This Department is in receipt of your favor of the 5th inst., in which you request an opinion as to whether a prisoner who is convicted of a crime outside of Pennsylvania, while on parole may be re-paroled.

The facts which give rise to your request I understand to be as follows:

One Grant Stupp was sentenced January 9, 1911, from Berks County, charged with forgery, to a term not less than two years and six months and not more than ten years. He was released on July 9, 1913. On December 29, 1913, he was sentenced from Chester County for a term of not less than five or more than ten years, for forgery of a bank check. He was pardoned for the second crime and pursuant to said pardon, paroled on June 6, 1916. On December 5, 1916, he was received at the Ohio State Penitentiary under an indeterminate sentence of not less than one year nor more than twenty years for forgery committed in that State. He was confined in the Ohio State Penitentiary until July 25, 1918, on which date an officer from the Eastern State Penitentiary took him into custody and returned him to your institution, where he has since been confined. The prisoner wrote to the Attorney General's Department some time ago and under a misapprehension of the facts he was advised that his case was one for the consideration of the prison inspectors and the Board of Pardons.

The Act providing for the release of prisoners upon parole, approved the 19th day of June, 1911, P. L. 1055, was in force when the crime was committed, for which this prisoner is now held.

Section 10 provides:

"If any convict released on parole as provided for in this Act, shall, during the period of parole, be convicted of any crime punishable by imprisonment under the laws of this Commonwealth, such convict shall in addition to the penalty imposed for such crime committed during the said period, and after the expiration of the same, be compelled by detainer and remand as for an escape, to serve in the penitentiary to which said convict had been originally committed the remainder of the term *without commutation*, which such convict would have been compelled to serve but for the commutation authorizing said parole."

The precise question is whether the words "convicted of any crime punishable by imprisonment under the laws of this Commonwealth" mean crimes committed and punishable in this Commonwealth or crimes, such as if committed in the Commonwealth, would be punishable under the laws thereof. It certainly could not have been the intention of the Legislature that a convict released on parole if he committed an offense of forgery in Philadelphia, should be required to serve the unexpired part of his maximum sentence, but if he went across the river to Camden and committed the same crime, he could not be required to serve out the balance of his term.

I am of opinion that the language of the Act requires any convict to serve the balance of an unexpired term, if he has been convicted outside of Pennsylvania of any crime of a grade which, if committed in Pennsylvania, would be punishable under the laws of this Commonwealth. The section requires such convict to serve the remainder of such term "without commutation", and therefore there is no power in the Board of Inspectors to re-parole a prisoner who has been convicted of a crime outside of Pennsylvania and subsequently returned to the penitentiary.

I am not unmindful that Section 14 of the Act of June 19, 1911, P. L. 1055, above referred to, provides for the return of a convict "for breach of parole", and requires the convict to serve the unexpired maximum sentence "unless sooner released on parole or pardon", but this Section plainly applies when construed with Section 10, to a convict who has violated his parole in some other manner than by committing a crime punishable under the laws of this Commonwealth, and the words "unless sooner released on parole or pardon", as found in Section 14, do not apply to a convict who has, while on parole, committed such offense.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

JUVENILE COURTS—POWERS—COMMITMENT TO HUNTINGDON REFORMATORY.

The Board of Managers of the Pennsylvania Industrial Reformatory at Huntingdon, cannot receive persons committed by the Juvenile Courts for any offense whatever.

Office of the Attorney General,
Harrisburg, Pa., October 6, 1919.

Mr. John D. Dorris, President, Board of Managers, Pennsylvania Industrial Reformatory, Huntingdon, Pa.

Sir: This Department is in receipt of your communication asking to be advised whether a Juvenile Court has power to commit to the Pennsylvania Industrial Reformatory, at Huntingdon, a boy over fifteen years of age "guilty of the crimes of arson and larceny."

This question has been before this Department at various times. In construing the Juvenile Court Act of May 21, 1901, P. L. 279, (declared unconstitutional in *Mansfield's Case*, 22 Superior Court, 224, and expressly repealed by the Act of April 23, 1903, P. L. 274) Attorney General Elkin advised that the Juvenile Courts created by said Act "may sentence male children over the age of fifteen years to custody" in the Pennsylvania Industrial Reformatory, at Huntingdon, (Attorney General's Reports 1902, page 37). That Act, however, specifically named that Reformatory as a place to which commitments might be made by the Juvenile Courts created by the Act.

In an opinion rendered by Attorney General Todd to the President of the Board of Managers of the Pennsylvania Industrial Reformatory, dated December 5, 1907, and reported in 34 County Court Reports, 288, it was held that the Juvenile Courts created by the Act of 1903 could not commit a person to that institution where the offense charged was not one punishable under existing laws in a State prison.

It appears from a certain communication of the Superintendent of the Reformatory to Attorney General Brown that, acting under the aforesaid opinion of Attorney General Todd, the Board of Managers had "declined to receive on several occasions prisoners who were committed from the Juvenile Courts." In a letter dated March 5, 1918, in reply thereto, the Attorney General construed the above opinion of Attorney General Todd as ruling that "the Pennsylvania Industrial Reformatory cannot under the law receive commitments from the Juvenile Courts," basing this construction further upon his understanding that such interpretation has been theretofore followed by the said institution, and advising that it should so continue to be followed until otherwise decided by the Courts, a test case being suggested.

This construction of Attorney General Todd's opinion goes beyond what was decided therein, and gives to it too wide an effect. What was, in fact, decided in that ruling was that the particular case there in question was one in which the commitment to the Reformatory could not be made for the reason that the offense charged was not punishable in a State prison, and was not based upon the broad ground that the Juvenile Courts can in no case commit to that institution. The opinion seems to recognize that if the offense had been one of the prescribed grade for reception at the Reformatory, such commitment might be made.

In none of the foregoing opinions, as I read them, or in any other case which I have been able to find, has the question been so definitely ruled as to constitute a controlling ruling. Let us turn to the respective legislation pursuant to which inmates are received by the Pennsylvania Industrial Reformatory, and the Juvenile Courts make commitments.

Section 4 of the Act of April 28, 1887, P. L. 63, "in relation to the imprisonment, government and release of convicts in the Pennsylvania Industrial Reformatory at Huntingdon, provides as follows:

"Any court in this Commonwealth, exercising criminal jurisdiction, may sentence to the said reformatory any male criminal, between the ages of fifteen and twenty-five years and not known to have been previously sentenced to a State prison in this or any other State or country, upon the conviction in such court of such male person of a crime punishable under existing laws in a State prison. And the said board of managers shall receive and take into said reformatory all male prisoners of the class aforesaid, who shall be legally sentenced on conviction as aforesaid; and all existing laws requiring the courts of this Commonwealth to sentence to the State prison male prisoners convicted of any criminal offense between the ages of fifteen and twenty-five years, and not known to have been previously sentenced to a State prison in this Commonwealth, or any other State or country, shall be applicable to the said reformatory, so far as to enable courts to sentence the class of prisoners so last defined to said reformatory, and not to a State prison."

To these provisions the Board of Managers of the Reformatory must look for guidance in admitting inmates to the Reformatory, and none can be received unless all of the conditions measure up to the prerequisites therein prescribed.

The Juvenile Courts were created by the Act of April 23, 1903, P. L. 274, and in it, as supplemented and amended from time to time,

are to be found the powers for the commitment of the children coming within the jurisdiction of these Courts. Section 1 vests the Court of Quarter Sessions with "full jurisdiction in all proceedings which may be brought before them affecting the treatment and control of dependent, neglected, incorrigible and delinquent children, under the age of sixteen years," as the terms "dependent child", "neglected child", "incorrigible child" and "delinquent child" are therein defined.

"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."

Section 4, as amended by the Act of June 15, 1911, P. L. 959, authorizes the Judge at the hearing, after inquiry into the facts, to determine—

"What order for the commitment and custody and care of the child, the child's own good and the best interests of the State may require; and may commit such child to the care of its parents, subject to the supervision of a probation officer, or to some suitable institution, or the care of some reputable citizen of good moral character, or to the care of some training school, or to an industrial school, or to the care of some association willing to receive it; and, in either case, it shall be within the power of the court to make an order upon the parent or parents of any such child to contribute to the support of the child such sum as the court may determine."

Section 6, as finally amended by Act No. 221, approved June 12, 1919, provides, *inter alia*:

"In the case of a delinquent, dependent, neglected, or incorrigible child, the court may continue the hearing from time to time, and may commit the child to * * * a suitable institution for the care of delinquent children."

Section 8 of the Act, as amended by the Act of April 22, 1909, P. L. 120, provides, *inter alia*, as follows:

"All orders which may hereafter be made by the several courts of quarter sessions of the peace of this Commonwealth, respecting the commitment to institutions, or other judicial disposal, of minors, under the age of sixteen years, by virtue of the several provisions of this act or any of them, shall be subject to amendment, change or extension by the judges thereof sitting in juvenile court, upon motion of the district attorney

or chief probation officer, or upon petition of any other person or persons in interest, after at least five (5) day's written notice both to the district attorney and the chief probation officer, up to the time when such minors shall have attained the age of twenty-one years."

In the above cited opinion of Attorney General Todd it is said:

"When the circumstances of the case warrant it, and the efforts at reformation, through placing the child in the care of probation officers, etc., have failed, the juvenile court is authorized to commit a delinquent child to a 'reformatory institution', or 'a suitable institution for the care of delinquent children'; but nowhere is express authority found in the act for the commitment of any child to the Pennsylvania Industrial Reformatory at Huntingdon."

A careful consideration of the several statutes governing admission and detention at the Huntingdon Reformatory, and of the powers vested in the Juvenile Courts for the commitment of children within their jurisdiction leads me to the further conclusion that not only is there no express authority for the commitment of a child to the said Reformatory by the Juvenile Courts, but that no such authority can be implied. It will be noted that under Section 4 of the said Act of 1887, governing the reception of inmates by the Reformatory, among the prerequisites are that the person shall be "legally sentenced" thereto "on conviction" of crimes of a certain character. The inmates in that institution are denominated "prisoners", and are there confined pursuant to a sentence duly imposed after conviction. The determination of a Juvenile Court as to what commitment of a child is for the child's good and the State's best interests cannot fairly be deemed a conviction in the sense and meaning imported by the term "conviction" as used in the foregoing statutory provision relating to the sentencing of persons to, and the receiving of them as inmates by, the Reformatory. The word "sentence" is nowhere employed in the Juvenile Act. By reference to the fourth paragraph of Section 2 of the Act of 1903 it will be seen that "upon the trial of any indictment of such delinquent child," the action of the Juvenile Court in exercising jurisdiction is based upon the opinion of the Court "that the good of the child and the interests of the State do not require a *conviction* under the criminal laws of this Commonwealth.

Although, as above stated, the Courts, so far as my search has been able to disclose, have nowhere decided this precise question, yet utterances in certain cases strongly tend to support the conclusion here reached.

In the case of *Juvenile Court No. 7943*, 21 *District Reports*, 535, Judge Staake, who in a number of cases has extensively construed the Juvenile Court Law, says:

"The court recognized the right of the management of the Glen Mills Schools to exercise a discretion as to the reception of children, who have been duly convicted of crimes and misdemeanors, but the children committed by the Juvenile Court were not *convicted* of crimes and misdemeanors, but were delinquents or incorrigibles, whose status was fixed by the provisions of the Act of April 23, 1903, P. L. 274, and its supplements. Such children, when adjudged, after a proper hearing, as delinquents or incorrigibles, become wards of the court subject to its jurisdictional care until they become twenty-one years of age, unless previously discharged by the court in due process of the law."

In *Commonwealth vs. Fisher*, 213 Pa. 48, in which the constitutionality of the Juvenile Act of 1903 was upheld, Justice Brown, speaking for the Court, says:

"The last reason to be noticed why the act should be declared unconstitutional is that it denies the appellant a trial by jury. Here again is the fallacy, that he was tried by the court for any offense. 'The right of trial by jury shall remain inviolate,' are the words of the bill of rights and no act of the legislature can deny this right to any citizen, young or old, minor or adult, if he is to be tried for a crime against the Commonwealth. But there was no trial for any crime here, and the act is operative only when there is to be no trial. The very purpose of the act is to prevent a trial, though, if the welfare of the public require that the minor should be tried, power to try it is not taken away from the court of quarter sessions, for the eleventh section expressly provides that nothing in the preceding sections '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.' This section was entirely unnecessary, for without it a delinquent child can be tried only by a jury for a crime charged; but, as already stated, the act is not for the trial of a child charged with a crime, but is mercifully to save it from such an ordeal, with the prison or penitentiary in its wake, if the child's own good and the best interests of the state justify such salvation."

Not only would a commitment by the Juvenile Court of a delinquent child to the Huntingdon Reformatory be outside any statutory provision expressly naming that institution as a place to which such commitments might be made, but it would, in my opinion, clearly offend against the spirit and purpose of the Juvenile Court Act. The status of a child committed by that Court, after due hearing, for the furtherance of the child's good and the best interests of the Commonwealth, is manifestly not that contemplated for those sentenced to the Reformatory.

It was said in *Wolf's Case*, 58 *Superior Court*, 260:

"As shown by its provisions, as well as by its preamble, the broad general purpose the legislature had in view was to guard children from association and contact with crime and criminals, to subject children lacking proper parental care or guardianship to a wise care, treatment, and control that their evil tendencies may be checked and their better instincts may be strengthened, and, to that end, to clearly distinguish the powers of the courts in respect to the care, treatment, and control over the classes of children mentioned, from the powers exercised in the administration of the criminal law."

Section 6 of the Act of 1887 put in the power of the Board of Managers of the Huntingdon Reformatory the duration of confinement of inmates thereat, not to exceed the maximum term for the crime for which the prisoner was convicted and sentenced. It has been held by this Department that by virtue of this provision the Courts are without power to parole from the Reformatory.

Section of the Juvenile Act, as amended by the Act of 1909 above quoted, subjects all orders respecting the commitments by the Juvenile Courts to "amendment, change or extension by the judges thereof sitting in juvenile court." This is plainly inconsistent with the authority expressly vested in the Board of Managers of the Pennsylvania Industrial Reformatory to fix the duration of confinement thereat, pursuant to Section 6 of the Act of 1887.

Under Section 10 of the Act of 1887 the Board of Managers of the Reformatory has the power to transfer incorrigible inmates to the State prison. To hold that the Juvenile Courts may commit to the Reformatory would thus, in this way, open the door to the incarceration at the penitentiary of a delinquent child committed to the Reformatory, and by it in turn transferred to the Penitentiary as incorrigible. Surely our system of criminal jurisprudence does not contemplate such a method of imprisonment.

That the Huntingdon Reformatory is an institution where a delinquent child would be vouchsafed treatment tending to the child's good is true. That institution in manifold ways has long and well demonstrated the splendid service it can render, and the many benefits it affords. Its design, however, is for another class than the children over whom the Juvenile Courts exercise jurisdiction.

You are, therefore, advised that the Board of Managers of the Pennsylvania Industrial Reformatory, at Huntingdon, cannot receive persons committed by the Juvenile Courts for any offense whatever.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

HUNTINGDON REFORMATORY—GRATUITIES TO PAROLED OR DISCHARGED INMATES.

The purpose of the gratuity paid to paroled and discharged inmates of the Huntingdon Reformatory is to provide them with means to go to their homes. The word "residence" as used in the Act of July 16, 1919, is to be interpreted in the light of that purpose.

When the residence of a discharged inmate of the Huntingdon Reformatory is known that must govern the amount of the gratuity paid. When the actual residence cannot be ascertained, the county from which such discharged inmate was sentenced determines the gratuity paid.

In the case of a paroled inmate of the Huntingdon Reformatory, the place to which he goes under his parole is his residence within the intent of the law.

Office of the Attorney General,
Harrisburg, Pa., October 7, 1919.

Mr. T. B. Patton, General Superintendent, Pennsylvania Industrial Reformatory, Huntingdon, Pa.

Sir: This Department is in receipt of your communication of the 25th ultimo relative to the gratuities paid discharged or paroled inmates of the Pennsylvania Industrial Reformatory. This gratuity is paid by virtue of the provisions of an appropriation as contained and made in Act No. 59-A, approved July 16, 1919, making an appropriation to the said Reformatory, reading as follows:

"For each discharged or paroled inmate whose residence is within fifty miles of Huntingdon Five (5) Dollars, and for each discharged or paroled inmate whose residence is more than fifty miles from Huntingdon the sum of Ten (10) Dollars; the total amount not to exceed in the aggregate the sum of Ten Thousand (10,000) Dollars."

The specific question submitted, as I understand it, upon which an opinion is requested is whether the quarterly requisition upon the Auditor General for the payment to the Reformatory of the amount of these gratuities paid to discharged and paroled inmates, in accordance with the foregoing provision, should be supplemented with a list of the counties from which the said inmates had been received, as showing their residence upon the basis of which the respective gratuities had been computed.

It would be difficult to lay down any single rule definitely applicable to every case in the determination of what constitutes the residence of a discharged or paroled inmate. The county in which he was convicted and from which he was sentenced to the Reformatory would afford no conclusive guide. The Act allows the gratuity in accordance with the distance from Huntingdon of the residence of the

inmates, not the place of conviction. It is obvious that many tried in, and received from, counties which are not their legal places of residence. The place where the crime was committed, not the place of residence, fixes the trial county.

The purpose of this gratuity is manifestly to provide an inmate, upon his release, with means to go to his home. The term "residence", as used in the Act, is to be interpreted in the light of that purpose. Where the residence of a *discharged* inmate is known that must govern in the amount paid him. Where the actual residence of a *discharged* inmate cannot, however, be ascertained, after due inquiry, I am of the opinion that the county in which the conviction was had, and from which he was sentenced, is the one on which to base the amount of gratuity to be paid. In the absence of information to the contrary, or satisfactory proof otherwise, that is to be taken as the place of residence for the purpose of this provision of the Act.

In the case of a *paroled* inmate, I am of the opinion that the place to which he goes under his parole and where pursuant thereto he enters upon employment is to be deemed his residence within the intent of the law. I understand from your communication that such is the rule that has been followed.

You are, therefore, advised that the county in which an inmate of the Pennsylvania Industrial Reformatory may have been convicted, and from which he was sentenced to that Institution, does not necessarily determine his "residence" within the meaning of the foregoing provision of the Act of 1919, according to which the gratuity there provided is to be paid him upon his discharge or parole, but that the fact of residence should be ascertained and determined, and payment of the gratuity on account thereof made in accordance with the general rules as above stated. It will be proper to supplement the gratuity requisition upon the Auditor General with a list showing the residences of the discharged or paroled inmates as so ascertained or determined.

Very truly yours, .

EMERSON COLLINS,
Deputy Attorney General.

PAROLE.

A prisoner paroled from his sentence for second degree murder, while on parole committed larceny in Indiana, is convicted, sentenced and pardoned for that offense, and returned to the Penitentiary in Pennsylvania to complete his unexpired sentence for murder. Held that the pardon reaches not only the consequences of the criminal act, but the conviction itself, that in contemplation of law, the prisoner committed no crime in Indiana, and is therefore now eligible for parole in Pennsylvania.

Office of the Attorney General,
Harrisburg, Pa., April 8, 1920.

Mr. John W. McKenty, Parole Officer, Eastern State Penitentiary,
Philadelphia, Pa.

Sir: This Department is in receipt of your communication of the 25th ult. relative to Joseph Ryan, alias Thomas McCluska, B3133. I understand the facts to be as follows:

He was convicted of the crime of Murder in the Second Degree and sentenced on March 5, 1906, to undergo imprisonment in your institution for a term of nineteen years. On June 19, 1914, he was paroled. Some time subsequent thereto, he left the State of Pennsylvania and went to Indiana where he was convicted of the crime of Petit Larceny and confined in one of the penal institutions of that State. On October 30, 1916, the Governor of Indiana pardoned Ryan, alias McCluska, "upon condition that he be delivered into the custody of the proper officials of said Eastern State Penitentiary of Philadelphia, Penna., and in the event said penitentiary does not come for him, he is to serve his term of sixty days, together with fine and costs, in said Indiana State Farm, until released as provided by law." In accordance with this pardon, he was returned to your institution and is now confined therein. You now inquire whether he can be again released on parole.

The conditions upon which the pardon was granted have been met and the pardon is in effect a full pardon. As held by former Attorney General Brown, in an opinion dated June 6, 1918, such a pardon reaches not only the consequences of the criminal act but the conviction itself; so that in contemplation of law, Ryan committed no crime while he was in the State of Indiana. To the same effect are *Diehl et al. v. Rogers et al.*, 169 Pa. 316; and *E. Parte Garland*, 71 U. S. 333.

Section 10 of the Parole Act of June 19, 1911, P. L. 1055, as amended by the Act of June 3, 1915, P. L. 788, substantially providing that if a convict, released on parole, is convicted of any crime punishable by imprisonment under the laws of this Commonwealth, he must serve out the remainder of his term without commutation, has no application. You are therefore detaining this convict not on account of what he did in Indiana, but because he violated his parole by leaving the State of Pennsylvania without permission of your Board of Inspectors. The present status of the prisoner, so far as his eligibility to parole, therefore, is governed by Section 14 of the Act of 1911, as amended by the said Act of 1915, which reads as follows:

"Whenever it shall appear to the Board of Inspectors of a penitentiary that a person who has been sentenced thereto under this act, and released on parole by commutation containing a condition that the convict shall be subject to this act, has violated the terms of his or her parole, the secretary of said Board of Inspectors may issue a warrant for the arrest of said person, in the same manner as in the case of an escaped convict. Upon said convict being returned to the penitentiary, he or she shall be given an opportunity to appear before its Board of Inspectors, and, if said board shall find that said parole has not been broken, the prisoner shall be released, and continue subject to the terms of said parole; but, if it be found that said parole has been broken, said board shall declare such convict delinquent; after which a full report of the said case shall be forwarded immediately to the Governor, who thereupon may issue his mandate, reciting the date of commutation, for the recommitment of such convict for breach of parole, to the penitentiary of original commitment, to be imprisoned in said penitentiary for the remainder of a period equal to the unexpired maximum term of such prisoner as originally sentenced (computing the same from the date of arrest for breach of parole), *unless sooner released on parole or pardoned*; but, if the Governor shall disapprove the finding of the Board of Inspectors, the said prisoner shall be released upon the conditions of his original parole."

The clear implication of this section is that where the parole has been broken by some act or omission not comprehended by Section 10, the convict is not required by the statute to serve the remainder of his term without commutation, but may be again released on parole by the Governor, upon the recommendation of the Board of Inspectors of your institution.

Specifically answering your inquiry, I beg to advise that Joseph Ryan, alias Thomas McCluska, B3133, a convict in the Eastern State Penitentiary, may now be legally recommended by your Board of Inspectors for release on parole.

Very truly yours,

FRANK M. HUNTER,
Deputy Attorney General.

HUNTINGDON REFORMATORY.

The contractor for furnishing uniforms for the officers of the Reformatory must bear the loss which accrued on the contract price.

Office of the Attorney General,
Harrisburg, Pa. April 14, 1920.

Mr. T. B. Patton, General Superintendent. Pennsylvania Industrial Reformatory, Huntingdon, Pa.

Sir: Yours of April 12th, asking an opinion as to whether, in view of the fact that your officers reimburse the State for all expenditures made for their uniforms, and an increased price might not be considered a gratuity payment by the State, your Board would be justified in increasing the allowance to be made for the uniforms furnished you, has been referred to me.

In reply would say, as I understand, the circumstances which raised these questions, are as follows:

"The Pennsylvania Industrial Reformatory receives bids which are dated from July 15th of each year for a period of one year for the furnishing of the uniforms of the officers of the Reformatory, which uniforms are paid for by the officers who reimburse the Reformatory for the payments made the party furnishing the same.

In July, 1919, the award for furnishing these uniforms was made to the firm of S. M. Meyers & Company of Lancaster, on the bids which they submitted. Some two months ago, or thereabouts, Meyers & Company addressed the Board of Managers requesting that they might be allowed an advance for the furnishing of the uniforms, giving as a reason that the largely increased cost for material as well as the advance in wages had resulted in their furnishing the uniforms at a loss to themselves which they did not feel justified in standing. The Board did not accede to their request, but Meyers & Company have made another appeal, asking for, what seems to be a reasonable increase for the furnishing of the uniforms."

In an opinion rendered by this Department on January 23, 1917, you were advised that:

"any additional sum paid over and above the contract price would amount to a gratuity out of State moneys, and would be without legal warrant or authority."

The fact that the officers reimburse the State for the money expended for their uniforms does not, in our opinion, render the contract any less binding on the parties thereto. Both your Board and the Contractors are bound by the terms of the contract, and, if loss falls upon the contractors because of increased costs, they are compelled to pay, under the law, they are bound to bear it.

You are advised, therefore, that under the circumstances detailed above, you do not have the authority to increase the allowance for uniforms to be paid to the contractors.

Yours very truly,

W. I. SWOOPE,
Deputy Attorney General.

ESCAPED CONVICTS.

A reward offered by the Western Penitentiary for information leading to the arrest of an escaped convict, is payable to a person in Canada who gave information which led to the arrest of the convict there.

Office of the Attorney General,
Harrisburg, Pa. April 28, 1920.

Honorable John Francies, Warden Western Penitentiary, Pittsburgh, Pa.

Dear Sir: Some time ago you requested the opinion of this Department as to whether the reward offered by the Western Penitentiary for the arrest of Robert Kenney, was payable to Madame M. A. Leblanc.

The facts I understand to be as follows:

Robert Kenney, alias Robert Harding, escaped from the Western Penitentiary September 10, 1919. The Board of Inspectors offered a reward of \$250.00 "for information leading to the arrest of this fugitive." Circulars containing said offer were issued. On December 5, 1919, Madame Leblanc telephoned to the police in Ottawa, Ontario, that there was a man boarding at her house whom she believed to be a burglar. The boarder, when arrested, was identified by the Ottawa police as the fugitive.

An investigation developed that he and several accomplices had committed a series of burglaries in and about Ottawa. He was tried; convicted and sentenced to undergo an imprisonment of five years in the penitentiary at Kingston, Ontario. It is probable that he will not be returned to the custody of the Western Penitentiary until he has served his sentence in Canada.

When Madame Leblanc gave the information to the police she had no knowledge of the reward offered for Kenney's arrest. She gave no information to the Western Penitentiary. On the other hand, it is through no fault of hers that he was not immediately turned over to the Penitentiary and the Chief Constable of Ottawa, Canada, has advised you that no member of the Police Department

will claim the reward, inasmuch as the information which led to the arrest was furnished by Madame Leblanc.

Under these facts, I am of opinion that she has complied with the terms of the reward. She has given information which led to the arrest of this fugitive. It would be too narrow a construction to hold that the information must have been given to the Western Penitentiary, or must have been given with knowledge of the reward and for the purpose of claiming it.

I am also of opinion that the reward is immediately payable. The fugitive was arrested pursuant to the information which Madame Leblanc gave, and will be, unless some circumstance over which she has no control, intervenes, turned over in due time to serve out his sentence in the Western Penitentiary.

I therefore advise you that the reward of \$250.00 is properly payable to Madame M. A. Leblanc.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

IN RE ADVERTISEMENTS.

An advertisement does not fall within any legal definition of "Supplies," so that the Act of April 23, 1903, prohibiting any officer or member of the board of managers of a state institution being connected with the sale, either directly or indirectly, of supplies to such institution, does not apply to one who was a stockholder in a newspaper which printed notice of a final discharge from parole of convicts, and this would not be a bar to his acting as a member of the board of prison inspectors of a penitentiary.

Office of the Attorney General,
Harrisburg, Pa., June 8, 1920.

Mr. John M. Egan, Parole Officer, Western Penitentiary, Pittsburgh, Pa.

Sir: Your letter of the third of June, 1920, asking for an opinion from this Department as to whether advertisements, pertaining to the final discharge from parole of convicts, can be published in a newspaper which is owned by a corporation of which a member and officer of the Board of Inspectors of the Western Penitentiary is an officer, duly received.

In reply would say that the first section of the Act of April 23, 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."

The Supreme Court has held that this is a penal statute and must be strictly construed. *Trainer v. Wolfe*, 140 Pa. 279. The question which you raise is whether an advertisement, required to be made by the officers of the Western Penitentiary, comes under "supplies" prohibited under this Act of April 23, 1903.

The word "supplies" was generally supposed to mean sustenance, which is food, fuel, bedding or articles of daily necessity, but now has a broader meaning. The Century Dictionary defines it to mean "the act of supplying what is wanted or that which is supplied; . . . a quantity of something supplied or on hand."

In the following case it was held that the word "supplies" means that township supervisors are not permitted to employ their own teams or minor children upon the township roads. *In re Hazle Township*, 6 Kulp, 491.

The word "supplies" has been defined to be "any substance, the use of which might reasonably tend to the working or development of a mine." *Grants Pass Trust Co. v. Enterprise Mine Co.*, 113 Pac. 859.

As advertisements do not fall within any of the legal definitions of "supplies", you are therefore advised that the law does not prohibit the insertion of the advertisements pertaining to the final discharge from parole of convicts from the Western Penitentiary in a paper published by a corporation of which a member of the Board is a Director.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

PAROLE OF PRISONERS.

A prisoner sentenced under the indeterminate sentence Act of May 10, 1909, P. L. 495, released on parole, and who was convicted of a second offense before the expiration of his parole, must serve the full unexpired term of his first offense, namely, from the date of his release on parole until the expiration of his original maximum sentence.

Office of the Attorney General,
Harrisburg, Pa., August 10, 1920.

Mr. John W. McKenty, Parole Officer, Eastern State Penitentiary,
Philadelphia, Pa.

Sir: Your letter of August 6, 1920, requesting an opinion from this Department as to whether you shall give a prisoner, sentenced under the Indeterminate Sentence Act of May 10, 1909, P. L. 495, and released on parole, and who was convicted of a second felony before the expiration of his parole and sentenced to another term and returned to your institution, credit for the time that he faithfully reported on the parole from his first sentence, or should he be made to serve the full unexpired term, viz: from the date of his release on parole until the expiration of his original maximum sentence, duly received.

You were advised by this Department on March 15, 1911, that the "unexpired maximum term" used in the Act of May 10, 1909, P. L. 495,

".....refers to the term of sentence and does not refer to the time passed on parole. To construe the words 'unexpired maximum term' to give credit to the prisoner for the time passed on parole, as you point out, would permit a prisoner who had committed a crime to take advantage of the time in which he had succeeded in evading arrest. My opinion, therefore, is that when a prisoner is arrested and returned, he must serve the amount of his sentence which had not expired at the date of his release on parole."

On April 9, 1914, this Department advised you that where a prisoner is sentenced for an indeterminate term and is released on parole before the expiration of the maximum sentence and subsequently is returned to serve a new sentence for a new indeterminate term and on a new charge, he must serve the new term first and after its expiration be held for the unexpired maximum term of his first sentence.

Judge McFarlane of Allegheny County, in construing the Act of May 10, 1909, P. L. 495, said:

"The only logical result of the relator's non-performance of the conditions of his parole is that he is in the same state in which he was at the time of his release."

And it was decided in this case, *Commonwealth ex rel. v. Francis*, 63 P. L. J. 41, that under the Act of May 10, 1909, providing for an indefinite sentence, a prisoner who is paroled under the provisions of the act and subsequently remanded to custody by reason

of a breach of parole, must serve the balance of the maximum term of sentence dating from the time he was released on parole. The time the prisoner is out on parole is not to be included in determining the time of the maximum sentence.

In accordance with these decisions, you are therefore advised that the prisoner will have to serve the full unexpired term of his first sentence, namely, from the date of his release on parole until the expiration of his original maximum sentence. The time he passed on parole cannot be considered part of the term of his sentence. The phrase "unexpired maximum term" refers to the term of sentence and not to the time passed on parole.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

OPINIONS TO HOSPITALS.

STATE HOSPITAL FOR CRIMINAL INSANE AT FARVIEW.

The plans and specifications for an additional ward to the hospital for criminal insane at Farview, must be revised so as to bring the cost of the structure within the appropriation made by the legislature at the session of 1919.

Office of the Attorney General,
Harrisburg, Pa. November 26, 1919.

G. von Phul Jones, Esq., 818 Real Estate Trust Bld'g., Philadelphia,
Pa.

Dear Sir: We have your favor of recent date in behalf of the Trustees of the State Hospital for the Criminal Insane at Farview.

The facts upon which you request an opinion are as follows:

The last session of the Legislature made certain appropriations to this institution, among them the following:

"For erecting and constructing an additional ward, the sum of one hundred thousand dollars (\$100,000), or so much thereof as may be necessary."

The Act making these appropriations also provides:

"It is further provided that by reason of the fact that the land contains building stone, brick clay, and brick plant and lumber, the said board of trustees may and are hereby authorized and empowered to construct and erect buildings, roads, walks, fences, pipe-lines, conduits, ducts, mains, reservoirs, dams and greenhouses sewage-disposal plant and the work of clearing land and grading, in whole or in part, as they may deem advisable by the employment of such inmate labor as is advisable, and employ such other labor, skilled and unskilled, as may be necessary."

The drawings and specifications prepared for the ward to be erected out of the appropriation above referred to, were made some years ago, and when bids were received it was found that the completed building as now planned will cost \$209,239.

You ask whether, in view of the language of this appropriation, this ward can be constructed as far as the appropriation is available, or whether the Board of Trustees must revise the plan in such a way as to cut down the size of the building without disturbing the general scheme of construction originally adopted.

I have no difficulty in advising you that the latter plan must be carried out. The Legislature did not appropriate \$100,000 to build an additional ward according to the plans and specifications which the trustees had theretofore adopted. The appropriation was made entirely for the purpose of erecting "an additional ward" without reference to the character or style thereof.

It must be presumed that in appropriating \$100,000 the Legislature was aware of the then existing conditions as to the increased cost of labor and materials. If the Legislature had intended the \$100,000 to be appropriated toward the building of a ward, it could have said so. The plain meaning of the appropriation is that a ward should be built; that is to say, ready for occupancy, to cost not exceeding \$100,000.

The language of the last paragraph does not authorize a different construction to be put upon this appropriation.

That paragraph of the Act authorizes the trustees to employ the inmates, as far as they may deem it advisable to employ them, in the work of constructing buildings or other improvements. It also authorizes the employment of other labor, skilled and unskilled, for such purposes, and the reason given for such authority is that the land contains raw material for building. The trustees in building the additional ward may employ such inmate labor as they deem advisable and spend \$100,000 in addition to the employment of such labor, but there is nothing in the Act which authorizes the trustees to use the \$100,000 appropriated for the purpose of "erecting and constructing an additional ward," for the erection and construction of a part of a ward, or a half-finished ward.

I am, therefore, of opinion, and so advise you, that the trustees must revise the plan so as to cut down the building to a size that can be built within the appropriation of \$100,000, which revision of course would be made so as not to disturb the general scheme of construction already adopted.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

WORKMEN'S COMPENSATION.

Re. amounts to be collected by the Shamokin Hospital for treatment of injured employes in certain cases.

Office of the Attorney General,
Harrisburg, Pa., March 5, 1920.

Dr. George W. Reese, Surgeon in Chief and Superintendent of State Hospital of the Treverton, Shamokin and Mount Carmel Coal Fields, Shamokin, Pa.

Sir: This Department is in receipt of your communication of the 16th ultimo relative to the liability of an employer of his insurer, under the Workmen's Compensation Law of June 2, 1915, P. L. 736, for hospital services rendered an injured employe.

You enclose certain letters from an Insurance Company in which it denies its liability to your Institution for services rendered an employe who died within fourteen days after his injury and as a result thereof. You refer to a ruling that prohibits you from recovering from an employer or his insurer where a major operation has been performed and where the employe dies within fourteen days after the injury, and you now inquire:

First: Whether you can recover under the original provisions of the Compensation Act where a major operation has not been performed and where the employe dies within the fourteen day period; and

Second: As to your rights as against an employer or his insurer under the Workmen's Compensation amendment approved June 20, 1919, P. L. 643, the amendment applying to injuries sustained at midnight on the thirty-first day of December, one thousand nine hundred and nineteen, or subsequent thereto.

Your first inquiry is ruled by a decision of the Workmen's Compensation Board in the case of *Hughes vs. Susquehanna Brewing Company*, 2 Department Reports, 1796. It was there held that where death resulted within fourteen days from the injury, the liability of the employer for medical expenses was defined by Section 307 of the Act, and that Section 306 did not apply; that the employer was only required to pay the sum of \$100 to the dependents, or to the personal representatives where there were no dependents, and that an award of \$25 for medical services, in addition to the \$100 aforesaid, was erroneous.

The test of the liability of the employer and hence of his insurer to pay hospital services is not the performance or non-performance of a major operation. The determining factor is whether the employe died within the fourteen day period as a result of the injury. If an injured employe is received by your Institution and survives the fourteen day period, Section 306 of the Act governs and you are entitled to recover from the employer or his insurer the cost of hospital services for so much of that period as the employe was

under your care, not exceeding of course, the maximum amounts specified in this section. Under this Section you can recover even though the employe should subsequently die as a result of the injury within or after the expiration of the compensation period (*Steinhart vs. Wert*, 3 *Department Reports*, 261).

In accordance with the foregoing, the contention of the Insurance Company, as expressed in the communications which you have enclosed, denying their liability to your Institution for hospital services by reason of the fact that the employe died within the fourteen day period, is correct.

As to your second question, the amendment of 1919 shortens the interval between the time of the happening of the injury and the beginning of compensation from fourteen days to ten days and lengthens the period during which the employer is required to furnish medical, surgical and hospital services and supplies from fourteen days to thirty days. This lengthened period necessitated a change in the maximum cost of such services and supplies. The Legislature, therefore, abandoned the performance of a major surgical operation as the principle upon which to base the maximum costs of such services and substantially provided that during the thirty day period the employer must furnish reasonable surgical and medical services, medicines and supplies not exceeding \$100, and that in addition he must furnish for that period "hospital treatment, services and supplies", the cost not to exceed the prevailing charge in the hospital for like services to other individuals.

The criterion to determine your right to recovery against the employer or his insurer is the same under the amendment as under the original provisions of the Act, i. e., whether the employe survived the interim between the time of the injury and the time when compensation begins. If the employe dies within ten days after the injury and as a result thereof, you cannot recover from the employer, as his liability for the cost of the employe's last sickness is governed by Section 307 and is directly to the dependents or, in the event there be no dependents, to the personal representatives. If the employe survives the ten day period, a liability exists on the part of the employer, within the statutory maximum, directly to your Institution, even though the employe should die as a result of the injury before his full compensation period expires.

I return the correspondence you enclosed.

Very truly yours,

FRANK M. HUNTER,
Deputy Attorney General.

IN RE HOSPITAL EXPENSES.

Under the Workmen's Compensation Act of 1915, if medical services and supplies furnished by a physician amount to less than \$100 and the injured employe is then transferred to a hospital, it can recover the difference between the previous expenses and \$100 during a 30-day period. The compensation for services during that period are limited in all cases to \$100.

Office of the Attorney General,
Harrisburg, Pa., April 12, 1920.

Doctor George W. Reese, Surgeon-in-Chief and Superintendent of
State Hospital of the Treverton, Shamokin and Mount Carmel
Coal Fields, Shamokin, Pa.

Sir: There was duly received your communication of the 22nd ultimo, inquiring as follows:

"When a patient has been treated in another hospital, or by surgeons or physicians for a number of days and said party is paid \$100. for their service, then for various reasons the patient is transferred to the Shamokin State Hospital; can we charge and collect for the remaining number of days specified by law?"

I assume you mean your rights as against the employer or his insurer.

Your inquiry is pertinent only where the injured employe survives the ten day waiting period, this Department having advised you on March 5, 1920, that there is no liability on the part of the employer or his insurer to your Institution where death results within ten days after the accident.

Section 306 of the Workmen's Compensation Law of June 2, 1915, P. L. 736, as amended by the Act of June 20, 1919, P. L. 643, provides, *inter alia*, as follows:

"During the first thirty days after disability begins, the employer shall furnish reasonable surgical and medical services, medicines, and supplies, as and when needed, unless the employe refuses to allow them to be furnished by the employer. The cost of such services, medicines, and supplies shall not exceed one hundred dollars. If the employer shall, upon application made to him, refuse to furnish such services, medicines, and supplies, the employe may procure the same, and shall receive from the employer the reasonable cost thereof within the above limitations. In addition to the above services, medicines, and supplies, hospital treatment, services, and supplies shall be furnished by the employer for the said period of thirty days. The cost for such hospital treatment, service, and supplies shall not in any case exceed the prevailing charge in the hospital for like services to other individuals."

On November 14, 1919, the Workmen's Compensation Board adopted the following rule:

"The accidents happening on or after January 1, 1920, where there are both medical and hospital charges, or hospital charges alone, the Board will rule one hundred dollars as a maximum charge for the latter."

Under the foregoing provisions your rights against the employer or his insurer, are clear. If medical services medicines and supplies are furnished by a physician to the value of \$100. or less, and the employe is then received by your Institution, you can recover the value of services, medicines and supplies furnished during the thirty day period not exceeding the sum of \$100. If medical services, medicines and supplies are furnished by the hospital, the pecuniary value of which is less than \$100. and the employe is then transferred to your Institution, you can recover for services, medicines and supplies the difference between \$100. and the pecuniary value of the services, medicines and supplies furnished by the hospital from which the employe was transferred. If the cost of the services, medicines and supplies in the hospital which first received the employe equals or exceeds the sum of \$100., you can recover nothing under the Workmen's Compensation Law from the employer or his insurer.

Very truly yours,

FRANK M. HUNTER,
Deputy Attorney General.

COMPENSATION.

A nurse in the State Hospital for the Insane at Danville, who was injured by an assault made by another nurse, should file a workmen's compensation claim petition, so that the matter of compensation for the injury may be adjudicated.

Office of the Attorney General,
Harrisburg, Pa., July 16, 1920.

J. Allen Jackson, M. D., Superintendent, The State Hospital for the Insane, Danville, Pa.

Sir: Your communication of the 6th instant was duly received.

You state that on May 21st a nurse in your employ, assigned to day duty, was injured in an assault made upon him by a night nurse, who had been assigned by the Hospital to call the day nurse for

duty; that the injury resulted in concussion of the brain, the man being as yet unable to return to work, and that his salary as a nurse is \$83.00 per month, with full board and lodging. Upon these facts you inquire whether or not this man is eligible for workmen's compensation.

The legal question involved is whether the injury occurred in the course of employment. This is a question upon which this Department will abstain from giving its advice. The workmen's Compensation Law has established in the Referees and Compensation Board a special tribunal for the determination of questions of this character. For this Department to give its advice on such a question would, to say the least, prove in many cases most embarrassing in the event that the Referee or the Board was inclined to a contrary view.

The injured employe should consult the person with whom you carry workmen's compensation insurance, and, in the event that he fails to adjust the matter to his satisfaction, file a Workmen's Compensation Claim Petition, and pursue such other course as the Workmen's Compensation Law requires.

Very truly yours,

FRANK M. HUNTER,
Deputy Attorney General.

STATE HOSPITAL.

A sum of money paid by an injured miner for treatment in the State Hospital for Injured Persons at Shamokin should be returned to him.

Office of the Attorney General,
Harrisburg, Pa., August 27, 1920.

Hon. W. C. McConnell, President State Hospital for Injured Persons of the Treverton, Shamokin and Mount Carmel Coal Fields, Shamokin, Pa.

Sir: This Department is in receipt of your letter of recent date stating that a man injured in the Scott Colliery of the Susquehanna Collieries Company was admitted to your hospital on the date of his injury, February 27, 1919, and discharged therefrom July 19, 1919. Within two weeks after his admission he paid to the hospital the sum of \$75.00 for his treatment. On April 23, 1919, his employer, in accordance with the provisions of the Workmen's Compensation Act, paid to the hospital the sum of \$75.00 for his treatment during

the period prescribed by that Act. The patient has asked that the amount which he paid be returned to him and you inquire whether this should be done.

The Act of June 13, 1907, P. L. 699, providing for the erection and management of your hospital provides, *inter alia*, as follows:

"Section 9. That this hospital shall be specially devoted to the reception, care, and treatment of persons injured in and about the mines, workshops, and railroads, and all other laboring men: Provided, however, That no person shall be admitted for treatment to said hospital, to the exclusion of the classes herein stated, and who has not contracted injuries in or at the coal mines, railroads, or workshops embraced within the limits of the aforesaid coal fields.

"Section 10. The trustees of the said hospital may, from time to time, charge any patient, other than the classes named in section nine of this act, an amount sufficient to cover the cost of treatment."

The Act of June 14, 1887, P. L. 399, provided for the erection and management of a State Hospital for Injured Persons of the Middle Coal Field. In construing Sections 9 and 10 of that act, which are identical with the Sections of the Act of 1907 which I have quoted, Attorney General Brown said:

"Within the excepted classes (i.e. the classes named in section 9) services rendered following his injury *must be given free.*"

Opinions of Attorney General 1915-16, 575.

We agree with this interpretation. In the case which you have submitted it seems apparent that the patient did not intend to make a contribution to the hospital, as he might have done under Section 11 of the Act of 1907, but intended to pay for the service which had been rendered to him, and I therefore advise you that you should return to him the sum of \$75.00 which he has paid.

Very truly yours,

GEORGE ROSS HULL,
Deputy Attorney General.

STATE HOSPITAL FOR THE INSANE AT DANVILLE.

The Treasurer of the Hospital may be a member of the Board of Trustees.

Office of the Attorney General,
Harrisburg, Pa., September 22, 1920.

Mr. H. T. Hecht, Secretary, Board of Trustees of the State Hospital
for the Insane, Danville, Pa.

Dear Sir: This Department is in receipt of your communication of the 15th instant, asking to be advised whether the office of the Treasurer of the State Hospital for the Insane at Danville may be filled by a member of the Board.

There is no general act covering the question submitted by you. Whether an officer of a State institution may be one who is at the same time a member of the Board of Trustees or Managers, depends upon the terms of the statute creating the institution, and providing for its government and administration.

The Act of March 27, 1873, P. L. 54, as amended by the Act of June 7, 1913, P. L. 460, entitled "An Act to organize the State Hospital for the Insane at Danville, and providing for the government and management of the same," provides in Section 1 thereof, *inter alia*, as follows:

"That the Governor shall nominate and, by and with the consent of the Senate, appoint nine persons to be trustees of the said institution, who shall be a body politic or corporate by the name and style of the Trustees of the State Hospital for the Insane, at Danville, Pennsylvania, and shall manage and direct the concerns of the institution, and make all necessary by-laws and regulations not inconsistent with the constitution and laws of the Commonwealth.....and shall serve without compensation.....Said trustees shall have entire charge of the management, government, and control of the institution;.....The trustees shall also appoint a treasurer, who shall give bonds to the Commonwealth for the faithful discharge of his duties; they shall determine his compensation for services, also the salaries of other officers and assistants who may be necessary for the just and economical administration of the affairs of said hospital."

A careful consideration of the above provision leads me to the conclusion that there is nothing therein which must necessarily be construed as inhibiting the Board from selecting one of their own number as Treasurer, and who could continue to act in both capacities. In my opinion, it is a matter within the sound discretion of the Board. We must presume that for the Treasurer to be also a member of the Board would not be contrary to the public policy,

for the reason that the statutes relating to the creation and management of various State institutions in some instances expressly direct that the Treasurer shall be a member of the Board charged with the management thereof.

A recent instance of this is seen in the Act of July 25, 1913, P. L. 1311, establishing the State Industrial Home for Women.

Specifically answering your question, you are, therefore, advised that the Treasurer of the State Hospital for the Insane at Danville may be a member of the Board of Trustees.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

STATE HOSPITAL FOR THE CRIMINAL INSANE AT FARVIEW.

The Hospital is without authority to sell brick produced by its inmates to the East Stroudsburg Hospital.

Office of the Attorney General,
Harrisburg, Pa., November 23, 1920.

Honorable Henry F. Walton, Chairman, Board of Trustees, State Hospital for the Criminal Insane, Farview, Pa.

Sir: The question has been submitted to the Attorney General whether the State Hospital for the Criminal Insane, at Farview, may lawfully sell brick manufactured by its inmates to the East Stroudsburg Hospital.

The powers of the said State Hospital for the Criminal Insane at Farview to sell the products of its inmates are such as arises from the Act of May 28, 1907, P. L. 290, as amended by the Act of June 19, 1913, P. L. 530. Section 3 thereof, as amended, reads as follows:

"Supplies, manufactured articles, goods and products, so made, manufactured, or produced, shall not be sold or exchanged to any person, firm, copartnership, unincorporated association, or corporation, except as otherwise herein provided; but the same may be made subject to sale or exchange to any institution within the confines of the Commonwealth which is maintained by the State, wholly or in part, wherein the insane, feeble-minded, and epileptic persons are confined; and articles the product of the individual skill and labor of the inmates of any such institution or hospital, and the produce of such small individual plots of ground as may be assigned to such inmates and cultivated by them, may be sold and the proceeds given to such inmates, or used for their benefit, or paid at their request to their families."

It will be seen that by virtue of the foregoing provision an institution to which the products of the Farview Hospital may be sold or exchanged is one "*maintained by the State, wholly or in part, wherein the insane, feeble-minded, and epileptic persons are confined.*"

The Stroudsburg Hospital manifestly does not fulfill this requirement, notwithstanding the fact that it may receive State aid. It is not to be deemed one wherein the "insane, feeble-minded and epileptic persons are confined" within the intent and requirement of the Act. It is a Hospital supported by public contributions, aided by State appropriations, operating without profit, and rendering the usual work of a general hospital.

The clear intent of the above quoted provision of the said Act of 1907, as amended by the said Act of 1913, is that the products of insane asylums may only be sold to or exchanged with other like institutions.

In an opinion by Deputy Attorney General Hull to the Secretary of Agriculture, under date of August 26, 1920, holding that the Farview Hospital could not sell tile to farmers, it is pointed out that the purpose of the Legislature in restricting the sale of the products of insane asylums was kindred to a corresponding restriction in the Prison Labor Act of 1915, and that the principle laid down by Attorney General Brown in construing the Act of 1915, holding that, however great the advantages might be to enlarge the scope of the same, it must be kept within the legislative mandate, applies in the case of the Act relating to the employment of inmates of insane asylums.

I am, therefore, led to the conclusion, and so advise, that the State Hospital for the Criminal Insane at Farview is without authority to sell brick produced by its inmates to the East Stroudsburg Hospital.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

MISCELLANEOUS OPINIONS

MISCELLANEOUS OPINIONS.

MOTHERS' PENSIONS.

The requirement of the proviso of section 2 of the Mother's Pension State Allotment Act of June 18, 1915, P. L. 1038, that counties desiring to avail themselves of the benefit of the system must make their appropriations within a period of one year after the approval of the bill, was a condition attached to the appropriation and not to the system, and was repealed by the Act of June 29, 1917, P. L. 664, which omitted this requirement.

Office of the Attorney General,
Harrisburg, Pa., January 3, 1919.

Miss Mary Bogue, State Supervisor, Mothers' Assistance Fund,
Harrisburg, Pa.

Madam: This Department is in receipt of your communication of the 25th ultimo, asking substantially whether a county can now come into the system provided by the Act of April 29, 1913, P. L. 118, entitled:

"An act applicable to all counties of this Commonwealth, to provide monthly payments, as approved by the trustees, to indigent, widowed, or abandoned mothers, for partial support of their children in their own homes. The manner of appointment of the trustees; the administration of the trust; amount of appropriations, proportioning appropriations, co-ordinate appropriations; amounts to be paid, form of records, eligibility, penalties, and reports, as set forth,"

as amended, and receive a proportionate share of the appropriation made for the purposes of that statute, by the Act of June 29, 1917, P. L. 664.

The system whereby State moneys was appropriated to indigent, widowed or abandoned mothers for the partial support of their children in their own homes, originated in this State by the Act of 1913 above referred to. The system was based upon county units, and by Section 2 there was appropriated the sum of two hundred thousand dollars to be apportioned to the counties according to their respective populations; the State Treasurer being required to place the proportionate amount of the entire appropriation to the various counties to the credit of the trustees. The section further provided as follows:

"Provided, however, That no county, through their trustees or otherwise, shall receive their allotment of the State's appropriation unless an equal amount has been provided by the government of such county desiring the benefits under this act."

Under the above provision, any county could come into the system by appropriating, from the county's funds, an amount equal to the sum allotted to it by the State Treasurer, and this could be done at *any time*, for there was no express restriction; and the title to the act expressly stated it was applicable "to all counties of the Commonwealth."

The original statute was extensively amended by the Act of June 18, 1915, P. L. 1038. By Section 2 of this latter act, amending Section 2 of the original law, a new appropriation was made of one hundred thousand dollars, and one hundred and fifty thousand dollars of the unexpended balance of the appropriation made for this purpose in 1913, was reappropriated. This section provided that—

"The moneys hereby appropriated and reappropriated shall be paid to and apportioned among the counties of the Commonwealth according to the following classification:" (Then follows a division of the counties of the State into six classes based upon population.)

And after providing, as in the original act, that the State Treasurer should place the proportionate amount of the entire appropriation to the various counties, enacted as follows:

"Provided, however, That no county, through its trustees or otherwise, shall receive its allotment of the State's appropriation unless an equal amount has been provided by the government of such county desiring the benefits under this act, *within a period of one year after passage and approval of this bill.*"

There can be no doubt that, under this language, counties desiring to participate in the appropriation of 1915 must have availed themselves of it within the time indicated in the amendment.

In 1917, By the Act of June 29, P. L. 664, a new appropriation of Four hundred thousand dollars was made to carry out the provisions of the Act of 1913, as amended, and Section 3 of this Act of 1917, like that of the original act, contained the provision that—

"No county, through its trustees or otherwise, shall receive its allotment of the State's appropriation unless an equal amount has been provided by the county desiring the benefits under this act."

No one year limitation, as contained in the Act of 1915, appears in this latter statute; nor does the Act of 1917 undertake to enlarge

or restrict the operation of the limitation period incorporated by the Act of 1915. As the title of the Act of 1917 indicates, the statute undertakes to do nothing more than to make an appropriation and to create the additional offices of Assistant State Supervisors. The disposition of your inquiry, therefore, resolves itself into a construction of the foregoing provision of the Act of 1915. Is that provision a continuing enactment, intended to be permanently operative as part of the system, or was it a condition attached to the appropriation which ended with it?

I am of the opinion that this one year limitation, contained in the Act of 1915, was a condition attached to the appropriation, and that it ceased to exist on June 29, 1917, when the Legislature intended the unexpended balance of the 1915 appropriation to lapse and the 1917 appropriation to take its place.

If this provision were to be construed as a part of the continuing provision of the statute, and a permanent element of the mothers' assistance system, then a conclusive intent must be imputed to the Legislature, that it wished to exclude every county in the Commonwealth, permanently, from coming into the system unless it would so come in before the expiration of one year after the passage of the Act of 1915. This, to my mind, is not a reasonable imputation. The act was intended for the benefit of the whole State and so the title of the original statute expressly provided; and no good reason can be found which would justify the Legislature in permanently excluding all counties which did not come in within a certain limited time. Moreover, by the amendment of 1915, it was expressly provided that the general field organizer shall—

“visit the officer of those counties who do not avail themselves, in behalf of their counties, of the funds appropriated under this act, for the purpose of explaining the provisions of this act to those concerned, in counties which have not taken advantage of the act; and assist the county commissioners, upon the acceptance by them of the provisions of this act, in the organization of mothers' assistance boards.”

Certainly the Legislature did not mean that these activities of the general field organizer should continue only for the term of one year after the act was passed. Many reasons might exist which would render it unwise for a county to appropriate a sufficient amount to enable them to come into the system within a year after the Act of 1915. What reason can justify an imputation that, under such circumstances, the indigent widows and mothers living in such counties should never be permitted to participate in the financial relief provided by the statute. It is more consonant with reason to

confine the limitation to its strictest bounds, and to give the benefits provided by the statute the widest application possible.

That this provision of the Act of 1915 is a limitation on the appropriation, and not an integral and permanent part of the system, is further evidenced by the wording of the section itself. It appropriates a certain amount of money and provides that the money thereby appropriated shall be paid to and apportioned among the counties of the Commonwealth "according to the following classification," as there stated. Certainly no one would seriously contend that this classification was anything other than a condition attached to the appropriation and existing only so long as the appropriation existed, and this was the construction which the Legislature in 1917 gave the provision, because they expressly provided that the money appropriated in 1917 should be apportioned—

"according to the classification contained in Section two of the act approved the eighteenth day of June, one thousand nine hundred and fifteen."

In other words, they re-enacted the classification and continued it as a condition of the appropriation of 1917. And just so is the paragraph which follows the classification attached to the appropriation.

A comparison of the sections of the Acts of 1913, 1915 and 1917 conclusively shows, to my mind, that the conditions precedent to counties wishing to avail themselves of the State appropriation were conditions attached to and co-existing with the appropriation itself. In Section 2 of the original act the condition that counties shall receive their allotment upon an appropriation made by them equal in amount to such allotment is contained in a proviso to the sentence which appropriates the State fund, and it is a rule long settled in the interpretation of statutes that a proviso will not, in the absence of a clear intent to the contrary, be construed as broader in substance or duration than the provision to which it is attached. In *2 Lewis' Sutherland Statutory Construction*, p. 673, para. 352—

"The natural and appropriate office of the proviso being to restrain or qualify some preceding matter, it should be confined to what precedes it unless it clearly appears to have been intended to apply to some other matter. * * * It should be construed with reference to the immediately preceding parts of the clause to which it is attached. In other words, the proviso will be so restricted in the absence of anything in its terms, or the subject it deals with, evincing an intention to give it a broader effect."

Likewise, in the Act of 1917, the limitation is in the form of a proviso to a clause dealing with a particular appropriation, and

under the rule above cited, a proviso, in the absence of a clear intent, cannot have a duration longer than the provision to which it is a limitation; and certainly the Legislature, in 1917, considered the proviso as attached to the particular appropriation, for the title of the act states their intent to do nothing other than make an appropriation and to create the offices of assistant supervisors, and, obviously, the proviso could not be to the latter proposition.

Every doubt should be resolved in favor of the broad application of the act, and I am of the opinion that the provision of the Act of 1915, providing that counties must come into the system within one year after the passage of that act, ceased to exist upon the approval of the Act of 1917, and is therefore not operative at the present time.

You are accordingly advised that a county can, at this time, come into the system provided for the relief of indigent widowed mothers, or those indigent mothers whose husbands are insane, and avail itself of the State appropriation.

Very truly yours,

JOSEPH L. KUN,
Deputy Attorney General.

PER DIEM COMPENSATION.

Officers and Employes of the General Assembly, chosen at the 1917 Session who are unable to return at the beginning of the 1919 Session, by reason of their service in the Army and Navy of the United States are entitled to their per diem compensation as returning officers and employes of the 1919 Session for ten days, or until their successors are chosen and qualified, but are not entitled to mileage.

Office of the Attorney General,
Harrisburg, Pa., January 17, 1919.

Mr. W. Harry Baker, Secretary, Senate of Pennsylvania, Harrisburg, Pa.

Dear Sir: This Department is in receipt of your communication of the 10th inst. asking whether those officers and employes of the General Assembly, who were elected and employed during the Session of 1917, and who are now unable to return for the performance of their duties during the Session of 1919 because they are engaged in the military or naval service, are entitled as returning officers to the per diem compensation and mileage prescribed by law.

Legislative officers and employes are chosen, and their compensation and mileage prescribed, by the Act of June 17, 1915, P. L. 1021. Section 2 of that statute provides, *inter alia*, as follows:

"All officers and employes of the General Assembly shall be elected or appointed in the odd-numbered years, at the opening of each regular biennial session, and shall serve until ten days after the opening of the next General Assembly, or until their successors are selected and have qualified."

Section 3 provides a *per diem* compensation for each officer or employe; and Sections 4 and 5, respectively, enact as follows:

"Section 4. All the officers and employes provided for in this act shall return, as such, to the next regular biennial session of the Legislature following that for which they were elected or appointed; and those who shall not be re-elected or re-appointed, or elected or appointed to some other office in the Legislature, shall be allowed their regular *per diem* compensation, except the assistant clerks, assistant librarian, assistant resident clerk, journal clerks, assistant journal clerk, reading clerks, assistant reading clerk, executive clerk, desk clerk, and message clerks, who shall each receive ten dollars *per diem*, and the clerk and the stenographer to the President, who shall each receive seven dollars *per diem*, for ten days, or until their successors are duly elected or appointed and have qualified.

Section 5. That each of the officers and employes authorized by this act shall be entitled to mileage for each regular biennial, special, or extraordinary session of the Legislature, and as returning officers, at the rate of ten cents *per mile* to and from their homes, to be computed by the ordinary mail-route between their homes and the State Capitol."

It therefore appears that the officers and employes of the General Assembly are chosen for a definite term which, under Section 8, was to commence on the day when said officers or employes were sworn, and actually entered upon the duties of their employment, and to expire ten days after the opening of the General Assembly next following that at which they were chosen; or, until their successors are selected and have qualified.

In an opinion of Attorney General Carson, dated April 7, 1909, (Attorney General's Reports 1909, 1910, page 62) he held, construing a similar statute, that the compensation of the legislative employes did not provide for the payment of a *per diem* for each day's service, but a *per diem* for each session.

Deputy Attorney General Trinkle held (Attorney General's Reports 1911-1912, page 313), that where an officer was duly appointed and

qualified according to law and invested de jure with the title to such office, he was entitled to the compensation provided by law during his continuance in office notwithstanding he was incapable of performing his official duties by reason of involuntary disability, and that in cases where there exists no law or regulation authorizing the discontinuance of the statutory compensation during disability, the only remedy is removal or dismissal of the officer, according to law. I am of the opinion that the reasoning in that case applies in the present instance alike to officers as well as employes of the General Assembly who are required to return to the session of 1919. They were chosen for a term which was not to expire until ten days after the session at which they were chosen, or until their successors qualified; and, their compensation was not predicated upon actual service, but upon the time for which they were selected. In case of their involuntary disability, by reason of absence or otherwise, to perform their duties, they are still entitled to their compensation, and this continues until they have been dismissed or removed according to law, or until their successors have been duly chosen and qualified.

As to their mileage, however, a different situation is presented. Mileage presumes an actual expenditure by the officer or employe, the term is thus defined in Bouvier's Law Dictionary as follows:

"A compensation allowed by law to officers for their trouble and expenses in traveling on public business".

In *United States vs. Smith*, 158 U. S. 346, 39 L. Ed. 1011, it was stated as simply "a reimbursement for traveling expenses". The term implies a reimbursement for an actual pecuniary expenditure on the part of the officer or employe. If no such expenditure has been made by such person, there is nothing for which reimbursement can be made.

I have, therefore, to advise you that the officers and employes of the General Assembly chosen at its session of one thousand nine hundred and seventeen, who are unable to return at the beginning of the session of one thousand nine hundred and nineteen, by reason of their service in the Army and Navy of the United States, are entitled to their per diem compensation as returning officers and employes for the ten days during the session of one thousand nine hundred and nineteen, or until their successors are chosen and qualified. Such officers however, are not entitled to mileage.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

SALARIES.

The Resident Clerk of the House of Representatives is paid a yearly salary, and the salary of a retiring Clerk is computed on a monthly basis to the date of his retirement and the salary of his successor is computed upon the same basis from the date he qualifies.

Office of the Attorney General,
Harrisburg, Pa., January 29, 1919.

Thomas H. Garvin, Esq., Chief Clerk, House of Representatives,
Harrisburg, Pa.

Dear Sir: This Department is in receipt of your letter of the 28th inst., stating that the successor to William S. Leib, Resident Clerk of the House of Representatives, was appointed on January 27, 1919.

You ask what pay Mr. Leib is entitled to, and when the pay of his successor should begin.

The Act of June 7, 1915, P. L. 1021, creates, among other positions, that of Resident Clerk in the House of Representatives. Section 2 of that Act provides:

"All officers and employes of the General Assembly shall be elected or appointed in the odd numbered years, at the opening of each regular biennial session, and shall serve until ten days after the opening of the next General Assembly, or until their successors are selected and have qualified."

I am of opinion that, under the provisions of the Act of Assembly just quoted, the salary of Mr. Leib should end with the 27th day of January, 1919, and that he should be paid up to that time.

I assume that Mr. Leib has been paid by the calendar month, and in that event he would be entitled to twenty-seven thirtieths of the monthly salary for the month of January.

I am of opinion that the pay of the successor to Mr. Leib should be computed from the time he is selected and qualified. In coming to this conclusion I am not unmindful of the opinions of this Department in which we have held that the per diem compensation to certain officers and employees was a per diem for the session, and did not depend upon the time when the officer or employe entered upon his duties.

The situation with reference to the Resident Clerk is different. He is not paid a per diem. He is paid a yearly salary. The Legislature has appropriated \$7200 for the two years beginning June 1, one thousand nine hundred seventeen. If Mr. Leib's compensation were to end January 27th, the day when his successor was selected and qualified, and the successor's compensation were to begin January

6, the appropriation of \$7200 would not be sufficient to pay for the overlapping time.

To further illustrate, suppose the successor to Mr. Leib should serve one month and resign. His successor would then be elected. Suppose that incumbent should die before the end of the session and another Resident Clerk be elected, there might be three persons acting as Resident Clerk during the same session, and if the rule obtained that the salary for each began at the beginning of the session, there would be an overlapping three times from the beginning of the session until each person was actually qualified.

The salary is attached to the office and not to the incumbent of the office, and therefore I am of opinion that it begins when the incumbent qualifies.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

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APPROPRIATIONS—LAPSE.

Where the state by a formal contract has committed itself to the payment of moneys out of an appropriation within the two fiscal years for which the appropriation was made, so much of the appropriation as is necessary to carry out the contract does not lapse at the end of two years, even though it has been found inadvisable to begin the work until after the expiration of the two fiscal years for which the appropriation was made.

Office of the Attorney General,
Harrisburg, Pa., February 14, 1919.

Mr. A. B. Millar, Secretary Public Service Commission, Harrisburg,
Pa.

Dear Sir: Your favor of the 6th inst., addressed to the Attorney General is at hand.

You ask whether so much of the appropriation made under the Act of July 25, 1917 (Appropriation Acts 293) which covers a contract made prior to June 1, 1919, will lapse if it be specified that the work eliminating such grade crossings shall not be commenced during the war, or at a date prior to June 1, 1919.

This Department has held that if "a contract be let within the period for which the appropriation is made, although the work be not completed within that period, the money appropriated is available to carry out such contract." (Opinions of Attorney General

1913-1914, page 348). In another case it was held that an appropriation to the Gettysburg Memorial Commission would not lapse where the Commission made a contract for the building of a memorial prior to May 31, 1909, but was not able to make a contract for the bronze tablets to be placed on said memorial prior to that date. It was held that the Commission could retain a sufficient sum for the purpose of supplying the bronze tablets, even after the two fiscal years expired.

I am of opinion that where the State by a formal contract has committed itself to the payment of moneys out of an appropriation within the two fiscal years for which the appropriation has been made, so much of the appropriation as is necessary to carry out the contract does not lapse at the end of the two fiscal years, even though, under the exigencies of the case it has been found inadvisable to begin the work until after the expiration of the two fiscal years for which the appropriation was made.

I therefore advise you that if the Public Service Commission enters into a specific contract for payment out of the appropriation for \$200,000 for the elimination of grade crossings and provides that the work shall not be begun during the war, or at a date prior to June 1, 1919, so much of said appropriation as is necessary to carry out said contract will not lapse but will be available after the two fiscal years have expired.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General

STATE BOARD OF FILM CENSORS.

The State Board of Motion Picture Censors is not required by the provisions of the Act of May 15, 1915, § 26, P. L. 534, to grant a re-examination of a film on the application of any person other than the original applicant.

However, the discretion of the board is wide, and they may recall their approval of the film and grant a re-examination at the request of the present owner.

Office of the Attorney General,
Harrisburg, Pa., February 26, 1919.

Frank R. Shattuck, Esq., Chairman State Board of Censors, 1025
Cherry Street, Philadelphia, Pa.

Sir: Yours, submitting to the consideration of the Attorney General the application of John McAleer, Manager of the Universal

Film Exchanges, Incorporated, of Pittsburgh, Pa., for a third review by your Board of moving picture film entitled, "The Heart of Humanity", duly received.

I understand the facts in this case to be that this film, "The Heart of Humanity", was reviewed by the Board of Censors on the application of the Interstate Films Company, 1304 Vine Street, Philadelphia, Pa., V. R. Carrick, Manager, and approved on condition that certain eliminations were made. This order was made on the seventeenth of January, 1919.

On the tenth of February, 1919 a re-review was granted on the application of the same person and certain eliminations were ordered and agreed to in writing by V. R. Carrick, Manager of the Interstate Films Company, Incorporated, and that the picture has been so exhibited and shown as "Approved by the Pennsylvania State Board of Censors."

On February 19, 1919 the present application for a third review of this film, "The Heart of Humanity," was presented to the State Board of Censors, by John McAleer, Manager of the Universal Film Exchanges, having headquarters at 938-940 Penn Avenue, Pittsburgh, Pa., an entirely different person and representing an entirely different corporation than the one who first submitted the picture in question for the approval of the Board.

The question you submit to this Department is whether under the provisions of the Act of May 15, 1915, creating the State Board of Censors and defining their powers and duties, you are required in this case to re-open your approval and findings as to the film, "The Heart of Humanity," and grant a third hearing on the application of a person who was a stranger to the two previous applications for approval of this film.

The Section of the Act of May 15, 1915 as to re-examination and appeals, Section 26, is in these words:

"If any elimination or disapproval of a film, reel or view is ordered by the Board, the person submitting such film, reel or view for examination will receive immediate notice of such elimination or disapproval, and, if appealed from, such film, reel or view will be promptly re-examined, in the presence of such person, by two or more members of the Board, and the same finally approved or disapproved after such re-examination, with the right of appeal from the decision of the Board to the Court of Common Pleas of the proper County."

In this section it is expressly provided that the re-examination shall be in the presence of the person who made the original application. This would imply that the application for re-examination must be

made by the person who first submitted the particular film in question.

You are, therefore, advised that the State Board of Censors is not required by the provisions of the Act of May 15, 1915 to grant a third examination of this film, "The Heart of Humanity," on the application of John McAleer, who was not a party to the original application.

But as you were advised by this Department on July 25, 1917, the discretion of the State Board of Censors is wide. In that opinion you were advised that although the Act was silent on the subject, you could recall your approval of a film.

I quote the following from the opinion :

"Under Section 26 of the Act a film disapproved by the Board must be re-examined, if the request be made, and certainly the Board at its own instance, could do that which it might be compelled to perform; but if the Board may reconsider its disapproval, why not its approval? It may err in the one instance as well as in the other and the harm which may ensue an approval may be infinitely greater than that which would result from an erroneous disapproval. In the first case the individual may be harmed but in the latter instance it is the public that would suffer.

Statutes are to be construed so as to advance the result sought to be attained and no intent is to be imputed to the Legislature hostile to the purpose for which the Act was designed. Unless rights have accrued or intervened following such approval, which a recall would disturb, your authority is clear.

The rule of law stated in Throop on Public Officers, Section 564, is in point. It is there said :

'It has been held, in several cases, that where a quasi judicial power has been exercised, upon which a private individual has acquired rights, the rule is the same, as where a judgment has been rendered by a court of inferior and limited jurisdiction; that is that the officer or body can exercise the power only once, and cannot afterwards alter his or its decision.'

It follows that a decision may be altered when no such rights have been acquired."

It would seem, therefore, in the present case that while the State Board of Censors cannot be compelled to grant a third examination of this film, "The Heart of Humanity," they have the power to do so in the exercise of the discretion conferred upon them. This discretion has been held by the Supreme Court in the following cases to be wide and the State Board of Censors is liable only for abuses of the same.

Buffalo Branch Mutual Film Corp. v. Breitinger, 250 Pa., p. 225.

In the matter of the *Franklin Film Mfg. Corp.*, 253 Pa., p. 423.

I enclose the three applications and the findings of the Board, and letter you left with me.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

PRACTICE OF DENTISTRY.

Unless prohibited by the rules of the Dental Council, the State Board of Dental Examiners may hold special examinations.

Office of the Attorney General,
Harrisburg, Pa., February 27, 1919.

Dr. Alexander H. Reynolds, Secretary, State Board of Dental Examiners, Philadelphia, Pa.

Sir: There has been received by this Department your letter of the 25th instant, requesting an opinion as to whether your Board may give a special examination to an applicant for a license to practice dentistry.

The first section of the Act of May 7, 1907, P. L. 161, regulating and defining the powers and duties of the Dental Council and the State Board of Dental Examiners, provides that the Dental Council shall supervise and provide rules in conformity with the provisions of this Act for the examination of all applicants for license to practice dentistry in this Commonwealth.

The second section of this Act, as amended by the Act of May 3, 1915, P. L. 219, provides that the Dental Council may authorize the State Board of Dental Examiners to examine any person who has made application to the Dental Council for a license, paid the proper fee, submitted proofs as to age and moral character, and presented a diploma from a reputable educational institution maintaining a three-years' course in dentistry.

The third section provides that the Board of Dental Examiners may make all necessary rules, regulations and by-laws concerning the transaction of its business, subject to the approval of the Dental Council.

The fourth section provides that for the purpose of examining applicants for license special meetings of the State Board of Dental Examiners may be held, the time and place to be fixed by the Board.

You are advised that the Act of 1907, as amended by the Act of 1915, expressly authorizes the State Board of Dental Examiners to hold special examinations. You are further advised, however, that the State Board of Dental Examiners is subject to the rules of the Dental Council providing for the examination of applicants to practice dentistry. Unless the rules of the Dental Council prohibit it, there is no objection whatever to your Board holding such special examination.

Yours very truly,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

WASHINGTON CROSSING PARK PROPERTY INSURANCE.

The Washington Crossing Park Commission cannot take over policies of insurance carried by former owners of property which has been acquired by the Commission for the State.

Office of the Attorney General,
Harrisburg, Pa., March 13, 1919.

Mr. J. Edward Moon, Secretary of the Washington Crossing Park Commission, Morrisville, Pa.

Sir: There was duly received your communication of the 11th inst. to the Attorney General, asking to be advised relative to the insurance on the property acquired by the Commonwealth at the Washington Crossing Park. It appears from your communication that certain of this property had fire insurance policies thereon at the time of its acquisition by the State.

The Act of May 14, 1915, P. L. 524, provides for the creation of an Insurance Fund and for the payment therefrom of the cost of replacing, restoring, or rebuilding any property owned by the State, damaged or destroyed by fire or other casualty. Under Section 7 it is made unlawful to place any insurance on State-owned property, the term of which will extend beyond December 31, 1920, and that only in such diminishing amounts as is therein prescribed.

The property owned by the Commonwealth at the Washington Crossing Park comes within the terms of this Act. In an opinion

of this Department to the Superintendent of Public Grounds and Buildings, of the 12th inst., rendered by the writer hereof, it was pointed out and held that by virtue of the provisions of this Act, no outside insurance whatever can be carried by the State on any property which it acquired subsequent to the date of its approval. It follows from that ruling that the State, or the said Washington Crossing Park Commission acting for it, cannot take over the policies of insurance which the former owners of the property may have had thereon at the time of the transfer of the property to the Commonwealth. That, in effect, would plainly be "to purchase, obtain or secure" insurance on property acquired by the State after the passage of the said Act, which as held in the above cited opinion, is inhibited under Section 7 thereof.

You are therefore advised that the Commission cannot take over for the Commonwealth, or for its use, the policies of insurance carried by the former owners of the property which has been acquired by the State at the Washington Crossing Park, protection thereon against loss by fire being now such as is provided pursuant to the foregoing Act.

Yours very truly,

EMERSON COLLINS,
Deputy Attorney General.

HUNTINGDON REFORMATORY.

The Act of June 19, 1911, P. L. 1059, pertaining to paroles by courts from jails and workhouses, does not apply to the Pennsylvania Industrial Reformatory at Huntingdon, or authorize paroles therefrom pursuant to its provisions.

Office of the Attorney General,
Harrisburg, Pa., April 21, 1919.

John D. Dorris, Esq., President Board of Managers, Pennsylvania Industrial Reformatory, Huntingdon, Pa.

Sir: There was duly received your communication of the 10th inst., to the Attorney General, requesting an opinion as to whether the courts have power under the Act of June 19, 1911, P. L. 1059, to grant paroles from the Pennsylvania Industrial Reformatory at Huntingdon. The said Act authorizes the Judges of the Courts of Quarter Sessions and the Courts of Oyer and Terminer of the several judicial districts of the Commonwealth

"to release on parole any convict confined in the county jail or workhouse of their respective districts and place

him or her in charge of and under the supervision of a designated probation officer."

They are further empowered to recommit to the jail or workhouse any convict violating his parole, and to reparole and again recommit. The Act, however, provides relative to recommital, that

"this power shall not extend beyond the limit of the sentence which shall have been first imposed upon the prisoner."

A careful consideration of the Act of 1911, together with the Act of April 28, 1887, P. L. 63, providing for the establishment of the Pennsylvania Industrial Reformatory and the method of imprisonment thereat, leads to the conclusions that the Act of 1911 does not extend or its provisions apply to that Institution. This Institution is not a jail, neither is it a "workhouse" within the common usage and meaning of the term workhouse. Its primary purpose is reformatory, not punitive, since it seeks to reform rather than to punish. The sentence of persons convicted of crime and sent to it are for an indeterminate period. The Act of April 28, 1887, establishing it, specifically inhibits the courts from fixing or limiting the duration of confinement thereat. The term of imprisonment is placed within the control of the Board of Managers of the Reformatory in the prescribed manner, being limited to the maximum length thereof provided by law for the particular offense for whose conviction the party is sentenced.

Pursuant to the powers vested in it, the Reformatory has its own parole system, and it is a safe presumption that it was not the legislative intent to modify or interfere with this by the Act of 1911. We may fairly assume that if it had been intended to do so, such intention would have been expressed by apt language and not left to a mere implication. In arriving at the proper construction of the Act of 1911, we are not wholly left, however, to presumption or implication. It will be noted that the power it bestows upon the courts to recommit a convict to a jail or workhouse for a violation of a parole, is specifically restricted to "*the limit of the sentence which shall have been first imposed upon the prisoner.*" This provision unquestionably denotes that the Act applies only to prisoners who have been sentenced for some fixed period, and consequently negative any proposition that it extends to persons sentenced to the Reformatory. As above pointed out, the courts cannot fix the term of a sentence to that Institution, the duration of detention therein being a matter placed under the control of the Board of Managers, within the limits of the maximum sentence provided by law for the crime, for the commission of which the person has been sentenced.

I have not overlooked the opinion of Attorney General Bell, dated March 12, 1912, and reported in 21 Dist. Reports, page 574, in which he advised that the Act of 1911 extends to said Reformatory. That ruling followed upon an order of the Court of Quarter Sessions of Philadelphia, releasing a prisoner from the Reformatory on parole, pursuant to the provisions of that Act. In the case of *Commonwealth vs. Yehle*, No. 558 June Sessions 1918, Allegheny County, (Judges Carpenter and Swearingen), it was held that the Court did not have power under that Act to order such parole. In the course of the opinion (a copy of which was forwarded with your communication), rendered by Judge Swearingen, it was said—

“Before the legislation relating to parole was enacted, there was no way of shortening a term in a workhouse except by executive clemency. The purpose of this legislation was to release prisoners in places of punishment from further imprisonment where the circumstances warranted such action; and there was no intention to provide for release of persons from this Reformatory, where a system in the nature of parole already existed. The legislature did not contemplate that there should be two systems of parole applicable to the Huntingdon Reformatory, a procedure which might seriously interfere with the discipline of the institution. We are therefore obliged to hold that the Pennsylvania Industrial Reformatory at Huntingdon is not a workhouse within the meaning of the Act of 1911. Consequently, this Court is without power to grant the parole for which the petitioner prays.”

The interpretation of the Act of 1911 reached in that decision harmonizes with the purposes of the Industrial Reformatory and wisely leaves to those charged with its management, the parole of the inmates thereof. The Board of Managers have first hand and abundant opportunity to know the individual record of each inmate, in conduct, work and study, and from a careful consideration thereof, and of his progress in the way of reformation, are best able to determine when, for his own welfare, he should be granted the freedom of a parole. A comprehensive plan with even and exact justice to all may thus be pursued which might, in a measure, be defeated if paroles are to be granted by the courts with varying views and policies in regard thereto.

For the foregoing reasons and in accordance therewith, you are therefore advised that the Act of June 19, 1911, P. L. 1059, pertaining to paroles by the courts from jails and workhouses, does not apply to the Pennsylvania Industrial Reformatory at Huntingdon, or authorize paroles therefrom pursuant to its provisions.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

INSURANCE COMPANIES—CHANGE OF NAME.

The Secretary of the Commonwealth has a right to use his discretion in the matter of changing the name of an insurance company.

Office of the Attorney General,
Harrisburg, Pa., April 23, 1919.

Honorable Thomas B. Donaldson, Insurance Commissioner, Harrisburg, Pa.

Sir: We have your favor asking to be advised as to whether you have discretion in approving the change of name to be secured by an amendment to the charter of a domestic insurance company.

Section 2 of the Act of June 1, 1911, P. L. 559, relating to the incorporation of fire and marine insurance companies provides, in part:

"Any name not previously in use by any existing company may be adopted, but such name must clearly designate the objects and purposes of the company. The Insurance Commissioner may reject any name or title when in his judgment it too closely resembles that of any existing company or is likely to confuse or mislead the public."

The Insurance Commissioner, therefore, undoubtedly has the power to pass upon the name of any proposed insurance company and to reject a name which too closely resembles that of any other existing company, whether it be foreign or domestic.

The law providing for the change of the name of an insurance company is in the Act of April 2, 1903, P. L. 251. It relates to all corporations and provides that any corporation may change its corporate title by a resolution of its Board of Directors adopted by a two-third vote and approved at an annual or special meeting by a two-third vote. Upon the approval of the stockholders, the president is required to file in the office of the Secretary of the Commonwealth a certificate setting forth, among other things, the name which the corporation desires to adopt.

"The Secretary of the Commonwealth shall examine the records in his office, and, if he find the name desired by said corporation does not conflict with the name of any corporation appearing upon said records, he shall require the said certificate to be recorded, and shall issue to the said corporation a certificate, under his hand and seal of his office granting to said corporation the use of the said new corporate title."

The Secretary of the Commonwealth would find nothing by an examination of the records of his office. He would do the most ob-

vious thing in order to practically carry out the provisions of this Act when an application for the change of a name of an insurance company is presented to him, namely confer with the Insurance Commissioner for the purpose of ascertaining whether the records of the Insurance Commissioner contain any name which conflicts with the name proposed.

The law requires the Secretary of the Commonwealth to determine whether the new name conflicts with the name of any other corporation.

I, therefore, advise you, that the Secretary of the Commonwealth has the right to use his discretion which undoubtedly would be exercised only after conference with the Insurance Commissioner in the matter of changing the names of insurance companies.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

REGISTRATION OF NURSES—TRAINING SCHOOLS.

In preparing a list of accredited training schools for nurses, the State Board of Examiners for Registration of Nurses' may include such information as it may deem necessary.

In refusing to approve a training school for nurses, the State Board of Examiners for Registration of Nurses, should spread upon its minutes its action and the reasons therefor.

The State Board of Examiners for Registration of Nurses is not authorized to exclude from examination a pupil nurse merely because her course of instruction had not been pursued at a training school approved by the board.

Office of the Attorney General,
Harrisburg, Pa., April 28, 1919.

Dr. Albert E. Blackburn, Pennsylvania State Board of Examiners
for Registration of Nurses, Philadelphia, Pa.

Dear Doctor: Your letter of recent date was duly received.

The questions which you ask I will endeavor to answer in their order.

1. You desire to know whether the Board of Examiners for the Registration of Nurses in publishing what you call the "accredited list of training schools" may include in such list such information "as will give the public, the superintendents of training schools and the prospective applicants as pupil-nurses, the necessary information that would enable them to have a comprehensive knowledge of the several training schools."

Section 7 of the Act of May 1, 1909, P. L. 321, as amended by the Act of June 4, 1915, P. L. 809, provides, among other things:

"* * * That it shall be the duty of the said registration board to prepare and make a report for public distribution, at intervals regulated by the by-laws of the said board, of all training schools or combinations of training schools that are approved by the board as possessing the necessary requirements for giving a pupil-nurse a full and adequate course of instruction."

In directing the Board to prepare and distribute such a list, the Legislature intended that it should be a useful and beneficial list. A list containing the mere name of a training school gives some information. If to the name were added the address of the school, such list would furnish more information; and if, in connection with each school, other prominent facts and information were given, it follows that the list would be still more valuable. There is nothing in this provision of the law which confines the Board of Examiners to making just a list of names. In fact, the thing which the law requires is not a list, but "a report." A report implies something more than a mere list.

I therefore advise you that in compiling what you call the "accredited list of training schools", the Board is authorized to include such information which it deems necessary.

2. You ask whether, when the Board determines not to approve a training school, the reasons therefor should be recorded in the minutes.

The action of the Board in refusing to approve a training school is a serious matter for the school. The Board should not refuse to approve unless there are good and sufficient reasons therefore, and when the Board has such reasons, it should have them spread at length on the minutes of the Board, together with the action which the Board takes. This should be done in order to protect the Board against litigation. Where the Board acts deliberately, with careful consideration and in good faith, its action would not be reviewed or reversed by a court. It would be only in the event that the Board acted arbitrarily and without the exercise of proper discretion, that its decision in any case would be subject to review.

3. You also ask: "Would a pupil-nurse entering a training school while that training school was on the accredited list be eligible for examination when she graduated, provided that the training school was not on the accredited list at the time of graduation?"

"Reversely, a pupil-nurse entering a training school that was not on the accredited list when she entered, and graduating when the training school was on the accredited list, should this applicant be admitted to examination?"

The same section of the Act of Assembly above referred to, provides, in part:

“* * * Every applicant to be eligible for examination must furnish evidence, satisfactory to the board, that he or she is twenty-one years of age or over, is of good moral character, and has graduated from a training school for nurses which gives at least a two years' course of instruction, or has received instruction in different training schools or hospitals for periods of time amounting to at least a two years' course, as aforesaid, and then graduated, and that such applicant, during said period of at least two years, has received practical and theoretical training in surgical and medical nursing.”

The report showing training schools approved by the Board will necessarily be construed as a recommendation of such schools. There is nothing in the statute which authorizes the Board of Examiners to examine only those pupils who have pursued a course in, or graduated from, the “approved schools”.

The law provides that every applicant shall be examined who has the other requirements and who has “graduated from a training school for nurses which gives at least a two years' course of instruction, or has received instruction in different training schools or hospitals for periods of time, amounting to at least a two years' course, and * * * * during said period of at least two years, has received practical and theoretical training in surgical and medical nursing.”

The Board is not authorized to exclude from examination a pupil-nurse who has filled all of the requirements of the law merely because the course of instruction was pursued at a training school which has not been approved by the Board. The Act of Assembly is crudely drawn and I suggest that if the experience of the Board indicates that it should have the right to decline to examine pupils who pursue their course of instruction in schools that have not been approved by the Board, the law should be amended to so provide.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

PRISON LABOR.

Brooms and brushes made by prison labor cannot be sold in the open market.

Office of the Attorney General,
Harrisburg, Pa., May 9, 1919.

Mr. G. J. Rafferty, Secretary and Treasurer, Prison Labor Commission, Philadelphia, Pa.

Dear Sir: This Department is in receipt of your letter of recent date, asking whether you can sell certain merchandise.

The facts, as I understand them to be, are as follows:

The Prison Labor Commission has on hand a miscellaneous lot of underwear and hosiery, which are imperfect, and a lot of brooms and brushes which cannot now be disposed of as required by the Act of June 1, 1915, P. L. 656. The brooms and brushes are deteriorating and unless permitted to dispose of the stock it would be a total loss.

The Emergency Aid of Pennsylvania will agree to purchase the hosiery and underwear, and you desire to sell the brooms and brushes in the open market.

The Act of Assembly above referred to provides a system of employment for inmates of penal institutions.

Section 4 of that Act provides:

"The Prison Labor Commission shall arrange for the sale of the materials produced by the prisoners, to the Commonwealth, or to any county thereof, or to any public institution owned, managed and controlled by the Commonwealth."

The evident purpose of this section was to prevent the prison labor from coming into active competition with merchants and manufacturers doing business in the State.

The Emergency Aid of Pennsylvania is a charitable organization working along the same lines as the Red Cross.

I am of the opinion that the spirit of Section 4 of this Act of Assembly would not prevent the Prison Labor Commission from disposing of its imperfect lot of hosiery and underwear to the Emergency Aid, to be used for charitable purposes, but such conclusion does not apply to brooms and brushes to be sold in the open market. Such sales would bring the prison labor into competition with merchants and manufacturers, and in my opinion would be contrary to the spirit and intent of the Act of Assembly.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

PRISON LABOR—EMPLOYMENT OF CONVICTS.

The Prison Labor Commission has no authority to employ inmates of the Eastern Penitentiary in cutting and sewing rag stock for private concerns.

Office of the Attorney General,
Harrisburg, Pa., June 5, 1919.

Mr. E. J. Lafferty, Secretary and Treasurer, Prison Labor Commission, Philadelphia, Pa.

Sir: This Department is in receipt of your communication of the 27th ult. requesting an opinion upon the following question, namely, whether the Prison Labor Commission has the power to provide for the employment of inmates of the Eastern State Penitentiary "in the cutting and sewing of rag rug stock" for a private concern.

The powers and duties of the Prison Labor Commission are such as are created and imposed by the Act of June 1, 1915, P. L. 656, providing a system of employment and compensation for the inmates of the Eastern Penitentiary, Western Penitentiary and other correctional institutions.

The character of the labor at which the inmates of the foregoing institutions may be employed, pursuant to the provisions of the Act, is fixed by Section 1 thereof as follows:

"Such labor shall be for the purpose of the manufacture and production of supplies for said institutions, or for the Commonwealth or for any county thereof, or for any public institution owned, managed, and controlled by the Commonwealth, or for the preparation and manufacture of building material for the construction or repair of any State institution, or in the work of such construction or repair, or for the purpose of industrial training or instruction, or partly for one and partly for the other of such purposes, or in the manufacture and production of crushed stone, brick, tile, and culvert pipe, or other material suitable for draining roads of the State, or in the preparation of road building and ballasting material."

In an opinion of this Department rendered by Attorney General Brown to the President of the Board of Inspectors of the Eastern State Penitentiary, dated October 25, 1918, in passing upon the right of the Eastern State Penitentiary to contract with the United States government for war work by the inmates of that institution, there was an extensive review of the law relative to the subject of the employment of convict labor in this Commonwealth. It was there held, following former rulings of this Department—

"That it was the intentment of the Prison Labor Act of 1915 to delegate the entire matter of the supervision and compensation of the inmates in the said State Institution, to the Prison Labor Commission and that the officials of these institutions have no further authority or jurisdiction in the premises. * * * If there is any authority to employ the inmates of that or any other State correctional institution in such work, it would have to be exercised by and through the Prison Labor Commission."

It was further held in the said opinion that—

"The purposes for which convict labor in the State correctional institutions in this State may be engaged is defined by Section 1 of the Act of 1915 above quoted, limiting the same to the manufacture and production of supplies for 'said institutions or for the Commonwealth or for any county thereof, or for any public institution, owned, managed and controlled by the Commonwealth.'"

It was consequently held that the Eastern State Penitentiary was without authority to contract with the United States government for its inmates to do war work.

In an opinion of this Department to Mr. John E. Hanifen, Chairman of the Prison Labor Commission, dated June 17, 1916, (Attorney General's Reports 1915-1916, page 534) rendered by Deputy Attorney General Kun, in answer to an inquiry of said Commission whether pursuant to said Act it might manufacture supplies for troops of foreign countries, and holding that the Commission was without power to do so, it was said:

"However beneficial the doing of other work might be in the way of preventing idleness and increasing the funds of your Commission, there is no legal authority to employ the prisoners except as specifically authorized by the Act above quoted."

The principle stated in the above cases was followed in a ruling to you, in an opinion rendered by Deputy Attorney General Hargest on May 9, 1919, ruling that the sale of "materials produced by inmates of such institutions was limited to the provisions of Section 4 of the Act."

The foregoing citations carry the clear conclusion that the Prison Labor Commission cannot lawfully employ the inmates of the Eastern State Penitentiary or other like institutions at labor such as that mentioned in your above communication.

Yours very truly,

EMERSON COLLINS,
Deputy Attorney General.

IN RE CHARITABLE INSTITUTIONS.

Any institution such as a hospital or home which serves the community in which it is located, whether there be one or more of such institutions in the municipality, is a community organization within the meaning of the 14th section of the Act of June 20, 1919, relating to the solicitation of moneys and property for charitable and patriotic purposes, and therefore exempt from its operation.

Office of the Attorney General,
Harrisburg, Pa., July 29, 1919.

Bromley Wharton, Esq., General Agent and Secretary Board of
Public Charities, Philadelphia, Pa.

Dear Sir: Your favor of the 17th inst., was duly received.

You ask to be advised whether certain homes and hospitals are within Act No. 248, approved June 20, 1919, entitled "An Act relating to and regulating the solicitation of moneys and property for charitable and patriotic purposes."

Section 14 of this Act provides:

"This act shall not apply to any fraternal organization incorporated under the laws of the Commonwealth, nor to any religious organization, or any college, school or university located within the Commonwealth, nor to any labor union or municipality, or municipal subdivision or *community organization* of the Commonwealth."

The principal question is whether the homes and hospitals to which you refer are "community organizations" within the meaning of this Act.

You state that there are a number of "homes" in Pennsylvania for the care of children, or of the aged, and hospitals for the treatment and care of the sick and injured, and that all of these institutions were founded by the efforts of persons resident in the communities in which they are respectively located, and they are maintained for the benefit of the residents of such communities.

I am advised that in large cities there are several institutions engaged in the same general character of charity, and all of them serve the whole municipality generally, while specially administering to the immediate neighborhood. To illustrate: A hospital may receive cases sent to it from any part of a large city but the majority of its patients come from the section immediately surrounding the hospital.

You ask whether such homes and hospitals are "community organizations" within the meaning of this Act, and therefore exempt from its operation.

This question must be answered by determining the meaning of "community organizations" as used in the Act. A community means the people who reside in one locality or a society having common interests and privileges. It is also defined to be a village, township or municipality.

Community is described to be a "number of persons having a common interest." *March's Thesaurus*.

"A number of people associated together by the fact of residence in the same locality or of subjection to the same local laws and regulations." *Century Dictionary*.

"The people who reside in one locality and are subject to the same laws."

"A society having common interests, privileges, etc., or sharing many or all things in common." *Standard Dictionary*.

If there were but one volunteer fire company in a borough, it unquestionably would be a community organization. If there were ten fire companies in a city who respondent to alarms in any portion of the city when required, but who served principally their immediate localities, they would be no less community organizations and so I think that a hospital opened to receive the sick and injured of a city, although the majority of its patients may come from the territory adjacent to the hospital itself, would be a community organization.

A home for the care of children or of the aged, whether there were one or more in a municipality, who served the people generally in that municipality, would undoubtedly be a community organization.

I am, therefore, of opinion that any institution such as a hospital or home which serves the community in which it is located, where there be one or more of such institutions in the municipality, is a community organization within the meaning of the 14th Section of this Act of Assembly and therefore exempt from its operation.

You ask whether associations organized for general charitable purposes, whether confined in their operations to small communities, or extending over a larger portion of the State, are community organizations.

I shall have to know the exact facts before being able to answer this portion of your inquiry.

Very truly yours,

WILLIAM M. HARGEST,
Deputy Attorney General.

BUREAU OF MEDICAL EDUCATION AND LICENSURE.

The Bureau has no authority to relicense a physician who has already been licensed to practice medicine in this State unless such physician complies with all the requirements of the Bureau, at present constituted.

Persons licensed under the Act of Assembly providing for the granting of certificates of licensure to certain persons who served in the army or navy of the United States may enter the examinations in the future.

Office of the Attorney General,
Harrisburg, Pa., August 14, 1919.

Dr. J. M. Baldy, President, Bureau of Medical Education and Licensure, Philadelphia, Pa.

Sir: Your request for an opinion as to whether the Bureau of Medical Education and Licensure may re-license a physician who has already been licensed to practice medicine in this Commonwealth has been received by this Department.

In my opinion, the Bureau of Medical Education and Licensure has no authority to re-license a physician who has already been licensed to practice medicine in this Commonwealth, unless such physician complies with all the requirements of the Board as at present promulgated. It is true that certain physicians have been licensed many years ago when the preliminaries and the medical education were not those required by the Bureau at the present date. Such physicians can be re-licensed by the Bureau of Medical Education and Licensure by complying with the requirements as laid down by the Bureau at the present time and by passing the examination. Their former licenses need not be revoked, and if they fail to pass the examination, they are still licensed physicians for the purposes as contained in the original Act, under which they were licensed.

You also ask whether persons licensed under the recent Act of Assembly, "providing for the granting of certificates of licensure to practice medicine and surgery to certain persons who served in the army or navy of the United States or any branch or unit thereof", may in future enter the Pennsylvania examinations if they now take a license under this Act without an examination.

You are advised that there is nothing in the recent Act to prevent persons who secure this privilege of licensure, by reason of the fact that they have served in the Army or Navy of the United States, from entering the examination in the future; and you are further advised that it is the duty of your Bureau, having issued a license without an examination under that Act of Assembly, to admit such licensee to an examination subsequently upon his application therefor.

Yours very truly,

BERNARD J. MYERS,
Deputy Attorney General.

PRACTICE OF MEDICINE.

The Bureau of Medical Education and Licensure has no authority to re-establish a license once revoked. It may remove the suspension of a license.

Office of the Attorney General,
Harrisburg, Pa., August 14, 1919.

Mr. J. M. Baldy, President, Bureau of Medical Education and Licensure, Philadelphia, Pa.

Sir: There has been received at this Department your requests for an opinion upon the following questions:

1. Has the Bureau of Medical Education and Licensure, under the Act of 1911 and subsequent amendments, the right to re-establish a license once revoked by them for any of the causes specified in Section 12 of that Act?

2. Does the word "suspension" as used in the third paragraph of Section 12 carry with it also the meaning of "revoke"?

These two questions are so closely linked that they can be answered together. The Legislature evidently used the words "revoke" and "suspend" advisedly, in order that the Bureau of Medical Education and Licensure should have the power to revoke a license to practice medicine, when the Members of that Bureau were convinced that a physician had violated the provisions of the Act in such a manner that he should suffer the extreme penalty for such violation, which extreme penalty was the revocation of his license to practice. The Bureau was further given the power and authority, however, to suspend the license of any person to practice medicine and surgery under certain conditions, and further to remove such suspension when certain conditions set forth in the Act have been complied with, thereby giving the Bureau of Medical Education and Licensure discretion, so that in certain cases the extreme penalty of the revocation of a license need not be imposed.

The word "suspension" as used in the third paragraph of Section 12 does not carry with it the meaning of "revoke". This follows from the definitions of the words themselves. The word "suspend" is defined "to delay, to hang", and the word "suspension" is the act of suspending. The word "revoke" is defined "to rescind". That is, the physician's right to practice medicine and surgery is hanging in the balance, and that right may be rescinded, unless he complies with the conditions set forth in the Act.

In my opinion, the Bureau of Medical Education and Licensure has no authority to re-establish a license once revoked, although it may remove the suspension of a license.

Yours very truly,

BERNARD J. MYERS,
Deputy Attorney General.

PUBLIC CHARITIES—ACT OF JUNE 20, 1919.

So long as the Public Charities Association of Pennsylvania is supported by voluntary contributions and does not undertake to raise money for charitable and patriotic purposes it is not required to comply with the provisions of the Act of June 20, 1919.

Office of the Attorney General,
Harrisburg, Pa., September 3, 1919,

Mr. Bromley Wharton, General Agent and Secretary, Board of
Public Charities, 714-716 Bulletin Building, Philadelphia, Pa.

Sir: This Department has received your communication of the 20th ult. requesting an opinion as to whether the Public Charities Association of Pennsylvania is subject to the provisions of the Act approved June 20, 1919, entitled "An Act relating to and regulating the solicitation of moneys and property for charitable and patriotic purposes." Your communication is accompanied by letter from the Secretary of the Public Charities Association to you, and from this letter I take the facts on which the answer to your inquiry is based.

The purpose of the Public Charities Association as expressed in its charter, is as follows:

"To study the condition and needs of the charitable, correctional and reformatory institutions within the State of Pennsylvania; to inform the public of these conditions and needs by correspondence, publications and public meetings, and to better the conditions and meet the needs by advocating the passage of appropriate legislation and the adoption of improved methods of administration."

The Association is supported by voluntary contributions of its members, who are residents of more than fifty counties of the State.

The Act of Assembly referred to subjects to its provisions all persons, co-partnerships, associations or corporations, except fraternal organizations incorporated under the laws of the Commonwealth, religious organizations, colleges, schools, or universities located within the Commonwealth, labor unions, municipal subdivisions, or community organizations of the Commonwealth. The Public Charities Association of Pennsylvania does not fall within any of these exceptions, and is subject to the provisions of the above mentioned Act of Assembly if it undertakes

"to sell or offer for sale to the public anything or object whatever to raise money, or to secure or attempt to secure money or donations or other property by promoting any public bazaar, sale, entertainment, or exhibition, or by any similar means, for any charitable, benevolent, or patriotic purpose, or for the purpose of ministering

to the material or spiritual needs of human beings either in the United States or elsewhere, or of relieving suffering of animals, or of inculcating patriotism."

It is the solicitation to secure or attempt to secure money or other things for charitable and patriotic purposes which subjects persons or associations to the provisions of the Act. So long as the Public Charities Association of Pennsylvania is supported by voluntary contributions and does not undertake to raise money for charitable and patriotic purposes, it is not required to comply with the provisions of this Act of Assembly relative to registration and making reports.

Very truly yours,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

OLD ECONOMY PARK.

The Act of July 21, 1919, does not transfer the title to the Old Economy Park from the Commonwealth to the Pennsylvania Historical Commission. Possession of the property for the purposes stated in the Act is all that is transferred.

Office of the Attorney General,
Harrisburg, Pa., September 9, 1919.

Mr. George P. Donehoo, Secretary, Pennsylvania Historical Commission, Coudersport, Pa.

Sir: This Department is in receipt of your communication of the 30th ultimo relative to Act No. 444 of the Session of 1919, imposing certain duties on the Commission with regard to the lands and buildings formerly owned by the Harmony Society, at or near Ambridge, Pa.

You state that by the Act of Assembly the property of this Society "has been transferred from the State to the Pennsylvania Historical Commission", and you ask for information "as to the method by which this transfer can be made to the Commission, and any other matters relative to this property so that the Commission may at once take steps to carry out the provisions of the Act."

I have to advise you that you are wrong in your premise. The Act does not "transfer" the property from the Commonwealth to your Commission; the title remains in the Commonwealth after the enactment of this statute as fully as before its passage. Your duties with respect to this property are prescribed by Section 2; the pertinent part of which is as follows:

"That the preservation, restoration, custody and maintenance of said Old Economy Park and Memorial is delegated hereby to the Pennsylvania Historical Commission in conformity with the provisions of the Act approved the twenty-fifth day of July, one thousand nine hundred and nineteen, entitled, 'An Act providing for the establishment of the Pennsylvania Historical Commission; defining its powers and duties and making an appropriation for its work', and the amendments and supplements thereto, subject to the powers of the said Pennsylvania Historical Commission to contract for the maintenance thereof, as provided in said last mentioned Act."

This provision of the statute is self-executing. It constitutes a direct grant of authority from the Legislature to your Commission to preserve, restore, take custody of and maintain Old Economy Park as a memorial, without the necessity of any action upon the part of any State official. The term "custody", as used in the foregoing provision, is sufficient to vest your Commission with the possession of this property for the purpose named in the statute as completely as if the legal title were vested in you, but, as before stated, the Act contemplates that the legal title shall remain in the Commonwealth.

In the exercise of your powers you may invoke the authority granted to you by the Act of July 25, 1913, establishing your Commission, and may do all things necessary to the maintenance, preservation and restoration of this land and the buildings thereon. You should proceed immediately to carry out the duties with regard to this property. You now have all the authority which anyone can give you except the Legislature itself.

Very truly yours,

FRANK M. HUNTER,
Deputy Attorney General.

PRISON LABOR.

The prison Labor Commission should not act as agent for a corporation in placing its product in State and County Institutions.

Office of the Attorney General,
Harrisburg, Pa., September, 22, 1919.

Mr. E. J. Lafferty, Secretary, Prison Labor Commission, Philadelphia, Pa.

Sir: This Department is in receipt of your communication of the 2d instant, in which you state that on account of the high price of leather you have introduced the Keystone Solether Corporation's product in the manufacture of shoes in the Eastern Penitentiary, and that, on account of being in constant communication with various State and County Institutions, the above named corporation offered its product at jobbers' prices, provided you would act as agent for them in placing its product in these institutions. You state that a considerable sum of money would be saved the State by this arrangement, and you inquire whether the Commission may legally so act.

The Prison Labor Commission was created by the Act of June 1st, 1915, P. L. 656. Its powers and duties are expressly prescribed by statute, and being an instrument of the State government the character of its authority is necessarily and exclusively public. It is obvious that if the arrangement suggested were consummated, your Commission, in advocating the sale of the corporation's product, would be acting not in a public character, but in a wholly private capacity. I am of the opinion that you cannot so act, as it is well settled, on the grounds of public policy, that any promises by a public servant, as such, to do what the law does not expressly or by necessary implication authorize is void.

No State commission or department can use its official position to further the financial interests of a private business. Public policy forbids such an undertaking, even though it be based upon consideration and be without personal gain to those constituting such commission or department.

From the standpoint of expediency, your Commission should abstain from entering into such an arrangement. If for any reason the product should prove other than represented, or become unsatisfactory to the institutions using it, reproach and distrust might be directed against you; and, in the event of litigation between the company and the purchasing institution, your situation might become exceedingly embarrassing.

Specifically answering your inquiry, you are now advised that you have no authority to act as agent for the Keystone Solether Corporation in placing its product in State and County Institutions of this Commonwealth.

Very truly yours,

FRANK M. HUNTER,
Deputy Attorney General.

WEIGHTS AND MEASURES.

The Act of July 24, 1913, P. L. 960, authorizes inspectors of weights and measures to test weights, measures and devices used in selling commodities. It does not apply to weights and measures used in laundries and washeries.

Office of the Attorney General,
Harrisburg, Pa., October 14, 1919.

Honorable James Woodward, Secretary of Internal Affairs, Harrisburg, Pa.

Dear Sir: This Department is in receipt of your communication asking whether Section 2 of the Act of July 24, 1913, P. L. 960, authorize the county and city inspectors of weights and measures to test scales used in laundries and washeries. The applicable provision of that Act is as follows:

"Inspectors shall take charge of and safely keep the proper standards. They shall be furnished by the Chief of the Bureau of Standards of this Commonwealth, with full specifications of tolerances and allowances to be used by them in the performance of their duties. Each inspector shall have power, within his respective jurisdiction, to test all instruments and devices used in weighing or measuring anything sold or to be sold, and seal the same, if found to be correct. Such test shall include all appliances connected or used with such instruments or devices. For the purpose of making such test each inspector at any reasonable time and without formal warrant, may enter upon any premises; and may, on any public highway, *stop any vendor or dealer, or the agent or servant of such vendor or dealer*, and stop any vehicle used in serving any commodity which is weighed or measured as delivered."

The Act also provides that when any instrument or device is seized, the inspector may retain it for use as evidence in any prosecution "under the laws of this Commonwealth relating to weights or measures, or to the sale of commodities."

I assume that weights and measures used in laundries and washeries are used for the purpose of measuring by weight the clothes which have been laundered. They are, therefore, not "used in weighing or measuring anything sold or to be sold."

It is apparent that this Act of Assembly was intended to authorize the inspectors to test the weights, measures and devices used in selling commodities.

I am, therefore, of opinion that it cannot be extended to cover inspection of weights and measures in laundries and washeries

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

STATE INSTITUTION FOR INEBRIATES.

Proof of loss of a building purchased for the State Institution for Inebriates which was destroyed by fire should be made by the chairman of the Commission to construct the Institution, and the check for the insurance should be payable to the State Treasurer and be deposited to the credit of the State Insurance fund.

Office of the Attorney General,
Harrisburg, Pa., October 16, 1919.

Honorable Lewis S. Sadler, Carlisle, Pa.

Dear Sir: I have your letter of the 13th instant.

You ask to be advised to whom the \$2,500.00 insurance is to be paid, which covered a barn on the property of the Commonwealth purchased for the State Institution for Inebriates, and also whether this insurance money can be used for the purpose of erecting temporary sheds for the housing of the tenants' stock and crops.

I have to advise you that the Proof of Loss should be executed by the Chairman of the Commission to Construct a State Institution for Inebriates.

The Act of May 14, 1915, which creates a State Insurance Fund, provides for the creation of the fund from certain revenues, among which are the following:

"All payments hereafter made by insurance companies on account of loss or damage to property of the Commonwealth, caused by fire or other casualty, or on account of the cancellation of existing policies of insurance."

This unquestionably covers, and was intended to cover, the property of the Commonwealth administered by the various commissions. It follows that the check should be made payable to the Commonwealth and it should be deposited in the State Treasury to the credit of the State Insurance Fund.

It, therefore, necessarily follows, also, that the Commission cannot use the money for the purpose of erecting temporary sheds for housing of the tenants' stock and crops.

I return to you the form of Proof of Loss.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

STATE INSTITUTION FOR FEEBLE MINDED, PENNHURST. PA.

Since the passage of the Act of June 12, 1913, P. L. 494, the committal to and dismissal from this institution is controlled by the Court, but those inmates who were admitted prior to the Act of 1913 do not come within the terms of that Act. Where an application of a parent or guardian of an inmate who was admitted prior to the Act of 1913, is made, and such inmate can be dismissed with safety to the public, he should be dismissed into the custody of such parent or guardian. Where such a patient has been dismissed, the Board of Trustees cannot require his return to the Institution, if the parent or guardian refuses to return him, without an order of Court.

Office of the Attorney General,
Harrisburg, Pa., October 23, 1919.

Honorable Oscar E. Thompson, Superintendent State Institution
for Feeble Minded, Pennhurst, Pa.

Dear Sir: This Department is in receipt of your letter of the 8th inst., asking,

First: Whether the Board of Trustees of the Institution has the authority to retain or dismiss patients who have been admitted to the institution prior to the Act approved June 12, 1913, P. L. 494, which amends the Act of May 15, 1903, P. L. 446, creating the institution, when an application for dismissal has been made by a parent, guardian or other proper custodian.

Second: Whether the Board of Trustees has authority to require the return of patients who have been granted a vacation for a fixed period when the parent, guardian or other custodian refuses to return them.

The scheme for the admission of children provided by the Act of 1903, was based upon requests made by parents or guardians. Section 11 of that Act provided for admission to the institution upon application made in the form prescribed by the Board of Trustees.

Section 12 provided:

"That any parent or guardian who may wish to have a child admitted to said institutions for treatment, culture or improvement, and pay all expenses of such care, may do so under terms, rules and regulations prescribed by the superintendent and approved by the trustees."

Section 13 provided that the institution should receive as inmates "feeble minded children", residents of this State, under the age of **twenty years**, who shall be incapable of receiving instruction in the common schools of the State."

But the Act of 1913 changed the scheme for the admission of inmates and provided that they should be admitted upon the commitment thereto by the courts of quarter sessions of certain counties

upon the petition of the husband, wife, parent, guardian or other persons standing in loco parentis, the next of kin, the county commissioners or overseers of the poor, the managers of trustees of any institution having such person in charge, or the district attorney of the county.

It therefore appears that under the original Act the parent, or guardian, had the final say as to whether a child should be admitted to the institution, provided the institution would accept him, but since the Act of 1913 both the committal and dismissal is under the control of the court. Those inmates who were admitted prior to the Act of 1913, upon the application of the parent or guardian, do not come within the terms of that Act. When an application of a parent or guardian or other person standing in loco parentis, is made to your institution for the return of any inmate who was admitted prior to the Act of 1913, and such inmate can be returned with safety to the public; that is to say, where the inmate has not a tendency to violence, he should be dismissed into the custody of the parent, guardian or proper custodian.

From what has been said, it also follows that the Board of Trustees cannot require the return of those patients admitted prior to the Act of 1913 who have been granted a vacation for a fixed period, if the parent, guardian or proper custodian refuses to return them.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

FEEBLE MINDED WOMEN—ADMISSION TO VILLAGE FOR FEEBLE
MINDED WOMEN—AGE.

The age at which women are admitted to a village for feeble minded women is a question for the court of quarter sessions of the proper County. The board of managers of the institution has no discretion in the matter.

Office of the Attorney General,
Harrisburg, Pa., October 30, 1919.

Miss Nona P. Brown, President, Board of Managers, Pennsylvania
Village for Feeble-Minded Women, Laurelton, Pa.

Dear Madam: Your request for an opinion, as to the age for admission of idiotic, imbecile or feeble-minded women to your Institution, is received at this Department.

The original Act of July 25, 1913, P. L. 1319, provided—

“That a State village for feeble-minded women, for the care of feeble-minded women between the ages of sixteen and forty-five, is hereby constituted and established, the ground and buildings for which are hereby directed to be selected and constructed, which village shall be governed and maintained in the manner hereinafter provided, and shall be known as the Pennsylvania Village for Feeble-Minded Women. That this institution shall be entirely and specially devoted to the reception, segregation, detention, care and training of feeble-minded women of child-bearing age; and shall be so planned, in the beginning and construction, as shall provide separate classification of the numerous groups embraced under the terms ‘idiotic,’ ‘imbecile,’ or ‘feeble-minded.’ * * * *”

This section was amended by the Act of July 5, 1917, P. L. 698, to read—

“That a State Village for Feeble-Minded Women, for the care of Feeble minded women, is hereby constituted and established, the grounds and buildings for which are hereby directed to be selected and constructed, which village shall be governed and maintained in the manner hereinafter provided, and shall be known as the Pennsylvania Village for Feeble-Minded Women. That this institution shall be entirely and specially devoted to the reception, segregation, detention, care, and training of feeble-minded women; and shall be so planned in the beginning and construction as shall provide separate classification of the numerous groups embraced under the terms ‘idiotic,’ ‘imbecile,’ or ‘feeble-minded.’***”

You will notice that in the section as amended the words “*between the ages of sixteen and forty-five*” and “*of child-bearing age*”, are omitted so that there are no restrictions upon admission to the Institution so far as the age of the woman is concerned under the Amendment of 1917.

Section 10 of the Act of July 25, 1913, P. L. 1319, relates to the admission of inmates to said village, and provides as follows:

“The said board of trustees shall receive and care for, as inmates of said village, such idiotic and feeble-minded women, *between the age of sixteen and forty-five*, as may be committed thereto by any of the courts of quarter sessions of the counties of the Commonwealth, as hereinafter provided; * * * *”

This section was amended by the Act of July 5, 1917, P. L. 698, to read—

"The said board of trustees shall receive and care for, as inmates of said village, such idiotic and feeble-minded women as may be committed thereto by *any of jurisdiction in such cases*, as hereinafter provided; * * *"
the courts of the counties of the Commonwealth, having

The Act of 1917 therefore eliminated all reference to the age of the women to be admitted to the Institution.

Section 10 of the Act of 1913, as amended by the Act of 1917, was again amended by Act No. 388, approved the sixteenth day of July, A. D. 1919, to read as follows:

"The said board of managers shall receive and care for, as inmates of said village, such idiotic, imbecile or *the court of quarter sessions of the respective counties* feeble-minded women as may be committed thereto by of the Commonwealth, as hereinafter provided. * * *"

The section then prescribes the form of procedure in the court of quarter sessions in the matter of an application to said court for commitment of an idiotic, imbecile, or feeble-minded woman to the village.

Your communication says that the State Board of Charities and Commission on Lunacy has advised you that the status of the word "woman" in the act should be more clearly defined. It seems to me, from a careful reading of the sections of the Act of Assembly, and especially Section 10 as amended by the Act of 1919, that it is not the function of the managers of your Institution to pass upon this question, nor have you the right to fix any age limit as a prerequisite for admission to your Institution; and, therefore the Attorney General's interpretation of the subject and his definite statement of the age of admission to the institution would mean nothing. Section 10 of the act above quoted provides, that—

"The said board of managers shall receive and care for, as inmates of said village, such idiotic, imbecile or feeble-minded women as may be committed thereto by *the court of quarter sessions of the respective counties of the Commonwealth.* * * *"

In my opinion this leaves no discretion in the board of managers of the Institution with regard to the age at which the women are to be admitted. This question is one only for the courts of quarter sessions of the respective counties of the Commonwealth. If an application is made in proper form to the court of quarter sessions of any county in the Commonwealth for the commitment of a woman to your Institution, it is for that court to determine whether or not the person is such an idiotic, imbecile or feeble-minded woman as is

contemplated by the Act of Assembly; and where the proceedings, in the court of quarter sessions are regular, the application is in proper form, and the commitment by the court in proper form, the managers of the institution have no discretion to receive or refuse the admission of the person, for the act provides that the board of managers *shall receive and care for*, as inmates of said village, such idiotic, imbecile or feeble-minded women as may be committed thereto by the courts of quarter sessions of the respective counties of the Commonwealth.

In view of this interpretation of the act, it is not necessary for this Department to define the word "woman" as used in the act. The word "woman" is generally defined in law to be any female of child-bearing age. That, however, is a question for the respective courts of quarter sessions to determine upon the application for commitment of a person to your Institution in accordance with the provisions of the Act of July 16, 1919.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General.

CHARITY—SOLICIATIONS FOR DONATIONS.

The Child Federation of Philadelphia is a "Community organization" within the Act of June 20, 1919.

Office of the Attorney General,
Harrisburg, Pa., November 7, 1919.

Bromley Wharton, Esq., General Agent and Secretary Board of Public Charities, Philadelphia, Pa.

Dear Sir: This Department is in receipt of your recent letter asking to be advised as to whether the Child Federation of Philadelphia is within the Act of June 20, 1919, No. 248.

This Act of Assembly is entitled: "An act relating to and regulating the solicitation of moneys and property for charitable and patriotic purposes."

It makes it unlawful for persons or corporations to appeal to the public for donations or subscriptions in money or property, unless an application is made to, and a certificate issued by, the Board of Public Charities, authorizing such solicitation.

Section 14 provides that "this Act shall not apply to any **** community organizations of this Commonwealth."

The Child Federation, as appears by its charter submitted with your letter, is formed "to conduct active measures and make research affecting the best interests of babies and children", and the charter provides that the business of managing the affairs of the corporation is to be conducted in the city and county of Philadelphia. It appears that the subscribers to the charter and the officers and directors are all residents of Philadelphia.

It also appears that one of its chief activities at the present time, is to act as a co-ordinating agency for more than forty other agencies in a large area of the city. There is nothing, however, in the charter which limits the activities of this federation to the city of Philadelphia, but it appears that up to this time they have been so limited.

The question, therefore, arises as to whether the words "community organization" are to be determined by the charter powers or by the active operations of the organization which intends to appeal for donations.

In my opinion it was the intention of the Legislature to provide against promiscuous solicitation throughout the Commonwealth, and in exempting "community organizations" from the provisions of this Act it intended to relieve from its provisions those organizations whose benefactions are confined to a community and where the solicitation for such community organizations is made in the community benefited.

I do not think it was the intention of the Legislature to require an organization whose charter gives it authority to operate beyond the community, to secure a certificate where in fact the corporation has not exercised such authority.

I am, therefore, of opinion that the Child Federation of Philadelphia, which has up to this time confined its activities to the city of Philadelphia, is a "community organization" within the provisions of Section 14 of this Act of Assembly and is, therefore, not required to comply with the terms of this statute.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

CHILDREN'S AID SOCIETY.

The Children's Aid Society, a charitable organization which has resident agents and visitors in several counties in the Commonwealth and is authorized by its charter to extend its work throughout the State, is within the provisions of the Act of June 20, 1919, P. L. 505, requiring charitable organizations seeking subscriptions to register with the Board of Charities.

Office of the Attorney General,
Harrisburg, Pa., November 14, 1919.

Bromley Wharton, Esq., General Agent and Secretary Board of
Public Charities, 714 Bulletin Building, Philadelphia, Pa.

Dear Sir: We have your letter of the 6th inst., addressed to the
Attorney General, asking whether the Children's Aid Society comes
within the provisions of the Act of June 20, 1919, No. 248.

The purpose of this society as stated in its charter are:

"To provide for any destitute child that may come
under its control; to establish and maintain for the
public a bureau of indormation in regard to children's
charities; to aid and cooperate in the protection of
children from cruelty."

I find from the letter of the General Secretary which you also
enclose, that the society operates principally in Philadelphia, but
also operates in the eastern counties of the State, and is supported
by contributions and bequests. The annual report submitted shows
that it has resident agents and visitors in Columbia, Lancaster,
Chester, Bradford and Lehigh Counties.

This Act of Assembly provides in Section 14:

"This act shall not apply to any fraternal organiza-
tion incorporated under the laws of this Common-
wealth, nor to any religious organization or any college,
school or university, located within the Commonwealth,
nor to any labor union or municipality or municipal sub-
division or community organization of the Common-
wealth."

The only question is whether this society is a community or-
ganization within the meaning of this statute.

We have heretofore advised you what is a community organiza-
tion and in an opinion concerning the application of the act to the
Child Federation of Philadelphia, we have held that even though the
charter authorizes the organization to operate in more than one com-
munity, if in fact its operations are confined to one community and
if the solicitation is limited to the community benefited, such an
organization is a community organization, within the meaning of
the act.

But it appears in this case that the charter of the society au-
thorizes it to extend throughout the State, and it is in fact operating
in a number of counties. I am, therefore, of opinion that the Child-
ren's Aid Society is within the provisions of the Act of Assembly
above referred to.

I return you herewith the letter of the General Secretary and the
report of the society.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

BOY SCOUTS.

The Boy Scout Council of Delaware and Montgomery Counties must comply with the terms of the Act of June 20, 1919, P. L. 505.

Office of the Attorney General,
Harrisburg, Pa., December 1, 1919.

Bromley Wharton, Esq., General Agent and Secretary Board of
Public Charities, 714 Bulletin Building, Philadelphia, Pa.

Dear Sir: This Department is in receipt of your letter of the 24th inst. enclosing the letter of Mr. Isaac C. Sutton and the Constitution and By-Laws of the Boy Scouts of America.

You ask whether this organization is within the provisions of the Act of June 20, 1919, P. L. 505. I gather from Mr. Sutton's letter that he thinks the organization is not within the provisions of this Act because it is an educational organization.

The boy scout organization is certainly not a community organization. It is incorporated by Act of Congress, and the purpose of the solicitation which the Council of Delaware and Montgomery Counties now desires to undertake, is to raise funds for the better equipment of the boy scouts camp, to accommodate the scouts of Delaware and Montgomery Counties, and also to enable the Council to make a contribution to the national work of the boy scouts.

Section 14 of this Act of Assembly does not exempt educational organizations. It exempts fraternal and religious organizations, as such, and "any college, school or university located within the Commonwealth." It does not exempt educational organizations other than colleges, schools and universities.

I am, therefore, of opinion that the Boy Scout Council of Delaware and Montgomery Counties must comply with the Act of Assembly.

I return you herewith Mr. Sutton's letter and the copy of the Constitution.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

VALLEY FORGE PARK COMMISSION.

Ordinarily the Commonwealth does not pay interest upon awards against her, but in case of an award approved by the Court, from which no appeal was taken, and a delay occurs in payment through no fault of the person to whom the award was made, or by reason of the transmission of the matter through the usual course in the offices of the Auditor General and State Treasurer, then interest is collectible.

Office of the Attorney General,
Harrisburg, Pa., December 18, 1919.

J. P. Hale Jenkins, Esq., Attorney at Law, Norristown, Pa.

Dear Sir: I have your favor of the 11th instant in reference to the expenses for acquiring land for the Valley Forge Park Commission. You ask whether the bills for witness fees, stenographers' costs, and counsel fees are properly chargeable to, and payable out of, the appropriation for acquiring the land.

Heretofore this question has arisen as to the cost and expense of examining or insuring titles, and we have uniformly held that such expenses are properly payable out of the appropriation for the payment of land because they are incident to the purchase.

Where the land has been taken under condemnation proceedings, and the costs of such proceedings, including witness fees and stenographers' costs, attach to the award, I am of opinion that those items are also properly chargeable to, and payable out of, the appropriation for the land.

I also think that the fees for counsel and representing the Commonwealth in such condemnation proceedings are incident to the purchase of the property, and therefore payable out of such appropriation.

You also state that in certain cases verdicts have been taken against the Commonwealth, and ask whether interest is properly chargeable against the Commonwealth from the date when such verdicts are taken, and also from the date of the approval of the report of the Jury of View in cases where no appeal has been taken.

It is true, as a general proposition, that the Commonwealth does not pay interest, but when the Commonwealth becomes a suitor in one of its Courts of Justice, and a verdict is obtained against it, the same incidents attach to that verdict as would attach in the case of other suitors. One of these incidents is that the verdict bears interest from its date, and I am of opinion that a verdict against the Commonwealth carries interest with it as in the case of a verdict against an individual.

I do not understand how the question of interest can arise in a case where the Court has approved the report of the Jury of View, and where there has been no appeal therefrom. In such a case a requisition should be promptly presented to the accounting officers of the Commonwealth for payment and no interest would accrue. The Commonwealth should not pay interest where the payment is deferred only for such a time as is necessary to pass the settlements and requisitions through the Accounting Department in the ordinary course of business. If, however, a case arises where there has been

an award approved by the Court from which no appeal has been taken, and the delay is not caused through any fault of the person to whom the award has been made, or by reason of the transmission of the matter through the usual course in the offices of the Auditor General and State Treasurer, then I am of opinion that the Commonwealth is also liable for interest in such a case.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

PHYSICIANS.

The Bureau of Medical Education and Licensure has no power to revoke the license of a physician who has been convicted of a crime involving moral turpitude until final affirmance of the judgment against him.

Office of the Attorney General,
Harrisburg, Pa., December 30, 1919.

Dr. J. M. Baldy, President, Bureau of Medical Education and Licensure, Philadelphia, Pa.

Sir: Your request at the end of your letter of December 13th for an opinion as to the advisability of revoking the license of a physician, who has been convicted of abortion, sentenced to the penitentiary, taken an appeal, and is out on bail pending the appeal, but who has been accused of repeated offenses and has escaped previous convictions by legal technicalities, is duly received.

In reply would say that you are advised in an opinion of this date that under the 12th Section of the Act of June 3, 1911, P. L. 639, as amended by the Act of May 24, 1917, P. L. 271, the Bureau of Medical Education and Licensure has no power to revoke the license of a physician who has been convicted of abortion, or "of a crime involving moral turpitude", and sentenced to the penitentiary but who has taken an appeal to the Superior Court and has given bail pending the appeal, until the proceedings on the appeal are terminated and the sentence is affirmed.

The fact that the physician you refer to has previously been often accused of the same offense, but not convicted, can not add to or alter the requirements of the Act of Assembly above referred to. It has been uniformly held in this State that penal statutes of all kinds are strictly construed, and their provisions can not be extended beyond the plain meaning of the words used in the Act. *Commonwealth vs. Lavery*, 247 Pa. 139,

You are therefore advised that the Bureau of Medical Education and Licensure has no power to revoke the license of any physician until he has been duly convicted of one of the crimes mentioned in the Acts above referred to, and after hearing the Bureau finds that he has been so convicted, or is habitually intemperate "in the use of ardent spirits or stimulants, narcotics, or any other substance which impairs intellect and judgment to such an extent as to incapacitate for the performance of professional duties", as provided in the above mentioned Act.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

Office of the Attorney General,
Harrisburg, Pa., December 30, 1919.

Dr. J. M. Baldy, President, Bureau of Medical Education and Licensure, Philadelphia, Pa.

Sir: Your letter of December 13th, requesting to be advised as to whether or not the Bureau of Medical Education and Licensure has the power, under Section 12 of the Act of June 3, 1911, P. L. 639, as amended by the Act of May 24, 1917, P. L. 271, to revoke the license of a physician who has been convicted of abortion and sentenced to the penitentiary, but who has taken an appeal to the Superior Court and has given bail pending the appeal, has been referred to me.

Section 12 of the Act of June 3, 1911, P. L. 639, as amended by the Act of May 24, 1917, P. L. 271, provides as follows:

"The Bureau of Medical Education and Licensure shall refuse to grant a license, to practice medicine and surgery, to an applicant upon the presentation to said Bureau of Medical Education and Licensure of a court record showing the conviction, in due course of law, of said person for producing, or aiding or abetting in producing, a criminal abortion or miscarriage, by any means whatsoever; and, further, the Bureau of Medical Education and Licensure, upon such evidence and proof, shall cause the name of any physician licensed to practice medicine and surgery, in the Commonwealth of Pennsylvania, to be removed from the record in the office of the Superintendent of Public Instruction.

"The Bureau of Medical Education and Licensure may refuse, revoke, or suspend the right to practice medicine and surgery, in this State for any or all of the following reasons; to wit, The conviction of a crime involving moral turpitude, habitual intemperance in the use of ardent spirits or stimulants, narcotics, or any other substance which impairs intellect and judgment to such an extent as to incapacitate for the performance of professional duties."

In an opinion rendered to you by this Department under date of August 21, 1918, you were advised that the Bureau had power to revoke the license of a physician licensed prior to January 1, 1912, when, after hearing, you found he had been convicted of abortion.

The meaning of the word "conviction" in the Acts of 1911 and 1917, above referred to, has not yet been construed by the Courts so far as these Acts are concerned, but the Courts of Pennsylvania have decided that the word "conviction" in other Acts of Assembly means a judgment and not merely a verdict, which in common parlance is called a "conviction".

Smith v. Commonwealth, 14 S. & R. 69.

This decision was followed by the Supreme Court in the late cases of—

Commonwealth v. Minnick, 250 Pa. 363.

Commonwealth v. Vitale, 250 Pa. 548.

But our Courts, so far as I have been able to find, have not yet directly decided what effect, so far as to statutory disabilities and disqualifications, an appeal from the sentence of the trial Court in a criminal case has.

In the case of *Shields v. Westmoreland County*, 253 Pa. 271, the Supreme Court held that after Sheriff Shields had begun to serve his term in the penitentiary the constitutional provision at once ousted him from office and he was not after that date entitled to any salary, but in that case they were not called upon to pass on the effect of the appeal on the sentence or judgment of the trial Court, as the plaintiff was paid his salary up to the time that the sentence was affirmed by the Supreme Court.

The appellate Courts of the other States are in hopeless conflict on this question. It has been held that the pendency of an appeal or other proceeding in suspension of judgment does not operate to prevent a prior establishment of guilt from constituting a conviction as the term is used in some contexts.

Hackett v. Freeman, 103 Ia. 296; 72 N. W. 528. (Right to interrogate witness as to previous conviction of crime.)

State v. Morrill, 105 Me. 207; 73 Atl. 1091. (Right to impose sentence.)

Com v. Lockwood, 109 Mass. 323; 12 Am. Rep. 699. (Grant of pardon.)

Ritter v. Democratic Press Co., 68 Mo. 458. (Disqualification of witness.)

State v. Alexander, 76 N. C. 231; 22 Am. Rep. 675.

Gilmore v. State, 3 Okla. Crim. 639; 108 Pac. 416, followed by *Chapman v. State*, 3 Okla. Crim. 643. (Right to pardon.)

In re Kirby, 10 S. D. 322; 73 N. W. 92.

In re Kirby, 10 S. D. 414; 73 N. W. 907. (Disbarment proceedings.)

Buciley v. Schwartz, 83 Wis. 304; 53 N. W. 511. (Effect of arrest of judgment on right to fees for convictions.)

On the other hand, it has been held in many cases that the pendency of an appeal or other proceeding in suspension of judgment operates to prevent an adjudication of guilt from constituting a "conviction" as the term is used in some statutes.

Rex v. Turner, 15 East (Eng.) 570. (No right to conviction fees where judgment was arrested.)

Card v. Foot, 57 Conn. 431. (Attacking credibility of witness pending appeal.)

Vinsant v. Vinsant, 49 Ia. 639. (Right to divorce for conviction of felony.)

Rivers v. Rivers, 60 Ia. 380; 14 N. W. 774. (Right to divorce for conviction of felony.)

Rivers v. Rivers, 65 Ia. 569; 22 N. W. 679.

State v. Volmer, 6 Kan. 379. (Prior record inadmissible in prosecution for second offense.)

Dial v. Com., 142 Ky. 32. (Witness not disqualified where judgment was set aside.)

Baker v. Modern Woodmen of America, 140 Mo. App. 619. (Right to recover insurance forfeited by conviction where insured died during pendency of appeal from conviction.)

People v. Van Zile, 80 Mics. 329. (Impeachment of witness.)

See also *White v. Com.*, 79 Va. 611; *State v. Pishner*, W. Va., 81 S. E. 1046.

In this connection it has been said:

"Probably, in a prosecution alleging a former conviction, and where the statute imposes an increased penalty for each succeeding offense, and when the alleged prior conviction and judgment thereon is held for review on writ of error in the court of last resort, it would be safer and more in consonance with a liberal and just view of the rights of the citizen to hold..... that pending the alleged former conviction in the appellate tribunal there is wanting that final judicial sentence essential to constitute conviction. In such case it is

apparent that if the judgment of the appellate court should be one of reversal nothing would be left as the basis of a second prosecution alleging a former conviction."

White v. Com., 79 Va. 611.

In the following case, it was held that the suspension of the civil rights of a person sentenced to the penitentiary begins at the date of his *imprisonment* under the sentence. In this case the Court said:

"A sentence to the penitentiary does not make void a deed executed by the convict after sentence, but while he is out pending appeal to the Supreme Court."

Harmon v. Bowers., 78 Kan. 135.

And in the following case, it was held that a person whose sentence has been suspended is not "convicted" so as to deprive him of his right to vote in New York. In this case Mr. Justice Bartlett said:

"Where disabilities, disqualifications, and forfeitures are to followed upon a conviction, in the eye of the law, it is that condition which is evidenced by sentence and judgment; and that, where sentence is suspended and so the direct consequences of fine and imprisonment are suspended or postponed temporarily or indefinitely, so also the indirect consequences are likewise postponed."

People v. Fabian, 192 N. Y. 443.

Chief Justice Smith in the following case also said:

"To authorize the loss of personal privileges..... there must be administered the appropriate punishment due to crime....and this from the benignant rule adopted in the construction of penal statutes of doubtful import, which interprets them favorably to the accused."

State v. Houston, 103 N. C. 383.

In accordance with these latter authorities, you are, therefore, advised that the Bureau of Medical Education and Licensure has no power under the twelfth Section of the Act of June 3, 1911, P. L. 639, as amended by the Act of May 24, 1917, P. L. 271, to revoke the license of a physician who has been convicted of abortion, or "of a crime involving moral turpitude", and sentenced to the penitentiary but who has taken an appeal to the Superior Court and has given bail pending the appeal, until the termination of the proceedings by affirmance of the judgment.

Yours very truly,

WILLIAM I. SWOOPE,
Deputy Attorney General.

DRUGS—ADULTERATION.

The sale of a medicine containing three per cent. iodine and ninety-seven per cent. alcohol as "Alcoholic Iodine," a preparation which should contain seven per cent. iodine and ninety-three per cent. alcohol, is a violation of the Act of June 7, 1917, P. L. 564.

Office of the Attorney General,
Harrisburg, Pa., January 15, 1920.

Doctor Thomas Blair, Chief of Drug Control Division, 206 Walnut St., Harrisburg, Pa.

Sir: You submitted to me some time ago, a bottle of medicine marked "ALCOHOLIC IODINE, 3% Iodine 97% Alcohol, for External Use Only", and requested an opinion as to whether this preparation was a violation of the Act regulating the sale of drugs. In reply, would say that the third section of the Act of May 8, 1909, P. L. 470, amended by the second section of the Act of June 7, 1917, P. L. 564, provides as follows:

"Section 3. That for the purpose of this act an article shall be deemed to be adulterated:

FIRST. If a drug is sold under or by any name recognized by the ninth revision of the Pharmacopoeia of the United States, the fourth edition of the National Formulary, or the American Homeopathic Pharmacopoeia, it differs from the standard of strength, quality, or purity as determined by the test or formula laid down in the ninth revision of the Pharmacopoeia of the United States, the fourth edition of the National Formulary, or the American Homeopathic Pharmacopoeia: Provided, That no drug defined in the ninth revision of the Pharmacopoeia of the United States, the fourth edition of the National Formulary, or the American Homeopathic Pharmacopoeia, except official preparations of opium, iodine, peppermint, camphor, ginger, and ethyl nitrit, shall be deemed to be adulterated, under this provision, if the standard of strength, quality, or purity be plainly stated, in juxtaposition with the official standard of strength, quality, and purity, upon the bottle, box, or other container thereof, although the standard may differ from that determined by the test or formula laid down by the ninth revision of the Pharmacopoeia of the United States, the fourth edition of the National Formulary, or the American Homeopathic Pharmacopoeia.

Second. If its strength or purity fall below the professed standard or quality under which it is sold."

You stated to me that the official preparation of Alcoholic Iodine should contain 7% Iodine and 93% Alcohol. It seems plain, therefore, that this preparation sold under the above label does not con-

tain the official amount of Iodine, and that on the label of the bottle submitted to me, as required by the Act, the standard of strength, quality, or purity was not stated, in juxtaposition with the official standard of strength, quality, and purity, upon the bottle. This seems to me plainly a violation of this provision of the Act of 1909, as amended by the Act of 1917, and subjects those selling the preparation of the penalties provided in the Act.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

STATE ART COMMISSION.

Act of May 1, 1919, P. L. 103.

The Commission has no power to adopt a regulation providing that payments on account of contracts for work, the design of which must be approved by the Commission, shall not become due under the contract until the Commission shall certify the contract is substantially completed, in accordance with the design.

Office of the Attorney General,
Harrisburg, Pa., January 27, 1920.

Mr. C. C. Zantzinger, President, State Art Commission, 112 S. 16th Street, Philadelphia, Pa.

Sir: Your communication of the 2d instant addressed to the Attorney General has been referred to me. You inquire whether your Commission has authority to adopt a regulation substantially providing that no final payment shall become due and payable under a contract to erect or construct any work, the design of which must be first approved by the Commission, unless and until your Commission shall certify that such work has been executed in substantial accordance with the design approved.

I am of the opinion that the Act of May 1, 1919, P. L. 103, which creates your Commission and defines its powers, contains no authority for the adoption of such regulation. The act expressly provides that the design for structures of a certain character must be approved by your Commission, and that no work can be commenced until such approval has been obtained. It implies that the work must be done in accordance with the design approved, for it is well settled that whenever the provisions of a statute is general, everything which is necessary to make such provision effective is supplied by the common law and by implication (2 Lewis' Sutherland Stat.

Construction, Sec. 504 A): and further, that whatever is implied in a statute, whether in the way of a grant or a restriction, or of a condition, is as much a part of the enactment as what is expressed therein (Endlich on Interpretation of Statutes, Section 417).

The State or municipal agency liable for the cost of any such structures should satisfy itself that the work has been done in accordance with the approved design before making payments therefor. The act does not, however, constitute your Commission as the judge of whether such design has been in fact followed. There may be some advantage of having the approval of your Board before final payments are due or can be made, but this is a matter to be submitted to the Legislature.

You are now specifically advised therefore that your Commission has no power to adopt a regulation substantially providing that payments on contracts for work, the design of which must be approved by the Commission, shall not become due or payable under the contract unless and until your Commission shall certify that the work has been executed in substantial accordance with the design so approved.

Very truly yours,

FRANK M. HUNTER,
Deputy Attorney General.

MOVING PICTURES.

The Act of April 13, 1911, P. L. 64, regulating amusements, was not repealed, as to moving pictures, by the Act of May 15, 1915 P. L. 534.

Office of the Attorney General,
Harrisburg, Pa., February 4, 1920.

Dr. Ellis P. Oberholtzer, Secretary, Pennsylvania State Board of Censors, 1025 Cherry Street, Philadelphia, Pa.

Sir: Your letter of January 29th, 1920, asking to be advised as to whether the Act of April 13, 1911, P. L. 64, regulating amusements, was repealed so far as moving pictures are concerned by the Act of May 15, 1915, P. L. 534, was duly received.

In reply would say that Section 1 of the Act of April 13, 1911, P. L. 64, provides as follows:

"That it shall be unlawful for any person or persons to give or participate in, or for the owner or owners of any building, tent, tents, or any premises, lot, park, or

common, or any one having control thereof, to permit within said building, tent, or tents, or any premises, lot, park or common, any dramatic, theatrical, operatic, or vaudeville exhibition, or the exhibitions of any fixed or moving pictures, of a lascivious, sacrilegious, obscene, indecent, or of an immoral nature and character, or such as might tend to corrupt morals."

This is the act regulating all kinds of public exhibition and amusements, including moving pictures, and providing for a criminal prosecution for showing immoral shows. It does not conflict in any way with the Act of May 15, 1915, P. L. 534, establishing the Pennsylvania State Board of Censors, and giving them the power to censor moving pictures. Further, the same Legislature in 1911, by the Act of June 19, 1911, P. L. 1067, which was the first act in this State establishing a Board of Censors of Moving Pictures, showed its intention that both acts were to be enforced. In case a picture has been approved by the Pennsylvania State Board of Censors, it would certainly raise a presumption that the same was not an immoral picture, but I do not think that the two acts are inconsistent, or the latter act would repeal by implication the Act of April 13, 1911.

You are therefore advised that there is nothing in the Act of May 15, 1915, P. L. 534, to prevent a criminal prosecution for showing an immoral picture under the Act of April 13, 1911, P. L. 64.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

STATE BOARD OF EXAMINERS OF ARCHITECTS.

An architect who has been in practice in Pennsylvania more than one year prior to the passage of the Act of July 12, 1919 P. L. 933, and who desires a certificate of qualification and to register as provided in the Act, must satisfy the Board as to his competency, qualifications and character.

Section 13 of said Act applies only to those who on or after July 1, 1919 enter upon the practice of architecture in this State.

Office of the Attorney General,
Harrisburg, Pa., March 5, 1920.

Mr. M. I. Kast, Secretary, State Board of Examiners of Architects,
Harrisburg, Pa.

Dear Sir: We have your letter of the 1st instant, asking for a construction of the Act of July 12, 1919, P. L. 933, creating the

State Board of Examiners of Architects, and defining its powers and duties.

The first question you propose is whether the Board may refuse to grant a certificate of registration to any person who has been engaged in the practice of architecture for at least one year prior to the passage of this Act, if the Board deem such person not properly qualified.

Section 6 of this Act provides in part:

“* * * Any properly qualified person who shall have been engaged in the practice of architecture under the title of ‘architect’ for at least one year prior to the date of the approval of this act may secure such certificate and be registered in the manner provided by this act.”

Subdivision “C” of Section 7 provides:

“The Board of Examiners may grant a certificate of qualification to and register without examination any one who has been engaged in the practice of architecture in this State for at least one year prior to the date of approval of this act as a member of a reputable firm of architects or under his or her own name, or to any one who has been engaged in the practice of architecture as an employe for at least five years prior to the date of approval of this act: Provided, That applicants under this subdivision shall present satisfactory proof of competency and qualifications and evidence as to character: And provided, That the application for such certificate shall be made within two years after the date of approval of this act.”

The certificate to be issued is called a “certificate of qualification.” Section 6 provides that it may be issued to “any properly qualified person”, who, as provided in Section 7, “shall present satisfactory proof of competency and qualifications and evidence of character”. The State Board of Examiners necessarily must be the judges as to whether a person is “properly qualified” and has presented “satisfactory proof of competency and qualifications and evidence as to character.”

If an applicant who has been “engaged in the practice of architecture under the title of ‘architect’ for at least one year prior to the date of the approval of this act” does not satisfy the State Board of Examiners that he is a “properly qualified person”, or does not submit proof that is satisfactory to the Board of Examiners of his “competency and qualifications and evidence as to character”, the Board may refuse to grant such an applicant a certificate or to register him, as provided by the Act of Assembly.

This applies to persons who have been in practice more than one year prior to the passage of the Act, who desire to secure a certificate and to be registered.

The Act, however, also provides that any person who has been engaged in the practice of architecture under the title "architect" for a period of more than one year prior to the approval of the Act may continue to do so without a certificate or registration, provided he file an affidavit setting forth the facts with the Board of Examiners within five years after the date of the approval of the Act.

The second question you ask is whether a person who has been engaged in the practice of architecture for a period of one year prior to the approval of this Act of Assembly comes within the provisions of Section 13.

Section 13 provides:

"On and after July first, one thousand nine hundred nineteen, it shall be unlawful for any person in the State of Pennsylvania to enter upon the practice of architecture in the State of Pennsylvania, or to hold himself or herself forth as an architect or as a 'registered architect', or to use any word or any letters or figures indicating or intended to imply that the person using the same is a 'registered architect,' unless he or she has complied with the provisions of this act and is the holder of a certificate of qualification to practice architecture issued or renewed and registered under the provisions of this act."

It is very plain that this section applies only to those who on and after July 1, 1919, *enter* upon the practice of architecture in the State. It does not apply to those persons who have been practicing architecture prior to the passage of the Act.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

CARRYING CONCEALED DEADLY WEAPONS.

There is no authority to authorize or permit the carrying of concealed deadly weapons. A direction by the Postmaster General that rural mail carriers carry a weapon should rebut the statutory presumption of unlawful intent.

Office of the Attorney General,
Harrisburg, Pa., March 30, 1920.

Hon. James I. Blakslee, Fourth Assistant Postmaster General, Post
Office Department, Washington, D. C.

Sir: Your letter of the 26th inst. requesting that this Department advise you whether or not under the laws of the State of Pennsylvania, any objection will be made to the carrying of concealed deadly weapons by drivers in the rural motor truck service while actually in charge of the United States mails in this State, has been referred to me.

In reply, would say that the Act of March 18, 1875, P. L. 33, Section 1, provides as follows:

"That any person within this Commonwealth who shall carry fire-arms, slung-shot, handy-billy, dirk-knife, razor or any other deadly weapon, concealed upon his person, with the intent therewith unlawfully and maliciously to do injury to any other person, shall be deemed guilty of a misdemeanor, and upon the conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars and undergo an imprisonment by separate or solitary confinement not exceeding one year, or either or both, at the discretion of the court, and the jury trying the case may infer such intent as aforesaid, from the fact of the said defendant carrying such weapons in the manner as aforesaid."

Under this Act, the Superior Court has held that a prosecution cannot be sustained unless it is shown that the person carrying the weapon had a malicious intent to do injury.

Commonwealth vs. Gallagher, 9 Pa. Superor Ct., 100.

Judge Endlich in the following case, says:

"The constitution, in art. I, Sec. 22, declares the right of citizens (see *Com. v. Papson*, 44 Pa. Sup. Ct. 128, affirmed 231 Pa. 46) to bear arms in defence of themselves. With this declaration the Act of 1875 is not in conflict, under the ruling in *Wright v. Com.*, 77 Pa. 470. But its consistency with the same is to be predicated according to that decision, not only upon the concealment of the weapon, but also the intent, by the use of it unlawfully and maliciously to do injury to another; and whilst the statute authorizes a presumption of such intent from the mere fact of defendant's carrying the weapon concealed upon his person, that presumption is liable to be rebutted by proof: *Com. v. McNulty*, 8 Phila. 610. Such proof, of course, may be direct by evidence of the party himself as to his reason for carrying the weapon; and it may also be circumstantial, by evidence of facts negating the existence of any wrongful purpose on his part, or raising a presumption to the contrary."

Commonwealth v. Sweitzer, 21 Dist. Rep. 807.

But it has been held in the following case that a policeman may be convicted of carrying concealed weapons:

"The defendant herein, who had recently been acquitted of the charge of murder, was tried for assault and battery with intent to kill, and carrying a concealed deadly weapon. In support of the latter charge, it was shown that the defendant, a police officer, having been relieved from duty, went to the house of the prosecutors, and in the course of a personal altercation, drew from beneath his coat a pistol, with which he beat them. His counsel contended that there could be no conviction on this indictment, because the defendant was armed by the public, as a conservator of the peace, and was required by his office to carry the weapon.

The court held that the offence of carrying a concealed deadly weapon could be committed by a police officer, as well as by a private citizen; the difference being, that a private person was presumed to carry it for an unlawful purpose, while an officer was presumed to have it for a lawful purpose, either presumption being liable to be rebutted by proof."

Commonwealth vs. McNulty, 8 Phila., 610.

The rule established by the above cited authorities is that, while the law of Pennsylvania forbids any person to carry a concealed deadly weapon with malicious intent, and the intent can be inferred by the jury by the possession of the weapon, if the defendant can show that he had a lawful purpose in carrying the weapon and did not intend to use it for any malicious purpose, he would be entitled to be acquitted of the offense.

There is no authority in Pennsylvania that can authorize or permit any one to carry a concealed deadly weapon. Every person carrying one must, under the above law, assume the burden of proving that he carries the same for a proper purpose. We might suggest, however, that your Department could direct that the rural mail carriers carry a weapon, and that such direction could, in case the mail carrier was arrested, under this law be shown by him to rebut the statutory presumption of his unlawful intent.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

STATE BOARD OF DENTAL EXAMINERS.

Re. Revocation of license of a practicing dentist.

Office of the Attorney General,
Harrisburg, Pa., April 8, 1920.

Dr. Alexander H. Reynolds, Secretary, State Board of Dental Examiners, Philadelphia, Pa.

Sir: I am in receipt of your favor of March 30, 1920, enclosing a letter of Dr. Blair, Chief of the Bureau of Drug Control, to the Director of the Dental Council, asking the Dental Council to revoke a license under the following facts:

The person complained against has been practicing denistry in Pennsylvania for a period of twenty-three years. He was a practitioner at the time the laws went effect requiring dentists to secure a license before being authorized to practice that profession, and, therefore, he holds no license, either from the State Board of Dental Examiners or the Dental Council. He has become addicted to narcotic drugs.

The question is whether the Dental Council can prohibit him from practicing denistry.

The Act of May 7, 1907, P. L. 161, regulating and defining the powers and duties of the Dental Council and the State Board of Dental Examiners, as amended by the Act of May 3, 1915, P. L. 219, does not authorize the Dental Council to revoke the licenses of, or to prescribe penalties against, persons addicted to the use of narcotics.

The only provisions in reference to this matter is found in the Act of July 11, 1917, P. L. 758, known as the Drug Control Act. This Act provides that:

"No person shall use, take, or administer to his person, or cause to be administered to his person, or administer to any other person, or cause to be administered to any other person",

morphine (which is the drug in question),

"except under the advice and direction, and with the consent, of a regularly practicing and duly licensed physician or dentist."

Section 14 of this Act of Assembly provides:

"Any license heretofore issued to any physician, *dentist*, veterinarian, pharmacist, druggist, or registered nurse may be either revoked or suspended by the proper officers or boards having power to issue licenses to any of the foregoing, upon proof that the licensee is

addicted to the use of any of said drugs, after giving such licensee reasonable notice and opportunity to be heard."

Section 15 provides; in part:

"The term 'license', as used in sections fourteen and fifteen of this act, shall be construed to include all licenses heretofore issued to any physician, *dentist*, veterinarian, pharmacist, druggist, or registered nurse, whether said license was issued by the officers or boards at present having power to issue the same, or whether granted under previous authority."

It will be noted that the Dental Council, "having power to issue licenses", has the power to revoke a license issued to any dentist either by the Dental Council or by previous authority.

But there is no authority in this Act to revoke the right to practice unless that right is based upon a license. The Act does not include the taking away of the right to practice a profession which was secured prior to the granting of the license, but is limited to the revocation or suspension of a license.

I, therefore, am compelled to advise you that you can not revoke the license in the case heretofore mentioned, because no license has been granted, and you can not revoke the right to practice denistry because that power has not been given to the Dental Council. I think the law should be amended so as to authorize the proper officers or boards to revoke the right to practice whether based on a license or not.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

BOARD OF EXAMINERS OF ARCHITECTS.

The fee charged by the Board for examination or certificate of qualification and registration should not be returned to the applicant in the event he is found unfit for registration.

Office of the Attorney General,
Harrisburg, Pa., April 13, 1920.

Mr. M. I. Kast, Secretary, State Board of Examiners of Architects,
Harrisburg, Pa.

Dear Sir: This Department is in receipt of your communication, asking whether the fee paid by an applicant can be returned to the applicant when the Board has found him unfit for registration.

The Act of July 12, 1919, P. L. 933, provides for a State Board of Examiners of Architects, who conduct examinations, and issue certificates of qualifications to persons desiring to practice architecture in this Commonwealth. The Act also provides for the registration of persons to whom certificates have been issued.

Section 7 of this Act provides:

“Every person applying for examination or certificate of qualification and registration under this act shall pay a fee of twenty-five dollars to the secretary of the board of examiners.”

Each member of the Board of Examiners is paid ten dollars per diem while actually engaged in attendance at meetings, or in conducting examinations, and also his actual traveling, hotel, clerical and other expenses incurred in the performance of the duties imposed by this Act of Assembly. The Board is authorized to pay a secretary at a salary which shall not exceed five hundred dollars per annum.

Section 4 of this Act of Assembly also provides, in part:

“All fees provided for by this act shall be paid to and receipted for by the secretary of the board, and shall be paid by him monthly into the State Treasury.”

Where one applies to this Board for a certificate of any character, it imposes the necessity upon the Board to make a sufficient examination into the qualifications of the applicant. The expense of this examination is met, at least in part, by the fee which the applicant is required to pay. When an applicant has imposed upon the Board the duty of making such examination, it would be unreasonable to return to the applicant the fee which he has paid, merely because the applicant has made an application to practice a profession for which the Board finds him unfit.

Moreover, this Act of Assembly provides for the payment of the fees into the State Treasury. After they are paid into the State Treasury there is no way of getting them out except by an appropriation.

It is, therefore, apparent that it was not the intention of the Legislature that the fee for examination or certificate of qualification, and registration, should be returned to the applicant in the event that he is found unfit for registration.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

MEASURES.

In measuring dry goods, the use of a yard measured upon the counter and indicated, with its fractional parts, by tacks driven into the counter, does not violate the Act of July 24, 1913, P. L. 965.

Office of the Attorney General,
Harrisburg, Pa., May 6, 1920.

Honorable James Sweeney, Chief, Bureau of Standards, Harrisburg, Pa.

Dear Sir: This Department is in receipt of your recent communication asking for a construction of the Act of July 24, 1913, P. L. 965.

I understand that there is a practice in dry goods stores of measuring a yard, or the fraction of a yard, along the edge of a counter, and driving tracks therein so as to have a permanent measure before clerks, and that such measures are used for the purpose of selling dry-goods.

You ask whether the Act of Assembly above referred to prohibits the measuring of cloth and other similar goods in this way.

This Act of Assembly is entitled:

“An Act defining commodities; regulating the sale thereof and providing penalties for violation hereof.”

Section 1 of this Act provides “that the word ‘commodity’, as used in this Act, shall be taken to mean any tangible, personal property, sold or offered for sale”.

Section 2 provides, in part, that “all dry commodities, when sold in bulk or from bulk, shall be sold by weight, dry measure or numerical count”.

The Act of Assembly then deals with measures and containers and fixes the weight which a bushel of various agricultural commodities shall contain. It also provides for the marking of packages.

There is a serious question whether this Act of Assembly was intended to deal with such dry commodities as are sold in a dry-goods store even though the definitions are broad enough to cover them. Assuming, however, that such commodities are within the purview of the Act, the Act then provides that such dry goods shall be sold by “dry measure”. The dry measure applicable to such dry commodities, would be the yardstick, and the question is whether tacks inserted on a counter can be substituted for a yardstick. If a yardstick were glued to the counter, it would be no less a yardstick; if, instead of gluing a yardstick to the counter the various subdivisions of it were carved thereon, that would be no less a dry measure; and

if, instead of carving the measure thereon, tacks were used to indicate the subdivisions, this device would certainly be quite as much a dry measure as a loose yardstick.

I, therefore, advise you that the use of such a substitute does not in any way offend against the Act of Assembly above referred to.

Very truly yours,

WM. M. HARGEST,
Deputy Attorney General.

INDUSTRIAL HOME FOR WOMEN.

A person cannot, at the same time, be Superintendent of the Industrial Home for Women and a members of its board of managers.

Furniture and equipment for the Industrial Home for Women can be lawfully purchased only after competitive bidding upon due advertisement.

Office of the Attorney General,
Harrisburg, Pa., May 11, 1920.

Mr. William F. Brittain, Chairman, Furniture Committee, State Industrial Home for Women, Muncy, Pa.

Sir: This Department is in receipt of your communication of the 1st inst., asking to be advised upon the following questions:

First: Whether a member of the Board of Managers of the State Industrial Home for Women, at Muncy, Pa., is eligible for the position of Superintendent or Secretary of the Board.

Second: Whether it is required that the bids for the entire furniture equipment be advertised, or whether certain of the furniture for which there is urgent need may be purchased without advertisement.

In reply to the foregoing you are respectfully advised as follows:

The Industrial Home for Women was created by the Act of July 25, 1913, P. L. 1311. Pursuant to its provisions its Board of Managers consists of nine members, at least three of whom shall at all times be women.

Section 7 provides, *inter alia* as follows:

"The Board of Managers shall elect annually from its members a president and a treasurer, and shall appoint a women superintendent, who shall be under its direction and control and who shall hold office during the pleasure of the board. The superintendent shall have

authority to make temporary appointments and to suspend any employe, subject to ratification by the board at its next meeting."

It is the unmistakable intent of this provision that the Superintendent shall not be a member of the Board. This official exercises her duties under and subject to its direction and control, and the Act clearly contemplates that this supervisory control and direction shall be that of the entire Board, which would not, in effect, be the case if the Superintendent were one of its members. In such case it would merely be eight of its members exercising authority over the Superintendent, while the intent of the law is that this authority should flow from the deliberations and thought of a body with a membership as thereby constituted.

This conclusion is supported by various provisions of the Act, all tending to show that the functions of the position of Superintendent are such as to render that place incompatible or inconsistent with membership on the Board.

The Act expressly directs the selection of a president and treasurer, but nowhere specifically authorizes the selection of a secretary. The need of such official is apparent, however, and the right of the Board to select one is to be presumed. Moreover, in Section 19 it is provided that the statement relative to the discharge of an inmate "shall be signed by the board's president or secretary." It will be noted that it is mandatory that the president and treasurer be members of the Board, and since the Act is silent as to the selection of a secretary, we may conclude that it is optional with the Board whether to select its secretary from its membership or not.

In answer to your first above stated question you are, therefore, advised that a person cannot at the same time be Superintendent and a member of the Board of Managers of the said State Industrial Home for Women, and that the secretary of the Board of Managers may or may not be a member of the Board as it may decide.

In regard to the method of the purchase of the equipment for the building, the Act is so explicit as to leave nothing to construction. Section 7 reads as follows:

"All contracts for the equipment of said buildings shall be entered into only after competitive bidding and upon the contractor executing a bond to the Commonwealth of Pennsylvania in an amount, and with surety or sureties, to be approved by the Board of Managers, conditioned for the faithful performance of the terms of the contract."

It plainly follows from this requirement that furniture equipment cannot be purchased otherwise than after competitive bidding, upon due advertisement. It must in all cases, in whatever amount and to

whatever extent, be purchased in strict conformity to this mandate, which accords with sound public policy in all purchases for State institutions.

You are, therefore, advised that the furniture equipment in question can only lawfully be purchased after competitive bidding upon due advertisement.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

MOVING-PICTURE CENSORS.

The Act of May 15, 1915, §17, P. L. 534, as amended by the Act of June 12, 1919, P. L. 475, provides that each film, reel or set of views of 1200 feet or less shall be examined, and approved or disapproved, by the Board of Censors; and if approved, shall have the approval seal attached thereon, and displayed. This applies to short films or reels known in the moving-picture trade as "trailers," which average about 150 feet in length.

Office of the Attorney General,
Harrisburg, Pa., August 10, 1920.

Mr. Joseph A. Berrier, Executive Clerk, Pennsylvania State Board of Censors, Harrisburg, Pa.

Sir: Your request for an opinion from this Department as to whether "trailers", which, I understand, are short films averaging about one hundred and fifty feet in length, are required to be censored under the Act of May 15, 1915, P. L. 534, and to have an approval seal thereon, duly received.

In reply would say that Section 17 of the Act of 1915, as amended by the Act of June 12, 1919, P. L. 475, provides as follows:

"For the examination of each film, reel, or set of views of one thousand two hundred lineal feet, or less, the Board shall receive, in advance, a fee of two dollars, and two dollars for each duplicate or print thereof, which must be applied for at the same time and by the same person."

In this section there is no exception of what are known as short films or reels, but every film or reel is to be examined, censored and approved or disapproved by the Board. The words of the Act are that each film, reel, or set of views of one thousand two hundred lineal feet, or *less*, shall be examined, approved or disapproved, and if approved, shall have the approval Seal attached thereon and displayed.

You are therefore advised that short films or reels known in the moving picture trade as "trailers", must be examined by the Board, approved or disapproved, and if approved, shall be shown with the approval seal.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

PURCHASE OF SCHOOL BONDS BY RETIREMENT BOARD.

The retirement Board under the terms of the Act of July 18, 1917, P. L. 1043 may bid for a proposed issue of school bonds for the purpose of investing the funds created by the Retirement Act of 1917.

Office of the Attorney General,
Harrisburg, Pa., September 10, 1920.

Honorable Harmon M. Kephart, State Treasurer, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 24th ult., asking to be advised relative to the purchase of an issue of school bonds by the Retirement Board of which you are a member. The precise question, as I understand, upon which an opinion is requested is:

Whether the Retirement Board, under its powers pursuant to the Teachers' Retirement Act of 1917, may bid for proposed issues of bonds in any case for the purpose of investing the funds created by said Act, and under the management of said Board.

Section 6 of the Public School Employees' Retirement System Act of July 18, 1917, P. L. 1043, dealing with the management of the funds created by the Act, provides, *inter alia*, as follows:

"The members of the retirement board shall be the trustees of the several funds created by this act, and shall have exclusive control and management of the said funds and full power to invest the same; subject, however, to all the terms, conditions, limitations, and restrictions imposed by this act upon the making of investments; and subject, also, to the terms, conditions, limitations and restrictions imposed by law upon savings banks in the making and disposing of their investments; and, subject to like terms, conditions, limitations, and restrictions, said trustees shall have full power to hold, purchase, sell, assign, transfer, or dispose of any of the securities and investments in which any of the funds created by this act shall have been in-

vested, as well as of the proceeds of said investments and of any moneys belonging to said funds."

The word "invest" is defined by the Century Dictionary as meaning:

"To employ for some profitable use; convert into some other form of wealth, usually of a more or less permanent nature, as in the purchase of property or shares, or in loans secured by mortgages, etc.: said of money or capital: followed by in: as, to invest one's means in lands or houses, or in bank-stock, government bonds, etc.; to invest large sums in books."

In *Words & Phrases*, vol. 2, Second Series, page 1189, is found the following citation defining the term "investment":

"The accepted definitions of that term, as well as its derivations, involve the idea of the clothing or investiture of the funds with new and different attributes. It is defined 'to convert into some other form of wealth, usually of a more or less permanent nature,' and 'to be the laying out of money in the purchase of some species of property, especially a source of income or profit,' and 'giving money for some other property, or the laying out of money in such manner that it may produce a revenue. *Fidelity & Deposit Co. of Maryland vs. Freud*, 80 Atl. 603, 605, 115 Md. 29."

As stated above, the sole question here passed upon is whether the Retirement Board, within the lawful scope of its powers to invest the funds with the management of which it is charged, can bid for a proposed issue of bonds. It is needless to consider whether, as a general proposition, a power "to invest" carries with it the right to bid for a prospective issue of securities permissible for the investment in question, since after careful consideration of the spirit and intent of the authority bestowed by the aforesaid Act upon the Retirement Board to invest the said funds I am clearly of the opinion that it would be an improper exercise of that authority for it to purchase bonds in that manner in any case. The provision clothing the Board with the power to invest is to be given a very strict construction, and we must presume that nothing was intended which might operate detrimentally to the wisest management of these funds.

For the Board to bid for bonds not yet issued, and whose market value is still uncertain or speculative, would conceivably, in some instances and in some measure, result in giving to such prospective issue a selling price higher than it might otherwise enjoy, the Board as the highest bidder becoming the purchaser at such price. It is manifestly unwise and contrary to sound policy to invest public funds in this manner. No possible advantage to the management of the said funds can be seen, from pursuing such a procedure in

making investments, while the possible disadvantages are patent. If the Board were to enter the field of competitive bidding for new bond issues, it would certainly invite appeals, importunities and pressure from various quarters for it to become a bidder for some proposed issue. It is too apparent to require comment that this might become mischievous and certainly would commonly be vexatious.

The sole concern of the Board in this matter of making investments is to make the same upon the most advantageous terms in conformity with the conditions for these investments as prescribed by the Act, and not in any degree to assist any one in the flotation of a bond issue, however sound or meritorious such issue might be. There is no need, in order to carry out the duty with which the Board is charged, to go into the domain of future issues and bid for bonds for the reason that there is at present a most abundant opportunity to invest said funds in seasoned securities permissible for their investment at prices unprecedentedly favorable. Where it is desired to purchase bonds, allowable as an investment for said funds in accordance with the provisions of the Act, the proper course is to go into the open market and purchase them at the current price there prevailing. In that way there can be no question that the investment has been made upon the best available terms, at a price everywhere recognized as the safest and best standard of value.

As stated above, I am of the opinion that to bid for proposed new issues of bonds is contrary to the best management of the said funds and hence to the spirit and strict intent of the Act, and inimical to sound public policy. This ruling confirms one already informally made to you upon this question by Deputy Attorney General Hunter.

In accordance with the foregoing, you are, therefore, advised that the Retirement Board in no case should bid for a proposed issue of bonds for the purpose of investing the funds created by the Retirement Act of 1917.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

IN RE DRUGGISTS.

"Medicine store" has the same meaning as "drug store," and its use is prohibited, unless the provisions of the Act of May 17, 1917, P. L. 208, are complied with.

Medicine is defined to be a substance used as a remedy for disease, a substance having, or supposed to have, curative properties. "Drug" is defined as any vegetable, animal or mineral substance used in the composition or preparation of medicine.

Office of the Attorney General,
Harrisburg, Pa., September 27, 1920.

Honorable Lucius L. Walton, Secretary, Pennsylvania Board of
Pharmacy, Williamsport, Pa.

Dear Sir: Your request for an opinion as to whether certain un-registered persons, employing the title "medicine store" for a place of business, who do not employ or have a registered pharmacist in charge thereof, are doing so in violation of the Act of May 17, 1917, P. L. 208, entitled: "An Act to regulate the practice of pharmacy and sale of poisons and drugs", etc., has been received.

Section 15 of the Act provides as follows:

"That it shall be unlawful for any person, firm, or corporation to use the title: 'pharmacist,' 'assistant pharmacist,' 'druggist,' or 'apothecary,' except as authorized under this act of Assembly. It shall further be unlawful to use the title: 'drug-store' or 'pharmacy', or any title having the same meaning, for a place where drugs are sold at retail except by persons registered as pharmacists under the provisions of this act: Provided, however, It shall not be unlawful for the owner of a pharmacy, who is not registered under this act as a pharmacist, to employ such titles when his pharmacy is conducted by a pharmacist duly registered under this act. Any person violating this section of this act of Assembly shall be guilty of a misdemeanor, and upon conviction shall be sentenced to pay a fine of not less than fifty dollars (\$50.00) and the costs of prosecution."

The question which arises here, therefore, is whether the title "medicine store" has the same meaning as "drug-store" or "pharmacy". "Medicine" is defined to be a substance used as a remedy for disease, a substance having, or supposed to have, curative properties. "Drug" is defined as any vegetable, animal or mineral substance used in the composition or preparation of medicine.

While medicines are compounded or prepared from drugs, this distinction is not ordinarily recognized and it seems to me that the title "medicine store" is used by persons not registered as pharmacists for the purpose of inducing others to believe that the ordinary drug store is therein conducted.

The Act provides that it shall be unlawful for any person other than a registered pharmacist to use the title "drug store" or any title having the same meaning.

In my opinion the title "medicine store" has the same meaning as "drug store", and its use, therefore, prohibited by Section 15 of the Act of May 17, 1917.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General.

PYMATUNING SWAMP. RESERVOIR.

It was not the intention of the Legislature that the appropriation of 1919 for \$400,000 should be available only if all the real estate in Pennsylvania necessary for the project could be purchased for that amount.

The appropriation is immediately available, and is not held in abeyance until consents of Ohio property holders waiving damages are had.

A title and trust Company may be employed to procure options on lands and insure titles, and the cost thereof may be paid from the appropriation.

Office of the Attorney General,
Harrisburg, Pa., November 4, 1920.

Mr. T. J. Lynch, Secretary, Water Supply Commission, Harrisburg,
Pa.

Sir: There has been received your communication of the 29th ult., relative to the establishment of a reservoir at Pymatuning Swamp in Crawford County. You state that the cost of acquiring land in Pennsylvania for the project will approximate \$1,200,000, and you inquire substantially as follows:

First: Is the availability of the appropriation of \$400,000 made by the Act of July 18, 1919, Appropriation Acts No. 247, conditioned upon the procuring of all the necessary land in the State of Pennsylvania for the sum appropriated; or, is this amount available for a partial acquisition of such real estate.

Second: If the appropriation is not so conditioned, whether it is available at the present time; or, whether its expenditure must be held in abeyance until waiver of damage consents have been procured from the owners of all those properties in Ohio whose lands would be submerged by the creation of the reservoir.

Third: If the money be available at present, whether you are authorized to contract for the services of the Potter Title & Trust Company to examine titles and acquire purchase options.

Fourth: If you may so contract, whether the company can be paid out of the appropriation made by the foregoing act.

Answering these inquiries seriatim, I am of the opinion that the Legislature, in appropriating the sum of \$400,000 by the Act of 1919 above referred to, did not intend that it should be available only if all the real estate in Pennsylvania necessary for the project could be purchased for that amount. This is evident from the history of the legislation on this subject. Pursuant to the Act of June 14, 1911, Appropriation Acts 288, providing for a survey of Pymatuning Swamp, and an examination into the feasibility of constructing a reservoir therein to conserve the waters draining into said swamp, your Commission made a report to the General Assembly at the

Session of 1913, wherein it was stated that the estimated cost of acquiring the land and buildings based upon values existing at that time was \$657,700, and that the total cost of the dam, reservoir, land and buildings, clearing of woods and shore treatment, and re-building and re-locating roads, railroads and bridges, was estimated at \$1,556,400. As a result of that report, the General Assembly passed the Act of July 25, 1913, P. L. 1270, providing for the erection of the dam and the establishment of the reservoir, and for the acquisition of lands and materials necessary thereto. By Section 8, \$400,000 was appropriated for the purchase of said lands and for otherwise carrying out the purposes of the act. It is obvious from the preamble to this act that it was predicated upon the report referred to and the conclusion in light of this report is irresistible that the Legislature did not intend that amount as sufficient to acquire all the land necessary to the creation of the dam and the reservoir. This appropriation was approved in the sum of \$100,000. At its session of 1915, the Legislature passed a bill re-appropriating the unexpended balance of the 1913 appropriation, amounting to \$65,000, and in addition thereto appropriated \$1,500,000 for the purposes enumerated in the said Act of 1913. The bill was approved June 18, 1915, Appropriation Acts 196, in the sum of \$65,000, but approval was withheld from the additional appropriation item. Then followed the Act of July 25, 1917, Appropriation Acts 191, which originally appropriated \$700,000 but was reduced by the Governor to \$400,000

“for the purpose of continuing the work upon the Py-matuning Swamp Reservoir”,

which was in turn followed by the Act of July 18, 1919, Appropriation Acts 247, re-appropriating this sum of \$400,000 for the same purpose. The history of the legislation on this subject and the sums appropriated from time to time for its consummation clearly disclose an intent that the amount re-appropriated by the Act of 1919 was not considered as sufficient to acquire all the land necessary for the reservoir, but that it was intended that it should be available for the partial acquisition of land necessary for the project.

This money is available to your Commission now, and is not held in abeyance until consents of Ohio property owners waiving damages are had. The procurement of these waivers was expressly made a condition precedent to the appropriation of 1913. The appropriation of 1917 was conditioned upon a transfer of legal title of all Ohio land likely to be submerged to the Commonwealth of Pennsylvania. No such condition, however, is contained in the Act of 1919. There is to the contrary therein expressly enacted that the

“money hereby appropriated be, and the same is, made available for the use of the Water Supply Commission

of Pennsylvania in the acquisition of lands in the Commonwealth of Pennsylvania necessary for the maintenance and operation of said reservoir, immediately upon the approval of this act."

It is therefore clear that the full amount of the appropriation is available at the present time.

I am further of the opinion that your right to acquire land by purchase implies your authority to procure the services of a Title Company to procure options and to examine and to insure titles; that the reasonable cost incident thereto is a part of the cost of the acquisition of the land as well as a part of the proper performance of your duties in the creation of the reservoir; and, that the appropriation of \$400,000 made by the Act of 1919 is available for the cost of such services as determined by a contract properly executed by your Commission and the Title and Trust Company.

The foregoing conclusions render it unnecessary at this time to discuss certain other questions raised in your communication. You are in consonance with the above now specifically advised:

First: That the appropriation of \$400,000 contained in the Act of June 18, 1915, Appropriation Acts 196, for the erection of a dam at Pymatuning Swamp and the establishment of a reservoir to conserve the water thereof, was not predicated upon the condition that it could only be expended if all the land in Pennsylvania necessary for the project could be acquired for that sum.

Second: That the said appropriation is now available to your Commission for the purposes contained in the Act of 1913, above referred to.

Third: That under the provisions of the Act of 1913, authorizing the work, you are empowered to contract for the services of the Potter Title and Trust Company looking to the procurement of options on land in Pennsylvania, or the actual purchase of said lands, and for the insurance of the legal titles thereto.

Fourth: That the appropriation made by the Act of 1919 is available to pay such reasonable cost of such service as is evidenced by a contract duly executed by your Commission and the Trust Company.

Very truly yours,

FRANK M. HUNTER,
Deputy Attorney General.

APPROPRIATION—WATER SUPPLY COMMISSION.

The appropriation in the Act of July 18, 1919, P. L. 247 is in addition to that of the Act of 1917, P. L. 1191, and may be expended for any of the purposes provided for in the Act of 1917.

Office of the Attorney General,
Harrisburg, Pa., November 17, 1920.

Thomas J. Lynch, Esq., Secretary, Water Supply Commission,
Harrisburg, Pa.

Sir: Your communication of October 27th, 1920, asking an opinion from this Department as to whether the appropriation contained in the Act of 1919, Appropriation Acts page 247, is in addition to the appropriation made under the provisions of the Act of 1917, P. L. 1191, duly received.

In reply would say that the Act of July 25, 1917, P. L. 1191, in Section 7 appropriates the sum of \$25,000, or so much thereof as may be necessary, to the Water Supply Commission of Pennsylvania for carrying out the purposes of this Act, which provides for the deepening, widening, and improvement of French Creek, in Crawford County. The Appropriation Act of July 18, 1919, Appropriation Acts page 247, provides another appropriation of \$25,000, or so much thereof as may be necessary, to the Water Supply Commission for the purpose of continuing the work of deepening, widening, and improving French Creek, in Crawford County, commenced under the Act approved the twenty-fifth day of July, 1917, P. L. 1191, and in Section 2 the Act provides that the moneys therein appropriated shall be available for expenditure for any of the purposes provided for in the said Act. This Act is, in effect, a supplement to the Act of July 25, 1917, and the money appropriated by this Act of July 18, 1919 is in addition to the sum appropriated by the Act of July 25, 1917.

You are, therefore, advised that this money is to be expended by the Water Supply Commission for any of the purposes provided for in the Act of July 25, 1917.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

STATE BOARD OF EXAMINERS OF ARCHITECTS.

A person, who, for the period of one year prior to the approval of the Act of July 12, 1919, P. L. 933 was not engaged in the practice of architecture within the State of Pennsylvania under the title of "architect" cannot qualify himself to practice in this State by filing an affidavit as prescribed by the last sentence of Section 6 of this Act.

Office of the Attorney General,
Harrisburg, Pa., December 1, 1920.

Mr. M. I. Kast, Secretary, State Board of Examiners of Architects,
Harrisburg, Pa.

Sir: This Department is in receipt of your recent communication inquiring whether, under the provisions of the Act of July 12, 1919, P. L. 933, a person, who, for the period of one year prior to the approval of the Act, was engaged in the practice of architecture under the title of Architect outside of the State of Pennsylvania, may file with your Board an affidavit as prescribed in Section 6 of said Act and thereby qualify himself to practice under the title of Architect in this State.

Section 6 of the Act referred to is as follows:

"Any person residing in or having a place of business in this State who upon the date of the approval of this act is not engaged in the practice of architecture in the State of Pennsylvania under the title of 'architect' shall, before engaging in the practice of architecture or being styled or known as an architect, secure from said board of examiners a certificate of his or her qualifications to practice under the title of 'architect', and be duly registered with said board as provides by this act. Any properly qualified person who shall have been engaged in the practice of architecture under the title of 'architect' for at least one year prior to the date of the approval of this act may secure such certificate and be registered in the manner provided by this act. Any person holding a certificate and being duly registered pursuant to this act may be styled or known as a registered architect. No other person shall assume such title or use the abbreviation R. A., or any other words, letters, or figures, to indicate that he or she is a registered architect. Any person who shall have been engaged in the practice of architecture under the title of 'architect' for a period of one year prior to the approval of this act *may continue so to do* without a certificate or registration, provided that an affidavit setting forth these facts be filed with the board of examiners within five years from the date of approval of this act, but such persons shall not be styled or known as a registered architect."

The words which I have underscored are significant. The use of these words and a careful examination of the entire statute lead to the conclusion that the Legislature intended that the last sentence of Section 6 should apply only to those who have been engaged *in the State of Pennsylvania* in the practice of architecture under the title "architect" for a period of one year prior to the approval of this Act.

I, therefore, advise you that a person. who, for the period of one year prior to the date of the approval of the Act of July 12, 1919, P. L. 933, was not engaged in the practice of architecture within the State of Pennsylvania under the title of "architect", cannot qualify himself to practice in this State by filing an affidavit such as is provided for by the last sentence of Section 6 of that Act. /

Very truly yours,

GEORGE ROSS HULL,
Deputy Attorney General.

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