Commonwealth of Pennsylvania

REPORT

OF THE

ATTORNEY GENERAL

OF

PENNSYLVANIA

FOR THE

TWO YEARS ENDING DECEMBER 31, 1922

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Attorney General

HARRISBURG, PA.
1923

REPORT OF THE ATTORNEY GENERAL

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Office of the Attorney General,
Harrisburg, Pa., Jan. 11, 1923.

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

As required by law, I have the honor to report concerning the business of this Department during the two years ending December 31, 1922.

Circumstances have caused an unusual number of changes in the personnel of the Department during this period. On the first of January, 1922, as reported in my last biennial report, the Deputy Attorneys General were the following: First Deputy Attorney General, Honorable Robert S. Gawthrop; Deputy Attorneys General: Honorable Emerson Collins, Honorable Bernard J. Myers, Honorable William I. Swoope, Honorable Frank M. Hunter and Honorable George Ross Hull, and Special Deputy Attorney General Edmund K. Trent. I have appointed Honorable Frank M. Hunter as Attorney to The Public Service Commission and Honorable Sterling G. McNees was appointed to the vacancy thus created. Honorable Bernard J. Myers was appointed to the office of Secretary of the Commonwealth and Honorable Fred Taylor Pusey was appointed to the vacancy thus created. Honorable Robert S. Gawthrop was appointed a Judge of the Superior Court of Pennsylvania and Deputy Attorney General George Ross Hull was appointed First Deputy Attorney General to succeed Judge Gawthrop. Honorable Harlan A. Denney was appointed Deputy Attorney General to succeed Mr. Hull. Judge Denney died in office and Honorable J. W. Brown was appointed to the vacancy thus created. Honorable William I. Swoope, having been elected a Member of the Congress of the United States, resigned as Deputy Attorney General and Honorable Paul J. Sherwood was appointed to the vacancy thus created. Frank M. Eastman, Esq., has continued as Special Attorney in charge of the collection of escheatable moneys and property. George W. Coles, Esq.,

who was Special Attorney to the Bureau of Maintenance Collections, on January 1, 1921, resigned upon being appointed United States District Attorney for the Eastern District of Pennsylvania and Harry J. Makiver, Esq., was appointed in his stead.

During the period covered by this report the business of the Department has been quite heavy. This has been caused partly by the fact that I have endeavored to have the legal work of the Commonwealth handled by the regular members of the Department, whenever practicable, so as to avoid the employment of special counsel and the incurring of the expenses incidental thereto. The Department has rendered two hundred and five formal opinions and in addition there have been written a very large number of letters of advice and innumerable oral conferences have been held with representatives of the various Departments, Commissions, Public Institutions, etc.

Among the matters with which this Department has been concerned, the following may be of special interest.

Department of Public Welfare.

This new Department was provided for by an Act of the Session of 1921 enacted upon the recommendation of the Governor. The Act was drafted in this Department and involved an extensive consideration of the law relating to public agencies which it was thought advisable to bring under the single jurisdiction thus provided. Since becoming effective it has given occasion for much attention here because of the many questions naturally arising in putting into operation its various provisions and organizing the machinery through which it operates.

Prohibition Enforcement.

During the Session of 1921 it fell to the lot of this Department to draft an Act for the enforcement of the Eighteenth Amendment to the Constitution of the United States. It was decided that it would be a backward step to permit the indiscriminate and unregulated sale of alcoholic liquors (containing less than one-half of one per cent. of alcohol) notwithstanding the fact that the sale of such liquors, by any one, and to any one, at any time or place, if freely permitted by the Volstead Act. To this end it was deemed appropriate to preserve the machinery of the Brooks Law, applying this machinery, however, only to the licensing and regulation of the sale of liquor containing less than the intoxicating percentage of alcohol fixed by Congress, and by the same Act prohibiting the manufacture, sale, possession, transportation or furnishing of any intoxicating liquor. The Bill was so drafted and, after the House

of Representatives had rejected an enforcement Bill known as the Martin Bill, which permitted the unrestricted sale of alcoholic liquor containing less than the percentage of alcohol fixed by the Volstead Act, it was introduced, passed, and approved and is now known as the Woner Law.

In the hope of being able to eliminate future controversies before our Legislature on the question of the intoxicating percentage of alcohol, and confine controversies on that question to Congress, where they now more properly belong, we provided in our Act that the words "intoxicating liquor" (being that which the Act prohibits) shall mean anything which Congress, from time to time, shall find and determine to be intoxicating under the authority now vested in Congress by the Constitution of the United States. To all such "intoxicating liquor" our Act would apply automatically. We had no precedent for such a provision, but it seemed clearly the logical and sensible one if it could be made to stand under our Constitution. This provision was attacked in the Courts on the ground that it is a delegation of legislative power, etc. Judges in several of our Counties held that the provision was unconstitutional and rendered the Act invalid. This view was also encouraged by an opinion by the Attorney General of Massachusetts and a decision of the Supreme Court of Massachusetts holding that the Legislature of the State could not thus adopt such standard as Congress may enact. Judges in several of our other Counties held the Act to be constitutional. The question was raised in Crawford County in the case of *Commonwealth vs. Alderman*, wherein the constitutionality of the Act and the conviction thereunder were sustained by the Court of that County. Upon sentence an appeal was taken to the Superior Court. By reason of the importance of the matter and at the request of the District Attorney of Crawford County, I prepared the brief and argued the case in the Superior Court, where the law was sustained: *Commonwealth vs. Alderman, 79 Pa. Superior Ct. 277.* Thereupon the case was appealed to the Supreme Court where I also argued it, during the month of October, 1922. On January 3d the Supreme Court affirmed the judgment of the Superior Court, the Chief Justice handing down an opinion fully sustaining the Constitutionality of the Act.

Very closely related to the matter just mentioned was the case of *Commonwealth vs. Vigliotti*, referred to in my last biennial report. At the date of that report the case was under consideration in the Superior Court where it had been argued October 11, 1920. It involved the question whether a conviction could be sustained under the Brooks Law for an offense committed after the adoption of the Eighteenth Amendment to the Constitution of the United States and the passage of the Volstead Act. The Superior Court sustained the conviction, whereupon the Defendant appealed to the Supreme Court which also sus-

tained the Commonwealth in an opinion handed down in, May, 1921. Subsequently an appeal was taken to the Supreme Court of the United States. I assisted the District Attorney of Fayette County in that Court. The Court affirmed the judgment of the Supreme Court of Pennsylvania and held that the Brooks Law was an appropriate aid to the enforcement of National Prohibition: *Vigliotti vs. Commonwealth of Pennsylvania, Advance Reports, May 15, 1922.*

Conferences of District Attorneys.

In connection with matters relating to the enforcement of the prohibition laws, or any other laws under which the State and Federal authorities might have concurrent jurisdiction, I invited the District Attorneys of Pennsylvania to a conference with the District Attorneys of the United States and other Federal Enforcement Officers located in Pennsylvania, which conference was held at the Capitol in March, 1922. At the close of that meeting I suggested to the Pennsylvania District Attorneys that they should arrange to keep in contact with each other for the interchange of views as well as for the purpose of giving the Legislature the benefit of their experience whenever changes are contemplated in the laws relating to crimes and criminal procedure. Such changes in the criminal laws are sometimes made at the instance of persons who view the questions from the standpoint of the accused and are lacking in knowledge of the problems of the officers on whom rests the responsibility for the enforcement of the laws. In pursuance of this suggestion a meeting of the Pennsylvania District Attorneys was held in November, 1922, at which time a permanent organization was formed. I think the creation of this organization is a matter of importance which should result in much good.

The Delaware River Bridge.

The Act providing for the construction of the bridge across the Delaware River between Philadelphia and Camden provides that counsel to the Commission shall be designated by the Attorneys General of Pennsylvania and New Jersey, and also provides that condemnations of real estate which become necessary on the part of the Pennsylvania Commission, shall be conducted through the Attorney General of Pennsylvania. I adopted the policy of designating one of the regular Deputies of this Department as counsel to the Commission without any extra compensation. The large amount of work growing out of the great number of condemnations of real estate led to the designation of two young attorneys to help in matters of detail, under the Deputy Attorney General, at a small expense. I think this arrangement has tended to efficiency as well as economy in these matters.

The work connected with the construction of this bridge has been a very important item of the work of the Department. Up to the present time the Deputy Attorney General thus designated has co-operated in the preparation of contracts for the Commission involving the expenditure of over $5,000,000. So far twenty properties have been condemned for bridge purposes and three acquired by purchase. The assessed value of the properties condemned is $390,400 and the total amount of the claims of the property owners is in excess of $1,500,000, indicating the probability of very substantial disputes in arriving at the amounts to be paid. Twenty-six tenants have been dispossessed from properties condemned and their claims for damages exceed $183,000. Amicable settlements have been made with some tenants. Forty-three condemnation cases are now pending before the Jury of View of Philadelphia County, representing claims of property owners and of tenants, and oral hearings have been conducted by the jury for a number of months.

In addition to the foregoing matters requiring legal attention the Department has been represented at all meetings of the Delaware River Bridge Joint Commission, as well as at the meetings of the executive committee, and has submitted numerous opinions by letter and otherwise. For months past almost daily conferences have been held with engineers, experts and others concerning matters arising in connection with contracts for construction, acquisition of properties, etc.

Other Pennsylvania-New Jersey Bridges.

Carrying out the provisions of legislation for acquiring and freeing certain Pennsylvania-New Jersey toll bridges this Department has taken care of all legal questions and generally looked after the work of the Pennsylvania Commission. Progress on these bridges is as follows: The Easton-Phillipsburg Bridge, transferred; the Milford, Pike County Bridge, transferred; the Taylorsville (Washington's Crossing) Bridge, transferred. The negotiations for the Yardleyville Bridge are completed and it will soon be taken over. Work has been commenced on the transfer of the Riegelsville Bridge and its transfer will soon be completed. Negotiations concerning the Belvidere Bridge are well along but are considerably involved and some little time will elapse before a transfer can be completed.

Pennsylvania-New York Bridges.

Duties similar to those mentioned in the last preceding heading have been performed by the Department in connection with the transfer

of toll bridges between Pennsylvania and New York and the several matters have proceeded as follows:

The Port Jervis-Matamoras Bridge is transferred; the Chehocton-Hancock Bridge is transferred. The negotiations for the Barryville-Shohola Bridge, the Cochecton Bridge, the Callicoon Bridge and the Skinners Falls-Milanville Bridge are practically completed and the transfers nearly consummated. The proceedings relating to the Highland and Lackawaxen and Lordville Bridges have been commenced and substantial progress made thereunder.

Indian Creek Litigation.

Shortly after the beginning of my term I received the petition of a large number of residents of Westmoreland County asking that the Attorney General intervene in certain equity proceedings, then recently instituted in Westmoreland and Fayette Counties, to prevent the waters of Indian Creek from being contaminated by coal mining operations. The waters of Indian Creek are used by the Mountain Water Supply Company largely for locomotives and other railroad purposes and from this Company the Westmoreland Water Company purchases large quantities of water distributed to the public. The request that the Attorney General intervene as one of the plaintiffs was based on the theory that in the absence of such intervention the Court could not give consideration to questions affecting the welfare of the general public, but only to the interests of the corporations involved. Under the circumstances and owing to the great importance of preserving this water supply, I deemed it proper to intervene and had petitions presented to the Courts to that end. The intervention was allowed and the Department was represented by one of the regular Deputies at the trial of the case in Uniontown, which occupied several weeks, and has also taken part in the argument and filed a brief. The trial Judge has found against the plaintiffs and exceptions to his findings will be argued before the full bench. The Westmoreland County cases involving the same question have not yet been tried.

West Virginia Gas Case.

By Joint Resolution, approved the 18th of April, 1919, P.L. 87, the Attorney General was authorized to file a Bill in Equity in the Supreme Court of the United States on behalf of the Commonwealth against the State of West Virginia, to restrict the enforcement of a Statute of West Virginia (known as the Steptoe Act) the purpose of which, as contended, is to restrict the exportation of natural gas from that State. This of

course is a question of the utmost importance to the people of the Western part of Pennsylvania and to the public service companies distributing natural gas in that section. My predecessor filed the Bill, a preliminary injunction was granted by the Supreme Court of the United States, and a commissioner appointed to take testimony.

After the testimony had been taken the Supreme Court of the United States fixed the 5th of December, 1921, for the argument of the case. Although the case was very fully argued, the Court subsequently made an order directing a reargument and it was reargued before the full bench during the week of February 13, 1922. On November 13, 1922, the Court handed down an order directing that the case be again restored to the calendar and reargued before the full bench at a date to be fixed. It is quite apparent that this case, which is being carried on in connection with a similar case in which the State of Ohio is plaintiff, has developed into one of the most interesting contests in the recent history of the Supreme Court of the United States. The two oral arguments which have taken place occupied a total of nine and one-half hours, yet the Court indicates its desire for further argument.

Anthracite Coal Tax.

In the Governor's address to the Legislature of 1921 he recommended a small ad valorem tax upon coal. The sentiment of the Legislature was against the imposition of this tax on bituminous coal. Under the Act of 1913 the Supreme Court of Pennsylvania in *Commonwealth vs. Alden Coal Company, 251 Pa. 134*, and in *Commonwealth vs. St. Clair Coal Company, 251 Pa. 159*, had declared that a tax on anthracite coal which did not apply also to bituminous coal was in violation of the provision of the Constitution of Pennsylvania requiring all taxation to be uniform upon the same class of subjects.

It being apparent that the members of the Legislature did not deem it wise to impose a tax upon bituminous coal, it became necessary either to abandon the idea of any coal tax or to make an effort to sustain a tax on anthracite coal notwithstanding what the Supreme Court had said in the cases referred to. Thereupon, at the Governor's instance, this Department drafted a Bill levying a tax on anthracite coal which was passed and approved.

Shortly after this anthracite coal tax became a law we arranged with representatives of the anthracite coal interests to have a test case started in the Dauphin County Court. This case throughout its career is entitled *Roland C. Heisler vs. Thomas Colliery Company et al.* Much investigation was involved in connection with the pleadings in this test case because it was deemed important to place upon the record, as far as possible, the facts distinguishing anthracite and bituminous coal as

commodities differing in their origin, production and use, which facts did not seem to have been fully or adequately found by the Court in the earlier cases.

The test case was argued on Bill and Answer in the Dauphin County Court in the latter part of November, 1921. The Court gave the case very thorough consideration and rendered a decision, joined in by all three of the Judges, sustaining the constitutionality of the tax. From this decision an appeal was taken to the Supreme Court of Pennsylvania, argued in Philadelphia before the full Bench in April of 1922, and a decision was rendered on June 24, 1922, holding the Act to be constitutional and affirming the decision of the Dauphin County Court.

From the decision of our Supreme Court a Writ of Error was taken to the Supreme Court of the United States and argued on the 14th and 15th of November. The Attorneys General of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey and Delaware (claiming that their people are the principal consumers of anthracite coal) filed a brief attacking the validity of the tax and argument was orally made by the Attorney General of Massachusetts representing this group. Of course the case was argued also by counsel representing the anthracite coal operators. On November 27, 1922, the Court, by Justice McKenna, delivered an opinion confirming the judgment of the Supreme Court of Pennsylvania and sustaining the validity of the tax.

Pending the appeal to the Supreme Court of the United States certain anthracite coal companies appealed from the settlements of the tax against them, which were made by the Auditor General after the argument in the Supreme Court of Pennsylvania. The Mill Creek Coal Company, (23 Commonwealth Docket, 1922) and the Philadelphia and Reading Coal and Iron Company, (28 Commonwealth Docket, 1922) in the Dauphin County Court, raised questions relating to the administrative features of the Act, not involved in the main test case and sought to avoid the tax on those grounds. These cases were argued in due course and on November 18, 1922, Judge Hargest handed down opinions sustaining all the features of the Act therein questioned and entered judgment against the contesting companies for the full amount of the settlements against them with interest and commissions. Exceptions have been filed to this decision but this Department is not apprehensive as to the questions raised therein. As stated, they relate to administrative features of the Act and do not involve the main question of the power of the Legislature to impose a tax upon anthracite coal, which question is now forever set at rest by the decisions of the Supreme Court of the United States and the Supreme Court of Pennsylvania.

Anthracite Mine Cave Law.

As the culmination of years of agitation and discussion, with which the members of the Senate and House are familiar, the Legislature of 1921 passed, and the Governor approved, the Kohler Act (P. L. 1198) and the Fowler Act (P. L. 1192) seeking to deal with the serious problem created by the mine caves in the anthracite region. A test case was promptly started in Luzerne County under the Kohler Act which the Court of Common Pleas of that County held to be unconstitutional. An appeal being taken to the Supreme Court of Pennsylvania, the Mayor of Scranton asked that the Attorney General take part in support of the law and at the request of the Governor this was done. The case was heard in the Supreme Court by the full Bench, and in an opinion by the Chief Justice the decision of the Court of Common Pleas of Luzerne County was reversed and the constitutionality of the law sustained, Justice Kephart dissenting. An appeal was promptly taken to the Supreme Court of the United States where the case was argued on the 14th of November, 1922, a motion to advance it having been granted. Though the Commonwealth was not a party to the case, we obtained leave of the Court to file a brief and to submit a short oral argument in support of the law. On December 11, 1922, the Supreme Court, by Mr. Justice Holmes, delivered an opinion holding that the attempted act was an unwarranted restriction upon property rights which could not be sustained under the police power. Mr. Justice Brandeis filed a dissenting opinion. The case in the Pennsylvania Courts is entitled *Mahon vs. Pennsylvania Coal Company* and in the Supreme Court of the United States is entitled *Pennsylvania Coal Company vs. Mahon.* I think the people interested in solving this problem feel that this Department did all it could do to sustain this legislation, the validity of which always was considered a very doubtful question. The case will, at least, be some guide in future efforts to relieve the situation at which the Act was aimed.

Gasoline Tax.

After the approval of the Act of 1921 imposing a tax upon sales of gasoline and like fluids (P. L. 1021) important questions were raised as to the commodities and sales to which it would apply. Thereupon a conference was held at this office with counsel representing the parties concerned and we were able to reach an understanding as to the interpretation of the law, entirely satisfactory to the Commonwealth as well as to the manufacturers, under which the tax has been collected without any contest of any kind.

County of Philadelphia vs. Commonwealth.

For years the County of Philadelphia has had a very large claim against the Commonwealth for reimbursement for the expenses of primary elections. Several Auditors General in turn refused to make any settlement on this claim. Finally the County of Philadelphia obtained a special Act of Assembly authorizing it to bring suit against the Commonwealth in the Court of Common Pleas of Philadelphia County. This case was tried and the Court of Common Pleas of Philadelphia County held the Act to be unconstitutional, but on appeal to the Supreme Court argued early in 1921, the Act was sustained. Thereafter the Court of Common Pleas entered judgment in favor of the County and against the Commonwealth for an amount which we deemed exorbitant and from which we appealed to the Supreme Court, the case being argued in October, 1922. On January 3, 1923, the Supreme Court rendered a decision which will reduce the amount of the judgment about $37,000. In the meantime, at the 1921 Session, an appropriation to take care of this claim was vetoed. The judgment entered by the Court of Common Pleas exceeded $600,000. Many of the charges included in it were grossly excessive and I have deemed it appropriate to contest it as far as possible. An appropriation for its payment will now be a matter for further consideration.

Inheritance and Corporation Taxes.

During the two year period numerous inheritance and corporation tax cases have been handled by this Department in the appellate courts and in the courts of first instance. The contentions of the Commonwealth have been sustained in nearly every case.

The case involving the largest amount in controversy is the matter of the inheritance tax in the estate of Henry C. Frick, deceased, in which the Orphans' Court of Allegheny County has entered a decree in favor of the Commonwealth for nearly $1,200,000 more than the amount for which the representatives of the estate admitted their liability. This case is now in the Supreme Court, where it is to be argued on January 12, 1923. It is practically certain that it will reach the Supreme Court of the United States if the contentions of the Commonwealth are sustained by the Supreme Court of Pennsylvania. At the outset my predecessor placed the case in the hands of Major David A. Reed of Pittsburgh as special counsel, and while this Department has co-operated the main work has been done by him and with much ability and success.

In the case of Kirkpatrick's Estate we obtained a decision by the Supreme Court of Pennsylvania reversing the Orphans' Court of Allegheny County and sustaining the provision of our Inheritance Tax Law

under which inheritance tax paid to the United States is not allowed as a deduction from the value of the estate in determining the State tax. The Orphans' Court of Philadelphia County had reached the same conclusion as the Orphans' Court of Allegheny County, and the decision of the Supreme Court was of much importance to the Commonwealth.

Treasury Investigation.

After consulting this Department as to his powers in the matter the Auditor General caused a very complete audit to be made of the administration of the Treasury Department from May 1, 1917, to April 30, 1922. During the four year term from 1917 to 1921 a number of matters developed in the audit which the Auditor General submitted to me for my opinion and of such action as I might find proper. The reports being more or less inconclusive, I suggested that they should be supplemented by oral hearings and a number of such hearings were held. As a result I filed a somewhat extensive opinion which will be found among the opinions of the Attorney General, and felt compelled to cause a prosecution to be entered against the State Treasurer who served during the term in question, for misdemeanor in office. It is only fair to say that the charge was not based upon any profit to the State Treasurer or financial loss to the Commonwealth, but on what seemed to me such failure to obey the law as could not be ignored.

In connection with this investigation I desire to give public expression to my great appreciation for the assistance rendered by Honorable Edward J. Fox, former Justice of the Supreme Court of Pennsylvania. Because of his high standing and ability and the public confidence reposed in him, I asked for his co-operation, which he rendered as a public service and for which he refused to receive any compensation.

The result of the prosecution above referred to is the case of *Commonwealth vs. Kephart* in which an indictment has been found in the Dauphin County Court, and a motion to quash the indictment and a motion to discharge the defendant have been overruled by that Court. An appeal from that decision is now pending in the Superior Court of Pennsylvania where it has been argued.

Bureau of Escheats.

The Bureau of Escheats, which is a Bureau of this Department, has continued its excellent work. From the beginning of its operation in May, 1919, to December 31, 1920, this Bureau collected and paid into the State Treasury $300,896.01, of which $13,974, being 4.6 per cent. of the amount collected, was refunded to claimants on orders of the

Board of Public Accounts. During the period from January 1, 1921, to December 31, 1922, the Bureau has collected and paid into the State Treasury $478,785.09, making a total of collections from the beginning of its operations of $779,681.10. Claims allowed and pending will involve a refund to claimants of $26,265.64 or 3.3 per cent. of the entire amount collected. In addition to the total collections paid into the State Treasury, the Bureau has obtained Court orders for the payment of $10,228.72, which will be paid within the next few weeks. In securing these collections 127 petitions were filed in the various Courts of Common Pleas of the Commonwealth, together with numerous petitions in the Orphans' Courts of the several Counties. In addition there are now pending in the Orphans' Court of Philadelphia County, petitions for orders for the payment of $52,226.62 being unclaimed moneys held by trust companies under trusts which have ceased to be active. Mr. Eastman, who has special charge of this Bureau, drafted several Acts which became laws during the last Session of the Legislature, and which facilitated the work of this Bureau. The collections from January 1, 1921, to December 31, 1922, were made under the following Acts: Act of April 21, 1921, P. L. 223 (amending Act of 1915), $421,322.28; Act of April 21, 1921, P. L. 216 (amending Act of 1919), $42,384.53; Act of May 16, 1919, P. L. 174, $9,222.92; Act of April 17, 1872, P. L. 62, $5,855.36. Provision to enable the Bureau to make more extensive examinations of trust companies would certainly result in very large additions to the amounts collected.

The expense of collecting the $478,785.09 paid into the Treasury during the past two years was less than $60,000, or 12½ per cent. of the amount collected. This includes cost of advertising and court fees chargeable to the Commonwealth, and all salaries and expenses of every kind. Of this amount less than $50,000 has been paid from the appropriation to the Auditor General's Department and about $10,000 from the appropriation to the Attorney General's Department.

Bureau of Maintenance Collections.

This Bureau, which is also a part of the Attorney General's Department, has rendered very efficient service, especially during the last year. The collections for the year 1922 exceeded the collections for 1921 by $48,964.30. The total collections from January 1, 1921, to December 31, 1922, have been $345,876.06. This is just a little over the amount collected during the preceding two years, the total for the four-year period being $689,052.40.

Extradition Cases.

The number of extradition cases passing through the Executive Department has been very large, a natural result of the unusual number of crimes committed throughout the country during the past two years. Where there is any contest or question raised on an application for extradition the matter goes to the Attorney General's Department for hearing. Seventy-five such hearings have been held, in which both parties were represented, the requisitions for the return of fugitives having come from almost every State in the Union. We have also advised in numerous cases before papers were sent from the Executive Department to some other State asking for the return of a fugitive who had fled from this State.

Banking Department.

Hearings in bank cases have been numerous, especially since the Governor adopted the policy of granting bank charters only after investigation of the need therefor. Very many hearings have been held before the Banking Commissioner and a Deputy Attorney General in connection with questions of impaired capital, insufficient business methods, banking irregularities, etc. Some of these involved institutions with very large deposits, trust funds, etc., wherein defects were corrected, deficiences in capital restored and failures prevented without creating any public sensations.

We have instituted Quo Warranto proceedings against eight banking associations. Six banking institutions have been placed in possession of the Banking Commissioner as have also five building and loan associations. We have had occasion during the two year period to render thirty-one formal opinions to the Banking Department and have given informal advice in very many cases in connection with the very vigilant and careful work of that Department.

Insurance Department.

We have had a considerable number of litigated cases for this Department and two dozen or more insurance corporations have been dissolved or their charters forfeited. We have also kept in touch with some very important litigation the Insurance Commissioner has had in the State of New York.

Collection of Delinquent Corporation Taxes.

As far as possible this important work has been placed in the hands of Deputy Attorneys General instead of in the hands of special counsel.

This, I think, has saved the Commonwealth considerable money. The cases in Allegheny County are referred to Special Deputy Attorney General Trent, and since I have had a Deputy Attorney General who is a member of the Philadelphia County Bar the Auditor General and I have arranged that all such cases shall be referred to him, and no further delinquent corporation tax claims have been placed in the hands of any special counsel in Philadelphia. Since this arrangement has been made more than one hundred such claims have been cared for in Philadelphia County, at an expense of practically nothing to the Commonwealth.

Freeport Bridge.

Very many questions have arisen in connection with the Freeport Bridge across the Allegheny River, where we have been able to save the Commonwealth between $200,000 and $300,000 through extended and tedious negotiations with the river interests and other parties concerned in the repair of the bridge, it having been greatly damaged through floods. A very dangerous grade crossing at Garver's Ferry at the eastern end of the bridge is also eliminated as part of the arrangement. There were concerned in this matter the Secretary of War, The Water Supply Commission, the State Highway Department, the Counties of Armstrong and Westmoreland, the Borough of Freeport, Pennsylvania Railroad Company, Pittsburgh Coal Association, and Allegheny River interests. An entirely satisfactory final agreement was reached and the bridge is now in the course of reconstruction.

Judicial Election Contests.

Following the election of 1921 petitions for the contest of the election of Judges were presented to the Attorney General from Blair County and from Northumberland County. It was contended by the contestants that it was the duty of the Attorney General to transmit the petitions to the Governor, without further inquiry, whereupon it would be the duty of the Governor to summon a special tribunal consisting of the three President Judges located nearest to the county seat of the county involved, in order to try the contest. While the wording of the Statute might appear to sustain this position, it did not seem that it could have been intended that the Attorney General had no function beyond the mere transmitting of the papers. Consequently I fixed dates for hearings in both cases and in each case heard extended arguments on the part of counsel on both sides, after which I filed opinions refusing to certify the petitions to the Governor. Nothing further was done in the Northumberland County case, but in the Blair County case man-

damus proceedings were instituted in the Dauphin County Court, leading to a very interesting opinion by Judge Hargest refusing the mandamus: *Commonwealth ex. rel. vs. Alter, 25 Dauphin Co. Rep. 161.* From this decision an appeal was taken to the Supreme Court, but the appeal was discontinued before argument. The case may be of some value as a precedent hereafter.

Board of Pardons.

The unusual number of crimes and convictions during the past few years has caused a corresponding increase in the number of applications for pardon. There has also been a tendency on the part of some Judges to sentence offenders to the penitentiaries who, under the law, should be sentenced to county prisons, thereby relieving the Judges from the annoyance of importunities to grant paroles but throwing an additional burden upon the Board of Pardons. This, of course, leads also to an unusual percentage of applications in the less serious class of cases, which to some extent increases the percentage of pardons granted.

Excluding petitions for commutation of the death sentence to that of imprisonment for life, the number of applications for pardon during the four years of the present administration has been 1110 and the number recommended 361 or 32.5 per cent. The increase in the work of the Board is shown by comparison with work during the administration of Governor Stone, 1899-1902, during which there were 411 applications of which 169 or 41 per cent. were granted. The percentages during the succeeding administrations were as follows: 1903-1906, 31.1 per cent.; 1907-1910, 30 per cent.; 1911-1914, 61 per cent.; 1915-1918, 42.8 per cent.

Board of Public Accounts.

This Board consists of the Auditor General, the State Treasurer and the Attorney General. Its duty is to pass on applications for the correction of errors in State tax settlements and refunds of moneys collected under the escheat statutes. About a year ago we adopted the plan of holding regular stated meetings with regular calendars of cases. As a result the work of the Board is practically cleaned up and can be kept so with very little effort. I think this plan has met with the favor of all parties concerned, as against the former plan of holding meetings by special appointment.

National Banks as Fiduciaries.

The recent legislation by Congress, authorizing national banks to act in a fiduciary capacity, has brought about a situation which will require a decision by the Supreme Court of Pennsylvania, which may lead to a case in the Supreme Court of the United States.

The Act of Congress authorizing national banks to act as fiduciaries provides that they shall submit their trust business to the inspection of the authorities of the State, but not their general business. It is also apparent that in the event of insolvency the administration of the affairs of a National bank through the Comptroller of the Currency would be less desirable than the administration of the affairs of an insolvent trust company through our State agencies.

The Judges of the Orphans' Court and the Court of Common Pleas of Allegheny County declined to place national banks in their list of institutions qualified for appointment as fiduciaries. The Orphans' Court of Philadelphia County took like action on the application of a national bank to be so listed and refused an application for the appointment of a national bank as guardian. Certain stipulations had been filed binding the bank to submit to full State examinations, etc., but of course these were outside the Act of Congress. Upon appeals to the Superior Court these decisions of the Orphans' Court of Philadelphia County were reversed and it was ordered to grant the applications. Thereupon, the matter being brought to the attention of the Attorney General's Department, I deemed it appropriate to intervene and appeal from the decision of the Superior Court to the Supreme Court, so that a final determination might be had and the authority of the State upheld as fully as possible. This appeal is now pending and the Supreme Court has fixed January 15th for the argument.

We have passed upon a large number of land titles and prepared many contracts for the Adjutant General's Department, Board of Public Grounds and Buildings and for various State Institutions, have looked after a number of cases under the Workmen's Compensation Act in which the State was interested, have passed upon all applications for retirement, conducted all the legal matters connected with the completion of the taking over of the State Normal Schools, innumerable matters connected with State Highway contracts, and generally tried to keep the State's legal business up to date and to protect her interests in every possible way. The following is a summary of certain features of the work of the Department which may be of interest:

	Jan. 1, 1921 to Dec. 31, 1922.
Collections by the Bureau of Maintenance, Collections from estates of persons confined in insane hospitals as indigents	$345,876.06
Collections by Bureau of Escheats in Attorney General's Department	478,785.09
Total	$824,661.15

Quo Warranto Proceedings in Dauphin County	16
Equity Proceedings in Dauphin County	9
Actions in Assumpsit instituted by Commonwealth of Pennsylvania in the Common Pleas of Dauphin County	4
Actions in Assumpsit instituted in other Counties	3
Orders to show cause, etc., against insolvent companies and associations	7
Mandamus Proceedings in Dauphin County	10
Cases argued in the Supreme Court of Pennsylvania	31
Cases argued in the Superior Court of Pennsylvania	4
Cases argued in the Supreme Court of the United States	4
Tax appeals in the Common Pleas of Dauphin County	138
Cases now pending in the Supreme Court of Pennsylvania	2
Cases now pending in the Superior Court of Pennsylvania	1
Bridge proceedings under Act of 1895 (P. L. 130) and supplements	2
Insurance Charters approved by the Attorney General	6
Bank Charters approved by the Attorney General	94
Applications for sewerage approved by the Attorney General	253
Formal opinions rendered in writing	205
Proceedings under Act of 1919, P. L. 1056A, for refund of moneys erroneously paid into State Treasury	2
Inheritance tax appeals under Act of 1919, P. L. 521	2

Collections for 1921, from all sources except escheats	$196,643.17
Collections for 1922, from all sources except escheats	683,751.00
Total	$880,394.17

I desire in conclusion to testify to the very able and loyal service rendered by the Deputies and all others connected with the work of the Department, and the pleasure it has been to work with the Governor and the fine body of men who have conducted the various Departments, Bureaus and Commissions of the State Government.

The same has been true of the relations between the Department and the members of the Senate and the House. Every bill sent to the Governor during the legislative session was first submitted by him to us and a written opinion furnished him before the bill was signed or disapproved. This led to many conferences with members relating to suggested objections, and almost invariably they were anxious to co-operate in anything tending to make their legislation more perfect and beneficial.

Respectfully submitted,

GEO. E. ALTER,

Attorney General.

OPINIONS TO THE GOVERNOR

OPINIONS TO THE GOVERNOR

For the Year 1921.

IN RE NOTARY PUBLIC

Seals—Wife Using Seal of Deceased Husband—Fees—Appearing in Person—Act of March 3, 1791, 3 Sm. 7.

Under the Act of March 3, 1791, 3 Sm. 7, the seal of a notary must have the name of the notary public, surname and office as written in the commission engraved thereon, so that a widow of a deceased notary public, cannot use her husband's seal, but must have a new one engraved with her name.

A notary public can waive his rights to fees, but no one can do it for him.

Person wishing to make an affidavit before a notary public must appear before him in person. This is a positive requirement of the law.

Office of the Attorney General,
Harrisburg, Pa., January 6, 1921.

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

Sir: Your request for an opinion duly received on the following questions:

First—Whether the seal used by Mrs. Charles Ludwick, Notary Public, having engraved the name "Charles Ludwick" is in proper form?

Second—Whether a notary public can waive the right to fees?

Third—Whether a person must appear in person to make oath before a notary public?

In answer to the first inquiry, would say that Section 7, of the Act of March 5, 1791, 3 Smith 7 (Stewarts Purdon, 13th Edition, page 3325), provides as follows:

> "Every notary shall provide a public notarial seal, with which he shall authenticate all his acts, instruments, and attestations, on which seal shall be engraved the arms of this commonwealth, and shall have for legend the name, surname and office of the notary using the same, and the place of his residence."

This means that the seal shall have engraved thereon for legend the name, surname, and office of the notary using the same. This provi-

sion requires that the name as written in the commission issued to the Notary Public shall be engraved upon the seal. It follows, therefore, that a widow of a deceased notary public cannot use her husband's seal, but must have a new one engraved with her own name.

It is true that it has been held that the protest of a notary public is not invalidated by the fact that the seal does not conform in all respects with this Act (Jenks *vs.* Doylestown Bank, 4 W. & S. 505), but to use a seal which does not conform with the provisions of this Act is a violation of law, and may be the subject of a charge against the offending notary in the manner hereinafter referred to.

In reply to your second inquiry, I am of the opinion that while the notary himself can waive his rights to fees, no one else can do it for him.

In reply to your third inquiry as to whether a notary public must require persons wishing to make affidavit before him to appear in person, would say that this is a positive requirement of the law. The words used in the third section of the Act of March 5, 1791, 3 Smith 7, are to "administer oaths and affirmations according to law," and this means to administer the oath or affirmation to a person who appears before the notary.

It was so held in an opinion rendered by this Department on July 10, 1907, 33 Pa. C. C. 607. To administer oaths in any other way is a violation of law and subjects the offending notary to removal from office.

Any notary violating any of the provisions of the law can be removed from office by the Governor. The procedure to be followed in such cases is set forth in the opinion before cited.

Yours respectfully,

GEO. E. ALTER,
Attorney General.

APPOINTMENT OF VOLUNTEER POLICEMEN DURING WAR.

Appointment by Governor under Act of July 18, 1917, P. L. 1062—Duration of commission—Power to arrest upon view.

The commissions of volunteer policemen expire upon limitation, where limited as to time, or, if commissioned for the term of the present war (*i. e.* War against Germany), the Governor may terminate the commissions whenever he deems it wise, active hostilities having long since ceased.

Under Section 3 of said act such policemen have power to make arrest upon view within the county in which they are commissioned.

Office of the Attorney General,
Harrisburg, Pa., January 12, 1921.

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

Sir: I have received your inquiry of the 4th instant, enclosing a letter from Charles J. Croissant, who was appointed a volunteer policeman for McKean County, asking (1) How long his commission continues, and (2) If, while his commission continues in force he can arrest on view?

By the Act of July 18, 1917, P. L. 1062, it is provided as follows:

> "That upon application to the Governor of the Commonwealth, the said Governor is hereby authorized, immediately after the passage of this act, and at any time during the continuance of the present war with Germany, or in any war in which this Nation may become involved, to appoint and commission such number of volunteer police officers, to serve without pay, in the several counties, as may be deemed necessary. In all cities, boroughs and townships where there is a duly constituted police department or police commission, such volunteer police officers shall be under, and subject to, the authority and direction of such department or commission. In all other cases the said Governor shall designate and appoint such officials, or official person or persons, to advise and direct the said police officers and services to be by them performed."

Under this Act of Assembly, I am informed that a very large number of volunteer policemen were commissioned in different parts of the State. The commissions first issued were for a limited period of time, but the greater number were commissioned "for the term of the present war, to be computed from the date hereof, if he shall so long behave himself well and perform the duties of said office, unless sooner lawfully determined or annulled."

If Mr. Croissant was commissioned for a limited time, it is presumed that his commission has long expired, but if he was commissioned "for the term of the present war," his commission would seem to be still in

force. The commission being issued while the war against Germany was going on, the words "present war" refer to that war. While warfare has long since ceased, the armies have been disbanded and we are carrying on trade with Germany, yet, it appears that technically the war still goes on. In *Hijo vs. United States, 194, U. S. 315*, the United States Supreme Court said:

> "The war was not legally ended by the signing of the Armistice, but still technically continues."

As to whether he may make arrest upon view, the third section of the said Act of July 18, 1917, provides as follows:

> "Section 3. The police officers, when so appointed and qualified, shall have and possess all the powers of police officers of the several cities, boroughs and townships of the Commonwealth, and are authorized to arrest upon view, with or without warrant, any person apprehended in the commission of any offense against the laws of the Commonwealth or of the United States."

While the Act thus specifically confers upon him the power to make arrest upon view, that power could not be exercised outside the county to which he was commissioned.

It is my opinion that you could terminate the authority of the holders of these commissions, who are your appointees, at any time you deem it wise to do so.

Respectfully yours,

GEO. E. ALTER,
Attorney General.

IN RE MURDER SENTENCES.

Governor—Execution—Time—Statutory. Form—Withdrawal of Warrant and Return to Court.

A sentence for execution on a charge of murder of the first degree which is not sufficient to bring the case before the Supreme Court on appeal cannot well be sufficient to justify the Governor in fixing a time for the execution of the defendant, so that where a valid sentence has not been imposed, the warrant should be withdrawn and the record returned to the court for further action.

Office of the Attorney General,
Harrisburg, Pa., February 9, 1921.

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

Sir: I have your request for advice in the following matter:

Your attention has been called to the sentence of the Court of Oyer and Terminer of Allegheny County certified to you under which a warrant has issued for the execution of Anton Weber, convicted of murder in the first degree in said Court at No. 35 January Term, 1919. The sentence in said case is as follows:

> "And now, Dec. 20, 1919, the sentence of the law is that you Anton Weber, for the murder in the first degree of Mary Kim whereof you stand convicted, be taken hence to the jail of Allegheny County whence you came, and that you be taken thence as required by law, to the Western Penitentiary in Centre County, Pennsylvania, and during the week fixed by the Governor of Pennsylvania in his warrant, that then and there in the building and in the manner and mode provided by law, a current of electricity shall be caused to pass through your body and continue until you are dead. And may God in His infinite Goodness have mercy on your soul."

In Commonwealth *vs.* Davis, 266 Pa., 245, wherein the sentence was in the above form the Supreme Court called attention to the fact that it was not in the form which the Court had prescribed as complying with the law, and directed that the defendant must be resentenced in the form prescribed by the Supreme Court, which is as follows:

> "And now * * * the sentence of the law is that you * * * be taken hence by the sheriff of * * * County to the jail of that County from whence you came, and from thence in due course to the Western Penitentiary in Centre County, Pennsylvania, and that you there suffer death during the week fixed by the Governor of the Commonwealth, in a building erected for the purpose on land owned by the Commonwealth, such punishment being inflicted by either the warden or deputy warden of the West-

ern Penitentiary, or by such person as the warden shall designate, by causing to pass through your body a current of electricity of intensity sufficient to cause death and the application of such current to be continued until you are dead. (To this may be added the usual invocation:) May God in His Infinite Goodness have mercy on your soul."

It appears from a certificate from the Prothonotary of the Western District that in the cases of Com. *vs.* Tompkins, No. 56, October Term 1920; Com. *vs.* Insano, No. 67, October Term, 1920; Com. *vs.* Domokos, No. 58 October Term 1920; and Com. *vs.* Ferko, No. 31, October Term 1920 in which appeals were taken to the Supreme Court, the Court in each case refused to consider the appeal, remitting the record in order that sentence might be imposed in the said form approved by the Supreme Court.

From the foregoing it would seem plain that in the case now under consideration a valid sentence has not been imposed. A sentence which is not sufficient to bring the case before the Supreme Court on appeal cannot well be sufficient for the execution of the defendant.

It is my opinion, therefore, that the warrant for the execution should be withdrawn and the record returned to the Court of Oyer and Terminer of Allegheny County for further action by that Court.

Very truly yours,

GEO. E. ALTER,
Attorney General.

IN RE NOTARY PUBLIC.

Notary Public—Stenographer—Clerk of United States Court—Article XII, Section 2, of the Constitution of Pennsylvania.

A stenographer of a clerk of a Court of the United States, as a stenographer, is merely an employe, and does not hold any office, or appointment in the nature of an office, under the United States government, so that he is eligible to the office of notary public in Pennsylvania. This would not violate Article XII, Section 2, of the Constitution of Pennsylvania.

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

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

Dear Sir: This Department is in receipt of your communication inquiring whether one who is employed as a stenographer by the clerk of a United States Court is eligible to the office of notary public in this State.

The Constitutional and Statutory provisions relating to this subject are as follows:

Constitution of Pennsylvania, ART. XII, Section 2:

> "No member of Congress from this State, nor any person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time hold or exercise any office in this State to which a salary, fees or perquisites shall be attached. The General Assembly may by law declare what offices are incompatible."

Act of April 14, 1840, P. L. 334, Sec. 1:

> "No person * * * holding or exercising any judicial office in this Commonwealth, or any office or appointment of trust or profit under the Constitution or laws of the United States, shall at the same time hold, exercise or enjoy the office of notary public * * *."

Act of May 15, 1874, P. L. 186, Sec. 1:

> "Every person who shall hold any office, or appointment of profit or trust under the Government of the United States, whether a commissioned officer or otherwise, a subordinate officer or agent, who is or shall be employed under the legislature, executive or judiciary departments of the United States, and also every member of Congress, is hereby declared to be incapable of holding or exercising, at the same time, the office or appointment of justice of the peace, notary public, mayor, recorder, burgess or alderman of any city, corporate town or borough, resident physician of the lazaretto, constable, judge, inspector or clerk of election, under this Commonwealth."

The Constitutional provision above quoted is substantially the same as the latter portion of ART. II, Sec. 8 of the Constitution of 1790, and the Act of 1874 quoted, is a verbatim re-enactment of the Act of February 12, 1802, 3 Sm. L. 485, except that the earlier Act did not contain the words "notary public."

These provisions of the Constitution of 1790 and of the Act of 1802 came before the Supreme Court for construction in Commonwealth *vs.* Binns, 17 S. & R. 219 (1828), where two extended and careful opinions were handed down expressing the views of the majority of the Court. In one of them Mr. Justice Tod said:

> "Thus, I understand the prohibition to be against all offices, and subordinate offices, of trust or profit, under the federal government, and against all appointments, agencies and employments, in the nature of offices of trust or profit, under the same government, and against nothing else * * * It was known, that by the laws and usuages of the federal government, appointments, in the

> nature of office, were sometimes granted without the name of office, without a commission, and without the vote of the senate. All these were evidently intended to be declared incompatible; but without meddling, or intending to meddle, with contracts, or with any agency or employment in the nature of contract, I am brought to this conclusion not only by the plain words of the section, and by the preamble of the law, in strict conformity with the title, but from the firmest persuasion, that if the legislature had meant to disable every agent whatsoever, and every person employed by the federal government including not only every contractor of every description, but every workman and day labourer, they would have said so in intelligible language."

In his concurring opinion Mr. Justice Smith said:

> "Is he, then, an officer under the government of the United States, or has he an appointment under that government, in the sense and meaning in which those terms are used in the law? The terms applied to the disqualifying employment are, 'office or appointment,' and on the part of the relator it is admitted that they are synonymous: the language of the act is, 'Every person who shall hold any office or appointment of profit or trust under the government of the United States, whether a commissioned officer or otherwise;'—and perhaps the only distinction between those terms, as there used, is, that by office was meant an appointment with a commission, and by appointment, an office without one. The distinction is immaterial."

While the particular case before the Court for decision at that time differed somewhat from the case which you present, the Court clearly announced that in its opinion the law did not forbid one who had a mere contract of employment with the United States government from holding at the same time any of the offices named in the Statute. The prohibition extended only to offices and to appointments or employments *in the nature of offices.* In my opinion this is, also, the proper construction of the Act of 1840 and 1874.

The stenographer of a Clerk of the Court of the United States, as a stenographer, is merely an employe, and does not hold any office, or appointment or employment in the nature of an office, under the United states government.

I, therefore, advise you that the stenographer of a Clerk of the Court of the United States is eligible to the office of notary public, in Pennsylvania.

Yours very truly,

GEORGE ROSS HULL,
Deputy Attorney General.

VACANCY IN OFFICE OF MAGISTRATE.

Public officers—Magistrates—Vacancy in office—Conviction of crime—Involuntary manslaughter not an infamous crime.

Conviction of a magistrate of involuntary manslaughter and of driving his motor-car while intoxicated does not create a vacancy in his office under art. vi, § 4, of the Constitution, since the conviction is not of an infamous crime.

Office of the Attorney General,
Harrisburg, Pa., March 8, 1921.

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

Sir: I have your request for an opinion whether a vacancy exists in the office of Magistrate in Philadelphia, owing to the incumbent being convicted of involuntary manslaughter and also of driving a motor car while intoxicated.

Article VI, Section 4 of the Constitution provides as follows:

> "All officers shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehaviour in office or of any infamous crime. Appointed officers, other than judges of the courts of record and the Superintendent of Public Instruction, may be removed at the pleasure of the power by which they shall have been appointed. All officers elected by the people, except Governor, Lieutenant Governor, members of the General Assembly and judges of the courts of record learned in the law, shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate."

It is not necessary to decide whether the first sentence of this Section contemplates an automatic removal or a removal in the manner provided in the last sentence, unless the present conviction is for misbehaviour in office or of an infamous crime.

Of course it is apparent that the conviction is not of misbehaviour in office, as it related to no official act. It seems, also, that the conviction does not involve what the law classes as an "infamous crime."

The Supreme Court has said that:

> "involuntary manslaughter is where it plainly appears that neither death nor great bodily harm was intended but death is accidentally caused by some unlawful act, not amounting to felony; or by an act not strictly unlawful in itself, but done in an unlawful manner, and without due caution":

Commonwealth vs. Gable, 7 S. & R. 428.

In *Schuylkill Co. vs. Copley, 67 Pa. 386*, Mr. Justice Agnew said:

> "Infamous crimes are treason, felony and any species the *crimen falsi*."

This rule is also announced in other cases. A different rule seems to prevail in the United States Courts, but with that we are not concerned. The rule in Pennsylvania appears to be clear. As involuntary manslaughter is a misdemeanor, not a felony nor any species of the *crimen falsi* in which are classed such offenses as forgery and perjury, it does not come within the definition of an "infamous crime."

Consequently the case would seem to fall within the last provision of the Section, authorizing the Governor to remove upon reasonable cause, after hearing, upon the address of two-thirds of the Senate.

You are advised, therefore, that nothing is required upon your part in this case at this time,

Respectfully yours,

GEO. E. ALTER,
Attorney General.

SMITH'S REQUISITION.

Criminal law—Extraditable offense—Form of affidavit in extradition proceedings.

It is not necessary that the charge of crime contained in the affidavit or indictment attached to requisition papers shall be drawn as carefully as a criminal pleading; it is sufficient if it substantially charges a crime against the laws of the requisitioning state.

Criminal law—Extradition—Fear of bodily harm to defendant in requisitioning state.

The fact that, upon the defendant's return to the requisitioning state, some individual might commit an assault upon him, is no reason for the refusal of his extradition.

Criminal law—Extradition—Fugitive from justice.

The defendant is a fugitive from justice, within the meaning of the Constitution and laws of the United States, although he left the requisitioning state for the purpose of escaping bodily harm and not for the purpose of evading criminal process.

A person charged with crime against the laws of a state, who flees from justice (that is, after committing the crime, leaves the state, in whatever way or for whatever reason) and is found in another state, may be brought back to the state in which he stands charged with crime, to be dealt with there according to law.

Criminal law—Extradition—Larceny by bailee.

A crime which corresponds to the offence of "larceny by bailee" in Pennsylvania is extraditable.

Office of the Attorney General,
Harrisburg, Pa., March 31, 1921.

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

Sir: A hearing was held in this Department on March 28, 1921, upon a requisition from the Governor of Georgia for the rendition of

L. Cleve Smith, charged with having sold certain property subject to a landlord's lien without the consent of the landlord and with intent to defraud.

Counsel for the defendant contend that the requisition should not be honored for the following reasons:

(1) That the Information which forms the basis of the prosecution does not charge a crime;

(2) That the rendition of the defendant is sought either for the purpose of collecting a debt, or of harassing and annoying the defendant, and not for the purpose of prosecuting him for any offense against the laws of Georgia;

(3) That the defendant is not a fugitive from justice, and

(4) That the offense charged is of such trivial character that the defendant should not be extradited.

(1) The objection made to the Information is that it does not aver that any loss was actually sustained by the landlord, that such loss is an essential element of the crime, and that, therefore, the Information does not charge a crime.

It is not necessary that the charge of crime contained in the affidavit or indictment attached to requisition papers shall be so drawn as to withstand all attacks which might be made against it as a criminal pleading. The Supreme Court of the United States in *Pierce vs. Creecy*, 210 *U. S.* 387, 52 *L. Ed.* 1113, said:

> "The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been in fact, however, inartificially, charged with crime in the state from which he has fled. Roberts *v.* Reilly, 116 U. S. 80, 95 (6 Sup. Ct. 291, 29 L. Ed. 544); Pearce *v.* Texas 155 U. S. 311, 313 (15 Sup. Ct. 116, 39 L. Ed. 164); Hyatt *v.* Corkran, 188 U. S. 691, 709 (23 Sup. Ct. 456, 47 L. Ed. 657); Munsey *v.* Clough, 196 U. S. 364, 372 (25 Sup. Ct. 282, 49 L. Ed. 515); Davise's Case, 122 Mass. 324; State *v.* O'Connor, 38 Minn. 243; State *v.* Goss, 66 Minn. 291 (68 N.W. 1089); Matter of Voorhees, 32 N. J. Law, 141; Ex parte Pearce, 32 Tex. Cr. R. 301 (23 S.W. 15); In re Van Sciever, 42 Neb. 772 (60 N.W. 1037, 47 Am. St. Rep. 730); State *v.* Clough, 71 N. H. 594 (53 Atl. 1086, 67 L. R. A. 946)."

We have examined the information attached to the requisition in this case and are of the opinion that it substantially charges a crime against the State of Georgia.

(2) No evidence was produced before us to support the defendant's contention that his rendition was sought for the purpose of collecting a debt. He was present in person at the hearing, and his own statements there made indicate that such was not the purpose of the prosecution.

He stated that prior to leaving Georgia his life had been threatened by a man not the prosecutor in this case or in any way connected with it, that he was sure that if he were returned to the State of Georgia he would be lynched, and that his rendition was sought for this purpose. The Sheriff of Turner County, Georgia, informed us that the man who made the threat upon the defendant's life was arrested and imprisoned in October, 1920, and is still in prison. It does not seem, therefore, that the defendant is in any real danger of harm at the hands of this man. However, if it were otherwise, the fact that upon the defendant's return to Georgia some individual or individuals, in violation of the laws of that State, might commit an assault upon him, is no reason, in our opinion, for the refusal of his extradition. The agent of the State of Georgia, named in the requisition papers, into whose custody this defendant will be delivered is the Sheriff of Turner County, officially charged with the enforcement of law and the preservation of order in that County, and the Governor of Pennsylvania should not assume that this officer will fail in his duty, that the laws of Georgia will be violated, and that harm will result to this defendant.

(3) The defendant contends that he is not a fugitive from justice, within the meaning of the Constitution and laws of the United States, for the reason that he left the State of Georgia for the purpose of escaping bodily harm and not for the purpose nor with the intent of evading criminal process.

The Supreme Court of the United States, whose authority upon matters of extradition we deem to be controlling upon us, in the case of *Roberts vs. Reilly*, 116 *U. S.* 80, 29 *L. Ed.* 544, said:

> "To be a fugitive from justice, in the sense of the Act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a State committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another."

In *Illinois vs. Peace*, 207 *U. S.* 100, 52 *L. Ed.* 121, the same Court said:

> "A person charged with crime against the laws of a state, and who flees from justice, that is, after committing the crime leaves the state, in whatever way or for whatever reason, and is found in another State, may, under the authority of the Constitution and laws of the United States, be brought back to the state in which he stands charged with the crime, to be there dealt with according to law."

To the same effect are *Ex parte Graham*, 216 *Fed.* 813, and cases cited therein. See also *Scott on Extradition*, 74.

In our opinion, these authorities are conclusive and are binding upon us. The defendant in this case, having admitted that he was in the State of Georgia at the time of the commission of the alleged offense and that he left there a few days thereafter and is now in Pennsylvania, is a fugitive from justice irrespective of the intention or motive which prompted him to go beyond the jurisdiction of Georgia.

The learned Counsel for the defendant has called our attention to the case of *Commonwealth vs. Weiner*, 27 *District Reports*, 249 (1918), wherein the Court of Common Pleas of Greene County, inter alia, held that to be a fugitive from justice a defendant must have left the demanding State with the intention of avoiding prosecution. In support of this conclusion the Court in that case cited a decision of the Supreme Court of Indiana and several Law Dictionaries. No authority is cited, however, overruling or qualifying the decisions of the Federal Courts from which we have quoted. We have carefully considered this opinion from our own State, and in so far as it controverts the principle laid down by the Supreme Court of the United States we feel that we must dissent from it.

Other cases cited by Counsel for the defendant, to the effect that a prisoner who was constructively but not actually present in the demanding State at the time of the commission of the alleged offense, have no application to the present case, for here actual presence in the State of Georgia is admitted.

(4) Finally, Counsel for the defendant state that the crime charged is of such trivial character that the requisition should be ignored. With this we must disagree. It is true the amount involved is not large, but the crime amounts to substantially the same offense as that which is known in this State as "larceny by bailee." This crime has always been considered of serious character and is extraditable.

After careful consideration, we are of the opinion and so recommend that the requisition in this case be honored.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

IN RE NOTARY PUBLIC.

Member of the House of Representatives—Civil Officers—Term—Appointment.

A notary public is a civil officer in Pennsylvania, so that a member of the House of Representatives may not, during the term for which he has been elected, be appointed to or hold the office of Notary Public.

Office of the Attorney General,
Harrisburg, Pa., April 26, 1921.

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

Sir: I am in receipt of your recent letter inquiring whether a member of the House of Representatives of Pennsylvania may be appointed to the office of notary public in this State.

Article II, Section 6 of the Constitution of Pennsylvania provides:

> "No Senator or Representative shall, during the time for which he shall have been elected, be appointed to any civil office under this Commonwealth, and no member of Congress or other person holding any office (except of attorney-at-law or in the militia) under the United States or this Commonwealth shall be a member of either House during his continuance in office."

Article XII, Section 2 of the Constitution of Pennsylvania, which also deals with incompatibility of offices, further provides:

> "The General Assembly may by law declare what offices are incompatible."

The Legislature, by Act of May 15, 1874, P. L. 186, for the purpose of making effective these constitutional prohibitions, provides, inter alia, as follows:

> "No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office under this commonwealth; and no member of Congress person holding any office except of attorney-at-law or in the militia, under the United States or this Commonwealth; shall be a member of either House during his continuance in office. They shall receive no other compensation, fees or perquisites of office for their services from any source, not hold any other office of profit under the United States, this State or any other State."

The appointment to any civil office under this Commonwealth, of a member of the House of Representatives, during the term for which he has been elected, and the holding of such office by him, are thus forbidden by the Constitution and by Statute.

An examination of the statutes relating to notaries public leaves no doubt that they are civil officers under this Commonwealth. The

Court in *Davey vs. Ruffel*, 14 *C. C.* 272 (affirmed by the Supreme Court in 162 Pa., 443 without a discussion of the point) said:

> "They (notaries public) are as much state officers as judges of the Supreme Court or common pleas."

I, therefore, advise you that a member of the House of Representatives may not, during the term for which he has been elected, be appointed to or hold the office of notary public.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

OPINION TO THE GOVERNOR.

For the Year 1922

IN RE STATE PRINTING.

Department of Health——Purchase of Equipment——Reports and Data——Act of July 23, 1919, P. L. 1128, and Article III, Section 12, of the Pennsylvania Constitution.

The State Department of Health may not legally install printing equipment or do any printing. The Act of July 23, 1919, P. L. 1128, Section 5 and Article III, Section 12 of the Pennsylvania Constitution prohibit the expenditure of state funds for that purpose.

Office of the Attorney General,
Harrisburg, Pa., February 23, 1922.

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

Sir: I have received your request for an opinion on certain enclosures sent you from the Department of Health. As I understand it, the question is whether or not the Department of Health may purchase necessary printing equipment and proceed to print the index of the birth and death records on file in their office. I understand they have not been able to get this work done promptly through the regular channels and desire to take this means to make the records available for their intended purposes.

The law governing the public printing and binding and affecting the Health Department's rights to do its own work is as follows:

> "It shall be unlawful for any officer of the State Government, or for any legislative committee, or for any commission or commissioner authorized by law, to have any printing done at the expense of the Commonwealth except by the contractor, unless the Superintendent of Public Printing and Binding is required to order printing done elsewhere because of the inability of the contractor to do the work or it is necessary, in order to expedite the printing, for the Superintendent of Public Printing and Binding to authorize the contractor to have the printing done elsewhere." (1919 P. L. 1131).

Under this Act all the printing done for the Department of Health must be done by the regular contractor unless, first, the Superintendent

of Public Printing and Binding orders it done elsewhere because of the inability of the contractor to do the work, or second, it is necessary in order to expedite the printing for the Superintendent of Public Printing and Binding to permit the contractor to have the work done elsewhere.

The first of these exceptions contemplates that the Superintendent of Public Printing and Binding may let out work to printers other than the contractor. It was intended primarily to permit the Superintendent to get work done which the contractor was not equipped to do and its exercise should be limited to that class of work. Under this exception the Superintendent could not let a contract to the Department of Health for such work as the Department desires to have done.

The second exception merely gives the Superintendent of Public Printing and Binding the right to authorize the contractor to sub-let part of his work when it is impossible for him to accomplish it within a reasonable time. The contractor could not sub-let the work of the Department of Health to the Department itself in view of the prohibition in law.

The Act seems to clearly prohibit the Department of Health from doing the printing it proposes to do. It could not well be interpreted otherwise in view of the express provision of Art. III, Section 12 of the Constitution:

> "All stationery, printing, paper and fuel used in the legislative and other departments of government shall be furnished, and the printing, binding and distributing of the laws, journals, department reports, and all other printing and binding, and the repairing and furnishing the halls and rooms used for the meetings of the General Assembly and its committees, shall be performed under contract to be given to the lowest responsible bidder below such maximum price and under such regulations as shall be prescribed by law; no member or officer of any department of the government shall be in any way interested in such contracts, and all such contracts shall be subject to the approval of the Governor, Auditor General and State Treasurer."

It is my opinion that the Department of Health may not legally install printing equipment or do any printing.

Very truly yours,

GEO. E. ALTER,
Attorney General.

OPINION TO THE SECRETARY OF THE COMMONWEALTH.

OPINIONS TO THE SECRETARY OF THE COMMONWEALTH

For the Year 1921.

LEGAL SERVICE ON FOREIGN CORPORATIONS.

Corporations—Service of legal process on foreign corporations registered with the Secretary of the Commonwealth—Act of June 8, 1911, Section 3.

The Secretary of the Commonwealth fully complies with the law when he mails by registered letter legal process against a foreign corporation to the address contained in the certificate of registration filed in his office.

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

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

Sir: I have your letter of January 31st wherein you desire to be advised whether you have performed your full duty under the following circumstances:

On January 25, 1921, a Summons and Affidavit of Claim were served upon you in a suit against George A. Fuller Company, a New Jersey Corporation registered in Pennsylvania, and having its certificate duly filed in your office, giving as its Pennsylvania office, 700 Land Title Building, Philadelphia, Pennsylvania, in care of J. Disbrow Baker. On the same day on which the Summons and Affidavit were served, you mailed them in a registered letter, postage prepaid, addressed to George A. Fuller Company, 700 Land Title Building, Philadelphia, Pennsylvania, in care of J. Disbrow Baker. On January 27th the Summons and Affidavit were returned with the Post Office notation: "Returned to the writer, unclaimed from Philadelphia, Pa., Land Title Station."

Section 3 of the Act of June 8, 1911, provides as follows:

> "When legal process against any such corporation has been served upon the Secretary of the Commonwealth, he shall immediately send by mail, postage prepaid, one copy of such process, directed to the corporation at the Post Office address designated by it as hereinbefore provided."

In my opinion you have performed your full duty. You have done everything the law prescribes. Your care in registering the letter was not required by the Act, but, of course, it is good practice.

Yours very truly,

GEO. E. ALTER,
Attorney General.

THE THOMAS DIAGNOSTIC CLINIC.

Corporations—Charter—Practice of medicine—Organization of corporation for profit, to own and carry on hospital—Acts of April 29, 1874, July 9, 1901, May 11, 1909, and June 3, 1911.

A charter for a corporation of the second class, the corporate purpose of which is stated in the application to be "establishing and maintaining a clinic for the diagnosis and treatment of disease, also laboratories for the examination and investigation of disease, and, further, for the purpose of establishing, maintaining and operating a hospital where medical and surgical treatment shall be provided," will not be approved, because the purpose would include the practice of medicine by the corporation; but a corporation may be formed for the purpose of owning, constructing, maintaining and leasing buildings, furnishings, equipment, apparatus and facilities which are adapted to use as a medical or surgical clinic, laboratory or hospital.

Acts of April 29, 1874, P. L. 73, July 9, 1901, P. L. 624, May 11, 1909, P. L. 515, and June 3, 1911, P. L. 635, considered.

Office of the Attorney General,
Harrisburg, Pa., February 3, 1921.

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

Sir: This Department is in receipt of your recent communication inquiring whether an application for Certificate of Incorporation of The Thomas Diagnostic Clinic should be approved. The corporate purpose stated in the application is as follows:

> "establishing and maintaining a clinic for the diagnosis and treatment of disease, also laboratories for the examination and investigation of disease; and further, for the purpose of establishing, maintaining and operating a hospital where medical and surgical treatment shall be provided."

This statement of purpose would include the practice of medicine by the corporation, and for this reason it should not be approved.

The several purposes for which corporations of the second class or corporations for profit may be formed are set forth at length in the Act of April 29, 1874, P. L. 73, and its amendments and supplements. Of these the only Acts which might be construed to include the practice of medicine are the Acts of July 9, 1901, P. L. 624, and June 3, 1911, P. L. 635, which extend the scope of Clause 18, Section 2, of the Act of 1874 to include "companies for the transaction of any lawful business not otherwise specifically provided for by Act of Assembly"; and the Act of May 15, 1909, P. L. 515, which repealed Paragraph 20 of Section 2 of the Act of 1874, and substituted the following:

> "For any lawful purpose not specifically designated by law, as the purpose for which a corporation may be formed."

It will be observed that since the passage of these amendments corporations may be formed under Clause 18 for the transaction of any lawful *business*, and under Clause 20 for any lawful *purpose*. It may be urged that the enactment of the Act of 1909, using the word "purpose," indicated a legislative intent to enlarge the scope of the Act by substituting "purpose" for "business."

Such a view, in my opinion, is erroneous for these reasons:

(a) The function of the statement of *purpose* in a certificate of incorporation of a corporation of the second class is to designate, describe or characterize the *business* in which the proposed corporation will engage. (See opinion of this Department in re corporate purposes, October 19, 1920.) The statement of purpose and the description of the business are one and the same thing.

(b) An examination of Article XVI, Section 6, of the Constitution, Sections 2 and 3 of the original Act of 1874, and Section 2 of the Act of 1909, discloses that the framers of the Constitution and the several Legislatures have used the phrases interchangeably and without distinction. For example, in Section 2 of the Act of 1909 the Legislature uses the word "purpose" in referring to the word "business," as used in the Act of 1901.

(c) Clause 18 of Section 2 of the Act of 1874, as it originally stood, specified particular kinds of corporations which might be formed under its authority. Section 39 of that Act imposed certain duties and liabilities upon "corporations incorporated under the provisions of Clause 18 of the second class." When, by the Act of 1901, Clause 18 was amended by adding thereto "any lawful business," a corporation formed under this amendment became subject to the duties and liabilities prescribed in Section 39. The evident intent of the Act of 1909, substituting a new Clause 20 and authorizing incorporation "for any lawful purpose," was to enable corporations to be formed under this broad general provision without at the same time making them subject to the duties and liabilities imposed by Section 39.

For the reasons stated, I am of the opinion that the terms "any lawful purpose" and "any lawful business" are synonymous, and that the opinions hereinafter cited, interpreting the phrase "any lawful business," apply whether the present application be considered as made under Clause 18, as amended by the Acts of 1901 and 1911, or under Clause 20, as amended by the Act of 1909.

The words "any lawful business," "it must be admitted, are extremely broad, and their vagueness is not relieved by any attempt at a definition for the words 'lawful business'." (*Attorney General Carson, In re Sayre Trackless Trolley, 13 Dist. Rep. 602.*) But, in my opinion, they are not sufficiently broad to include the practice of medicine, nor did the legislature by using them intend to provide for the incorporation of companies to engage in such practice.

It may, indeed, be questioned whether the word "business," in its ordinary acceptation, embraces the practice of the learned professions. Attorney General Carson defined the term "business" as follows:

> "Business, in a general sense, means an occupation pursued continuously and systematically as a means of livelihood, usually in connection with trade or traffic, as distinguished from the practice of a profession or the pursuit of the arts, literature or science." *In re Sayre Trackless Trolley, supra.*

But assuming that it were otherwise, I agree with the opinion expressed by the Court of Appeals of New York, which said in a similar case, that the words "any lawful business" mean

> "a business lawful to all who wish to engage in it."
> * * * * * * * * * * * *
> "The legislature, in authorizing the formation of corporations to carry on 'any lawful business,' did not intend to include the work of the learned professions. Such an innovation, with the evil results that might follow, would require the use of specific language clearly indicating the intention." *In re Co-Operative Law Co. 198 N. Y. 479, 32 L. R. A. (N.S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879, 92 N.E. 15.*

The case cited death with a corporation organized for the purpose of practicing law. The reasons for this view, which are set forth at length in the opinion quoted from, are: (1) A corporation, by reason of the fact that it is an artificial person, cannot possess professional knowledge and skill and cannot be examined, registered and qualified, as is required by the laws regulating the practice of law, and (2) The relation between lawyer and client, is based upon a contract, for the breach which the client has his action for damages. If he make his contract with a corporation, which perchance is irresponsible, there being no privity of contract with the lawyer who rendered the service, the client may be left without redress for his damage. By this device the lawyer might readily escape the liability which the law has placed upon him.

That decision was followed by the New York Courts in *Re. Bensel, 124 N. Y. Suppl. 726* and *In re Lands in New York, 128 N. Y. Suppl. 999.*

In this State Attorney General Schaffer, in an opinion to Governor Sproul, rendered July 14, 1920, (In re *White Dentists*) held that a company should not be incorporated for the purpose of practicing dentistry, and in *Commonwealth ex rel. Atty. Gen. vs. Alba Dentist Co. 13 Dist. Rep. 432,* the Court held that a charter of a foreign corporation which authorized it to engage in "any lawful business" did not permit it to engage in the practice of dentistry.

For the reasons so well stated in the several cases cited, I am of the opinion that the application, in the form in which it has been presented to you, should not be approved.

The incorporators, however, suggest that the real purpose of the corporation is not to practice medicine, but to own, construct, maintain and lease buildings, furnishings, equipment, apparatus and facilities which are adapted to use as a medical and surgical clinic, laboratory, and hospital and express their willingness to amend the statement of purpose contained in the application if such amended application would meet with approval.

This presents a different question, and one which is of considerable public concern.

It is a matter of common knowledge that the establishment and maintenance of such institutions require the investment of large amounts of capital in real estate, and in expensive apparatus and appliances. To such enterprises the corporate form of organization is peculiarly adapted. If they cannot be incorporated under the "any lawful business" clause, many private institutions of great benefit to the public could not be organized, for there are no special statutory provisions for the incorporation of private hospitals, clinics and laboratories.

Prior to 1874 the Legislature, and since that time, the courts, have frequently incorporated such institutions as corporations not for profit, and the Legislature has from time to time appropriated large sums for their support and maintenance. There is no apparent reason why the Legislature should foster such enterprises when not engaged for profit, and decline to permit them to be organized for profit. The great charitable hospitals that have been established throughout the State are of as much benefit to the wealthy patient who pays well for his accommodations as to the poor man to whom their services are pure charity.

Furthermore, the reasons advanced against the incorporation of companies for the purpose of practicing medicine, dentistry or law, have no application to such a corporation. It would be engaged in the conduct of a business, not in the practice of a profession. It would not be required to possess professional knowledge or skill, or to be examined, registered or qualified, nor would it enter into contracts for the rendering of professional services. Its business would be similar to that of a hotel company or a corporation organized for the purpose of owning and leasing real estate. It would differ from them only in the nature and character of the property dealt with.

In my opinion the statement of corporate purpose, when amended, should be approved.

I therefore advise you (1) That a corporation may not be formed for the practice of medicine, but (2) a corporation may be formed for the purpose of owning, constructing, maintaining and leasing buildings,

furnishings, equipment, apparatus and facilities which are adapted to use as a medical and surgical clinic, laboratory and hospital.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

IN RE DEEDS.

Seal—Form of—Necessity for—Certifying to Execution of Paper.

A seal is essential to the validity of a deed, so that a deed signed in 1876, without any seal opposite the name of the grantor and his wife, was not executed in accordance with the laws of Pennsylvania in force at that time.

Office of the Attorney General,
Harrisburg, Pa., May 24, 1921.

Mr. G. H. Hassler, Chief, Commission and Bond Bureau, Secretary of Commonwealth's Office, Harrisburg, Pa.

Sir: Your letter of the 20th of April, 1921, asking for an opinion from this Department as to whether or not a deed signed by Benjamin Herr and Elizabeth Herr on the 23d day of March, 1876, without any seal opposite their names, was executed in accordance with the law of Pennsylvania at that time, has been referred to me.

In reply to your letter would say that a long line of decisions establishes the fact that a seal of some kind is essential to the validity of a deed.

2 Black. Comm. 227, 312.
4 Kent's Comm. 450.

So long as there remains a distinction in the forms of action, it will be necessary to maintain a broad line of difference between that which is a sealed instrument, and that which is not. The Courts have gone very far, in Pennsylvania, to give a flourish with a pen the character of a seal, but, to go further, would be to lose sight of what was or was not a seal.

The Supreme Court in the case of *Hacker's Appeal, 121 Pa. 192*, said:

> "A seal is not necessarily of any particular form or figure; when not of wax is usually made in the form of a scroll, but the letters 'L. S.' or the word 'Seal,' inclosed in brackets or in some other design, are in frequent use.

It may, however, consist of the outline without any inclosure; it may have a dark ground or a light one; it may be in the form of a circle, an ellipse, or a scroll, or it may be irregular in form; it may be a simple dash or flourish of the pen: Long *v.* Ramsay, 1 S. & R. 72. Its precise form cannot be defined; that, in each case, will depend wholly upon the taste or fancy of the person who makes it.

"The mere fact that in the testimonium clause the testatrix states that she has affixed her hand and seal, is insufficient to constitute the instrument a writing under seal, if in fact there be no seal; but if there be any mark or impression which might reasonably be taken for a seal, this statement of the testatrix will certainly afford the strongest evidence that the mark was so intended. In Taylor *v.* Glaser, supra, there was nothing but a flourish of the pen below the signature, and it was offered to be shown that this accompanied Glaser's ordinary signature. There was nothing on the face of the paper, which, in the opinion of the court, the obligor could have intended for a seal. To the same effect is the case of Duncan *v.* Duncan, 1 W. 322, where a ribbon had been inserted, manifestly as a preliminary to the act of sealing, which act was never performed."

In the papers submitted by you there is nothing to show that there was any kind of a mark attached to the signatures of the parties who executed this deed to show that they intended to seal the same. It was, therefore, not executed by the parties in accordance with the laws in force on March 23, 1876.

You are, therefore, specifically advised that you cannot in this case certify that this deed was executed according to the law of Pennsylvania in force on the date of the deed.

Yours very truly,

WILLIAM I. SWOOPE,

Deputy Attorney General.

JUSTICE OF THE PEACE OF NORTH CLAIRTON BOROUGH.

Municipalities—Cities of the third class—Consolidation of boroughs—Justice of the Peace—Public officers—Time—Acts of June 25, 1913, and May 27, 1919.

1. Under the Act of June 25, 1913, P. L. 568, as amended by the Act of May 27, 1919, P. L. 310, where a city is formed by the consolidation of boroughs and townships, the constituent municipalities end their existence at midnight on the 31st day of December, following the general municipal election thereafter, and the new city thereupon begins to exist.

2. If a term of a justice of the peace for one of such boroughs ended on Dec. 31st at midnight, his election for the borough at the previous municipal election does not entitle him to a commission for the six years from Dec. 31st at midnight.

3. In such case, it cannot be claimed that the new city did not come into existence until the councils met at 10 o'clock A. M. on Jan. 1st, and that, therefore, the justice was actually in office before the borough ended its existence, and was entitled to hold over.

Office of the Attorney General,
Harrisburg, Pa., June 7, 1922.

Honorable Bernard J. Myers, Secretary of the Commonwealth, Harrisburg, Pa.

Dear Sir: The Attorney General's Department has received your request for an opinion on the question of issuing a commission to S. Arthur Carrabotta as a Justice of the Peace for North Clairton Borough.

As we understand the facts, Clairton Borough, North Clairton Borough and Wilson Borough were chartered as a third class city by letters patent dated September 14, 1921.

The law requires that new officers shall be elected at the next municipal election following the creation of a third class city, and it provides further that persons holding the office of Justice of the Peace in any municipalities which have joined to make up the new city shall hold office until the expiration of their respective terms. In the case before us there were two Justices of the Peace in Clairton Borough whose terms of office extended for six years from the first Monday of January, 1920; there was one Justice in Wilson Borough whose term of office extended six years from the first Monday of January, 1918, and one whose term of office extended six years from the first Monday of January, 1920. These men continue to hold office and no question has arisen concerning them. In North Clairton Borough, however, both Justices held office for a term of six years from the first Monday of January, 1916, which term expired at the last midnight preceding the first Monday of January, 1922. At the municipal election held in the Fall of 1921 the County Commissioners certified two vacancies in the office of Justice of the Peace for North Clairton Borough, and consequently the names were placed upon the ballot and S. Arthur Carrabotta duly returned as elected to the office of Justice of the Peace. The return board declared

S. Arthur Carrabotta elected Justice of the Peace for the City of Clairton, which was obviously an error as the City of Clairton was not entitled to the election of any Justice of the Peace. This was later corrected and an effort has been made to secure a commission for Mr. Carrabotta from the Secretary of the Commonwealth as a Justice of the Peace for North Clairton Borough.

The real question, therefore, apparently is whether or not North Clairton Borough existed for any period of time during which Mr. Carrabotta was entitled to act as a Justice of the Peace therein. If it did, Mr. Carrabotta would continue to act for the six year term for which he was elected. The law affecting the change from separate boroughs or townships to third class cities provides in part as follows:

> "All of the property and estates whatsoever, real and personal, of the towns, townships or boroughs, which shall have thus become a city of the third class, are hereby severally and respectively vested in the corporation or body politic of said city, by the name, style and title given thereto as aforesaid, and for the use and benefit of the citizens thereof forever; and the charters of the said towns, townships or boroughs shall continue in full force and operation, and all officers under the same shall hold their respective offices until the first Monday of January following the general municipal election next succeeding the issuing of the letters patent to the said city, at which time the officers of the said city chosen at the preceding municipal election shall enter upon their respective terms of service, and the city government shall be duly organized under this act. * * *"
> *1913, P. L. 568, Art. I, Sec. 3; Am. 1919, P. L. 310.*

If North Clairton Borough actually ceased to exist at 12 o'clock midnight December 31, 1921, which was coincident with the beginning of the right of Mr. Carrabotta to serve as a Justice of the Peace, then it would seem that he never had, even for a moment, actual title to the office, and if such is the case, of course he would not be entitled to serve the full six year term. It is urged by Mr. Carrabotta that the City of Clairton did not come into existence until 10 o'clock a. m. January 1, 1922. If such is the case, it may be argued that North Clairton Borough continued to exist until that time and that the claimant here was entitled to act as a Justice of the Peace therein from 12 o'clock midnight of December 31, 1921, to 10 o'clock a.m. January 1, 1922. We cannot agree with the claimant's contention in this matter.

The actual time of the organization of the councils could not determine the actual time of the creation of a city of the third class. If such were the case and it became necessary for some reason to adjourn the organization meeting, then the city could not come into existence until the time of the actual organization of council. When the law says that

the old officers shall hold their respective offices until the first Monday of January it surely did not contemplate that there would be an interregnum between midnight and the time of organization of councils during which no responsible government would exist.

Where by general law or by express statute itself, if it is to take effect upon a fixed future time it will take effect from the first moment of the day named. And so, in this case, we are of the opinion that the City of Clairton began its existence at the first moment of the first Monday of January, 1922. Certainly it began at the same time the title of former officers ended. It is a familiar principle that the law does not regard fractions of a day and, therefore, where a term extends to January first and a new situation begins January first, the law would not recognize any intervening period.

We have come to this conclusion with reluctance as we understand that Mr. Carrabotta has gone to considerable expense in equipping an office, as well as expense of time and money in securing the election. We are unable to see, however, how we can come to any other conclusion under the law.

We, therefore, advise that in our opinion, it would not be legal to issue a commission to S. Arthur Carrabotta as Justice of the Peace for North Clairton Borough.

Very truly yours,

STERLING G. McNEES,
Deputy Attorney General.

REVIVAL OF CHARTERS.

Corporations of the second class—Revival of charters—Act of June 25, 1895.

1. A corporation of the second class chartered after the Act of June 25, 1895, P. L. 310, whose charter has expired, may have its charter revived upon complying with the provisions of that act.

2. The act is remedial, and applies to all cases where the remedy is needed, unless definitely restricted.

Office of the Attorney General,
Harrisburg, Pa., September 14, 1921.

Honorable Bernard J. Myers, Secretary of the Commonwealth, Harrisburg, Pa.

Sir: The Attorney General's Department is in receipt of your letter inquiring as to whether or not a corporation chartered after the Act of June 25, 1895, P. L. 310, whose charter has since expired, may have said charter revived or renewed under the provisions of said Act.

The facts in the case before us are that a corporation duly chartered in 1904 for a term of three years, and which term expired in 1907, has now petitioned for a revival of such charter.

The question turns upon the interpretation of Section 2 of the Act of June 25, 1895, P. L. 310. The title of said Act and Section 2 thereof are as follows:

> "A further supplement to 'An act to provide for the incorporation and regulation of certain corporations,' approved April twenty-ninth, one thousand eight hundred and seventy-four."
>
> "Section 2. That the charters of all manufacturing corporations granted in accordance with the provisions of the present Constitution of this Commonwealth, and the act of General Assembly, 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 the charters of all manufacturing corporations that have accepted the provisions of the said Constitution and act of Assembly, which charters were limited in their duration by the articles of association or by the act of Assembly under which they were granted, and have now expired or shall hereafter expire, are hereby extended for a period of twenty-five years from the date of the expiration of said charters: Provided, That a bona fide organization has taken place and business has been commenced in good faith within a period of two years from the date of the granting of said charters: Provided further, That manufacturing concerns availing themselves of the provisions of this act shall first pay into the Treasury of this Commonwealth the fee and bonus upon their capital stock now fixed by law for the renewal or extension of a corporate charter: And provided further, That upon the payment of said fees and bonus and the production to the Secretary of the Commonwealth of evidence that the terms of this act have been complied with, letters patent shall issue to said manufacturing corporation."

The Act of April 29, 1874, which is supplemented by the Act of June 25, 1895, is designated by authority of the subsequent Act of June 13, 1883, P. L. 122, Section 7, as "The Corporation Act of 1874," and establishes a complete system or code for the regulation of all corporations falling within the classes named therein. *St. Luke's Church, 17 Phila. 261 (1884).*

The Act of 1874 made no provision under which the expired charter of a corporation could be renewed. The supplement of 1895 was passed to provide a means of reviving charters of corporations which "have now expired or may hereafter expire." Does this Act apply to corporations created after its passage as well as those created before that time? The Act is remedial in nature, and should apply to all cases where the remedy

is needed unless definitely restricted: *Pocono Spring Water Co. vs. American Ice Co., 214 Pa. 640 (1906)*; *Umholtz License, 191 Pa. 177*; *Clay vs. McCreanor, 9 Pa. Super. Ct. 433*; *Seminary vs. Bethlehem, 153 Pa. 583.*

The only suggested restriction in this case is the use of the word "granted" in line two, Section 2, of the Act. Does the statement "that the charters of all manufacturing corporations granted in accordance with the provisions of the present Constitution," etc., refer only to charters granted and in existence at the time of the passage of the Act? We are of the opinion that it does not, and that it is not a strained construction to say that it also includes corporations created at any time after the passage of the Act of 1895: *Independent School District, 19 Pa. C. C. 452*; *Mutual Life Ins. Co. vs. Talbot, 113 Ind. 373*; *Black Creek Improvement Co. vs. The Commonwealth, 95 Pa. 450*; *Lehigh Bridge Co. vs. Lehigh Coal & Navigation Co., 4 Rawle 23.*

We are of the opinion, therefore, and so advise you, that you may revive the charter of a corporation issued subsequent to 1895 and which has since expired, provided said corporation complies with all the other requirements of the Act.

Very truly yours,

STERLING G. McNEES,
Deputy Attorney General.

OPINION TO THE SECRETARY OF THE COMMONWEALTH.

For the Year 1922.

IN RE STATE AND FEDERAL OFFICES.

State Senator—Prohibition Director—Resignation—Recall of Same—Article II, Section 6, of the Pennsylvania Constitution.

A member of the senate of Pennsylvania is prohibited by Section 6 of Article II of the Constitution from holding any office under the United States, so that when a state senator accepted the appointment of "Federal Prohibiton Director of the State of Pennsylvania" and then sent his resignation to the Lieutenant Governor, during a recess of the senate, this resignation could not be recalled later when the senator resigned his Federal office, even if the resignation had not been accepted. This vacancy could be filled only by an election.

Office of the Attorney General,
Harrisburg, Pa., March 9, 1922.

Honorable Bernard J. Myers, Secretary of the Commonwealth, Harrisburg, Pa.

Sir: I have your letter enclosing a letter received by you from the Lieutenant Governor informing you of the facts bearing upon the question whether there is a vacancy in the office of Senator from the Twenty-seventh District. You desire to be advised whether the facts thus stated create a vacancy?

It appears that the Lieutenant Governor received from Senator William C. McConnell of said District a written resignation effective as of the fifteenth of July, 1921, which resignation stated that it was tendered "in view of my appointment as Federal Prohibition Director of the State of Pennsylvania." It appears further that on the twenty-seventh of January, 1922, the Lieutenant Governor received from Senator McConnell a second communication requesting the return of the said resignation for the reason that he was no longer holding the said office under the United States. He held the office from July, 1921, to January, 1922.

I do not think any difficult question is presented. Probably the resignation was not essential to the vacation of the office of Senator, but, in any event, it was a proper thing, making clear the Senator's attitude and giving official notice to the Lieutenant Governor, who under the Constitution is charged with the duty of calling special elections to fill vacancies in the Senate.

Section 6 of Article II of the Constitution of Pennsylvania provides that no person holding any office under the United States shall be at the same time a member of the Senate or House. No provision of the Constitution or Statutes of the Commonwealth could prevent the Senator from accepting and holding office under the government of the United States, but when he assumed that office it would seem clear that his membership in the Senate was terminated by operation of the Constitution. Otherwise, a situation would have existed which under the Constitution cannot exist—an officer of the United States holding membership in the Senate of Pennsylvania. The Senator's resignation indicated his recognition of the impossibility of such a situation.

It follows that the letter sent by Senator McConnell to the Lieutenant Governor on January 27, requesting the return of the resignation, can in no way affect the situation. Once the Senatorship is vacated it requires no reasoning to show that it cannot be resumed. The Constitution provides that vacancies shall be filled by election and they can be filled in no other way.

Of course under the Constitution the Senate is the sole judge of the qualifications of its members, but there is no way of obtaining its judgment at this time. Consequently, in deciding the present question we must be governed by our own judgment, and, in my opinion, the existence of the vacancy is quite free from doubt.

You are advised, therefore, that under the facts as stated there is a vacancy in the office of Senator from the Twenty-seventh District; that the Lieutenant Governor should issue a writ for a special election, and that in compliance therewith you should take the necessary measures to provide for the nomination and election.

Very truly yours,

GEO. E. ALTER,
Attorney General.

OPINIONS TO THE AUDITOR GENERAL.

OPINIONS TO THE AUDITOR GENERAL.

For the Year 1921.

STATE HOSPITALS FOR THE INSANE.

Quarterly reports to be made to the Auditor General relative to indigent insane—Act of July 18, 1919 (Appropriation Acts No. 44A).

Quarterly reports to the Auditor General relative to indigent insane in State hospitals for the insane must, under the Act of July 18, 1919, be made by the directors or managers of the several hospitals for the insane in strict accordance with the act, and the power or duty to make such reports cannot be delegated.

Office of the Attorney General,
Harrisburg, Pa., March 8, 1921.

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

Sir: This Department is in receipt of your communication of the 1st inst. asking to be advised whether the quarterly report relative to the indigent insane in hospitals for the insane, as required by Act No. 44-A, approved July 18, 1919, Appropriation Acts, page 95, can lawfully be made by officers other than the directors or managers of such institutions.

The aforesaid Act, making an appropriation for the care, treatment, removal and maintenance of the indigent insane, provides, inter alia, as follows:

> "The said appropriation shall be paid on the warrant of the Auditor General on the basis of settlement by that officer and the State Treasurer; but no warrant shall be drawn or settlement made until the directors or managers of the several hospitals and asylums for the insane shall have made, on oath or affirmation, to the Auditor General, a quarterly report, setting forth the actual number of indigent persons received and maintained in said hospitals and asylums for the insane, respectively, during the quarter for which the report is made, with the dates of their admission, and discharge or death, respectively, and the actual time during which each of said indigent insane persons was treated, maintained, and cared for during said quarter."

The term "directors or managers," as used in this provision, means the members of the board of directors, managers or trustees of a hospital,

and the question submitted by you is whether these directors or managers can delegate the power and duty to make the aforesaid report to some other officer connected with the institution. The general rule is that a public officer cannot delegate to another the performance of a duty where in the discharge of such duty an exercise of discretion is required, unless the power to delegate is expressly conferred, and that the performance of an act, although only ministerial, cannot be delegated where "the law expressly requires the act to be performed by the officer in person." *Mechem's Public Offices and Officers, 567-568.*

In the case here under consideration there is an express statutory requirement that the prescribed quarterly report shall be made on oath or affirmation by "the directors or managers" of the several hospitals for the insane receiving and caring for the indigent insane. The direction that it be so made is mandatory and must be construed as excluding any right to make it in any other way. It is the evident intent and purpose of this requirement to throw around the appropriation the safeguard of a report coming directly from those charged with the management of these institutions and to whom the State can look as directly responsible for the accuracy and fullness of the statements to be embraced in the report. Inasmuch as this report is only to be made quarterly the duty imposed by the act is not unduly burdensome or vexatious. I understand that this ruling is in accord with the practice heretofore prevailing in your Department in this matter.

In accordance with the foregoing, you are advised that the quarterly report required pursuant to the above quoted provision of said Act must be made by the directors or managers of a hospital or asylum in strict conformity with said provision and that the power or duty to make the same cannot be delegated by the board of directors, managers or trustees to some other officer.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

BIENNIAL REPORT OF AUDITOR GENERAL.

Report of Auditor General—To whom made and period covered thereby—Acts of March 30, 1911, P. L. 145, Sec. 46, and April 18, 1919, P. L. 89, Secs. 1 and 2.

The annual reports of the Auditor General formerly made to the Legislature have been abolished and should now be made biennially to the Governor. Such reports should cover the two year period ending May 31 of each odd-numbered year.

Office of the Attorney General,
Harrisburg, Pa., June 8, 1921.

Honorable Samuel S. Lewis, Auditor General, Harrisburg, Pa.

Sir: There has been received at this Department your request for an opinion whether, under the provisions of the Act of 1919, P. L. 89, requiring the report of your Department to be made to the Governor not later than the first day of June of each odd-numbered year, said report shall cover the two-year period ending May 31, 1921, or the two-year period ending November 30, 1920.

Section 46 of the Act of March 30, 1811, P. L. 145, provides that the Auditor General shall make a report of the finances of the Commonwealth to the Legislature on the fourth Monday in December annually for the preceding year ending on the last day of November.

Section 1 of the Act approved April 18, 1919, P. L. 89, reads as follows:

> "That all reports required to be made annually under existing law, shall hereafter be made biennially only. All such reports shall be made to the Governor, not later than the first day of June of each odd-numbered year, and shall cover the report of the department, board, bureau, division, or commission, for the two years immediately preceding. * * *"

Section 2 provides:

> "That all acts and parts of acts inconsistent with this act are hereby repealed."

It is, therefore, clear that the Legislature intended to abolish the annual reports to be made by the Auditor General under the provisions of the Act of 1811 above quoted, and to require that such reports should be made biennially and to the Governor instead of to the Legislature.

The Act of 1919 provides that the reports be made for the two years immediately preceding the first day of June. As the first day of June is the beginning of the fiscal year of the Commonwealth, in my opinion, the Legislature intended this report to include the two years immediately preceding, or the two-year period ending May thirty-first. Section 2 of

the Act of 1919 repealed all acts inconsistent with the provisions thereof. The provision requiring the Auditor General's report to cover the period ending the last day of November, in the Act of 1811 is, therefore, repealed by the Act of 1919.

You are, therefore, advised that your report should cover the two-year period ending May 31, 1921.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General.

IN RE BAILMENT LEASES.

Taxation—"Dealer"—Contracts—Future Payments—Mercantile Tax—Act of May 2, 1899, P. L. 184.

One engaged in the business of disposing of personal property under bailment contracts is a dealer within the meaning of the Act of May 2, 1899, P. L. 184, and as such is liable to pay a mercantile license tax to be computed upon the total amount of the payments which he is entitled to receive under all contracts entered into during the year, including cash payments and payments to be made in the future.

Office of the Attorney General,
Harrisburg, Pa., July 28, 1921.

Mr. C. W. Myers, Chief of County Bureau, Auditor General's Department, Harrisburg, Pa.

Sir: I am in receipt of your inquiry stating the following facts:

A dealer handling personal property is engaged in the business of disposing of the same on bailment contracts. These contracts, of which you submit copies, provide that possession of the property shall be delivered to the bailee upon the payment of an initial instalment of rent; that he shall have the possession and use thereof during a stated period upon the payment of further instalments of rent; that at the expiration of such period, if he shall have paid his rent, he shall have the right to purchase the property for a consideration named; and that in such event the amounts previously paid by him as rent shall be credited upon the purchase price. Under these contracts the bailee is required to pay all of the instalments of rent. He has no option to return the property during the term of the lease and thereby avoid liability for further instalments of rent. The bailor, on the other hand, upon the completion of the term, has no option except to deliver title to the goods and give full credit upon the purchase price for all rent paid. Thus, upon the execution of the contract, the bailor becomes entitled to receive the

full purchase price in stipulated instalments, and the bailee acquires the right to have full title to the property as soon as all payments have been made. The only feature which distinguishes the transaction from an ordinary sale on credit is that title is retained by the bailor until the full purchase price is paid.

Contracts of this character are not entirely new. Chief Justice Gibson discussed them in 1831 in the case of *Myers vs. Harvey, 2 P. & W. 478*. However, the regular conduct of business under such forms is more modern and the increasing volume of business so conducted lends considerable importance to your inquiry.

You ask (1) whether such bailor is a "dealer" within the meaning of the Act of May 2, 1899, P. L. 184, which imposes a mercantile license tax, and (2) if he be a dealer, upon what basis should this tax be computed?

The Act of 1899 imposes a tax upon each "vender of or dealer in goods, wares and merchandise." It is a tax on the *business* of vending and dealing. *Knisely vs. Cotterell, 196 Pa. 614 (1900)*. By the use of both of the words "vender" and "dealer" the Legislature evidenced an intent to impose a tax upon all persons engaged in conducting such business as falls within the ordinary meaning of either. A dealer is one who engages in the business of buying to sell again. *Norris Bros. vs. Com., 27 Pa, 494 (1856), Com. vs. Brinton, 14 Pa. C. C. 460 (1896)*, and *Com. vs. Davis, 11 Dist. Rep. 427 (1902)*. In the case before us the "bailor" is engaged in the business of buying merchandise for the purpose of selling again. When he enters into a contract to "lease" property, his purpose and intention is to secure by means of the "rent" his full purchase price, and the bailee's purpose is to acquire title to the property. The contract which is executed secures to each the legal right to have that which moved him to enter into it, and, when completed, results in a sale. The fact that the complete title is split up into parts, the right of possession being delivered at the making of the contract, and the right of property being transferred at the end of the so-called "rental" period, does not exclude the "bailor" from the scope of the Act.

"The contract may be regarded as dual; (1) a hiring or bailment, and (2) a contract of sale." *Kelley Springfield Road Roller Co. vs. Schlimme, 220 Pa. 413*. In consideration for the bailee entering into the contract of bailment out of which the bailor will realize his selling price, the bailor enters into an executory contract of sale, under which the bailee will secure title to the property. The ultimate purpose and result is a sale.

"The law regards the substance and not the form, and this is especially true in the construction and administration of taxing statutes." *Com. vs. Westinghouse Air-Brake Co., 251 Pa. 12, Com. vs. Pittsburgh, Ft. Wayne & Chicago Ry. Co., 74 Pa. 83, Com. vs. Erie & Pittsburgh R. R.*

Co., 74 Pa. 94, Western Union Telegraph Co. vs. State of Kansas, 216 U. S. 1. Looking through the form of these contracts to the substance it is clear that the bailor is not engaged in the business of renting property, but is engaged in selling it.

I am, therefore, of the opinion that one conducting such a business is a "dealer" within the meaning of the Act of May 2, 1899, P. L. 184, and as such is liable to pay a mercantile license tax.

Upon what basis shall the tax be computed?

Section 4 of the Act provides that blanks shall be prepared by the Auditor General containing a request:

> "For such information as may be necessary in arriving at *the actual amount of business transacted* by the vender of or dealer in goods, wares and merchandise * * *.
> The *whole volume of business*, including cash receipts and merchandise sold on credit * * * shall be the basis upon which the license is to be rated."

The language employed by the Legislature is significant. The basis of computation is not the "whole volume of sales," "gross sales," or "gross receipts," but the "whole volume of business, including cash receipts and merchandise sold on credit." In the conduct of the business concerning which you inquire the total amount of cash and all the payments of rent to be made in the future are included in the "whole volume of business." This is the amount which the dealer is entitled to receive under his contracts, and is the basis upon which the tax is to be computed.

I, therefore, specifically advise you:

(1) That a man engaged in the business of disposing of personal property under bailment contracts such as you describe is a "dealer" within the meaning of the Act of May 2, 1899, P. L. 184, and

(2) That his license fee should be computed upon the total amount of the payments which he is entitled to receive under all contracts entered into during the year, including cash payments and payments to be made in futuro.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General

IN RE TRANSFER INHERITANCE TAX IN ESTATE OF WILLIAM K. VANDERBILT, DECEASED.

Act of June 20, 1919, P. L. 521.

William K. Vanderbilt, of the State of New York, died in 1920. In 1895, a marriage settlement was entered into between the Duke of Marlborough, of Great Britain, of the first part, William K. Vanderbilt, of the second part, Consuelo Vanderbilt, his daughter, of the third part, and two Trustees named therein, of the fourth part. It provided that in consideration of a marriage to be solemnized between the Duke or Marlborough and Consuelo Vanderbilt, the sum of $2,500,000, in shares of the capital stock of the Beech Creek Railway Company (a Pennsylvania Corporation,) should be transferred, on the execution of the settlement, to the Trustees, they to pay the interest thereof to the Duke of Marlborough during the joint lives of himself and Consuelo Vanderbilt, and thereafter over to other uses. By his Will, probated fifteen years later, he bequeathed to the two Trustees, under the marriage settlement, or the survivor, the said sum of $2,500,000, with interest thereon from the day of his death, "free and clear of any and all death duties, succession tax or taxes or other charges or deductions whatsoever."

The nuptial agreement made in 1895, was made for what the law deems a good, valuable and adequate consideration. It was not testamentary in character or purpose, and while payment of the principal sum was postponed until death, the benefits were not postponed.

Under the provisions of the Act of 1919, the sum of $2,500,000, which William K. Vanderbilt covenanted to be paid by his executors to trustees named in the nuptial agreement, would not have been taxable had he been a resident of Pennsylvania, and, therefore, should not be taxable in computing the amount of tax due from his estate upon the transfer of his property in Pennsylvania.

Office of the Attorney General,
Harrisburg, Pa., August 10, 1921.

Honorable J. Lord Rigby, Revenue Deputy, Auditor General's Department, Harrisburg, Pa.

Sir: This Department is in receipt of your recent communication relative to the transfer tax upon the Estate of William K. Vanderbilt, deceased. The facts, as stated in your letter and the accompanying enclosures, are as follows:

The decedent was a resident of the State of New York at the time of his death on July 22, 1920. His will, dated March 14, 1919, was admitted to probate in Suffolk County, New York, on September 2, 1920. That will contained, inter alia, the following item:

> "Seventh: For the purpose of discharging the obligation resting upon me under the marriage settlement made on behalf of my daughter, Consuelo, on the sixth day of November, One thousand, eight hundred and ninety-five, I give and bequeath to the Trustees under said marriage

> settlement or the survivor of them, or the executors or administrators of said survivor, or his assigns, or other the Trustees or Trustee for the time being under said marriage settlement, the sum of Two million, five hundred thousand dollars ($2,500,000), with interest thereon at rate of four per cent. per annum from the day of my death, free and clear of any and all death duties, succession tax or taxes or other charges or deductions whatsoever."

On November 6, 1895, a marriage settlement had been entered into between The Most Noble Charles Richard John, Duke of Marlborough, of Blenheim Palace, in the County of Oxford, of the first part, William Kissam Vanderbilt, of Oakdale, in the County of Suffolk and State of New York, of the second part, Consuelo Vanderbilt, of the City of New York, daughter of William Kissam Vanderbilt, of the third part, and William Kissam Vanderbilt and The Honorable Ivor Churchill Guest, of Arlington Street, in the County of Middlesex, Trustees, of the fourth part. It provided that in consideration of a marriage to be solemnized between the Duke of Marlborough and Consuelo Vanderbilt the sum of $2,500,000 in 50,000 shares of the capital stock of the Beech Creek Railway Company was transferred at the execution of the settlement to the Trustees to pay the interest thereof to the Duke of Marlborough during the joint lives of himself and Consuelo Vanderbilt, and thereafter over to other uses.

It further provided that William K. Vanderbilt should pay to the Trustees during the joint lives of himself and his daughter Consuelo, the annual sum of $100,000, beginning from the date of the marriage, upon trust, to pay the same to Consuelo Vanderbilt during her life for her separate use, and in addition it contained the following provision:

> "And the said William Kissam Vanderbilt hereby further covenants with the said Trustees their executors administrators and assigns that if the said marriage be solemnized the executors or administrators of the said William Kissam Vanderbilt shall within 12 calendar months after his decease pay unto the said Trustees or the survivor of them or the executors or administrators of such survivor or his assigns or other the Trustees or Trustee for the time being of these presents the sum of $2,500,000 together with interest thereon at the rate of 4 per centum per annum from the day of the death of him the said William Kissam Vanderbilt."

The additional sum of $2,500,000 thus agreed to be paid upon the death of William K. Vanderbilt was to be held for the sole and separate use of Consuelo Vanderbilt during her life, and thereafter over to other uses specified in the agreement.

William K. Vanderbilt, at the time of his death, owned certain shares of stock of Pennsylvania corporations and other property, the transfer of which is taxable in this State, and your inquiry is whether, in com-

puting the amount of the tax due to the Commonwealth of Pennsylvania under the Act of June 20, 1919, P. L. 521, the sum of $2,500,000, which, under the marriage settlement was to be paid to Trustees upon his death, and which he by his will has directed his executors to pay to them, is taxable.

The method of computing the tax to be paid in the case of a non-resident decedent is provided for by Section 32 of said Act, which is as follows:

> "On the transfer of property in this Commonwealth of a nonresident decedent, if all or any part of the estate of such decedent, wherever situated, shall pass to persons or corporations who would have been taxable under this act if such decedent had been a resident of this Commonwealth, such property located within this Commonwealth shall be subject to a tax, which said tax shall bear the same ratio to the entire tax which the said estate of such decedent would have been subjected to under this act if such nonresident decedent had been a resident of this Commonwealth as such property located in this Commonwealth bears to the entire estate of such nonresident decedent wherever situated: Provided, That nothing in this clause contained shall apply to any specific bequest or devise of property in this Commonwealth."

Under this Section the ratio of the value of property in this State to the value of the entire estate is multiplied by the amount of the entire tax which would be due if the decedent had been a resident, in order to determine the amount of tax due this State. The value of the property in Pennsylvania has been determined under the law by appraisers appointed by the Auditor General. The value of the entire estate has been determined by appraisers in the State of domicile and duly certified to the Auditor General. The remaining element of the fraction is the entire tax which would have been due if the decedent had been a resident of Pennsylvania.

The determination of this factor occasions a consideration of the nature and character of the tax, the terms employed by the Legislature in imposing it, and the legislative intent expressed thereby.

The Act of June 20, 1919, P. L. 521, lays a tax upon the transfer of property from a decedent. It is not a tax upon the property, but an excise, impost or franchise tax upon its transfer. The theory upon which in other jurisdictions taxation of the devolution of estates at the death of their owners is based and its validity upheld is that the right to direct to whom one's property shall go after death and the right to take property by devise are not inherent or natural rights, but are privileges accorded by the State, which may tax and charge for the same. It is the transmission or reception, not the thing transmitted or received, that is taxed. *Plumer vs. Coler, 178 U. S. 115, 44 L. Ed. 998*; *United States vs. Perkins, 163 U. S. 625, 41 L. Ed. 287*; *In re Dow's Estate, 75 N. Y.*

Suppl. 837, affirmed on opinion of the Court below in *64 N. E. 1125*; *Gleason and Otis on Inheritence Taxation, pp. 2-21*; *Ross on Inheritance Taxation, Sec. 4*, and cases therein cited. *Cf. Strode vs. Com. 52 Pa. 181*; *Clymer vs. Com. 52 Pa. 186*; *Cope's Estate, 191 Pa. 1*; and *Finnen's Estate, 196 Pa. 72.*

The theory of the Pennsylvania Act is the same, and its form and phraseology are in a large measure patterned after the statutes which have been in force for years in other States.

The first section of the Act defines four classes of transfers upon which tax is imposed, as follows:

(a) A transfer from a resident decedent by will or by the interstate laws;

(b) A transfer of certain classes of property from a non-resident decedent by will or by the intestate laws;

(c) A transfer from a resident (or of certain classes of property from a non-resident) decedent, if the same is effected by deed, grant, bargain, sale or gift

(1) Made in contemplation of death, or
(2) Intended to take effect in possession or enjoyment after such death;

(d) A transfer from a resident (or of certain classes of property from a non-resident) decedent

(1) Of an estate in expectancy which is contingent or defeasibly transferred by an instrument taking effect after the passage of this Act, or
(2) Pursuant to a power of appointment contained in any instrument taking effect after the passage of this Act.

The first of these four classes is designed to tax the transfer by will or by the intestate laws of all the property of a resident decedent, and the second to tax a transfer of the some character from a non-resident of all of his property which is within the jurisdiction of the taxing power. The third and fourth classes include transfers which, while they may not be made by will or by the intestate laws, are closely similar in character and which are expressly included within the terms of the Act because of such similarity and for the purpose of preventing the easy evasion of the tax levied upon the first two classes.

The second section of the Act fixes the rate of the tax at two per cent. upon the *clear value* of property passing to "direct heirs" and ten per cent. (by Act of May 4, 1921) upon that passing to "collateral heirs." "Clear value" is defined as gross value less "the debts of the decedent and the expenses of administration."

I am of the opinion that the intent of these provisions is to tax all transfers which involve the privilege of transmitting or receiving property by virtue of the intestate laws and the laws governing testamentary dispositions, and to exclude transfers for the payment of debts.

The transfer of title to property from a decedent to those entitled to receive it upon his death may occur in three ways:

(1) To his heirs and next of kin by virtue of the intestate laws, which provide for the distribution of the excess after payment of debts and expenses in cases where he has failed to leave a will;

(2) To his legatees, devisees or donees by virtue of those laws which afford him the privilege of making a testamentary disposition of his property either by will or by an instrument executed during his lifetime which is testamentary in purpose and effect; and

(3) To his creditors by virtue of those laws which make his property a fund for the payment of debts, and provide for the authorization of fiduciaries who take it into possession and distribute it among his creditors in accordance therewith.

Of these several transfers the first two involve the exercise of rights, franchises or privileges both on the part of the decedent and the beneficiaries of his estate, and, in my opinion, they are the transfers contemplated by the Act. A transfer to creditors in payment of a debt can scarcely be deemed to involve the exercise of any privilege, and certainly not such an one as is within the intent of the Act.

Is the transfer of the $2,500,000 in question either a "transfer by will" or by deed, grant, sale or gift made in contemplation of death, or intended to take effect in possession or enjoyment after death so as to make it taxable under paragraph (b) or (c), of Section 1, of the Act of 1919?

The marriage settlement in question was executed by William K. Vanderbilt in 1895. The consideration was the consummation of a proposed marriage between his daughter and the Duke of Marlborough. This marriage was solemnized. Under the law of England and of the State of New York, as well as of this State, a marriage is a good and sufficient consideration for such a contract, and by the consummation of the marriage all of the matters and things agreed to be done by William K. Vanderbilt became valid and binding obligations.

One of these obligations was to pay $100,000 annually to certain trustees for uses set forth in the agreement during the life of William K. Vanderbilt, and complementary to this was the obligation to pay to the trustees for the same uses at his death the sum of $2,500,000. The fact that the payment of this principal sum was to be made at death does not affect the character or validity of that obligation, but merely fixes the time when it shall be performed.

At the time of his death, therefore, the sum of $2,500,000 was a debt due and owing from the estate to the trustees named in the marriage settlement. If the will of the decedent had made no mention of this obligation, and the trustees had presented their claim under the settlement and the same had been paid by the executors no question could be raised as to the liability for tax on the transfer of this item of property.

It would have been a debt paid by the executors as such, and must have been deducted from the appraised value of the entire estate in arriving at the "clear value" upon which to compute the tax. However, the decedent inserted in his will a provision for a legacy of $2,500,000, with interest at four per cent., to be paid to the trustees in discharge of the obligation created by the settlement, and this provision raises the question whether, in spite of the fact that there was an existing debt, a payment made by the executors is a "transfer by will" so as to render it taxable under the statute.

The question has been considered by several of our lower courts in cases involving the collateral inheritance tax laws which imposed a tax upon "all estates, real, personal and mixed * * * passing * * * by will, or under the intestate laws."

In *Quinn's Estate, 13 Phila. 340 (1880)*, Judge Penrose of the Orphan's Court of Philadelphia said:

> "A gift by a testator to a creditor and in satisfaction of his claim, of the precise sum due with interest, falls neither within the letter or spirit of these acts. * * * What is paid to him forms no part of the 'clear value' of the estate, nor can it be said to pass to him under the will, any more than in case of a general testamentary direction to pay debts."

The same view was expressed by the court in *Walter's Estate, 3 Pa. C. C. 447 (1887)*.

The courts of other jurisdictions have also considered the question. In the *Estate of Alfred G. Vanderbilt, 172 N. Y. Suppl. 511, affirmed on opinion of the court below in 123 N. E. 893 (1919)*, the facts were substantially the same as those presented in the case now under consideration. There, and in *Baker's Estate, 82 N. Y. Suppl. 390, affirmed on opinion of the court below in 70 N. E. 1094 (1903)*, it was held that the property received by the beneficiaries did not "pass by will" and was not taxable. In *Gould's Estate, 156 N. Y. 423, 51 N. E. 287 (1898)*, *Kidd's Estate, 188 N. Y. 274, 80 N. E. 924 (1907)*, *State vs. Mollier, 152 Pac. 771, 96 Kans. 514*, *Rogers' Estate, 75 N. Y. Suppl. 837 (1902)* and *Hill vs. Treasurer and Receiver General 227 Mass. 331, 116 N. E. 509 (1917)*, it was held that the property transferred to the beneficiaries passed by will, and was taxable. A careful examination of these cases reveals their distinguishing features and points to the rule to be applied in the present case.

In *Gould's Estate*, the terms of the will liquadated a claim hitherto uncertain in amount and gave to the legatee certain specific property to which he would not have been entitled as a mere creditor. In *Kidd's Estate* and in *State vs. Mollier*, the decedents had not entered into contracts to *pay*, but had each contracted *to make a will*. In *Rogers' Estate*,

the testatrix paid a debt of her own by exercising a power of appointment over an estate against which her creditor would have had no claim in the absence of her will. And in *Hill vs. Treasurer etc.*, the will gave the legatee an election to take from the estate such specific property as she might choose and she elected to do so.

In each of these cases the legacies were given to persons to whom the deceased was obligated, but the obligees received by virtue of the several wills something other than that which each would have received as a creditor. The rule of these cases, and the rule to be applied to the case before us, seems to be, that if the creditor or obligee receives nothing by virtue of the will which he would not have received as a creditor, the transfer is not a transfer by will, within the meaning of the acts, and is not taxable; but if, on the other hand, he receives some right or advantage, acquires something different or takes in a different manner than as a creditor, the transfer is by will and is taxable.

In the present case there was, at the time of the death of William K. Vanderbilt, a valid existing obligation upon him and his estate to pay to the trustees under the marriage settlement a sum certain in money. The provisions of the will added nothing. I am, therefore, of the opinion that the transfer was not a "transfer by will."

Nor was it a transfer by deed, etc., within the meaning of the act. The transfers included within paragraph (c) Section 1 of the Act of 1919 are those which, although not made by will or by the intestate laws, are nevertheless testamentary in character and purpose. *Orvis' Estate, 223 N. Y. 1, 119 N. E. 88 (1918); Baker's Estate, 82 N. Y. Suppl. 390, affirmed 70 N. E. 1094 (1903). Cf. Reish vs. Com., 106 Pa. 521; Seibert's Appeal, 110 Pa. 329; Du Bois' Appeal, 121 Pa. 368; Line's Estate, 155 Pa. 378.*

In *Orvis' Estate, supra*, the Court said:

> "It was intended to tax all transfers which are accomplished by will, the intestate laws of this state, and those made or incepted prior to the death of the transferer in contemplation of or intended to take effect in possession or enjoyment after his death which are in their nature and character instruments or sources of bounty or benefactions and which can be classed as similar in nature and effect with transfers by wills or the intestate laws, because they accomplish a transfer of property, donative in effect, under circumstances which impress on it the characteristics of a disposition made at the time of the transferer's death."

The decedent, in 1895, twenty-five years prior to his death, entered into an agreement to pay $100,000 annually during his life to certain Trustees for specified uses, and to pay through his executors after his death $2,500,000 to the same Trustees, whereby the income to the Trustees might continue undiminished. The agreement was made for

what the law deems to be a good, valuable and adequate consideration, and the benefits of it were not postponed until death. Payment of the principal sum only was postponed. This agreement was not testamentary in character or purpose.

I therefore specifically advise you that the sum of $2,500,000 which William K. Vanderbilt, by agreement made in 1895, convenanted to be paid by his executors to trustees named therein, would not have been taxable under the provisions of the Act of June 20, 1919, P. L. 521 if he had been a resident of Pennsylvania, and should not, therefore, be considered taxable in computing the amount of tax due from his estate upon the transfer of his property in Pennsylvania.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

TAXATION.

Payment of tax upon gasoline purchased and used by a municipality, by Pennsylvania State College, by the Western State Hospital for the Insane.

Acts of February 22, 1855, P. L. 46; May 20, 1857, P. L. 617; Act of Congress, July 2, 1862 (U. S. Statutes at L. Vol. 12, 503); April 1, 1863, P. L. 213; April 11, 1866, P. L. 100; February 19, 1867, P. L. —; June 12, 1878, P. L. 178; May 13, 1887, P. L. 115; March 24, 1905, P. L. 50; June 18, 1915, P. L. 1055; July 6, 1917, P. L. 749; July 16, 1919, P. L. 774; and May 20, 1921, P. L. 1021.

Under the provisions of the Act of May 20, 1921, no tax should be collected or paid upon gasoline purchased and used by the State, its municipal subdivisions, agencies or institutions.

The Pennsylvania State College is dependent upon and largely controlled by the State, and is in fact a State Institution, and, therefore, exempt from payment of gasoline tax.

The Western State Hospital for the Insane is a purely public institution, and its property is the property of the Commonwealth, and it is, therefore, exempt from the payment of gasoline tax.

Office of the Attorney General,
Harrisburg, Pa., December 21, 1921.

Honorable Samuel S. Lewis, Auditor General, Harrisburg, Pa.

Sir: This Department is in receipt of your several letters inquiring whether, under the provisions of the Act of May 20, 1921, P. L. 1021, a tax should be paid upon gasoline purchased and used (1) by a municipality or (2) by Pennsylvania State College. We have also received a similar inquiry from the Western State Hospital for the Insane.

1. This Act imposes a tax "on all gasoline sold in this Commonwealth for any purpose whatsoever, except for the purpose of re-sale," and pro-

vides (in Sec. 4) that "The tax imposed by this Act shall be paid by the person, firm, association or corporation purchasing gasoline for his or its own use * * * ". Under these provisions the burden of paying the tax is specifically laid upon the purchaser. If, therefore, the tax be collected upon gasoline sold to a municipality for use in motor vehicles operated by it in the exercise of its public functions, it is paid by the municipality out of public moneys raised by taxation only to be paid out again in taxes to the Commonwealth.

It is settled in this state that while the state may impose a tax upon its own property, upon that of its municipal sub-divisions, and upon that of institutions owned or controlled by it, it is presumed that it did not intend to do so unless there is expressed in the Act imposing the tax a clear intention that such property shall be taxed. The mere use of general words which might include the state or its municipal sub-divisions is not sufficient. The intent must be clearly expressed, and in the absence thereof such property is not taxable. *37 Cyc. 872, Directors of the Poor vs. School Directors 42 Pa. 21; County of Erie vs. City of Erie 113 Pa. 360; Carlisle School District vs. Carlisle Borough 11 Dist. Rep. 294; Pittsburgh vs. School District 204 Pa. 641.* The reasons supporting this rule are: first, that if such property be liable for taxes and the taxes be not paid, a consequent sale of the public property would interfere with the functions of the government, and second, that it is manifestly absurd for the Commonwealth, whose governmental functions are supported by taxation, to collect taxes from a municipal sub-division which in turn must levy taxes in order to make payment, or to collect from an institution which must in turn apply to the Legislature for money with which to pay the tax.

The cases we have cited have been cases involving taxes upon property, and the first reason given in support of the rule would apply only to such taxes. However, the second reason given applies with equal force to a tax such as is imposed upon gasoline by the Act of 1921. Inasmuch as there is nothing in that Act which indicates a legislative intention to impose the tax upon the State, its municipal sub-divisions, agencies or institutions, I am of the opinion that the rule operates to relieve a municipality from payment of that tax.

2. Whether the tax shall be paid by Pennsylvania State College depends upon whether it is a State institution. The determination of this question necessitates an examination of the history of the institution and of its relations to the State.

Pennsylvania State College was incorporated by Act of February 22, 1855, P. L. 46 as the "Farmers' High School of Pennsylvania," which name was changed in 1862 to "The Agricultural College of Pennsylvania" and again in 1874 to "The Pennsylvania State College." The body corporate consists of the Board of Trustees of which the Governor

of the Commonwealth, the Superintendent of Public Instruction and the Secretary of Agriculture are ex officio members, and six of the remaining members are appointed by the Governor and confirmed by the Senate (Act of March 24, 1905, P. L. 50). By Act of May 20, 1857, P. L. 617, admissions to the institution from the several counties were proportioned according to the number of their taxables. By Act of July 2, 1862 (U. S. Statutes at L. Vol. 12, p. 503) entitled "An Act donating lands to the several States and territories which may provide colleges for the benefit of agriculture and the mechanic arts," popularly known as the "Land Grant Act" Congress offered a grant to each of the States of the Union, not then in rebellion, of 30,000 acres of the public lands (or an equivalent amount of land scrip) for each Senator and Representative in Congress, to which such State was entitled, under the census of 1860. Sections 4 and 5 of the Act provided that the lands or land scrip should be sold by the States and invested as

> "* * * a perpetual fund, the capital of which shall remain forever undiminished (except so far as may be provided in section fifth of this act), and the interest of which shall be inviolably appropriated, by each State * * * to the endowment, support, and maintenance of at least one college where the leading object shall be without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.
>
> "And be it further enacted, That the grant of land and land scrip hereby authorized shall be made on the following conditions, to which, as well as to the provisions hereinbefore contained, the previous assent of the several States shall be signified by legislative acts:
>
> "First. If any portion of the fund invested, as provided by the foregoing section, or any portion of the interest thereon, shall, by any action or contingency, be diminished or lost, it shall be replaced by the State to which it belongs, so that the capital of the fund shall remain forever undiminished; and the annual interest shall be regularly applied without diminution to the purposes mentioned in the fourth section of this act, except that a sum, not exceeding ten per centum upon the amount received by any State under the provisions of this act, may be expended for the purchase of lands for sites or experimental farms, whenever authorized by the respective legislatures of said States.
>
> "Second. No portion of said fund, nor the interest thereon, shall be applied, directly or indirectly, under any pretence whatever, to the purchase, erection, preservation, or repair of any building or buildings,

"Third. Any State which may take and claim the benefit of the provisions of this act shall provide, within five years, at least not less than one college, as described in the fourth section of this act, or the grant to such State shall cease; and said State shall be bound to pay the United States the amount received of any lands previously sold, and that the title to purchasers under the State shall be valid.

"Fourth. An annual report shall be made regarding the progress of each college, recording any improvements and experiments made, with their cost and results, and such other matters, including State industrial and economical statistics, as may be supposed useful; one copy of which shall be transmitted by mail free, by each, to all the other colleges which may be endowed under the provisions of this Act, and also one copy to the Secretary of the Interior."

By Act of April 1, 1863, P. L. 213, the Legislature of Pennsylvania provided that the said Act of Congress "is hereby accepted by the State of Pennsylvania, with all its provisions and conditions, and the faith of the State is hereby pledged to carry the same into effect." Thus the State of Pennsylvania entered into a covenant with the United States, to establish and maintain a college of the character described in the Act and, to the extent therein indicated, subject to the control of the Legislature. The Act of 1863 further provided that the Surveyor General, Auditor General and the Governor should receive Pennsylvania's share of the land scrip distributed by the Act of Congress, should sell the same and invest the proceeds, and the annual interest therefrom was appropriated to the Agricultural College of Pennsylvania for its endowment, support and maintenance.

By Act of April 11, 1866, P. L. 100, the Legislature authorized the payment out of the State Treasury of the expenses of selling the land scrip, and authorized the Trustees to borrow on mortgage $80,000 to pay and consolidate the debts of the institution, most of which were incurred for the erection of the original building. By Act of June 12, 1878, P. L. 178, an appropriation was made to pay off the mortgage.

By Act of February 19, 1867, one-tenth part of the proceeds of the land scrip donated by Congress was appropriated for the purchase of lands for experimental farms, and the income from the remainder, for endowment, support and maintenance on condition that the Trustees establish, conduct and maintain three experimental farms, one at the college, one east and one west thereof. The Trustees of the College, by resolution adopted March 13, 1867, accepted the trust. By Act of May 13, 1887, P. L. 115, the Trustees were authorized to sell the eastern and western farms and directed to pay the proceeds into the State Treasury to be invested in bonds the income from which was to be paid to the Trustees for other educational purposes.

Congress has made further donations, each of which, like the original grant of 1862, has been accepted by the Legislature. Although the institution has received substantial donations from private individuals, most of its property has been acquired with funds appropriated by the Federal and State governments, to both of which its Trustees are required to make a report of their operations (Act of Congress of July 2, 1862, supra, and Act of April 1, 1863, P. L. 213). This report is printed at the expense of the State and distributed in the same manner as other public documents.

These facts made it clear that although the Trustees of Pennsylvania State College are a separate and distinct corporate body, they have received and now hold their property as trustees for the people of the Commonwealth. The institution is dependent upon and largely controlled by the State, and is, in fact, as its name indicates, a State institution. Its status is quite different from that of similar institutions which merely receive state aid from time to time. I am of the opinion, that so far as relates to the application of tax laws, its property and its functions are to be deemed purely public in character, and that the rule hereinbefore stated as applying to municipal sub-divisions of the State applies to it and relieves its property and its functions from the operation of such laws. *Auditor General vs. Regents of the University of Michigan, 83 Mich. 467, 47 N. W. 440, 10 L. R. A. 376.*

3. The Western State Hospital for the Insane, was established by the Act of June 18, 1915, P. L. 1055, as amended by the Acts of July 6, 1917, P. L. 749, and July 16, 1919, P. L. 774. An examination of these Acts makes it clear that this hospital is a purely public institution. Its property is the property of the Commonwealth. Its functions are the functions of the Commonwealth. The rule hereinbefore referred to applies to it.

I therefore advise you that under the provisions of the Act of May 20, 1921, P. L. 1021, no tax should be collected or paid upon gasoline purchased and used by a municipality, by Pennsylvania State College, or by the Western State Hospital for the Insane.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

OPINIONS TO THE AUDITOR GENERAL.

For the Year 1922.

CITY HOSPITAL ASSOCIATION.

Corporations of first class—Merger—Transfer of property and franchises to another hospital—Act of April 17, 1876.

A corporation of the first class owning and operating a hospital has no power to sell, assign and transfer all of its property and franchises to another hospital and merge itself therein, without complying with the provisions of the Act of April 17, 1876, P. L. 30.

Office of the Attorney General,
Harrisburg, Pa., January 6, 1922.

Honorable Samuel S. Lewis, Auditor General, Harrisburg, Pa.

Sir: I have received your letter to which are attached certain papers relating to the City Hospital Association of Washington, Pa., which papers I am returning herewith.

The Legislature by Act No. 116-A, approved May 27, 1921, appropriated the sum of $10,000, or so much thereof as may be necessary, to the City Hospital, Washington, Pa., *or its successor.*

It appears from the papers enclosed that on July 12, 1921, at a meeting of the Board of Directors of the City Hospital, Washington, Pa., resolutions were passed providing for the sale, assignment and transfer to the Washington Hospital of all the property, real, personal and mixed, and of all the rights, privileges and franchises of the City Hospital. Pursuant to the resolutions thus passed by the Directors, a meeting of the incorporators of the City Hospital was held, and at this meeting a majority of the incorporators unanimously approved a similar resolution. Subsequently, on November 15, 1921, the officers of the corporation executed a deed conveying the property and franchises of the City Hospital to the Washington Hospital, which deed was on November 23, 1921, recorded in the Recorder's Office of Washington County. The Washington Hospital now requests you to pay to it the appropriation made by Act No. 116-A, and you inquire whether this should be done.

The appropriation is made to the City Hospital "*or its successor.*" The question is, therefore, whether the Washington Hospital is the legal successor of the City Hospital.

Under the provisions of Section 23 of the Act of April 29, 1874, P. L. 73, as amended by Act of April 17, 1876, P. L. 30, Section 5 and Act of June 2, 1915, P. L. 724, Section 1, when a corporation sells, assigns and disposes of or conveys to another in the manner provided for in the Act its franchises and all its property, the vendor corporation ceases to exist, and the vendee corporation becomes its successor. This provision, however, is clearly applicable only to corporations of the second class, i. e., corporations for profit, and I can find no similar provision in the law relating to the sale of the property and franchises of a corporation not for profit. It appears that the only way in which such corporations may merge or consolidate so that the one may become a legal successor to the other, is under the provisions of Section 12 of the Act of April 17, 1876, P. L. 30, which is an amendment of Section 42 of the Corporation Act of 1874. This Section provides, in part, as follows:

> "If any two or more such corporations (corporations not for profit) shall desire to consolidate and merge with each other, or one or more within the other, upon application to the court of common pleas of the county in which the corporation is situated, into which the one or more desire to merge or become consolidated with, the same proceedings shall take place as are required on an application to amend; and upon decree being made by said court, and the same being recorded in said county, upon the terms specified in said application, the said corporations, with all their rights, privileges, franchises, powers and liabilities, shall merge and be consolidated into, by the name, style and title given to the same in such decree, and upon the terms, limitations and with the powers stated and conferred in said application and decree."

It does not appear that the directors and incorporators of the City Hospital have taken the necessary legal steps to constitute the Washington Hospital its legal successor, and accordingly you would not be justified in making payment of the appropriation to the Washington Hospital until this has been done.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

INHERITANCE TAX OF PERSONS PRESUMED TO BE DEAD.

Transfer inheritance tax—Persons presumed to be dead—Deduction for payment within three months—Acts of June 7, 1917, and June 20, 1919.

1. A discount of 5 per cent. will be allowed from the amount of transfer inheritance tax due from the estate of a person presumed to be dead, if such payment be made within three months from the date of the final confirmation of the decree of the Orphans' Court wherein the presumption of death was adjudicated.

2. The Acts of June 7, 1917, P. L. 447, and June 20, 1919, P. L. 521, considered.

Office of the Attorney General,
Harrisburg, Pa., January 12, 1922.

Honorable Samuel S. Lewis, Auditor General, Harrisburg, Pa.

Sir: This Department is in receipt of your communication inquiring what shall be considered to be the date of death within the meaning of Section 38 of the Act of June 20, 1919, P. L. 521, in the case of a presumed decedent.

Section 38 of the Act of 1919 provides, in part, as follows:

> "If the tax is paid within three months after the death of the decedent, a discount of five per centum shall be allowed."

This Act of 1919 provides for the imposition and collection of a transfer inheritance tax upon property passing by will or by the intestate laws from persons dying seized or possessed thereof to others. In the case of one who, by proper legal proceedings in such cases made and provided, has been declared legally dead, his property passes by will or by the intestate laws in substantially the same manner as the property of one known and proved to be actually dead.

Section 6, paragraph (g), of the Fiduciaries Act (June 7, 1917, P. L. 447) provides:

> "The executor or administrator to whom letters have been issued upon the estate of a presumed decedent, as aforesaid, shall administer the estate in the same manner and with the same effect as the same would be administered under existing laws of this Commonwealth, if the presumed decedent were in fact dead. * * *"

It is clear, therefore, that the transfer inheritance tax is collectable from such estates in substantially the same manner as it is from the estates of other decedents.

Section 6 of the Fiduciaries Act provides the procedure to be followed in the case of one presumed to be dead. After presentation of a proper petition to the Orphan's Court and advertisement of notice, a time for

hearing is fixed. At the hearing, if the legal presumption of death is made out, the Court frames its decree and determines therein the date when the presumption of death arose. Notice of this decree is then published and a period of twelve weeks must elapse after the date of the last publication, within which time, if satisfactory evidence be produced that the presumed decedent is still alive, the decree will be vacated. If such evidence is not forthcoming, then the decree theretofore made is confirmed absolutely, and the Court thereupon directs the register of wills to issue letters of administration, etc. to the person entitled thereto.

Under the procedure thus prescribed the final adjudication of the presumed death does not occur until the decree of the Court is confirmed absolutely, and accordingly the date of this confirmation should be considered as the date of death in such cases for the purpose of computing the three-months period within which payment of the transfer inheritance tax will entitle the estate to a discount of five per centum.

I, therefore, specifically advise you that a discount of five per cent. shall be allowed from the amount of transfer inheritance tax due from the estate of a presumed decedent if such payment be made within three months from the date of final confirmation of the decree of the Orphans' Court wherein the presumption of death was adjudicated.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

IN RE DAMAGE CLAIMS.

Public Service Orders—Motor Vehicle License Fund—Railroad or Railway Crossings—Property Taken, Injured or Destroyed—Payment of Claims.

Under the Act of June 17, 1917, P. L. 1025, the Motor Vehicle License fund is available for the payment of land damage claims for property taken, injured or destroyed under an order of the Public Service Commission altering, abolishing or relocating a railroad or railway crossing. Payments for such damages assessed against utilities or municipalities when paid in advance of payment to the property owners should be deposited in the Motor Vehicle License fund and earmarked so as to be exclusively used for said damage claims.

Office of the Attorney General,
Harrisburg, Pa., March 9, 1922.

Honorable Samuel S. Lewis, Auditor General, Harrisburg, Pa.

Sir: I have your inquiry of February 28th based upon the letter of February 27th written to you by Honorable Frank H. Hunter, Counsel, by direction of The Public Service Commission.

The inquiry thus submitted on behalf of the Commission relates to the question of properly handling moneys received from corporations or municipalities by reason of the assessments made against them by The Public Service Commission in connection with the abolition of grade crossings on public highways, so that said payments may be available with promptness and certainty to those who have sustained the damages for which they are intended as compensation. The specific legal questions involved, as stated in the letter of Mr. Hunter, are as follows:

First: Is the Motor Vehicle License Fund available for the payment of land damage claims for property taken, injured or destroyed under an order of The Public Service Commission altering, abolishing or relocating a railroad or railway crossing?

Second: Assuming the availability of said License Fund, and in the event that utilities or municipalities pay the amount assessed against them in advance of the payment by the State to the property owners, can such municipal or utility payments be deposited in the Motor Vehicle License Fund and there so marked so as to be exclusively used for the payment of land damages occasioned as aforesaid?

The first question is answered very simply by the statute. The amounts ascertained as damages are payable primarily by the State, and by Section 12 of the Act of July 17, 1917, P. L. 1025, they are "to be paid out of any funds specifically appropriated for such purpose, or generally appropriated for the improvement of the roads or highways of the Commonwealth." That the Motor Vehicle License Fund is a fund generally appropriated for the improvement of the roads or high-

ways of the Commonwealth is entirely clear. The question, therefore, may be answered in the affirmative without further discussion.

The second question seems equally free from difficulty. If payments of their contributions are made by utilities and municipalities in advance of a payment by the State to the persons suffering damages there is no apparent reason why it is not lawful and proper to anticipate from which fund such payment will be made and deposit the contributions made by the utilities and municipalities in that fund. The provision of the Act that "the amounts so recovered shall be paid into the State Treasury for the improvement of the roads of the Commonwealth" contemplates the payment of the damage claims by the State prior to payment of their contributions by the utilities and municipalities, but where the contributions are paid in prior to payment of the damage claims by the State the very great injustice that would result from such contributions being paid out of the Treasury for any other purpose, thus compelling those whose property has been taken, injured or destroyed to await the replenishing of the fund before receiving their compensation, sorely needed perhaps for the purpose of obtaining new homes to replace those of which they have been deprived, leaves no room for doubt of the propriety of so marking the funds paid in as contributions that they shall not be diverted to other purposes. To permit them to be so diverted, to the prejudice of those who have been deprived of their property, would be manifestly improper and inconsistent with plain moral standards.

I am of opinion, therefore, both questions are to be answered in the affirmative, and you are so advised. The amounts so paid into the Motor Vehicle License Fund should be trusted as available only for the purpose of paying the damage claims for which they are contributed.

As these questions also concern the State Treasurer a copy of this opinion will be sent to him.

Very truly yours,

GEO. E. ALTER,
Attorney General.

IN RE PENNSYLVANIA COMPANY.

Corporations—Bonus on capital stock—Nature—Change of rate—Railroad companies—Exemption—Acts of May 1, 1868, April 18, 1874, April 29, 1874, May 22, 1878, May 3, 1899, and Feb. 9, 1901.

1. A bonus upon capital stock is not a tax, but is a consideration paid to the Commonwealth for a right, privilege or franchise.

2. The Act of May 1, 1868, P. L. 108, was the first general act imposing a bonus upon the grant of corporate franchises and upon increases of capital stock. It was of general application to all corporations except railroad, canal, turnpike, bridge or cemetery companies and companies incorporated for literary, charitable or religious purposes.

3. The Pennsylvania Company, chartered by Special Act of April 7, 1870, P. L. 1025, was given very broad corporate powers, including the right to construct, operate, lease and manage railroads and to buy and sell their stock and bonds. The charter contains no provision as to bonus or exemption from making payment thereof. The company is exclusively engaged in the business of operating and managing, by means of leases and ownership of their stocks and bonds, a number of railroads.

4. In 1868 the term "railroad companies" applied, in both popular and legal acceptation, to companies incorporated for the purpose and exercising the franchise of constructing or owning and operating a railroad. It did not include a company which merely leased or controlled railroads constructed and owned by others.

5. The exemption of railroad companies from liability for payment of bonus under the Act of 1868 was for the purpose of attracting capital to the construction of railroads and in order to encourage such improvements. Exemption of leasing companies was not contemplated, since it would not serve the purpose for which exemption was granted.

6. The Pennsylvania Company is liable for payment of the bonus on its capital stock and increases thereof, and is not exempt as a "railroad company."

7. The rate of bonus to be charged is a legislative question, it is not in the nature of a continuing contract protected against change by the constitutional prohibition of impairing the obligations of contracts.

8. The rate to be paid by any corporation is to be determined from the legislation applicable to that particular class of corporation at the time. The Act of May 1, 1868, P. L. 108, was not repealed by the Acts of April 18, 1874, P. L. 61, April 29, 1874, P. L. 73, May 22, 1878, P. L. 97, and June 15, 1897, P. L. 155. The Act of May 3, 1899, P. L. 189, changed the rate of charge from one-quarter to one-third of one per cent., and applies to increases of capital stock authorized after May 3, 1899. The Act of Feb. 9, 1901, P. L. 3, makes the determination of the amount of bonus to be paid depend upon the actual increase of capital stock as distinguished from the authorized increase, but no change is made in the rate of the charge which remains as fixed by the Act of 1899.

Office of the Attorney General,
Harrisburg, Pa., June 14, 1922.

Honorable Samuel S. Lewis, Auditor General, Harrisburg, Pa.

Sir: The Attorney General is in receipt of your communication requesting an opinion as to the liability of the Pennsylvania Company for bonus upon its original capital stock and subsequent increases thereof. If it were liable for bonus upon all of its capital stock it should have paid to the Commonwealth $249,166.68, of which it has paid only

$93,333.34, leaving a balance due of $155,833.34. The Company, however, contends that it was not liable for the payment of bonus upon any of its capital stock, that the amount already paid was erroneously paid, and that it should receive credit for $93,333.34.

The facts upon which the alleged liability to the Commonwealth is based are set forth in a tabulated statement. (See page 83)

The Pennsylvania Company was incorporated by special Act of April 7, 1870, P. L. 1025. The first section conferred upon the incorporators the right to form and be a body corporate, with the usual incidents of corporate existence, to receive, hold and enjoy property real, personal and mixed and to convey, lease, mortgage or pledge the same for its corporate purposes. This Act gave to the Company an "omnibus" charter. The many and varied powers conferred are too numerous to be here set forth at length. They may be found in Sections 2, 3 and 4 of the Act. The broad scope of these powers is indicated in the opinion of the Court in *Commonwealth vs. International Navigation Company, 104 Pa. 38*, which involved a charge for bonus against a company upon which all of the powers of the Pennsylvania Company had been conferred by Act of May 4, 1871, P. L. 565. Among them is included the power to construct and operate railroads, to buy and sell the stocks and bonds of railroad companies, to lease, manage and operate railroad properties, and to exercise the right of eminent domain for the purpose of erecting or managing any public works.

Section 5 provided, inter alia, that—

> "The capital stock of said company shall consist of two thousand shares of the value of fifty dollars each, being one hundred thousand dollars, and with the privilege of increasing the same, by a vote of the holders of a majority of the stock present at any annual or special meeting, to such an amount as they may from time to time deem needful; * * * and whenever an increase of capital stock is made a certificate thereof, duly executed under the corporate seal of the company, and signed by the president and secretary, shall be filed with the auditor general before the same shall be deemed to be valid."

The Company began business in the year 1871, and since then has been "exclusively engaged in the business of operating and managing, by means of leases and ownership of their stocks and bonds, a number of railroads, some wholly within and others wholly without, and most of them partly within and partly without the State of Pennsylvania, and of extending and improving said railroads * * * and it was not during said period of time, exercising any other franchise." *Commonwealth vs. Pennsylvania Company, 135 Pa. 266, 270.* "The Pennsylvania Company obtained its charter in 1870, completed its organization in 1872, and

BONUS ON CAPITAL STOCK.

Pennsylvania Company, *in account with the Commonwealth of Pennsylvania*

Date of Incorporation or Increase.	*Dr.*	*Capital Stock*	*Bonus*	*Instalments*	*When Due*	*Date of Payment*	*Dr.*
			¼ of 1%				
4/ 7/1870	Original Capital	$ 100,000	$ 125.00			5/ 7/1870	$ 125.00
1/20/1871	Increase in Capital	11,900,000	29,875.00	$14,875.00		7/18/1871	14,875.00
				15,000.00		4/ 1/1872	15,000.00
3/21/1881	" "	8,000,000	20,000.00		4/21/1881		
5/15/1892	" "	1,000,000	2,500.00		6/15/1892		
			⅓ of 1%				
10/31/1901	" " "	19,000,000	63,333.34			11/11/1901	63,333.34
10/31/1902	" " "	40,000,000	133,333.34		11/31/1902		
	TOTALS.....	$80,000,000	$249,166.68				$93,333.34
	TOTAL BONUS DUE.....			$249,166.68			
	TOTAL BONUS PAID.....			93,333.34			
	BALANCE DUE COMMONWEALTH			$155,833.34			

entered at once upon active business as a lessee of lines of transportation built and owned by existing corporations." Williams, J., in same case, at page 276.

The Company has not at any time been "engaged in any other business than that of operating and managing railroads under the provisions of its Act of Incorporation, and at no time during said period did it make any increase of its capital stock except in accordance with the provisions of its Act of Incorporation, relating to the making of increases in capital stock; it did not accept the Constitution of the State of Pennsylvania of 1873; and in particular it did not accept the benefits of, or act under, the statute of February 9, 1901, P. L. 3, and the provisions thereof relating to the increase of capital stock." (Affidavit of the Secretary of the Company.)

Under these facts the Company contends that it is not, and was not, subject to the payment of bonus upon its original capital stock or any of the increases thereof, for the reason that there was no statute passed prior to its incorporation which imposed a bonus upon it, that the Act of Incorporation did not do so, and that it is not subject to the provisions of any of the bonus Acts passed since 1870.

It is well settled that a bonus is not a tax but is the consideration paid to the Commonwealth for a right, privilege or franchise. Therefore a privilege or franchise, which has been granted free of bonus and accepted and exercised by the grantee, cannot, under the State and Federal Constitutions, be subjected to such a charge by a subsequent Act of Assembly, for such an Act would impair the obligation of the contract. *Commonwealth vs. Erie and Western Transportation Co., 107 Pa. 112.* If the Pennsylvania Company acquired its original franchises free of bonus, has acquired no others since its incorporation, and has not subjected itself to the provisions of subsequent bonus Acts, then its contention is sound and must be sustained. Accordingly the first inquiry is whether its original franchises were granted free of bonus.

The first general Act imposing bonus upon the grant of corporate franchises and upon increases of capital stock was the Act of May 1, 1868, P. L. 108, which was in force when the Pennsylvania Company was incorporated, and which provided in Section 15 as follows:

> "That hereafter every company incorporated by or under any general or special law of this commonwealth, except railroad, canal, turnpike, bridge or cemetery companies incorporated for literary, charitable or religious purposes, shall pay to the state treasurer, for the use of the commonwealth, a bonus of one-quarter of one per centum upon the amount of capital stock which said company is authorized to have, in two equal instalments, and a like bonus upon any subsequent increase thereof. The first instalment shall be due and payable upon the

> incorporation of said company, or upon the increase of the capital thereafter; and no company, as aforesaid, shall have or exercise any corporate powers until the first instalment of said bonus is paid; and the governor shall not issue letters patent to any company until he is satisfied that the first instalment of said bonus has been paid to the state treasurer; and no company incorporated by any special act of assembly shall go into operation, or exercise any corporate powers or privileges, nor shall said act be enrolled among the laws of the state until said first instalment of bonus has been paid as aforesaid."

The Act incorporating the Pennsylvania Company (April 7, 1870, P. L. 1025) was silent upon the subject of bonus, but the Act from which I have quoted above imposed a bonus upon all companies incorporated after May 1, 1868, whether under general or special Act, excepting railroad, canal, turnpike, bridge, etc. companies. The first inquiry—whether this Company received its original franchises free of bonus—thus depends upon whether it was a railroad, canal, turnpike or bridge company, within the meaning of those terms as used in the Act of 1868.

If this inquiry were to be determined by merely asking whether this Company possessed the franchises of a railroad company, it would have to be admitted that it was a railroad company, and likewise that it was a canal company, a turnpike company and a bridge company. But it is not of so much consequence what franchises the Company possessed, but what franchises it actually employed in the transaction of its business. *International Navigation Company vs. Commonwealth, 104 Pa. 38.*

If the character of the franchises possessed were a controlling consideration it might indeed be urged that the Pennsylvania Company and eleven others which received similar grants of omnibus powers between 1870 and 1873 were, by the very breadth of the franchises conferred, placed in a class by themselves, so that they could not properly be considered as belonging to any of the specific classes exempted from bonus by the Act of 1868. But in the view which I take of the character of this Company as evidenced by the franchises actually used, it is not necessary to consider this question. I am of the opinion that this Company was not a "railroad company" within the meaning, purpose and intent of the exemption contained in the Act of 1868.

The term "railroad company" does not have a distinct, independent and precise meaning in itself. *Hestonville & R. R. Co. vs. Philadelphia, 89 Pa. 210; Gyger vs. Railroad Co., 136 Pa. 96; Rafferty vs. Central Traction Co. 147 Pa. 579.* When used in a particular statute its meaning must be determined from a consideration of the nature and purpose of the Act, the context in which it is used, and the legal acceptation of the term at the time the statute was enacted.

Both the popular and the legal meanings of this term have widened and extended with the growth of the railroad industry and the develop-

ment of the laws relating to it. The first charter granted by the Legislature of Pennsylvania to a railroad company was the Act of March 31, 1823, P. L. 249, which incorporated "The President, Directors and Company of the Pennsylvania Rail Road Company." Throughout this Act the term is written "rail road," not "railroad," and this is to be observed also in the Act of April 4, 1833, P. L. 144. "To authorize the Governor to incorporate the Philadelphia and Reading rail road company." These companies were incorporated, as turnpike companies were chartered, for the purpose of building and maintaining an artificial road which should be a public highway open to the use of any who might choose to operate their cars upon it. This company never built its road and its charter was repealed. However, during the thirty years, 1826-1856, the Commonwealth, in addition to granting charters to many companies to construct similar roads, undertook itself the building of an extensive system of internal improvements, including railroads, canals and incline planes. As the road was intended to be operated by horse power, and so used for several years, the space between the rails of each track was filled in with broken stone or gravel to form a horse path. All the cars for both passengers and freight were owned by individuals or transportation companies, who furnished their own teams of horses or mules, and paid to the State for the use of the road the rates of toll established by the Canal Commissioners. After steam motive power was provided by the State an additional rate was paid by those transporters who availed themselves of it. (Wilson—"Internal Improvements of Pennsylvania," page 37. Published by Railway World, Philadelphia, 1879.) Interesting questions which arose out of the status of the rail road in these early days are discussed in *Lake Superior & Mississippi R. R. Co. vs. United States, 93 U. S. 442, 23 L. Ed. 965 (1877)*; *Boyle vs. Phila. & Reading R. R. Co., 54 Pa. 310 (1867)*; *Trunick vs. Smith, 63 Pa. 18 (1869)*.

As the industry developed, these companies were first given the power "to prescibe the kinds and descriptions of cars, carriages or wagons, to be used" (see Act of April 4, 1833, P. L. 144, Sec. 20), and then "the exclusive control of the motive powers" (see Acts of April 13, 1846, P. L. 312, Sec. 21, and Feb. 19, 1849, P. L. 79, Sec. 18). Contracts which provided for interchange of traffic between companies owning connecting roads, were authorized. (Acts of March 13, 1847, P. L. 337, March 29, 1859, P. L. 290, and April 11, 1854, P. L. 393.) The power to execute leases of railroads, when given, was limited to leases between companies which already owned connecting roads, and a like limitation was placed upon the power to purchase and hold the stocks and bonds of other roads. (Acts of April 23, 1861, P. L. 410, May 1, 1861, P. L. 485, and April 14, 1868, P. L. 100.)

During the period from 1823 to 1868 two general Acts were passed relating to the organization of railroad companies—the Act of February

19, 1849, P. L. 79, which prescribed the duties and powers of companies theretofore or thereafter incorporated under any special Act of Assembly, and the Act of April 4, 1868, P. L. 62, which provided a general method for "the formation and regulation of railroad corporations." "The object for which the Act of 1868 was passed is unmistakable. It was to vest in voluntary associations of individuals, under definite, uniform and general rules, powers which had previously been given only by special Acts of Incorporation. It applied to railroad companies in the sense in which the term had always been commonly employed. Passenger railways were expressly excluded from its operation. The companies to be chartered under it were made subject to the provisions of the General Railroad Law of 1849 * * * ." Woodward. J., in *Edgewood R. R. Co.'s Appeal, 79 Pa. 257, 269.*

A railroad company both in the popular and legal acceptation of the term, as used in 1868, was a company incorporated for the purpose and exercising the franchise of constructing or owning and operating a railroad. It was a company belonging to the class to which the Acts of 1849 and 1868 (April 4) related. It did not include one organized for or exercising merely the franchise of leasing or controlling by means of stock ownership, the railroads of other corporations. Such powers had not been granted to any corporations excepting such as already owned connecting lines.

In this connection it is to be observed also that the Act of May 1, 1868, P. L. 108, which exacted a bonus from corporations generally, was approved just twenty-six days after the General Railroad Act of 1868, and undoubtedly the Legislature, when it exempted railroad companies from liability for bonus, had in mind the companies having and using the franchises conferred by that Act, and not companies which, under later Acts, might be incorporated with broader and different powers. *Commonwealth vs. Pennsylvania Water and Power Co., 23 Dauphin 10, affirmed in 271 Pa. 456.*

A consideration of the purpose of the exemption leads to the same conclusion. Many of the States and the Federal Government had made donations of land and subsidies to railroad companies to encourage the construction of these internal improvements. In this State, municipalities were authorized to subscribe to the capital stock of such companies, for the same purpose. *Sharpless vs. Philadelphia, 21 Pa. 147.* In view of this legislative policy it seems clear that railroad, canal and turnpike companies were relieved from bonus in order that capital might be attracted to the construction of these public works. To exempt the capital of corporations which did not construct or own railroads, but merely leased them, would not serve this purpose.

Inasmuch as the bonus is the consideration paid upon the contract entered into between the Commonwealth and the company, some

weight may properly be given also to the construction placed upon it by the parties at the time it was entered into. It appears from the tabulated statement given above that the Pennsylvania Company paid bonus on May 7, 1870, upon its original capital stock, and on July 18, 1871, and April 1, 1872, upon an increase of $11,900,000. Evidently the Company did not consider at that time that it was a "railroad company" within the meaning of the exemption in the Act of 1868.

For the reasons which I have outlined, (1) that a railroad company within the ordinary and legal acceptation of that term in 1868 did not include a company which merely leased or controlled the railroads which had been constructed and were owned by other corporations, (2) that a company exercising such franchises was not within the purpose for which the exemption was provided, and (3) that the company itself did not at the time consider that it was entitled to the exemption, I am of the opinion that the Pennsylvania Company was not a "railroad company" within the meaning of the exemption made to such companies by Section 13 of the Act of May 1, 1868, P. L. 108, but that it received its franchises subject to the bonus charge made by that Act.

The further question then arises as to the rate at which bonus was due and payable upon the several increases of capital stock made by the Pennsylvania Company since its incorporation. Since the Act of May 1, 1868, P. L. 108, the following Acts have been passed relating to the payment of bonus: April 18, 1874, P. L. 61; April 29, 1874, P. L. 73, Sec. 44; May 22, 1878, P. L. 97; May 7, 1889, P. L. 115; June 15, 1897, P. L. 155; May 3, 1899, P. L. 189, and February 9, 1901, P. L. 3.

The Act of April 18, 1874, P. L. 61, applied only to such corporations as might increase their capital stock under its provisions, and the Forty-fourth Section of the Act of April 29, 1874, P. L. 73, which was amended by the Acts of May 22, 1878, P. L. 97, and June 15, 1897, P. L. 155, applied only to corporations created under or accepting the provisions of the Act of 1874. Accordingly the provisions of these several Acts do not apply to the Pennsylvania Company. *Commonwealth vs. Buffalo, Rochester & Pittsburg Ry. Co., 6 Dauphin 94 (affirmed 207 Pa. 160).* Those Acts, however, did not repeal the Act of 1868, and the increase of capital stock made by the Company in 1871 and 1881 were subject to the provisions of the original Act of May 1, 1868, P. L. 108.

The Act of May 7, 1889, P. L. 115, was a general Act imposing a bonus at the same rate as the Act of 1868 upon the authorized increase of capital stock made by any corporation theretofore or thereafter incorporated under any general or special Act, with certain exceptions which are substantially the same as those mentioned in the Act of 1868. Inasmuch as no change in the rate of bonus was effected by this Act, it is not necessary to consider whether the increase made by the Com-

pany in 1892 fell within the provisions of this Act or the original Act of 1868. The rate of one quarter of one per cent. was the rate applicable.

The Act of May 3, 1899, P. L. 189 changed the rate from one quarter one-third of one per centum. Its provisions, so far as they are material here, were as follows:

> " * * * All corporations hereafter created under any general or special law of this commonwealth, * * * shall pay * * * a bonus of one-third of one per centum upon the amount of the capital stock which said company is authorized to have, * * * and a like bonus shall be paid by all such companies heretofore incorporated upon any increase of their capital stock hereafter authorized. * * *"

The words "hereafter authorized," as applied to the Pennsylvania Company, refer to the corporate action taken authorizing the increase. *Commonwealth vs. Independence Trust Co., 233 Pa. 92 (1911).* Accordingly the provisions of this Act are applicable to the increases of capital stock made by the Pennsylvania Company by corporate action taken subsequent to May 3, 1899, unless it be that an increase in the rate of bonus would amount to a violation of the constitutional provision forbidding impairment of the obligation of contracts. This constitutional objection was urged in *Commonwealth vs. Independence Trust Company, 233 Pa. 92 (1911)*, but the Court held that the rate might be changed. The fact that bonus at a certain rate is payable by a corporation at the time of its incorporation, says Mr. Justice Elkin (p. 96):

> "does not mean that a contract was entered into between the commonwealth and the corporation that the bonus rate should always remain the same and that the legislature could not, if deemed wise or expedient, increase the rate without violating a contractual relation. We see nothing in the law providing for the payment of a bonus upon capital stock to require us to hold that the rate is in the nature of a continuing contract, protected by the constitution, and beyond the power of the legislature to disturb. The rate of bonus to be charged for the privilege of incorporating, or for increasing capital stock, is a legislative question, and the legislature has been attempting to cover every phase of it."

The last of the Acts cited above, that of February 9, 1901, P. L. 3, provides a general method for the increase of capital stock and indebtedness of corporations, and provides for the payment of bonus at the rate of one-third of one per centum upon the *actual* increase of capital stock, as distinguished from the *authorized* increase. The officers of the Pennsylvania Company, in their petition for re-settlement, insist that the company is not subject to the provisions of the Act of 1901 because it

possessed authority under its charter to make the increases, and actually made them under that authority and not under the Act of 1901. There is much force in this contention. It does not aid the Company nor affect the rate applicable to subsequent increases, however, because of the fact that the Act of 1899, above referred to, is applicable, and the rate there fixed is the same. I am of the opinion that the increases made by the Company on October 31, 1901, and October 31, 1902, were subject to bonus at the rate of one-third of one per centum, as fixed by the Act of 1899.

I, therefore, advise you that the Pennsylvania Company was liable for bonus upon its original capital stock and the subsequent increases thereof at the several rates which are indicated in the settlement made by you and set forth in the schedule hereinbefore given.

Very truly yours,

GEO. ROSS HULL,
First Deputy Attorney General.

CORPORATIONS OF THE FIRST CLASS.

Capital stock and loans reports—Acts of June 1, 1889, July 22, 1913, July 15, 1919, July 21, 1919, and April 9, 1921.

1. All corporations of the first class incorporated under the Act of April 29, 1874, P. L. 73, which have capital stock, excepting such as are created and operated for religious or charitable purposes, are required to make capital stock reports annually to the Auditor General and to pay the capital stock tax.

2. All corporations of the first class are required to make annual reports of their loans and assess, collect and pay into the State Treasury the State tax on their loans.

The Acts of June 1, 1899, P. L. 420, July 22, 1913, P. L. 903, July 15, 1919, P. L. 948, July 15, 1919, P. L. 955, July 21, 1919, P. L. 1067, and April 9, 1921, P. L. 119, considered.

Office of the Attorney General,
Harrisburg, Pa., July 13, 1922.

Honorable Samuel S. Lewis, Auditor General, Harrisburg, Pa.

Sir: The Attorney General is in receipt of your communication inquiring whether corporations of the first class organized under the provisions of the Act of April 29, 1874, P. L. 73 are required to file annually in your office capital stock and corporate loan reports and to pay whatever taxes may appear to be due from the facts set forth therein.

Section 20 of the Act of June 1, 1889, P. L. 420, as amended by Acts of June 8, 1891, P. L. 229, June 2, 1915, P. L. 730 and July 15, 1919, P. L. 948, provides, in part, as follows:

> "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*, every joint-stock association, limited partnership, and every company whatsoever * * * to take annually, on or before the last day of February, for the calendar year next preceding, a report in writing to the Auditor General * * * stating specifically:
>
> "First, The amount of its capital stock, etc., etc."

"Every corporation having capital stock," excepting such as are specifically exempted from its provisions are required under this section to make report annually to the Auditor General. Corporations of the first class are not relieved, as a class, from this duty, and they may have, and many of them do have, capital stock.

Section 21 of the Act of June 1, 1889, P. L. 420, as amended by the Acts of June 8, 1891, P. L. 229, June 8, 1893, P. L. 353, June 7, 1907, P. L. 430, June 7, 1911, P. L. 763 and July 22, 1913, P. L. 903, provides, inter alia, as follows:

> "That every corporation * * * *from which a report is required under the twentieth section hereof*, shall be subject to, and pay into the Treasury of the Commonwealth annually, a tax at the rate of five mills upon each dollar of its whole capital stock * * *"

Under the provisions of this section every corporation "from whom a report is required under the twentieth section," is subject to the capital stock tax (see *Commonwealth vs. National Cash Register Co., 271 Pa., 406.*) There are certain specific exemptions made, but corporations of the first class are not relieved, as a class, from the payment of the tax.

Inasmuch as the Legislature in each of these sections has set forth specifically the corporations which shall be excluded from its provisions, and has not excluded corporations of the first class as such, the conclusion follows that such of them as have capital stock, are required to make report and pay the capital stock tax (excepting only religious and charitable corporations which will be referred to hereafter.) "Language which relieves from taxation is to be strictly construed," *Commonwealth vs. Lackawanna I. & C. Co. 129 Pa., 346, 356*; and "the rule is well settled that an exception in a statute excludes all other exceptions," *Erie vs. First Universalist Church, 105 Pa., 278, 281, Miller vs. Kirkpatrick, 29 Pa., 226; Olive Cemetery Co. vs. Phila., 93 Pa. 129.*

However, all doubt of the intention of the Legislature to subject such corporations to the capital stock tax was removed by the Act of June 25, 1895, P. L. 310. This Act provides a method whereby cor-

porations not for profit may obtain authority for the issuance of capital stock, and adds:

> "Thereafter such corporations shall be subject to the same taxation as corporations for profit."

The tax on corporate loans is impowed by Section 17 of the Act of June 17, 1913, P. L. 507, as amended by the Act of July 15, 1919, P. L. 955, which provides:

> "That all scrip, bonds, certificates and evidences of indebtedness issued, and all scrip, bonds, certificates and evidences of indebtedness assumed, or on which interest shall be paid, *by any and every private corporation, incorporated or created under the laws of this Commonwealth* * * * are hereby made taxable * * * for state purposes, at the rate of four mills on each dollar of the nominal value thereof * * *"

Under Section 18 of said Act of 1913, as amended by Act of July 15, 1919, P. L. 958, the tax thus imposed is "collected in the same manner as the tax heretofore imposed for state purposes upon such obligations," that is, in the manner set forth in Section 4 of the Act of June 30, 1885, P. L. 193, as amended by Act of July 21, 1919, P. L. 1067, which provides, inter alia, as follows:

> "That hereafter it shall be the duty of the treasurer *of each private corporation* * * * upon the payment of any interest on any scrip, bond, certificate or evidence of indebtedness * * * to assess the tax imposed and provided for state purposes upon the nominal value of each and every said evidence of debt, and to report on oath annually * * * to the Auditor General * * * and it shall be his further duty to deduct four mills on every dollar of the interest paid as aforesaid and return the same into the State Treasury * * *"

The words "any and every private corporation," and "each private corporation" are comprehensive and clear and they include corporations of the first class. The Act makes some specific exemptions, but there is none which relieves corporations of the first class as such. The conclusion follows that corporations of the first class are required to assess, deduct, report and pay over the tax imposed for state purposes upon evidences of indebtedness. *Miller vs. Kirkpatrick*, and other cases last above cited.

It may be suggested that corporations of the first class are not subject to the provisions of these Acts because they are not created and operated for profit. It is probably for this reason that the practice of

the Auditor General's Department has been not to call upon any such corporations for reports or payment of tax. In view of this practice the suggestion deserves careful consideration. Is there any general statute exempting such corporations, or has the law established any rule of public policy which would operate to exclude such corporations from the provisions of these acts in the absence of language specifically including them?

Article IX, Section 1, of the Constitution of Pennsylvania, provides that:

> " * * * the General Assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity."

It will be noted that this provision creates no exemptions, but merely declares what property the legislature may, by general laws, exempt. *Coatesville Gas Co. vs. Chester, 97 Pa. 476, General Assembly vs. Gratz, 139 Pa. 497.* In exercise of the power thus given the Legislature has from time to time passed a number of Acts, the last of which was the Act of April 9, 1921, P. L. 119, which exempts from "all and every county, city, borough, township, county, road, school and poor tax," all churches hospitals, universities, colleges, seminaries, academies, associations, and institutions of learning, benevolence or charity, etc. While many of the institutions which are mentioned in this Act may be incorporated as corporations of the first class, a comparison of the purposes set forth in the Act of 1874 for which such corporations may be formed, with the institutions made exempt by the Act of 1921, discloses that there are many first class corporations which could not claim exemption thereunder. But apart from this, it will be observed that the Act of 1921 grants no exemption from *state* taxes. (See opinion of court below in *General Assembly vs. Gratz, 139 Pa. 497.*)

Accordingly the Act of 1921 creates no exemption of corporations of the first class, and I have found no other Act which might be deemed to create such exemption.

As to certain corporations of the first class, however, it was held in *General Assembly vs. Gratz, supra*, and declared again in *Mattern vs. Canevin, 213 Pa. 288, 289*:

> "That inasmuch as it had been the settled custom and policy from the foundation of our commonwealth to abstain from the taxation of property held for charitable and religious purposes, such taxation would not be presumed to have been intended by the legislature in the absence of express language clearly showing that such taxation was intended."

In order to determine to what extent the rule of those cases is applicable to the questions which you have raised, we must consider the nature of the capital stock and corporate loan taxes.

The tax on capital stock is a tax upon the property of the corporation. *Commonwealth vs. Standard Oil Co., 101 Pa., 119.* If there were any religious or charitable corporations which have capital stock, a tax upon such stock would be a tax upon the property of the corporation. It cannot be said that the language of the Act imposing the capital stock tax is "express language clearly showing that such taxation was intended." It follows from the decisions cited above, that such corporations of the first class as are created and operated for purely charitable or religious purposes, are not subject to the capital stock tax.

As to other corporations of this class, it is to be observed that this tax is not a tax upon gross earnings or receipts, net earnings or income, but upon the corporate property. The fact that corporations of the first class are not organized for profit, furnished no reason why property owned by them should not bear its share of the burden of state taxations. Country clubs, golf clubs, recreation clubs, fishing and game associations and many others avail themselves of the privilege of incorporation and of having capital stock. It would seem just and proper that they should be subject to the capital stock tax, and the language of the statutes clearly includes them.

The tax upon corporate loans, however, differs in character from the capital stock tax. It is not a tax upon the corporation or its property, but upon the holder of the bond or other obligation from whom the treasurer of the corporation, as the agent of the Commonwealth for the purpose, is required to deduct the tax at the time the interest is paid. *Com. vs. P. & R. Ry. Co., 150 Pa. 312, Com. vs. L. V. R. R. Co. 104 Pa. 89.* Accordingly the rule in *General Assembly vs. Gratz, supra,* has no application to the Acts imposing the tax on corporate loans, and charitable and religious corporations are not relieved from these provisions.

I, therefore, advise you:

1. That all corporations of the first class incorporated under the Act of April 29, 1874, P. L. 73, which have capital stock, excepting such as are created and operated for religious or charitable purposes, are required to make capital stock reports annually to the Auditor General and to pay the capital stock tax.

2. All corporations of the first class are required to make annual report of their loans and to assess, collect and pay into the State Treasury the state tax on their loans.

Very truly yours,

GEO. ROSS HULL,

First Deputy Attorney General.

TAX ON CORPORATE LOANS.

Bonds owned by resident and held by non-resident agent, etc.—Bonds owned by non-resident and held by resident agent, etc.—Acts of June 17, 1913, July 15, 1919, and July 21, 1919.

1. Bonds owned by a resident and held by a non-resident agent, attorney or trustee are subject to the tax on corporate loans in Pennsylvania.

2. Bonds owned by a non-resident and held by a resident agent, attorney or trustee are subject to the tax on corporate loans in Pennsylvania.

Acts of June 17, 1913, P. L. 507, July 15, 1919, P. L. 955, July 15, 1919, P. L. 958, and July 21, 1919, P. L. 1067, considered.

Office of the Attorney General,
Harrisburg, Pa., July 19, 1922.

Honorable Samuel S. Lewis, Auditor General, Harrisburg, Pa.

Sir: The Attorney General is in receipt of your communication inquiring whether, under the statutes which provide for the imposition and collection of the tax on corporate loans,

1. Bonds owned by a resident and held by a non-resident agent, attorney or trustee, are taxable in Pennsylvania; and

2. Bonds owned by a non-resident and held by a resident agent, attorney or trustee are taxable in Pennsylvania.

The principal doubt which now exists upon these questions arises by reason of the enactment of the Act of June 17, 1913, P. L. 507. The law prior to that time was reasonably well settled, as we shall endeavor to show hereafter.

Although the tax on corporate loans is now imposed by *Section 17 of the Act of 1913*, as amended by Act of July 15, 1919, P. L. 955, and collected under the provisions of Section 18, of the Act of 1913 as amended by Act of July 15, 1919, P. L. 958 and Section 4 of the Act of June 30, 1885, P. L. 193, as amended by Act of July 21, 1919, P. L. 1067, the solution of the questions stated is to be found in the language of *Section 1 of the Act of 1913*, which imposes a tax for county purposes on personal property other than corporate loans. That the effect of Section 1 upon Section 17 may clearly appear requires a brief consideration of the legislation which preceded the Act of 1913.

The State tax on personal property was first imposed by Section 32 of the Act of April 29, 1844, P. L. 386. An interesting and valuable review of the history of this tax is contained in the opinion of Judge Hargest in *Commonwealth vs. Jacob Reed's Sons, 25 Dauphin 117*. For present purposes it is not necessary to go behind the Act of June 30, 1885, P. L. 193, which was the foundation of the scheme for taxation of such property from the date of its enactment until 1913.

The first section of the Act of 1885 created a general class of taxable subjects, consisting of mortgages, bonds, etc., "owned or possessed by any person or persons whatsoever * * * and all other moneyed capital in the hands of individual citizens of the State," which was made taxable for State purposes. "Corporate obligations by the 4th section of the Act of 1885 are taken out of the general designation of subjects contained in the first, and as a distinct class are subject to a different standard of valuation, and the tax to a different method of collection." *Com. vs. Delaware Division Canal Co., 123 Pa. 594, 622.* The fourth section provided that the treasurers of corporations should assess, collect, report and pay into the State Treasury the tax on corporate loans. "A careful analysis of the provisions of the 4th Section of the Act of 1885, is necessary to a clear understanding of the purpose of the legislature. It will be observed that the tax, which the treasurer of the corporation is by this section authorized and directed to assess and collect, is 'the tax imposed and provided for state purposes'; that is to say, the tax which is imposed and provided by the first section of the same act, upon the general class of subjects, consisting of mortgages, money owing by solvent debtors, etc., at the rate of three mills on the dollar of the value thereof, annually. The effect of the fourth section, as we said in Commonwealth *vs.* Delaware Division Canal Co., 123 Pa. 594, was to subdivide this general class into two particular classes, one embracing the debts of private corporations, to be taxed at the rate specified on their nominal value, the other embracing the residue of the general class, except the bonds of municipal corporations, to be taxed at the same rate upon their value to be ascertained under the ordinary processes of assessment by the local assessor." *Commonwealth vs. Lehigh Valley R. R. Co., 129 Pa. 429, 447.*

"It is apparent that the legislature * * * intended to separate personal property for taxation into two classes, *although the subjects were enumerated in the same section of the act of assembly.*" *Commonwealth vs. Jacob Reed's Sons, 25 Dauphin 117, 123.*

The first section of the Act of 1885 was supplied by Section 1 of the Act of June 1, 1889, P. L. 420, which described the general class of subjects made taxable as follows:

> "* * * all personal property of the classes hereinafter enumerated, owned, held or possessed by any person, persons, co-partnership, or unincorporated association or company, resident, located or liable to taxation within this Commonwealth, or by any joint stock company or association, limited partnership, bank or corporation whatsoever, formed, erected or incorporated by, under or in pursuance of any law of this Commonwealth or of the United States, or of any other state or government, and liable to taxation within this commonwealth, whether such per-

> sonal property be owned, held or possessed by such persons, co-partnership, unincorporated association, company, joint-stock company or association, limited partnership, bank or corporation in his, her, their or its own right, or as active trustee, agent, attorney-in-fact or in any other capacity, for the use, benefit or advantage of any other person, * * * is hereby made taxable annually for state purposes * * * that is to say:
>
> "All mortgages, etc., etc., * * *
>
> "All other moneyed capital in the hands of individual citizens of the state: * * *"

This language is more specific than that contained in the Act of 1885, particularly with respect to the owners or holders whose property is to be taxed, and is repeated verbatim in all of the succeeding acts: June 8, 1891, P. L. 229, May 1, 1909, P. L. 298, and May 11, 1911, P. L. 265. From 1889 to 1913 the section quoted furnished the description of the general class of subjects made taxable for state purposes, while Section 4 of the Act of 1885 served to point out what part of the general class should be assessed through the treasurers of corporations. Decisions of the courts during this period upon questions similar to those now under consideration, rested upon the construction of the language above quoted. See *Commonwealth vs. Buffalo & Lake Erie Traction Co., 14 Dauphin 114, 233 Pa. 79*; *Commonwealth vs. Hudson Coal Co., 14 Dauphin 137*; *Commonwealth vs. Phila. Mortgage & Trust Co., 15 Dauphin 96.*

The Act of June 17, 1913, P. L. 507 introduced a change. The tax which had theretofore been collected locally was made a county tax, and that which had been collected through the treasurers of corporations remained a state tax. The former was imposed by Section 1 and its assessment and collection provided for in Sections 2 to 16. The latter was imposed by Section 17 and its assessment and collection provided for by Section 18 and by Section 4 of the Act of 1885. "The history of the legislation taxing personal property in this State shows that the Act of June 17, 1913 is a codification or compilation of the prior laws relating to the personal property tax. The principal purpose of the enactment, we think, is to give the tax to the counties instead of, as theretofore, having it collected as a State tax and part of it paid to the counties." *Provident Life & Trust Co. vs. Klemmer, 257 Pa. 91, 100.* "The purpose * * * was not to disorganize this system of assessing and collecting taxes, which was well understood and established, but to provide that instead of the counties receiving three-fourths of the personal property tax thus collected through the local authorities * * * they should have all." *Phila. Company for Guaranteeing Mortgages vs. Guaranty Realty Co.*, 401 Jan. Term, 1922, Superior Ct. Opinion filed March 3, 1922, not yet reported.

"When the Act of 1913 came to be prepared, the draftsman had before him the first section of the Act of 1889 as it was amended, containing the subjects upon which the personal property tax was imposed, and upon which also the tax on loans was imposed. Both, up to that time were state taxes. * * * So the draftsman of that act took the first seventeen sections of the Act of 1889 as they had been amended up to that time, and embodied them in the first sixteen sections of the Act of 1913." *Commonwealth vs. Jacob Reed's Sons, 25 Dauphin 117, 123.* In the first section of the Act of 1913, he copied verbatim the description of the general class of subjects which we quoted above from Section 1 of the Act of 1889. These were made taxable for county purposes. The subjects of taxation for state purposes were then enumerated in Section 17 (as amended by Act of July 15, 1919, P. L. 955) as follows:

> "That all scrip, bonds, certificates and evidences of indebtedness issued, and all scrip, bonds, certificates and evidences of indebtedness assumed, or on which interest shall be paid, by any and every private corporation, incorporated or created under the laws of this Commonwealth or the laws of any other State or of the United States, and doing business in this Commonwealth, and all scrip, bonds, certificates, and evidences of indebtedness issued, and all scrip, bonds, certificates, and evidences of indebtedness assumed, or on which interest shall be paid, by any county, city, borough, township, school district, or incorporated district of this Commonwealth are hereby made taxable * * * for State purposes, at the rate of four mills on each dollar of the nominal value thereof: * * *"

This is the section which now imposes the tax on corporate loans. It contains no reference to holders of loans. No distinction is made between bonds held by residents and those held by non-residents. All bonds of the corporations designated, wherever and by whomsoever held are within its comprehensive language. Did the legislature intend by this language to attempt to tax all such bonds? It must be assumed that the legislature knew that it had been held in *State Tax on Foregin Held Bonds, 15 Wall. 300, 21 L. Ed. 179 (1872)*, that no tax could be imposed by the State of Pennsylvania upon bonds owned by a non-resident and held by him at his place of domicil; that for many years the tax had been imposed only upon bonds held in the manner set forth in Section 1, and that the practice of the taxing officers of the Commonwealth during these years had been to demand tax only upon bonds so held. It seems clear that there could not have been any intention to attempt to tax all bonds of the corporations designated. On the contrary it is apparent that the draftsman of the Act of 1913, forgetting that in Section 17 he was creating a tax separate and distinct from that

imposed in Section 1, neglected to make the later section complete in itself and to repeat the description or designation of the holders whose property should be taxable, which is so carefully and specifically set forth in the first section.

In the light of the history of the Act of 1913, I am clearly of the opinion, that, although Section 17 does not designate the holders whose bonds shall be taxable, the legislative intent is that those bonds shall be taxable which are held by the persons and in the manner set forth in the first section. Accordingly the decisions of the courts from 1885 to 1913 construing the language of the prior acts, identical with Section 1 of the Act of 1913, apply to the questions which you have raised.

First, with respect to bonds owned by a resident of this State and held by a non-resident agent, attorney or trustee, which is the subject of your first inquiry—

It was held in *Commonwealth vs. Buffalo & Lake Erie Traction Co., 233 Pa. 79*, that bonds owned by residents of this State were taxable here even though they were held by non-residents as collateral security. The court said:

> "The fact that the bonds were physically outside of the state cannot affect the question of their taxability. The owners were domiciled in this state and the bonds had their situs here also."

In *Commonwealth vs. Hudson Coal Co., 14 Dauphin 137*, it was held that bonds owned by residents and deposited with non-residents under a contract of indemnity are taxable here. Although they may be held or possessed by non-residents who have a special property in them, yet they are "owned" by residents of this state, and are clearly within the language of the Act. Here again the court said:

> "The fact that the bonds were physically outside of the state cannot relieve the owners from the tax respecting them. As the owners were residents of this state the situs of the property in contemplation of law was also in this state."
>
> * * * * * * * * * * *
>
> "So it would seem that the subject of the tax is the loan of money at interest owing by solvent debtors, as well as the bond or the writing or the certificate which evidences the indebtedness. This being so, the debt represented by the bonds in question, notwithstanding the fact that the the bonds were outside of the state, was a debt due to residents of this state and as such was taxable in this state, the domicil of the person to whom it was due."

Thus it appears that the fact that a non-resident bailee may have physical possession of the bonds or may have a special property in them,

does not relieve them of taxation here if they be owned by a resident, and the reasoning of the cases cited applies as well in the case of a non-resident agent or attorney.

So also bonds held by a non-resident trustee for the benefit of a resident cestui que trust, are taxable here as the property of the beneficiary. "Whilst the cestui que trust of the bonds in question may not 'possess' them, he may in some sense be said to own them, and it is all mortgages owned *or* possessed by any person or persons which are taxable for state purposes." *Commonwealth vs. Lehigh Valley R. R. Co., 129 Pa. 429, 452.*

Second. Are bonds owned by a non-resident and held by a resident agent, attorney or trustee taxable in Pennsylvania?

The tax is laid by Section 1 upon "property * * * owned, *held or possessed* by any person * * * resident * * * within this Commonwealth * * * in his * * * own right *or as active trustee, agent, attorney-in-fact, or in any other capacity,* for the use, benefit or advantage of any other person * * * *."

Under the language of the Act of 1885, which was less specific, it was held that bonds held by resident trustees for non-resident cestuis que trustent were taxable in this State. In *Commonwealth vs. Lehigh Valley R. R. Co., 129 Pa. 429, 439,* the court below (which was affirmed upon this point) said:

> "* * * it is a fair inference from the report of the defendant to the auditor general and the findings of fact that, even if the cestuis que trustent are not residents of the state, the bonds themselves are within the state in the hands of individual trustees and, therefore, 'owned or possessed by' the trustees, and for this reason within the very words of the Act of June 30, 1885."

The same conclusion was reached in cases arising under the language of Section 1 quoted above. *Commonwealth vs. Philadelphia Mortgage & Trust Co., 15 Dauphin 96* (appealed to the Supreme Court to No. 20 May Term, 1912 and non-prossed); *Guthrie vs. Pittsburgh, Cincinnati & St. Louis R. R. Co., 158 Pa. 433.*

It may be suggested that the maxim *mobilia personam sequuntur*—the rule that intangible personal property has its situs at the domicil of the owner—operates to relieve bonds owned by non-residents from the operation of the corporate loans tax. "That rule, however, is not of universal application. Based on a fiction of law it has its special use where convenience and justice require, but ordinarily the truth and not the fiction must form the basis of action." *Hostetter's Estate, 267 Pa. 193, 196.* "The rule *mobilia sequuntur personam* is a fiction of the

law, not resting of itself upon any constitutional foundation, and which gives way before express laws, destroying it in any given case when constitutional requirements themselves do not stand in the way." *New Orleans vs. Stempel, 175 U. S. 309, 44 L. Ed. 174, 178.*

The situs of a bond may be at the place where the bond itself is held. "We find the frequent ruling that when an indebtedness has taken a concrete form and become evidenced by note, bill, mortgage, or other written instrument, and that written instrument evidencing the indebtedness is left within the state in the hands of an agent of the non-resident owner, to be by him used for the purposes of collection and deposit or reinvestment within the state, its taxable situs is in the state." *Id. 179.* Or it may have a situs in this State by reason of the fact that the trustee who has title to it, is resident here, even though the bond itself be outside the State. *Guthrie vs. Pittsburgh, Cincinnati & St. Louis R. R. Co., 158 Pa. 433.*

If it be clear, as it is in this case with respect to bonds held by non-residents, that the legislature intended to recognize for tax purposes the situs in this State established either by the physical presence of the bonds or the domicil of the agent, attorney or trustee holding the same, the bonds are taxable here.

I, therefore, advise you that—

1. Bonds owned by a resident and held by a non-resident agent, attorney or trustee, are subject to the tax on corporate loans in Pennsylvania, and

2. Bonds owned by a non-resident and held by a resident agent, attorney or trustee are subject to the tax on corporate loans in Pennsylvania.

Very truly yours,

GEO. ROSS HULL,
First Deputy Attorney General.

IN RE STATE DEPOSITS.

Depositories—Interest—Checks in Transit— Uncollected Moneys—Method for Computing Time—Special Agreements.

The auditor general on behalf of the State cannot recover from active depositories in which State funds are deposited interest on checks in transit where there is no agreement to that effect. The bank or depository is liable only for interest on amounts actually on deposit.

Depositories of State funds should calculate interest on the balances either at the opening or the closing of the business of the day. The rule seems to be to include the day money is received and exclude the day it is paid out, or vice versa. Either way the rule is applied the result will be exactly the same.

Office of the Attorney General,
Harrisburg, Pa., August 10, 1922.

Honorable Samuel S. Lewis, Auditor General, Harrisburg, Pa.

Sir: This Department is in receipt of your inquiry as to what constitutes a "daily balance," as the term is used in connection with the payment of interest to the Commonwealth by active depositories on moneys on deposit with them. The particular questions appear to be—

First. May active depositories, in calculating interest due to the State, deduct from the daily balance as shown on their books the amount of uncollected checks in transit and pay interest only on the amounts actually on deposit.

Second. May active depositories, in calculating interest due to the State, deduct from the daily balance as shown on their books the amount of checks presented that day for payment and pay interest only on the amount actually in the hands of the depositories at the end of the day's business.

The law concerning the placing of State moneys in active depositories is silent concerning daily balances, as such. It nowhere uses the words nor attempts to define them. It provides that interest shall be paid "upon all State deposits" at the prescribed rate per annum. This has been true for the entire period covered by your inquiry.

This requirement is our only authority for collecting interest on daily balances. Obviously if interest is to be paid on State deposits it is to be paid from the day they are made. The result of paying interest on each deposit from the day it is made is the same as paying interest on the daily balance in a lump sum. Should there be included in the daily balance, checks or other items on banks other than the depository and which are still in transit and uncollected? This involves the question as to when a depository actually becomes a debtor and the Commonwealth a creditor for the amount of such items deposited with it.

The payment of interest is based upon the establishment of the status of debtor and creditor. When cash is deposited in a bank the depositor is creditor and the bank is debtor. If payment is refused the creditor has the ordinary action for debt. When a check, however, is deposited for collection, the status of debtor and creditor is not established until the money is collected. This is evidenced by the fact that in the event of the insolvency of the collecting bank before collection, the depositor has a right to reclaim his check and collect through other sources. If the relationship referred to had been established he would be restricted to the same right as other such creditors and the bank would have the right to proceed to collect the check and place the proceeds among its assets for the benefit of all claimants.

> "All the cases agree that when such checks or drafts deposited for credit are collected and the money in the collecting bank, the relation of debtor and creditor exists, unless there be some special agreement or understanding between the bank and its customer to the contrary. All the cases agree that all third parties may treat the bank in which checks have been deposited for credit of the depositor as the owner of the paper. But where the title is during the process of collecting is a very different question. Some courts erroneously say that, if the depositor is allowed to check against the deposit, the title is in the bank. Other courts deny this, and say the right to check against the deposit is a mere privilege. This latter idea is the true one, because there is no question on the authorities but that the bank, having received checks or drafts on other banks as cash credited, has the right to revoke the credit if the collection is not made; but this would not be possible if title had passed. * * * One part of the custom may be to treat the deposit as cash, but the other part of the custom is to treat the credit as merely tentative. * * * Now, on principle, a deposit of checks for credit on one bank upon another bank is a bailment. The duty of the bank is to collect and credit the depositor with the amount obtained. When that is done the bailment is complete. The collecting bank takes no risk upon the paper; if collection is not made it charges the paper back to the depositor. If the bank fails in this duty it is liable for negligence. It would not be so if it owned the paper. Hence we are driven to conclude that the bank has no title until the collection is complete."
>
> *Zane on Banks and Banking, p. 210.*
>
> "The insolvency of a bank at once terminates its authority to proceed further, and if collections are afterward made, or those previously undertaken are completed, the proceeds are held in trust for the owners. As a rule, if the bank at the end of the series has collected the proceeds of

paper, but before sending or remitting the first bank has failed, the depositor or principal can collect the proceeds from the receiver, if these have come into his possession; * * *."

(*7 C. J. 625.* Citing American Can Co. *v.* Williams, 178 Fed. 420; Holder *v.* Western German Bank, 136 Fed. 90; Richardson *v.* Continental Nat. Bank, 94 Fed. 450; National Exch. Bank *v.* Beal, 50 Fed. 355; etc.)

"The Penn Bank did not become the owners of the note by the plaintiff's indorsement and delivery of it to them for collection, and they had no right to pledge it, or direct its proceeds to be placed to their credit, in payment of their indebtedness to Reynolds, Lamberton & Co. It is true, that they were the apparent owners of the note, and, in the absence of notice of the plaintiff's title, Reynolds, Lamberton & Co., had the right to treat them as the real owners. If Reynolds, Lamberton & Co., had made advances or given new credits to the Penn Bank on the faith of the note, they would undoubtedly be entitled to retain the amount out of the proceeds; but just at this point the defense wholly fails. The testimony of the cashier does not show that Reynolds, Lamberton & Co., made any advances, or gave any new credits on the faith of the note; nor does it show that they incurred any liability or did anything by which their condition is worse than it would have been if they had not received the note for collection and credit, or that they will suffer any loss or damage if the credit is not allowed; if so, they clearly have no equity which entitled them to withhold the proceeds from the owners of the note."

Hackett vs. Reynolds, Lamberton & Co., 114 Pa. 328.

The general custom when checks are deposited with banks for collection is to consider the bank as the agent of the depositor until the collection is made.

"When the plaintiff drew his check for $5,000 on the Penn Bank of Pittsburgh, and deposited said check with the Commercial National Bank of Philadelphia for collection, he made the latter bank his agent. The mere fact that the collecting bank credited him with the check as cash did not alter that relation. This is done daily,—indeed, it is the almost universal usuage to credit such collections as cash, unless the customer making such deposit is in weak credit. If the check is unpaid, it is charged off again, and the unpaid check returned to the depositor."

Hazlett v. Commercial N. Bank, 132 Pa. 118.

Even if the collecting bank has received a check for the amount of the collection but the check has not been actually paid, the owner

thereof may reclaim it in case of insolvency of the collecting bank and that bank would have no right to cash it. *Levi vs. Mo. National Bank, 15 Fed. Cases, No. 8289.*

A depository has the unquestioned right to charge back on its books uncollectable checks which it has credited there. No interest could be claimed in such cases, yet the bank had just as much benefit from the uncollectable check as from a collectable one before actual collection.

Further evidence that there is not an actual completed deposit by merely depositing checks on other banks is shown by the fact that until such checks are collected the depositor has no legal right to check out moneys presumed to be the proceeds of such checks. A depositor with a balance of five hundred dollars in the bank, who deposits a one thousand dollar check requiring collection from another bank, has no legal right to issue his own check for more than five hundred dollars on the deposit until the check in transit has actually been collected.

There is another seeming inconsistency which would result from treating a deposited check as money prior to its collection. Suppose the bank on which it is drawn is also a depository, paying interest on deposits. It is very plain that interest on the amount of the check would not be stopped in that bank until it paid the check. In the meantime both banks would be paying interest on the same money, though it is manifest that both could not have it at the same time.

> "In casting interest or making the charge to the drawer, it is clear that the banker must debit the drawer of a check, not from the date of the drawing but from the date of the actual payment of the check. * * *"
>
> *Morse on Banks and Banking, Vol. 1, p. 580.*

In connection with this question we have examined the bond which the depositories give for the protection of the Commonwealth. So far as interest is concerned the condition of the bond is that the principal "shall also pay over to the said State Treasurer, or his successors in office, for the use of the Commonwealth, interest *on said moneys* at the rate of two per centum per annum payable semi-annually," and the moneys referred to are those "which now are or may hereafter from time to time remain on deposit" with the depository. No mention is made in the bond of the payment of interest on book deposits, uncollected checks or any thing except actual money in the hands of the depository.

I am of the opinion that you could not recover from active depositories interest on checks in transit where you have no agreement to that effect.

It is well settled that a bank may have rules and practices, governing deposits, if not inconsistent with the law. Therefore, while the law seems to require allowance of interest only from the time the bank has obtained the money, it could have a valid rule for the allowance of in-

terest from the time the item is credited to the depositor's account, regardless of the delay incurred in the collection. Where such is the rule of a bank in which the Commonwealth is a depositor I would insist that it be applied to the Commonwealth's account.

The second question seems to present no difficulty. Interest should be calculated on the balances either at the opening or the closing of the business of the day. The result will be exactly the same in either case. If the balances are taken as of the opening of business, the money will bear interest for the day it is paid out but not for the day it is received; and if they are taken as of the close of business it will bear interest for the day it is received but not for the day it is paid out. The rule seems to be to include one day and exclude the other and it is immaterial which way it is applied.

Very truly yours,
GEO. E. ALTER,
Attorney General.

AUDITOR GENERAL.

Western Pennsylvania Hospital—Appropriation to—Acts of 1921, Appropriation Acts p. 204, and March 15, 1899, P. L. 8.

The quarterly reports prescribed by the Act of 1899, are not required under the Act of 1921, making an appropriation to the Western Pennsylvania Hospital. All that is required is a statement showing the number of free patients maintained and the number of days so maintained, the amount payable being determined at the rate fixed by the Act.

The Auditor General may lawfully in his official discretion pay to the institution for all the free patients maintained in any given quarter at the rate prescribed, although it may amount to more than one-eighth of the entire appropriation, so long as there is a sufficient balance of the appropriation remaining unpaid to pay such amount.

It is not incumbent upon the institution to show what is the actual cost of maintaining a free patient. Such actual cost is immaterial in ascertaining what it shall receive.

Office of the Attorney General,
Harrisburg, Pa., December 5, 1922.

Honorable Samuel S. Lewis, Auditor General, Harrisburg, Pa.

Sir:

This Department is in receipt of your communication of the 23d ult. requesting an opinion relative to the appropriation made to the Western Pennsylvania Hospital by Act No. 246-A, approved May 27, 1921, Appropriation Acts 1921, page 204, upon the following questions:

"First: Whether the usual quarterly statements, as above described and required by the Act of 1899, must still be filed by said institution in the usual manner in which they show the necessity for State aid for maintenance purposes, in addition to the report as already filed showing the number of free patients maintained.

"Second: Whether more than 1/8 of the $110,000 appropriated sould be paid in any quarter where the amount due for such quarter, on the basis of $2.00 per day for each free patient, exceeds this sum.

"Third: Whether the quarterly statements should not show that the cost for maintaining free patients is at least equal to the amount fixed by the appropriation act aforesaid, to wit, $2.00 per day for each free patient maintained."

The aforesaid Act of 1921 as approved appropriates to the said Hospital the sum of one hundred and ten thousand dollars, or so much thereof as may be necessary for maintenance for the current two fiscal years "*to be paid on the basis and at the rate of two dollars per day for each free patient maintained.*"

The said Act of March 15, 1899, P. L. 8, provides, inter alia, that no warrant shall be drawn for the payment of appropriations to educational penal, reformatory, charitable, benevolent and eleomosynary institutions until the directors or managers of the institution "shall have made under oath, to the Auditor General a report, accompanied by vouchers, containing a specifically itemized statement of the receipts from all sources and the expenses of the institution during the previous quarter, together with the cash balance on hand" etc. The purpose of this provision is to give to the fiscal officers of the Commonwealth information showing whether the institution is entitled to the State said, the appropriation thereto for maintenance usually being restricted to so much thereof as may be necessary, and hence not available beyond the instition's deficiency in income to meet expenses. The rule of quarterly payments which received statutory recognition in this Act of 1899 was evidently intended to prevent heavy or irregular drafts on the State Treasury and to distribute the payment of appropriations regularly throughout the fiscal period. The Auditor General audits the books of these institutions to verify and check up the correctness of their accounts and books upon which the aforesaid reports are founded.

The provisions of the said Act of 1921, making the above appropriation to the Western Pennsylvania Hospital, presents a different situation from what is usual in appropriations to charitable institutions. The Act itself prescribes a definite standard by which the amount to be paid on account of the maintenance of free patients is to be measured, viz.: that the Hospital shall receive two dollars per day per free patient it

maintains. Such a patient, of course, is one who pays nothing whatever for his maintenance, this being wholly borne by the Hospital. A statute can define its own terms, which are binding in its interpretation. What is here plainly contemplated is that instead of the said Hospital being obliged to show what its needs in any given quarter may be as measured by its excess of outgo over receipts, it is to be reimbursed by the State out of said appropriation for its free patients at a fixed, flat rate. The effect of this is to take this appropriation out of the scope of the requirement of the said Act of 1899. The information it has in view would in this case serve no purpose and to make the report as thereby called for would be idle. It is incumbent, however, upon this institution to furnish to the Auditor General a statement, duly verified, showing the number of free patients maintained therein and the number of days they are so maintained. I think that this should be furnished quarterly.

I see no valid objection in paying to the said Hospital in any given quarter the whole amount for all the free patients maintained during the quarter, calculated on the prescribed basis, even though such amount should be in excess of the one-eighth of the total appropriation. This would be within the administrative discretion of the Auditor General. As the Hospital is to be compensated for its free patients at a given rate, it is no particular concern as to how much it may get in any one quarter, provided it is never paid at any time in excess of the total amount for all free patients theretofore maintained at the given rate.

From what has been said above, it obviously follows that the said Hospital under the terms of the said appropriation thereto is not under any necessity to show that it actually costs it two dollars a day to maintain a free patient in order to be entitled to receive that amount for each such patient per day. The clause in the Act making the appropriation reading "or so much thereof as may be necessary" relates to the whole amount appropriated and not to how much it may necessarily take to maintain a free patient a day. To hold otherwise would in effect place this appropriation in the precise position of the ones as commonly made and render meaningless its own special provision.

You are, therefore, advised in answer to the above stated questions, and in the order as stated, as follows:

That the report prescribed by the said Act of 1899 is not required under the said Act of 1921, making an appropriation to the Western Pennsylvania Hospital. All that is required is a statement showing the number of free patients maintained and the number of days so maintained, the amount payable the institution being determined thereby at the rate fixed by the Act.

2. That the Auditor General may lawfully in his administrative discretion pay to the institution for all the free patients maintained in any given quarter at the rate prescribed, although it may amount to more than the one-eighth of the entire appropriation, so long as there is a sufficient balance of the appropriation remaining unpaid to pay such account.

3. That it is not incumbent upon the said institution to show what is the actual cost of maintaining a free patient. The Act provides that it shall be paid at a specific and fixed rate, and hence the actual cost is immaterial in ascertaining what it shall receive.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

OPINIONS TO THE STATE TREASURER.

OPINIONS TO THE STATE TREASURER.

For the Year 1921.

IN RE LEGISLATIVE SALARIES.

Salaries—Members of the Legislature—Act of June 24, 1919, P. L. 579—Article II, Section 8, of the Constitution.

A member of the legislature whose term of office began prior to the passage of the Act of June 24, 1919, P. L. 579, is not entitled to the increased salary provided by that statute. This is prohibited by Article II, Section 8, of the Constitution of Pennsylvania.

Office of the Attorney General,
Harrisburg, Pa., February 23, 1921.

Honorable Harmon M. Kephart, State Treasurer, Harrisburg, Pa.

Sir: I am in receipt of your communication of the 9th instant, asking whether a Member of the Legislature elected to office prior to the passage of the Act of June 24, 1919, P. L. 579, is entitled to the increase of salary contemplated by that statute.

Article II, Section 8 of the Constitution of the Commonwealth provides that:

> "The members of the General Assembly shall receive such salary and mileage for regular and biennial and special sessions as shall be fixed by law, and no other compensation whatever, whether for service upon committee, or otherwise. No member of either house shall, during the term for which he may have been elected, receive any increase of salary or mileage under any law passed during such term."

The last sentence of this section is too clear to raise any doubt as to its meaning; it furnishes a complete answer to your inquiry.

You are accordingly now specifically advised that a Member of the Legislature whose term of office began prior to the passage of the Act of June 24, 1919, P. L. 579, is not entitled to the increased salary provided for by that statute.

Yours very truly,

GEO. E. ALTER,
Attorney General.

INSURANCE FUND.

Transfer of moneys placed therein under Act of July 15, 1919, P. L. 964.

Acts of April 4, 1873, P. L. 20, June 7, 1879, P. L. 112, June 1, 1889, P. L. 420, Section 24, June 28, 1895, P. L. 408, April 20, 1905, P. L. 229, May 14, 1915, P. L. 524, May 8, 1919, P. L. 157, Constitution of Pennsylvania, Article III, Section 3, and July 15, 1919, P. L. 964.

Act of July 15, 1919, P. L. 964, will not operate retroactively in such a manner as to require a transfer or taxes on premiums paid to foreign insurance companies which were received from January 1, 1919 to July 15, 1919, and placed in the Insurance Fund,

The State Treasurer, therefore, will not be required to distribute the moneys so received to the various cities, boroughs and townships of the Commonwealth.

Office of the Attorney General,
Harrisburg, Pa., August 11, 1921.

Mr. T. A. Crichton, Cashier, Treasury Department, Harrisburg, Pa.

Sir: We have your request for an interpretation of the Act of July 15, 1919, P. L. 964, concerning which you ask the following questions:

> "1. Is the Act of 1919 valid legislation in so far as it affects the revenues from this source during the period between January 1, 1919, and July 15, 1919? In this connection we particularly call your attention to the title of the Act.
>
> "2. If your answer to the foregoing question is yes, then does this legislation go to the extent of taking away from the Insurance Fund money that had been invested in securities for said fund under authority of law during the period between January 1, 1919, and July 15, 1919?
>
> "3. If your answer to the second question is yes, can you suggest to us how we should proceed to realize from the securities of the Insurance Fund a sum equal to that so invested; and in this connection it is to be borne in mind that the market conditions since these investments were made have considerably reduced them in value."

The title of the Act of July 15, 1919, P. L. 964, to which you refer is as follows:

> "An act to amend the second section as amended, of, and to supplement, an act, entitled 'A supplement to the twenty-fourth section of an act entitled "An act to provide revenue by taxation, approved the seventh day of June, one thousand eight hundred and seventy-nine," approved the first day of June, one thousand eight hundred and eighty-nine, amending the twenty-fourth section, by providing for the payment by the State Treasurer of one-half of the two per centum tax on premiums paid by foreign fire insurance companies to the treasurers of the several cities and boroughs within this Commonwealth,' approved the twenty-eighth day of June, one thousand eight

> hundred and ninety-five; amending the same to provide for the payment of the net proceeds of the entire two per centum tax for the purpose indicated in the original act and supplement, including townships among the distributees."

The first section of the act amends Section 2 of the former act as follows:

> "Section 2. On and after the first day of January, one thousand nine hundred and nineteen, and annually thereafter, there shall be paid by the State Treasurer to the treasurers of the several cities, townships and boroughs within the Commonwealth, the entire net amount received from the two per centum tax paid upon premiums by foreign fire insurance companies. The amount to be paid to each of the treasurers of the several cities, townships, and boroughs shall be based upon the return of said two per centum tax upon premiums received from foreign fire insurance companies doing business within the said cities, townships, and boroughs, as shown by the Insurance Commissioner's report. Warrants for the above purposes shall be drawn by the Auditor General, payable to the treasurers of the several cities, townships, and boroughs, in accordance with this act, whenever there are sufficient funds in the State Treasury to pay the same."

The immediate question is whether or not this law, which was approved July 15, 1919, will operate retroactively in such a manner as to require a transfer of moneys placed in the Insurance Fund from January 1, 1919, to July 15, 1919, to the several cities, townships and boroughs in the Commonwealth. In order to determine this question it will be necessary to first examine briefly the history of the tax which it is proposed to divert, and of the Insurance Fund into which one-half of this tax was legally paid until July 15, 1919.

The Act of April 4, 1873, P. L. 20, entitled "An act to establish an Insurance Department," provides in Section 10 thereof for a three per cent. tax on all premiums paid to any insurance company of another State or foreign government.

The Act of June 7, 1879, P. L. 112, entitled "An act to provide revenue by taxation," did not affect this tax on foreign insurance companies. Section 8 thereof, however, levied an eight mill tax upon the gross amount of premiums paid to insurance companies incorporated under the laws of this Commonwealth. The amendments and supplements concerning this tax which were passed thereafter all pertain to the Act of 1879, except the Act of June 1, 1889, P. L. 420, in Section 24 of which the three per cent. tax created by the Act of 1873 was changed to two per cent. tax.

The Act of June 28, 1895, P. L. 408, made a new direction as to the disposition of the funds realized from this tax in the following manner:

> "On and after the first day of January, one thousand eight hundred and ninety-six, and annually thereafter, there shall be paid by the State Treasurer to the treasurers of the several cities and boroughs within the Commonwealth, one-half of the net amount received from the two per centum tax paid upon premiums by foreign fire insurance companies. The amount to be paid to each of the treasurers of the several cities and boroughs, shall be based upon the return of said two per centum tax upon premiums received from foreign fire insurance companies doing business within the said cities and boroughs as shown by the Insurance Commissioner's report. Warrants for the above purposes shall be drawn by the Auditor General, payable to the treasurers of the several cities and boroughs in accordance with this act whenever there are sufficient funds in the State treasury to pay the same."

The Act of April 20, 1905, P. L. 229, extends the second section of the foregoing Act to include townships of the first class, and under the present Act of 1919 all townships are included.

We now come to the Acts creating and governing the Insurance Fund. This Fund was created by the Act of May 14, 1915, P. L. 524, entitled:

> "An act creating a fund for the purpose of rebuilding, restoring, and replacing buildings, structures, equipment, or other property of the Commonwealth of Pennsylvania, damaged or destroyed by fire or other casualty, and regulating the placing of insurance thereon, and providing penalties for any violation of the provisions of this act."

Section 1 of this Act is as follows:

> "* * * That, for the purpose of creating 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, the following funds, income, and revenue of the Commonwealth of Pennsylvania are hereby specifically dedicated, appropriated, and set apart, to constitute a fund separate and apart from all other funds of the Commonwealth, and to be known as the Insurance Fund, to-wit:
>
> * * * * * * * * * * *
>
> "(c) One-half of all taxes received upon premiums of foreign fire insurance companies, after the date of the approval of this act.
>
> * * * * * * * * * * *

It will be noticed that one-half of the taxes received upon premiums of foreign fire insurance companies are set apart definitely in a separate fund. These moneys never reached the General Fund of the Treasury. The purposes for which the Insurance Fund is created are carefully set forth under Section 3, in which we find:

> "The said fund hereby created shall be available for expenditure, in the manner hereinafter provided, for the rebuilding, restoration, or replacement of buildings, structures, equipment, or other property owned by the Commonwealth, and damaged or destroyed by fire or other casualty, and for no other purpose whatsoever. * * *"

There is a further provision that all moneys in the fund in excess of one million dollars shall be transferred annually on the 31st day of December to the General Fund of the State Treasury. Complete reliance upon the integrity and separate existence of this Fund is further evidenced by Section 7, which makes it 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 any policy of insurance on State owned property for a term extending beyond the 31st day of December, 1920, and thereafter they shall take out no insurance.

Of the five sources of revenue on which this fund must rely the tax in question is quite the most important. The Legislature of 1919, by Act approved May 8, 1919, P. L. 157, eliminated the second of the sources of income. This Act states directly in its title that it is an Act to amend the Act of May 14, 1915, which created the Insurance Fund.

A retroactive change so important and far reaching as to possibly seriously embarrass the Insurance Fund should not be enacted without reasonable notice thereof being given in the title. The question is not one of a transfer of moneys from the General Fund nor one of a diversion of future revenues, but, on the contrary, it involves the transfer of funds already legally set apart for a definite purpose to such an extent that the very purpose itself might be defeated.

The Constitution of Pennsylvania in Article III, Section 3, provides that "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title." Does the Act of July 15, 1919, in so far as its retroactive effect is concerned, violate this section of the Constitution?

> "The object is to prevent the practice, which was common in all legislative bodies where no such restriction existed, of embracing in the same bill incongruous matters having no relation to each other, or to the subject specified in the title, by which measures were often adopted without attracting attention."
>
> *Sutherland on Statutory Construction, 2d Ed., Sec. 111, p. 184.*
>
> "Whatever may be the scope of an act, it can embrace but one subject, and all its provisons must relate to that subject; they must be parts of it, incident to it or in some reasonable sense auxiliary to the object in view."
>
> *Sutherland on Statutory Construction, 2d Ed., Sec. 118, p. 198.*

The right of the Legislature to alter or abolish the sources of the income of the Insurance Fund or to abolish the entire Fund itself is not questioned. It does not appear that the title to the act under construction give sufficient notice of the serious effect thereof upon the Insurance Fund, no mention of said Fund nor of the Acts creating it being made. The Act under discussion amends the Act of 1915 in Section 1, sub-section (c), retroactively without notice.

> "The purpose of this amendment in the old Constitution was to prevent a number of different and unconnected subjects from being gathered into an Act; another purpose was to give information to the members or others interested, by the title of the bill, of the contemplated legislation, and thereby to prevent the passage of unknown and alien subjects, which might be coiled up in the folds of the bill. The title should be so certain as not to mislead. If the title seems to mean one thing, while the enactment as clearly refers to another, it cannot be said to be clearly expressed. (See, also, Beckert et al. *v.* The City of Allegheny et al., 4 Weekly Notes, 530; Allegheny City *v.* Morehead, 31 P. F. S. 438.)"
>
> *10 Weekly Notes of Cases, 500.*

Quoting from *Commonwealth of Pennsylvania ex rel. vs. Friebertshauser*, which case was reversed upon other grounds, we have the following:

> "In Ruth's App., 10 W.N.C. 498, the Common Pleas Court of Luzerne County held the Act of April 7, 1877, P. L. 83, unconstitutional because it repealed a clause in a prior act, no notice being given in the title of intention to repeal. The decree was affirmed. In the House of Refuge *vs.* Luzerne County, 215 Pa. 429, Mr. Justice Potter quotes from Ruth's Appeal and says: 'We are brought then to the conclusion that the repealing Act of 1867 is unconstitutional and void by reason of the failure to give notice in its title of an intention to repeal the 4th section of the Act of 1827.'"
>
> *66 Pittsburgh Legal Journal, 379.*

It may be contended that a supplement or an amendment affecting the tax received on fire insurance premiums would lead interested parties to investigate the matter of the support of the Insurance Fund, but we may not require persons interested to go in a roundabout fashion through two or three Acts to arrive at the one affected.

> "The object of that requirement is that the legislators and others interested shall receive direct notice in immediate connection with the Act itself of its subject, so that they may know or be put upon inquiry as to its provisions and their effect. Suggestions or inferences which

> may be drawn from knowledge dehors the language used, are not enough. The Constitution required that the notice shall be contained in the title itself: Phoenixville Road, 109 Pa. 44; Ridge Ave. Pass. Ry. Co. *vs.* Philadelphia 124 Pa. 219; Phila. *vs.* Ridge Ave. Pass. Ry. Co., 142 Pa. 484; ex. rel. *vs.* Samuels et al., 163 Pa. 283. To omit, as the Act under consideration does, all indication of its most important feature and effect is to fail entirely in the constitutional requirement that the subject shall be clearly expressed in the title. Stegmaier *vs.* Jones, 203 Pa. 47."
>
> *66 Pittsburgh Legal Journal, 379.*

The title to the Act under question declares that it is to amend certain Acts to provide for the payment of the net proceeds of the entire two per centum tax for the purpose indicated in the original Act and supplement, but it contains no intimation that taxes already paid and set apart under a valid Act of Legislature are to be taken from the Insurance Fund. No one, however, jealous of the existence of said Fund, would have notice by this title that moneys already invested therein should be taken from it. I believe the case of *Commonwealth ex. rel. vs. Friebertshauser, Appellant, 263 Pa. 211*, and similar cases, are clearly distinguishable. On the question of liability for refunding money without due notice in the title of the Act, see *Riffle's Petition in re License Fee, 74 Superior Ct. 410.*

> "In that case the provision sought to be repealed was contained in the act to which the repealing bill was a supplement, and even then the title was held defective. Much more, then, does it fall short, when as here the provision to be repealed is not found in the act of 1826, to which the act of 1867 refers, but is found in another statute, that of March 2, 1827. We are brought then to the conclusion that the repealing act of 1867, is unconstitutional and void, by reason of the failure to give any notice in its title of an intention to repeal the 4th section of the act of 1827."
>
> *House of Refuge vs. Luzerne Co., 215 Pa. 429.*
>
> "But if such a change in the long established policy, with such important and burdensome results is to be made, it should be done openly, directly, expressly and in such terms as to give notice to all the interests involved. The title of an act need not be an index of its contents, and though the title may be general it will cover all details and collateral matters naturally and properly incident to the subject named, but to omit, as the act under consideration does, all indication of its most important feature and effect is to fail entirely in the constitutional requirement that the subject shall be clearly expressed in the title."
>
> *Stegmaier vs. Jones, 203 Pa. 47.*

It is probably not improper here to call attention to the unusual wording of the amendment which we are asked to construe. It does not set forth that all taxes collected after January 1, 1919, shall be used for certain purposes, but it does say that on and after January 1, 1919, all taxes shall be paid as directed. This, of course, would be physically impossible as all such taxes, under our theory of a separate fund, received up to July 15th were already disposed of and paid under an existing valid statute. If these moneys are to be paid to the municipalities in any way it must be by actual transfer from the fund into which they have already been paid. This is not done by the Act, the framers of which may possibly have assumed that these moneys were in the General Fund of the Treasury, and could be paid out without the formality of transfer. Such was not the case, and I do not believe it practicable for the Treasurer to comply with the Act insofar as the period between January 1, 1919, and July 15, 1919, is concerned inasmuch as there was already a complete disposition of the moneys under question.

I am of the opinion, therefore, that the Act of July 15, 1919, does not operate as a valid transfer of the taxes on premiums paid to foreign insurance companies, which were received from January 1, 1919, to July 15, 1919. Under this opinion, therefore, it will not be incumbent upon the State Treasurer to distribute the moneys so received to the various cities, townships and boroughs of the Commonwealth.

Very truly yours,

STERLING G. McNEES,
Deputy Attorney General.

OPINIONS TO THE STATE TREASURER.

For the Year 1922.

STATE TREASURY.

Expenses of audit made under direction of the Auditor General—Where payable—Act of March 2, 1921, Appropriation Acts, page 3.

The bills of Main and Company for auditing done in February, March and April, 1922, may be paid out of the deficiency appropriation provided by the Act of March 2, 1921.

Office of the Attorney General,
Harrisburg, Pa., June 2, 1922.

T. A. Crichton, Esq., Cashier, Treasury Department, Harrisburg, Pa.

Sir: I have your letter of today, submitting the question whether bills of Main and Company, aggregating approximately $16,000, for auditing done under the Auditor General, in February, March and April, 1922, can be paid out of the deficiency appropriation provided by the Act of March 2, 1921, page 3 of the Appropriation Acts of 1921.

The appropriation in question is for "deficiencies in certain appropriations * * * and for other minor expenses, incurred or to be incurred to May thirty-first, one thousand nine hundred and twenty-one."

The item of $110,000 to the Auditor General's Department, under this Act, covers such work as that for which the present bills are rendered. The only question is whether the fund is available for the work included in the bills, by reason of the fact that said work was performed after May 31st., 1921.

With your letter you submit a contract between Main and Company, Certified Public Accountants, and the Auditor General, dated May 4th., 1921, whereby certain auditing is undertaken by Main and Company, including the audit of the Treasury Department as required of the Auditor General "under the provisions of the Act of March 31, 1811, and supplements and amendments thereto." The contract provides for compensation on a per diem basis, to wit: "Senior accountants, special engagements, $50. per day; Senior accountants, accountant in charge, $35. per day; Junior accountants, $20 and $25. per day."

The contract provides that all the work specified shall be started at once and brought to a conclusion at as early a date thereafter as is possible. It also contains the following provision:

> "It is mutually agreed that this agreement can be terminated at any time upon written notice being given to that effect. The payment of services up to date of said notice shall be considered as a release in full of all claims against the Commonwealth of Pennsylvania arising out of the services furnished under this agreement."

The question presented here is somewhat unusual and by no means free from difficulty. The appropriation is available for expenses "incurred or to be incurred to May thirty-first, one thousand nine hundred and twenty-one." It is the general rule that if work has been contracted for prior to the expiration of the period covered by the appropriation, that fact keeps the appropriation available until the work is completed and paid for. Do we have here such a contract?

I understand the work here in question has been done on the theory that it is deferred work, which might have been done from year to year during the period involved. In any event its being done since that period seems quite within the power of the Auditor General. It is work referable to a period prior to May 31st. 1921, and the expense necessary for its completion is proper to be incurred within that limit of time.

Under the provision for the termination of the agreement, quoted above, it may be said, of course, that the Commonwealth was not committed to the completion of the work covered by the contract. There was, however, an agreement for the full performance of all the work described in the contract, and the undertaking on the part of the Auditor General, acting for the Commonwealth, would continue to the end in the absence of affirmative action for its termination. No such action has been taken and the work has continued, and payments therefor have been made, from time to time, from this appropriation.

Of course the provision permitting the termination of the agreement was a proper one for the Auditor General to insert, for the protection of the Commonwealth, the contract being one for a personal service which might prove unsatisfactory. No action having been taken under this provision, the contract remains in full force.

It must be remembered that sound public policy requires that the Auditor General be given very wide discretion in the performance of the important duties vested in him for the protection of the interests of the Commonwealth. Consequently, as far as reasonably possible, we should assume such intendments as will enable him to perform these duties to the fullest extent.

Therefore, I advise you to pay the auditing bills above described, out of the appropriation of March 2d, 1921, as requested by the Auditor General.

Very truly yours,

GEO. E. ALTER,
Attorney General.

STATE TREASURY.

State Treasurer—Authority to designate in Dauphin County active depositaries of State moneys.

Acts of February 17, 1906, P. L. 45; July 18, 1917, P. L. 1065; April 26, 1921, P. L. 279; and May 5, 1921, P. L. 387.

The provisions of the Act of 1921, P. L. 279, increasing the number of active depositaries in Dauphin County from two to three were not affected by the subsequent Act of 1921, P. L. 387, and the lawful number of such depositaries in that county is three.

Office of the Attorney General,
Harrisburg, Pa., June 8, 1922.

Honorable Charles A. Snyder, State Treasurer, Harrisburg, Pa.

Sir: An opinion has been requested of this Department as to whether the Revenue Commissioners and Banking Commissioner shall designate two or three banks or trust companies in Dauphin County as active depositaries of State moneys. The question turns upon the effect which is to be given to the provisions of the Acts of April 26, 1921, P. L. 279, and May 5, 1921, P. L. 387, both of which amended Section 8 of the Act of February 17, 1906, P. L. 45, as amended by Act of July 18, 1917, P. L. 1065.

Prior to the amendments of 1921, the section under consideration read as follows:

> "The interest rate to be paid by the depositaries upon all State deposits shall be at the rate of two per centum per annum, and all distinctions between active and non-active depositaries, as to interest rate, shall be abolished.
>
> "The Revenue Commissioners and the Banking Commissioner, or a majority of them shall designate *two* banks or trust companies in Dauphin County, two banks or trust companies in Philadelphia County, and two banks or trust companies in Allegheny County, to be known as active depositaries, in which shall be deposited a sufficient amount of the daily receipts of the State Treasury to

> transact the current business of the Commonwealth; and said Revenue Commissioners and the Banking Commissioner, or a majority of them, shall have power, if to them it seem necessary, to designate two other banks or trust companies, located in any of the counties above-mentioned or in any other county of the Commonwealth, to be known as active depositaries, and to be used for the purpurposes above mentioned."

The Act of April 26, 1921, P. L. 279, amended this section by striking out the word "two" (which is underscored above), and inserting "three." The effect of this was to increase the number of active depositaries in Dauphin County from two to three.

With the law in this state the Act of May 5, 1921, P. L. 387, was approved, and the solution of the question which has been raised depends upon the effect which this enactment had upon the then existing law.

The title of this Act is as follows:

> "An Act to further amend section eight of the act, approved the seventeenth day of February, one thousand nine hundred and six (Phamphlet Laws, forty-five), entitled 'An act to regulate the deposits of State funds, to prescribe the method of selecting State depositaries, to limit the amount of State deposits, to provide for the security of such deposits, to fix the rate of interest thereon, to provide for the publication of monthly statements of moneys in the general and sinking funds, to declare it a misdemeanor to give or take anything of value for obtaining the same, and prescribing penalties for violations of this act,' *by fixing the rate of interest to be paid by active and non-active depositaries.*"

The Act cites for amendment the eighth section as it stood after the amendment of 1917 and contains no reference to the Act of April 26, 1921. The title indicates specifically the particular change which the Legislature intended to effect, to-wit: "fixing the rate of interest to be paid by active and nonactive depositaries." The amendment of which this title gives notice consisted in striking out of the first paragraph the words "and all distinctions between active and nonactive depositaries as to interest rate shall be abolished," and substituting in lieu thereof the following: "by all active depositaries and at the rate of three per centum per annum by all nonactive depositaries." In re-enacting the remainder of the section the number of depositaries in Dauphin County is mentioned as *two* as it was in the Act of 1917, and not *three*, as it was in the Act of April 26, 1921. Does this re-enactment have the effect of repealing the said Act of 1921, and again fixing the number of such depositaries at *two*? I am of the opinion that it does not.

The subject of a bill must be clearly expressed in its title and the title must not be misleading. Where the title to an amendatory act is specific the maxim *expressio unius est esclusio alterius* applies, and the amendment is effective only to the extent specifically indicated in the title. *Union Passenger Railway Company's Appeal, 81, Pa. 91; Brown's Estate 152, Pa. 401; Sanderson on Validity of Statutes in Pennsylvania, 47.*

> "When the title conveys the belief that one subject is the purpose of the bill, while another and different one is its real subject, it is evident that it tends to mislead by diverting the attention from the true object of the legislation. Confiding in the title as applicable to a purpose unobjectionable to the reader he is led away from the examination of the body of the bill. In such a case the subject is not *clearly expressed* in the title. Indeed it is not expressed at all."
>
> *Agnew, J. in Union Pass. Ry. Co.'s Appeal, 81* Pa. 91,94.*

A change in the number of active depositaries in Dauphin County is not in any way related to or suggested by a change in the amount of interest to be paid upon deposits. There is, therefore, no notice in the title of the Act of May 5, 1921, P. L. 387, of any intention to alter, amend or repeal the Act of April 26, 1921, P. L. 279, or to change the number of depositaries. If the Act would be given such effect it would be clearly unconstitutional.

I, therefore, advise you that the provision of the Act of April 26, 1921, P. L. 279, increasing the number of active depositaries in Dauphin County from two to three was not affected by the Act of May 5, 1921, P. L. 387, and that the lawful number of such depositaries in said County is *three.*

Very truly yours,

GEO. ROSS HULL,
First Deputy Attorney General.

STATE TREASURY.

Bill of accountants for auditing authorized by the State Treasurer and deemed necessary—Where payable—Act of May 27, 1921, Appropriation Acts, p. 33.

The State Treasurer may, under the General Appropriation Act of 1921, pay the bill of Lybrand, Ross Bros. and Montgomery, Accountants, for auditing the accounts of the State Treasurer out of the appropriation for additional auditors, their work coming within the field of auditing as commonly understood.

Office of the Attorney General,
Harrisburg, Pa., June 22, 1922.

Mr. T. A. Crichton, Cashier, Treasury Department, Harrisburg, Pa.

Sir: I have your letter of June 14th concerning a bill of Messrs. Lybrand, Ross Bros. & Montgomery for accountants furnished by them on a per diem basis in doing certain work in the Treasury Department.

You state that the auditing in question was authorized by the State Treasurer with a view to verifying the accuracy of the accounts of the Department, as well as determining the exact situation of the Department in the matter of meeting the obligations created by appropriations made by the Legislature, in pursuance of the purpose of discovering the probable outlay and the probable income during the present appropriation period. You state that this was deemed essential to the conduct of the work of the Department in view of the condition of the General Fund and the difficulty you have been having in meeting bills against that Fund, and, further, in order that the State Treasurer might have at hand information as accurate as possible upon which to base reports to the Governor before the next session of the Legislature as to the probable amount available for appropriations.

The General Appropriation Act of 1921, Act of May 27, 1921,App. Acts p. 33, at (page 39) provides $50,000.00 "for the salaries of additional auditors, including necessary expenses."

The work you describe and its purpose do not come within the field of auditing in the sense in which the Auditor General's Department audits other Departments of the State Government, as discussed in the opinion given by this Department to the Auditor General on March 30, 1922. It seems rather for the purpose of ascertaining the situation with reference to matters involved in the performance of duties of the State Treasurer, the assembling of information desirable to be obtained, and of course it tends to make certain the accuracy of his records.

The Treasury Department differs materially from the Departments in general. Certain auditing constitutes an important part of the duties of the Treasurer. For this purpose auditors are a part of his general force. Additional auditors may be taken on singly and directly, and

doubtless the best way to obtain high class experts for temporary service is through a contract with a firm of expert accountants by which men whose services would not ordinarily be on the market may be obtained for such period of time as is desired.

The propriety of the work as you describe it seems clear enough, and if it is properly termed auditing, or if it is proper to have it done by those commonly termed auditors, of course it comes within the terms of the appropriation referred to. I think said terms are proper to be used in connection with this work. We are coming to make so much use of expert accountants in straightening out or verifying the accuracy of accounts, or making reports or other deductions therefrom, all of which work comes under the common use of the term "auditing," that it cannot be restricted to such matters as passing upon the amount of claims to be allowed, settling accounts, etc., which constitute the main work of a Department like that of the Auditor General.

Therefore, as the work is proper work to be done and comes within the field of auditing as commonly understood, and you have the appropriation for additional *auditors* in the Treasury Department, it is my opinion that the work may be paid for out of the said appropriation.

Very truly yours,

GEO. E. ALTER,
Attorney General.

STATE TREASURY AUDIT.

Act of March 30, 1811, 5 Sm. Laws, 228, conferring authority on the Auditor General to make such audit.

Acts of March 31, 1860, P. L. 382, Section 62, February 17, 1906, P. L. 45, July 18, 1917, P. L. 1065, April 26, 1921, P. L. 279, and May 5, 1921, P. L. 387, regulating State deposits.

Act of May 9, 1874, P. L. 126, Section 5, relating to monthly accounts by the State Treasurer to be furnished to the Auditor General.

Review of certain irregular, improper and illegal practices in the State Treasury, relating to moneys therein and deposits in the several banks, developed by the audit of that department made under direction of the Auditor General, pursuant to Act of March 30, 1811. This audit covered the period beginning May 7, 1907, and ending April 30, 1921.

Office of the Attorney General,
Harrisburg, Pa., September 9, 1922.

Pursuant to the provisions of the Act of March 30, 1811, 5 Sm. L. 228, the Auditor General made an examination of the public treasury in relation to the moneys therein and the deposits in the several banks, for the four years from May 7, 1917 to April 30, 1921, no such audit

having been made annually during that period. From time to time, commencing in April, 1922, the Auditors engaged in this work presented to the Auditor General in writing various sections of their report, which were designated by them as Sections I, II, etc., which he, in turn, transmitted to me for my consideration and for such legal action as it might be deemed necessary or proper to take.

Upon the receipt and consideration of the first section of the Auditors' report it was apparent that further inquiry and investigation would be necessary before it would be possible to determine whether there was any money due and owing from Honorable Harmon M. Kephart, the former State Treasurer, or from any of the depositaries of State moneys, and what legal action, if any, should be taken. I accordingly suggested that the Auditor General exercise the powers vested in him by the Act of 1811 to summon and examine witnesses under oath, so that we could supplement the information furnished to him by the Auditors. This suggestion was followed and a number of hearings were held at which witnesses were examined and books and records produced. A complete stenographic record of the testimony was taken and has been transcribed, a copy of which record together with the exhibits produced and copies of the Auditors' report are now on file in this Department. This record is the basis for the facts and conclusions hereinafter set forth.

When the first section came into my Department, with the information that it would be followed by others, it was apparent, of course, that it might involve matters of more than usual public concern, which should be so treated as to give the public every assurance that the investigation was conducted with an eye single to just results and with the greatest available skill. To this end I conferred with the Honorable Edward J. Fox, former Justice of the Supreme Court of Pennsylvania, asking permission to appoint him a special Deputy Attorney General to co-operate with me in the investigation. With the fine public spirit for which he is distinguished, Judge Fox at once agreed to contribute his services, making it a condition that he should receive no compensation. I have known of no case wherein any one has displayed finer citizenship, and the assistance rendered by him has been of the greatest value. First Deputy Attorney General Hull was assigned to take part, and has done an enormous amount of work, some of which is reflected in the record of the testimony, and all with the skill and accuracy which characterize his work always. Judge Fox, Mr. Hull and I are in accord in the conclusions which have been reached herein.

The deposit of State funds by the State Treasurer is regulated by the provisions of the Act of February 17, 1906, P. L. 45, as amended by the Acts of July 18, 1917, P. L. 1065, April 26, 1921, P. L. 279 and May 5, 1921, P. L. 387, which provides for the designation of depositaries of

two classes, active and inactive, and directs (Section 11) that "the State Treasurer, on the first business day of each month, shall render a statement of account to the Auditor General, giving in detail the different sums which go to make up the grand total of the amount on that day in the State Treasury, including moneys appropriated to the sinking fund. Such statement shall include the names of banks, banking institutions or trust companies with whom the public funds are deposited, with the various amounts of such deposits, and shall be verified by oath or affirmation of the State Treasurer, and recorded in the book kept for that purpose in the Auditor General's office; and such record shall be open for the inspection of the Governor, heads of departments, members of the Legislature, or any citizen of the State desiring to inspect the same; and shall be correctly published in not more than six newspapers, two of which shall be published at Harrisburg, to be selected by the Auditor General, for general information."

The records of the Treasury Department (other than the bank ledgers), and the records of the Farmers Trust Company, Carlisle, an inactive depositary, show that on the last days of July, August, September and October, 1919, there was on deposit in the Farmers Trust Company $185,000. The ledger account kept in the State Treasury Department in account with the Farmers Trust Company, and the monthly statements filed by the State Treasurer in the office of the Auditor General, however, indicate that at those times there was but $85,000 on deposit in this institution. The difference of $100,000 in July is accounted for by the fact that within a few days preceding the last day of the month there was entered upon the Bank Day Book and in the Bank Ledger in the Treasury Department a credit of $100,000, which was designated as a "Book Transfer." This credit was merely a bookkeeping entry, did not represent an actual transfer of funds, and was reflected only upon the Treasury records just mentioned and upon the Treasurer's monthly statement. The differences which occurred in August, September and October, 1919, are accounted for by the fact that just before the close of each of these months there was entered upon the Treasury records a credit of $100,000 to the Farmers Trust Company purporting to arise from a draft drawn upon it, which entry was offset immediately after the last day of the month by a debit purporting to represent the transfer by draft of $100,000 back into that institution. Whether drafts were drawn in all of these cases and subsequently cancelled, does not clearly appear. It is clear, however, that no drafts were actually forwarded and cleared through the banks, and that the drafts, if drawn, were cancelled in the Treasury Department and were never deposited.

At the same time these several entries were made to the credit of the Farmers Trust Company, similar debits to offset them were entered on the records of the Treasury Department to the account of the Colonial Trust Company, Pittsburgh, an active depositary.

The Treasurer's monthly statement was made up by taking from the several ledger accounts the balances as they appeared upon his books at the close of business on the last day of each month. Accordingly the entries to which I have referred were reflected in this statement, by which it appeared that at the close of each of the months aforesaid there was $100,000 more on deposit in the Colonial Trust Company than was the fact.

By means of reverse entries of like character within the first few days of each succeeding month the ledger accounts in the Treasury Department were restored.

By reason of similar entries at the close of August, September and December, 1918, transfers of $500,000, $300,000 and $700,000, respectively, were made from the accounts of certain of the active depositaries into a "Cash on Hand" account, kept by the Treasurer, and back again. All of these entries were mere bookkeeping entries, designated in the Treasury records as "Book Transfers."

Because of the death of the man in charge of the Bank Day Book and Bank Ledgers, it has not been possible to determine who authorized or directed the making of these book entries, and the cancellation of drafts. Mr. Kephart, the former State Treasurer, testified that at different times he directed the transfer of moneys out of certain banks into others just prior to the last day of the month and directed the transfer of the funds back again on the first of the succeeding month for the purpose of concealing from some of the banks the amount of deposits carried in others, and thus avoiding complaint from them. He states, however, that he thought these transfers were always made by drafts which were actually put through the banks in the regular way.

It was suggested by the Auditors in their report that the purpose of the making of "Book Transfers" out of the Farmers Trust Company may have been to avoid publication in the Treasurer's monthly statement of the fact that this institution had on deposit an amount of money in excess of twenty-five per cent. of its capital and surplus, and from the testimony of Mr. Kephart it would appear that he was influenced to some extent by this consideration when he directed actual transfers of money to be made.

Section 1 of the Act of July 18, 1917, P. L. 1065, provides that "no bank, banking institution, or trust company shall receive a deposit of State moneys in excess of twenty-five per centum of its paid in capital and surplus." During 1919 twenty-five per cent. of the capital and surplus of the Farmers Trust Company amounted to $87,500.

Without expressing any opinion as to whether the clause just quoted fixes a limitation upon the amount of deposits which it is unlawful to exceed, or whether a failure to observe the limitation merely renders the State Treasurer personally liable in case of loss, it does not seem probable that the transfers of funds out of the Farmers Trust Company at the times mentioned were made for the purpose of concealing what the State Treasurer believed to be an infraction of the law, for it appears that the deposit in that institution continued from October, 1919, until April, 1920, in excess of twenty-five per cent. of its capital and surplus, yet during this period of six months no such transfers were made, and the published statements showed the excess.

In Section V of their report the Auditors have pointed out a number of inactive depositaries which had on deposit at different times funds in excess of twenty-five per cent. of their capital and surplus or in excess of $300,000; and a number of times when the total amount of deposits in the active depositaries exceeded $6,000,000. It seems that it was almost impossible to sell the first issue of State highway bonds and that as an inducement to purchase them the several banks had been promised that the proceeds of their purchases should remain on deposit with them until needed. In most, if not in all cases, the excess deposits were occasioned by the subscriptions for bonds made under this agreement. It appears that the Governor, the State Highway Commissioner and the State Treasurer had full knowledge of this arrangement, and that it had the sanction of the then Attorney General. It was in furtherance of one of the greatest road building projects ever undertaken by any Commonwealth, a work urgently needed, and one sanctioned and approved by direct vote of the people of the State.

Regardless of the purpose of transferring funds out of an account at the end of one month and back again the beginning of the next, and regardless of the method employed, whether by actual draft, drafts subsequently cancelled or book transfers, manifestly the practice is by no means to be commended. The purpose of the Legislature in requiring monthly statements under oath and the publication of the same was to give to the public accurate information of the state of the public treasury and of the amount of deposits in the institutions in which the moneys were being kept. In effect the practice referred to defeated this purpose. It resulted in no loss of money, either principal or interest, to the Commonwealth, and gives rise to no cause of civil action. If Mr. Kephart did not know that mere book transfers were being made, and there is no evidence that he did know it, I do not think any criminal offense was committed in this connection. In any event, the Statute of Limitations would preclude any prosecution.

Prior to December 1, 1920, it was the practice of the Highway Commissioner to transmit daily to the State Treasurer the moneys received by him in payment of automobile registrations and licenses. These moneys were in the form of cash, checks and money orders for small amounts, and at certain seasons of the year aggregated large sums. It was physically impossible for the Receiving Clerk in the State Treasury to check up each day these moneys transmitted to him from the Highway Department. During the months of December, January and February they accumulated and reached at times an aggregate of over a million dollars. The delay thus occasioned in presenting checks for payment resulted in some loss to the Commonwealth, and it was deemed advisable to adopt some other method of handling these moneys in order that checks might be more promptly collected. An arrangement was accordingly made between the Highway Commissioner, the State Treasurer and the Commonwealth Trust Company, of Harrisburg, Pa., whereby all moneys received for motor registrations and licenses were to be deposited daily in the Commonwealth Trust Company and were later to be deposited in the State Treasury by checks drawn by the Highway Commissioner upon the Commonwealth Trust Company. This method of handling these funds was inaugurated December 1, 1920.

Prior to that date the State Treasury had on hand at nearly all times small amounts of cash and, from time to time, accommodated persons known to Mr. Kephart or to employes of the Treasury Department by cashing checks out of this fund. Upon some occasions these moneys were used also to advance to officers or employes sums of money in anticipation of pay day, for the repayment of which the Receiving Clerk took as security an assignment of the moneys which would be due the assignor for service rendered to the Commonwealth, together with a Power of Attorney to endorse checks drawn by the State Treasurer in favor of the assignor.

At the time when this change of method of handling the motor funds was determined upon by the Highway Commissioner and the State Treasurer, the State Treasurer and his Receiving Clerk discussed between themselves the fact that this change would result in leaving the Treasury with practically no cash, and would render it difficult for the Treasury Department to continue to accomodate persons in the manner above referred to. The requests for such accommodation were always much more numerous during the sessions of the Legislature, and the Legislature convened in January, 1921. The State Treasurer accordingly directed his Receiving Clerk to devise a method whereby a sum of money might be kept on hand in the Treasury Department so that the accommodations theretofore made might be continued. This fund was referred to in the testimony as a "petty cash" or "cash reserve" fund.

While the State Treasurer was not familiar with all of the details of the method adopted by his Receiving Clerk, there is no doubt that he was advised as to all of the essential features of the plan and that he is officially responsible for what his Receiving Clerk did in pursuance of his direction.

The fund was created by the Receiving Clerk in the following manner:

On December 8, 1920, a check for $300,000, drawn on the account in the Commonwealth Trust Company, heretofore referred to, was received from the Highway Commissioner. This check represented moneys received in payment for 1921 motor licenses. This check was deposited to the credit of the Commonwealth in the Harrisburg Trust Company, but the Receiving Clerk caused this payment to be entered upon the books of the Treasury as $280,000. On the same day he caused to be entered upon the books $20,000 of moneys previously received for 1920 motor licenses and held by him at that time in the form of cash. The deposit made was $300,000, and the total of the entries made upon the books $300,000, so that the balance of the Treasury books was not disturbed. Nevertheless, the Receiving Clerk was enabled to retain $20,000 in cash, the receipt of which had not yet been entered upon the books.

A similar transaction on December 15, 1920, enabled the Receiving Clerk to withhold from the books $8,000 more, thus creating a cash reserve fund of $28,000.

On January 6, 1921, or within a few days prior thereto a group of seventeen checks in payment of taxes, etc. due the Commonwealth, was received and deposited on that day to the credit of the Commonwealth. These checks aggregated approximately $28,000. The receipt of these moneys was not entered upon the books of the Treasury on that day, but in lieu thereof the $28,000 of motor funds previously received were entered. Thus all of the motor funds received December 8 and December 15 were finally entered upon the books on January 6, 1921, but the group of checks already referred to had not been entered. These checks were finally entered upon the books at later dates.

By this practice, which it is unnecessary to detail further, the Receiving Clerk kept on hand at all times a fund of approximately $28,000, which was used in cashing checks and making advances. The practice resorted to made it necessary for the Receiving Clerk from time to time to withhold from entry on the books any record of certain moneys which he had received in his official capacity in payment of taxes, fees or other charges due the Commonwealth. In order that the official receipts for moneys paid to him might not be too long delayed it was necessary for him to keep this cash reserve fund constantly revolving, so that while it remained substantially the same in amount at all times

it actually represented from time to time the delayed entry of different receipts. This fund, which I believe may be accurately described as a "revolving fund," was continued from December, 1920, until the close of Mr. Kephart's term as State Treasurer on April 30, 1921, at which time the fund amounted to $25,895.38. Receipts totaling this amount were later recorded upon the books on May 9 and May 17, 1921, during the term of the new State Treasurer.

It appears from the testimony of the Receiving Clerk that the fund thus withheld remained at all times in a safe in the Treasury Department, together with memoranda showing the several persons to whom it ought to be credited. It appears from the investigations of the Auditors that all this money was eventually recorded upon the books and accounted for, and that no loss resulted to the State other than the loss of interest at two per cent., which it would have earned if the State Treasurer had deposited this fund in a State depositary.

During the period that the receipt of these funds was not recorded upon the Treasury books those books did not present a true and accurate account of the receipts of the State Treasury, and the monthly statements of receipts made by the State Treasurer to the Auditor General in pursuance of law did not correctly and accurately inform him of the moneys which had been received during the preceding month. This will be referred to later in connection with the much larger fund handled in the same way.

We have to consider here the advancement of funds received by the State Treasurer in his official capacity to members of the Legislature and officers or employes of the Commonwealth.

The testimony taken shows that in practically every case such advances were made only upon the direction or with the consent of the State Treasurer. At the time the advances were made the moneys were not yet due from the Commonwealth.

Section 62 of the Act of March 31, 1860, P. L. 382, provides as follows:

> "If any officer of this commonwealth, or of any city, borough, county or township thereof, shall loan out, with or without interest, or return therefor, any money or valuable security received by him, or which may be in his possession, or under his control by virtue of his office, he shall be guilty of a misdemeanor in office, and on conviction be sentenced to pay a fine not exceeding one thouand dollars, and undergo an imprisonment by separate or solitary confinement at labor, not exceeding five years, and if still in office, be adjudged thereafter incapable of exercising the same, and the said office shall be forthwith declared vacant by the court passing the sentence."

It might be urged with some force that advances such as have been described were loans within the meaning of the section just quoted. I am not certain that they were. Penal statutes must be strictly construed. But, in any event, this practice has been going on for a long time without any apparent selfish or corrupt purpose or public criticism, and while that would not cure its illegality, if it is illegal, I would not feel justified in suggesting any prosecution here. But I call attention to the Section above quoted as an admonition to the Treasury Department that the question may be raised at some time and that it might be held that the Section applies. Certainly it is a practice which, as a rule and under ordinary circumstances, should not be encouraged.

Sometime prior to May 7, 1917, there was opened upon the Treasury books a ledger account which I shall refer to as the "Cash on Hand" account. It represented moneys received by the State Treasurer and not deposited in any of the State depositaries. It does not appear from the testimony and it is not material to inquire in what form this fund was kept prior to July, 1918. From that time, however, until the close of Mr. Kephart's administration as State Treasurer this "Cash on Hand" fund was kept in the form of commercial paper.

During the summer of 1918 the State Treasurer determined to set up a fund of not more than $500,000 to be available as a war emergency fund and to be carried as cash on hand. He consulted with the Receiving Clerk and instructed him to withhold from deposit all checks received from the County Treasurer of Allegheny County in payment for taxes due the Commonwealth from that officer. A check in the amount of $98,953.79 received during the month of July 1918, drawn upon the Carnegie Trust Company, was held until October 25, 1918. On that day the State Treasurer took this check to the office of Mr. John A. Bell, in Pittsburgh, where he delivered it to Mr. Bell and received in exchange a check for the same amount, signed by him as President of the Carnegie Trust Company, drawn upon the Colonial Trust Company. At the same time he stated to Mr. Bell that he desired to exchange other checks which he might receive from time to time and that he then had on hand at Harrisburg a check which he desired to exchange and he requested that Mr. Bell give him blank checks drawn by him as President of the Carnegie Trust Company upon the Colonial Trust Company, in order that he might substitute these checks for the check of the Allegheny County Treasurer. This Mr. Bell agreed to do and delivered at that time several such blank checks. These blank checks were brought to the State Treasury and were there filled in payable to the Commonwealth of Pennsylvania in amounts aggregating the amounts of the checks received from the County Treasurer, which were then

forwarded to Mr. Bell. The checks of Mr. Bell were retained by the State Treasurer in his "Cash on Hand" fund until he deemed it necessary or advisable from time to time to make deposit of them. Other such exchanges were made subsequently for the same purpose.

The amount of the funds thus withheld from deposit were accurately recorded upon the books of the State Treasury from the time this fund was created in July, 1918, until June 2, 1920. At the latter date the State Treasurer instructed his Receiving Clerk to remove this fund from the records of the Treasury so that although the funds would remain on hand, the records of the Treasury Department would not show it. Pursuant to this direction the Receiving Clerk removed this fund from the records of the Treasury by means of delaying the entry on the records of money received from other sources; that is to say, as receipts came in from various creditors of the Commonwealth they were not recorded upon the books. They were deposited in the bank and the deposits were credited to the "Cash on Hand" account so as to make it appear that the cash on hand had been deposited. By June 30, 1920, the "Cash on Hand" fund was completely removed from the books. Nevertheless there remained in the hands of the Receiving Clerk commercial paper in the amount of $200,177.92, which represented moneys received by the Treasury and not recorded upon its books. Thus there was established a revolving fund which continued until the close of Mr. Kephart's administration. At various times some part or all of this fund appeared upon the books to the credit of the "Cash on Hand" fund, but during most of the period all or a part of the fund did not appear upon the books and throughout this period there was a systematic delay in recording upon the Treasurer's books the receipts of money as they came in from time to time.

According to Mr. Kephart's testimony this fund was originally begun for the purpose of enabling him to meet some war emergency which might arise. The expectation of any such emergency ceased in the latter part of 1918 or the early part of 1919. The fund, however, was continued in order to meet demands which might arise for the payment of appropriations to hospitals and other institutions receiving State aid whom the State Treasurer might desire to give precedence as against other persons who had claims against the Treasury. The State Treasurer caused the fund to be removed from the books in order that he might more effectually control its disbursement by concealing its existence. In stating these reasons I am taking the testimony of Mr. Kephart, which is our only source of information as to them. No one in the Treasury Department excepting the State Treasurer himself and his Receiving Clerk knew of the existence of this fund during the time when the same did not appear upon the books. When requests were made to him personally for the payment of appropriations it was

possible for him to deposit a part of this secret fund in one of the depositaries and then check it out in payment of such appropriation. There is no suggestion in the testimony submitted that any of the moneys were paid out in any unlawful manner or for any unlawful purpose.

With reference to the fund just discussed, during the period when the books were so kept as to conceal its existence, as well as the fund previously discussed and referred to as the petty cash fund, the existence of which was not disclosed by the books at any time, however innocent might be the purpose which the Treasurer was seeking to accomplish, there seems to be no escape from the conclusion that we have a direct and important violation of the law.

Section 5 of the Act of May 9, 1874, P. L. 126, provides:

> "It shall be the duty of the State Treasurer to keep a correct and accurate account of all moneys received and expended and he shall furnish to the Auditor General on the first business day of every month an account of all moneys so received and paid by virtue of the powers of his office during the preceding month, together with vouchers for the payments made by him, and the Auditor General shall transfer all the receipts and payments to their proper accounts in the books of his office."

This Act imposes upon the State Treasurer the specific duty of keeping a correct and accurate account of all moneys received by him in his official capacity and of making a true and correct report of such receipts to the Auditor General on the first business day of each month. It is clear that during the period when the petty cash fund was maintained by the Receiving Clerk of the Treasury Department, and the time when the books were so kept as to conceal the larger fund, the official books of the Treasury did not represent a true and accurate account of the moneys received, nor did the reports made to the Auditor General, which in each case were taken from the books, represent an accurate statement of the receipts of the Treasury.

It is plain, therefore, that the State Treasurer wilfully—that is, knowingly and intentionally—failed to perform the specific duty imposed upon him by the Act of 1874, above quoted. Not only was there a failure to keep an accurate account, but there was the deliberate keeping of an inaccurate account, for the purpose of giving inaccurate and misleading information.

While the Act of Assembly which imposes this official duty of keeping accurate accounts provides no penalty for its neglect, wilful disregard of that duty is a criminal offense. Every officer commits a misdemeanor in office who wilfully neglects to perform any duty which, either by common law or by statute, he is bound to perform, provided that duty is not a matter of discretion and he is able to perform it with-

out any danger greater than a man of ordinary firmness and activity may be expected to encounter. The duty of the State Treasurer, involved here, is not discretionary but ministerial. Its performance was not attended with any danger or even inconvenience. It would have been much more convenient and easy to keep the accounts right than to keep them in the misleading way in which they were kept. It follows inevitably that we have here a case of misdemeanor in office for which and indictment lies at common law.

It is not necessary to such a prosecution that corruption or any loss to the Commonwealth shall be shown. But the Commonwealth may suffer loss other than of its funds. Official disregard of the law causes loss of public confidence and loss of respect for the administration of public affairs, much more serious to the Commonwealth than loss of money. It is needless to say that the keeping of records scrupulously accurate in an office of such grave responsibility as that of the State Treasurer of the Commonwealth of Pennsylvania is a matter of the gravest public concern. The manipulation of the accounts here involved was so entirely at variance with the decorum which ought to prevail in everything done in a great public office that when the Attorney General finds himself in a position where he must either condemn or condone, a proper regard for his own office leaves only one course to be pursued. I will have to cause an Information to be made on a charge of misdemeanor in office. In so doing I am not passing on the question of guilt or innocence. That is not my function. Prima facie there is a plain case. The records which the law commands the Treasurer to keep correctly were kept incorrectly, intentionally so and for the purpose of concealing the existence of a part of the funds of the Commonwealth. A jury may hear the explanation and find that no offense was committed. That is their function, not mine. The question of guilt or innocence is wholly for them.

The Legislature of 1917, in its General Appropriation Bill, provided a Contingent Fund for the use of the State Treasury Department of $10,000, which was approved by the Governor in the sum of $8,000.

On July 18, 1917, the State Treasurer withdrew on an advance requisition $3,000, and on October 3, 1917, withdrew in the same manner $3,000. This total of $6,000 was deposited in the Union Trust Company of Pennsylvania at Harrisburg, Pennsylvania, in the account of "H. M. Kephart, Chief Clerk," and was there mingled with other moneys belonging to Mr. Kephart personally. The account was not opened and kept in the manner provided by the Act of June 2, 1915, P. L. 726.

Between the dates of these deposits and November 18, 1917, all of the $6,000 aforesaid was withdrawn from this account. Mr. Kephart testified that he had paid this money out to a list of persons who were

supposed to be employed by the Commonwealth and who gave him receipts or vouchers for the payments. Subsequently, feeling that these payments could not properly be made out of funds of the Commonwealth, he paid the same amount of money to three other persons employed by him during 1917, 1918 and 1919, and when accounting for the expenditure of the $6,000 referred to he made no mention of the first persons to whom he had paid moneys but inserted in his accounting vouchers in lieu thereof the payments subsequently made to three persons.

It seems apparent from his statement that this sum of $6,000 was not lawfully used for the purposes of the Commonwealth but was converted to personal uses. I do not mean by this that he received the benefit of any of the money, but using it for the benefit of individuals and not for State purposes was in effect a conversion to his own use as between him and the Commonwealth.

What I have said concerning this $6,000 applies equally to the Contingent Fund of $10,000 appropriated by the Legislature of 1919 and withdrawn by the State Treasurer on two checks of $5,000 each, dated September 3 and December 16, 1919, both of which were cashed by the Receiving Clerk in the Treasury Department and the cash delivered to Mr. Kephart. Indeed the testimony with reference to the $10,000 is much the more definite and surprising. The money was simply distributed among a number of people whose names were given to the State Treasurer, without any pretense of any return in service to the State. As to any such service the Treasurer frankly says, "that is not the way it is done."

Such distributions as that just described cannot be too severely condemned. Just as well might a bank cashier invite his friends in to share in the contents of the bank safe. Mr. Kephart, realizing on reflection that the action was indefensible, disavowed it and does not ask credit for the payments. In the case of the said distribution of his contingent fund of $10,000 in 1919, he turned $10,000 of his own cash into the Treasury at the end of this term. This, however, though commendable, would not wipe out the offense committed in the original misappropriation, and but for the bar of the Statute of Limitations it would be difficult to show why there should not be prosecutions, including all those who participated in the distribution. It is clear from the testimony, however, that all this was done by the beginning of the year 1920, or earlier, and the period of two years, fixed by the Statute of Limitations, had expired before this investigation was commenced.

It further appears from the testimony taken that on April 18, 1918, a check was drawn to the order of "Commonwealth of Pennsylvania, Dept. of State Treasury" in the sum of $500, which was charged to the

Contingent Fund and delivered to Mr. Kephart. This check was subsequently endorsed by Mr. Kephart and used in the manner set forth in Section VI of the Auditors' Report. According to the testimony taken at the hearings this money was drawn from the State Treasury to reimburse Mr. Kephart for traveling expenses which he had previously advanced out of his own personal funds, and these traveling expenses were incurred in the transaction of official business for the Commonwealth. Although there is no accurate and detailed accounting of these traveling expenses, the statement that such expenses were incurred is corroborated by a letter written by the former Auditor General. If the expenses were actually incurred in the transaction of the public business and the check referred to was given to reimburse Mr. Kephart for such expenditure, there is nothing improper in the use to which this check was subsequently put. Under such circumstances the check would be his own.

On July 2, 1918, a check in the sum of $200 was drawn to the order of "Commonwealth of Pennsylvania, Treasury Department," delivered to Mr. Kephart, endorsed by him and subsequently deposited in a Connellsville bank in a personal account of his own. It does not appear from the testimony what specific expenditure were intended to be covered by this check. The inference from all the testimony is, however, that this check, like the check of $500 last referred to, was drawn to reimburse Mr. Kephart for expenditures previously made by him upon official business, and, in my opinion, no claim on the part of the Commonwealth would be warranted by the facts and circumstances surrounding the issuance and use of this check.

With respect to the sum of $6,000 and the checks of $500 and $200 withdrawn from the Contingent Fund of 1917, it appears that an accounting requisition is not itemized with sufficient detail to enable any one examing it to determine whether the moneys accounted for had actually been expended or for what purpose they had been expended. This account should have been supported by vouchers indicating the nature and character of the service rendered, the persons to whom and the times when, the moneys were paid. The failure to supply such vouchers at the time of filing the account may now be supplied by the testimony of witnesses or the submission of vouchers or receipts showing that these moneys were actually spent for the lawful uses of the Commonwealth. If such evidence is supplied of course the matter will be ended. If, however, no satisfactory accounting is made, the accountant should be called upon to pay into the State Treasury so much of this fund as is unaccounted for.

On February 12, 1919, Mr. Kephart withdrew on advance requisition from the State Treasury $7,500, which was deposited in his account in the Commonwealth Trust Company, Harrisburg, Pennsylvania,

in the name of "H. M. Kephart, Special." This check was charged to the deficiency appropriation made to the Treasury Department of 1919. According to the testimony of Mr. Kephart the expenditure of this money was accounted for by an accounting requisition dated October 6, 1920, a photostatic copy of which appears as Exhibit 310 in the record of this investigation. This accounting requisition is supported by twenty-three vouchers signed by the several persons to whom the moneys were paid and certified by each of them to represent service actually rendered to the Commonwealth. It appeared from the testimony taken at the hearings, however, that in a number of instances the money represented by these vouchers was paid by Mr. Kephart to persons who had rendered no service whatever to the Commonwealth. They would come within the same class with the $10,000 distribution which has been discussed, but their adequate treatment is barred by the same Statute.

With respect to the payments represented by the accounting voucher filed under date of October 6, 1920 (Exhibit No. 310), amounting to $7,500, Mr. Kephart should be called upon to repay to the Commonwealth all of the moneys which do not represent payments made for services rendered to the Commonwealth.

The $10,000 contingent fund of 1919 was promptly distributed to the list of individuals, not employes of the State, as explained, and it was not until the end of his term, about the first of May, 1921, that the amount was restored to the State Treasury. There is no Statute of Limitations in civil claims in favor of the Commonwealth. It seems perfectly clear that from the time this money was used, which is approximately from the time it was drawn, until the time of its repayment to the State Treasury, Mr. Kephart must be asked to compensate the State at the rate of six per cent. per annum. Similar situations will arise in connection with some of the other appropriations.

The dealings between the State Treasurer and the Carnegie Trust Company present a very unusual situation and the position we should take with reference to it involves a very interesting question. What relation was created between the Commonwealth and the Trust Company and what liabilities grow out of that relation?

It is plain that as a result of the practice which was maintained, money in the course of transfer to the State Treasury from the account of the Treasurer of Allegheny County was delayed and that during the period of that delay it was in the possession of the Trust Company. Thus for a long period the Trust Company had the benefit of an amount averaging several hundred thousand dollars for which the State Treasurer was holding its drafts. These drafts were not given for the purpose for which drafts are ordinarily issued—the transfer of money—but it was understood they were going to be held by the State Treasurer until

he had occasion to pay the money out, and to facilitate his thus holding them and cashing only such portions of the proceeds of the checks as the disbursements of the State Treasury might require from time to time, there was followed this unprecedented practice of issuing the drafts in blank—several of them in return for a check.

For these large sums which remained in the hands of the Trust Company we cannot well measure the Commonwealth's compensation by the two per cent. prescribed by the law relating to State deposits, because that same law provides how State deposits shall be authorized and regulated and secured, none of which provisions were observed in this matter. It is neither needful nor appropriate at this time to go into any elaborate reasoning upon the question here involved, but I think it might well be urged that the whole situation created a constructive trust under which we might ask the Trust Company to account to the Commonwealth for the profits of the fund while it was in its possession. This will be a matter to be taken up with the Trust Company by the Auditor General and the Attorney General.

The very interesting testimony of Mr. E. J. Edwards, of Pittsburgh, relates in part to money received by him as recently as April 28, 1921, but this payment, however much it may be criticised, is not one with which we can interfere under the testimony. His duties during the period, February, March and April, 1921, as described in the testimony, appear to have been somewhat those of an evening office attendant, for which he was paid at the rate of about $66 per month. He says the main purpose of his presence in Harrisburg was to look after legislation desired by the Sheriff of Allegheny County relating to the Coroner's office of that County, and that he was receiving full pay as a Deputy Sheriff of Allegheny County all the time. According to his testimony the taxpayers of Allegheny County were unconsciously paying him to lobby for a law to increase the fees of their Coroner's office. The whole situation shows a deplorable lack of official sense of propriety, but, as far as we are here concerned, as long as Edwards was rendering some service his employment was a matter of discretion as was also his compensation, which was small in amount, though, doubtless, very ample for the service rendered.

The cases wherein it may seem practicable to enforce the repayment of money paid out unlawfully have not been discussed to any extent in detail. They will be worked out by the Auditor General and the Attorney General and the mention of them herein is sufficient for the present purpose.

The thought may suggest itself that as the accounts of these payments have passed through the fiscal offices and have been formally approved, their legality has been adjudicated and is not now open to question. This is not sustained by a careful examination of the cases.

Where the settlement is in favor of the Commonwealth and the other party does not appeal, the settlement becomes conclusive. This is very different from a settlement against the Commonwealth in favor of one of its own officers and particularly in favor of one of the fiscal officers themselves. It would not do to hold that the fiscal officers could settle accounts in favor of each other and thereby place them beyond question. The law makes no such departure from common sense.

Probably it is no part of the Attorney General's duty to suggest legislation. It may be proper to mention, however, that so far as I have discovered there are now no statutes expressly forbidding the deposit of funds in excess of the limits mentioned in the Act of 1917 and providing a penalty therefor; expressly forbidding the State Treasurer to cash checks or make advances upon salary or upon contracts; providing a penalty for the making of false entries upon the books of the Treasury where there is no fraudulent intent; expressly forbidding the exchange of commercial paper received in payment of debts due the Commonwealth for other commercial paper; nor specifically requiring the State Treasurer to deposit in a bank or trust company all of the funds which he receives in his official capacity. Upon consideration the Legislature may determine to make some or all of these acts or ommissions criminal. It seems that it has not yet done so.

GEO. E. ALTER,
Attorney General.

OPINIONS TO THE COMMISSIONER OF BANKING.

OPINIONS TO THE COMMISSIONER OF BANKING.

For the Year 1921.

IN RE STATE BANKS.

Borough Tax Collector—Public Moneys—Director or Cashier of State Banks—Acts of January 27, 1819, 7 Sm. L., 148, and of 1913.

As a borough tax collector no longer receives and accounts for any public moneys of this Commonwealth, he is not disqualified from acting as director or cashier of a State Bank.

Office of the Attorney General,
Harrisburg, Pa., January 4, 1921.

Honorable John S. Fisher, Commissioner of Banking, Harrisburg, Pa.

Sir: There has been received by this Department your request for an opinion whether a borough tax collector is disqualified from acting as director, or cashier, of a State bank.

The act approved the twenty-seventh day of January, A. D. 1819, 7 Sm. L. 148, provides as follows:

> "No judge of any court, nor any person holding any office under this commonwealth, in the accounting or treasury department, or in the land offices, or any person authorized to receive and account for the public moneys of this commonwealth, shall be capable, at the same time, of being a director or cashier of any bank."

The question therefore arises whether a borough tax collector is the agent of the Commonwealth in collecting taxes, and therefore, a person authorized to receive and account for the public moneys of this Commonwealth. I understand this question was raised on the theory that a borough tax collector collects State taxes from mortgages, judgment creditors, guardians, etc. A borough tax collector no longer collects such tax for the Commonwealth. Prior to the Act of 1913, the Commonwealth received a portion of the taxes collected from mortgages, judgment creditors, etc., and the counties received a portion thereof. Since the passage of that act, the Commonwealth no longer receives any of these taxes; the same are paid to the counties in which they are assessed and collected. It follows that a borough tax collector no longer

receives and accounts for any of the public moneys of this Commonwealth, and you are therefore advised that a borough tax collector is not disqualified from acting as director or cashier of a State bank.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General.

IN RE B. & L. ASSOCIATIONS.

Net Profits—Five Per Cent of Net Earnings—Contingent Fund—Act of May 14, 1913.

Under the Act of May 14, 1913, a building and loan association is authorized to set aside from the net profits as a contingent fund a sum not exceeding five per centum of the net profits earned during any particular year, and said sum must be set aside in each year and such sum cannot be cumulated, so that if a year is allowed to pass, the amount cannot be set aside thereafter for that particular year.

Office of the Attorney General,
Harrisburg, Pa., January 21, 1921.

Mr. H. H. Eshbach, Chief of Building and Loan Bureau, Banking Department, Harrisburg, Pa.

Sir: There has been received by this Department your request for an opinion as to whether the Act of May 14, 1913, restricts the amount that can be set aside by a building association as a contingent fund in any one year to five per cent. of the earnings of that year, or whether an association may set aside each year five per cent. of its total earnings to that date; also your request for an opinion as to whether a building association may, if it fails to set aside a certain percentage of the net earnings in any one year, cumulate the same and set aside five per cent. for each of the years that it has failed so to do.

The Act approved the 14th day of May, A. D. 1913, P. L. 205, 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 my opinion this restricts the amount that may be set aside each year to five per centum of the net profits earned in that particular year. It seems to me this construction of the Act is upheld by the theory and method of doing business by building and loan associations. The theory upon which the business of building and loan associations is transacted is that all the profits are to be distributed at the end of each year or some other fixed period by adding them to the value of the shares of outstanding series of stock, and that no surplus shall be carried by the association. Up until the Act of 1913 no amount was set aside nor were associations authorized to set any amount aside for contingent or other losses. In order that the stock of all series then outstanding may participate in the profits of the association for each year the net profits of one year are added to the total net profits, and all of such profits are redistributed at the end of each year. If the five per centum were computed on the total net profits of the association and not the net profits for each year, it might work to the disadvantage of the stock of certain series, and I am of the opinion this was not contemplated nor intended by the Legislature when the Act was passed. For the same reasons I am led to the conclusion that these deductions or amounts set aside can not be cumulated.

The Act authorizes the association to set aside a certain percentage not to exceed five per centum of the net profits at the end of each year. If, however, the association allows the year to pass and fails to set aside a portion of the profits in accordance with the provisions of the Act, it can not thereafter set aside any portion of the net profits for that particular year.

You are, therefore, advised that building and loan associations are authorized to set aside from the net profits a sum not to exceed five per centum of the net profits earned during any particular year, and said sum must be set aside in each year, and such sums can not be cumulated.

Very truly yours,
BERNARD J. MYERS,
Deputy Attorney General.

BUILDING AND LOAN ASSOCIATIONS.

Building and loan associations—Borrowers—Right to set off value of stock against loan.

Borrowers from building and loan associations have the right to set off the value of their stock against their loans.

Office of the Attorney General,
Harrisburg, Pa., June 6, 1921.

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 a stockholder in a building and loan

association may set off the value of his stock against any indebtedness of his to the association.

I note the question has arisen as to whether payment made on account of stock may be set off against balances due on loans. I am of the opinion that borrowers are entitled to set off the value of their stock against their loans. While payment on account of a stock subscription in a corporation might not be credited against the debt which the stockholder owes to the corporation, a payment on account of the stock in a building and loan association is a somewhat different matter. The subscriber for a certain number of shares of the stock of a building and loan association pays a certain sum monthly per share on account of said subscription. At the end of a period, which is between eleven and twelve years, the money so paid in by the subscriber as dues, with interest accumulations, becomes worth a certain amount, and the stock is then called mature, and the mature value, which is double the par value of the stock, is repaid to the subscriber.

At any time during the period from the time the subscriber goes into the association up until the time his shares mature, he has the right to withdraw, and his shares of stock have a definite withdrawal value.

I, therefore, am of the opinion that at the time the Home Providers Building and Loan Association, to which you refer in your request, was taken over by your Department all the stock had a fixed withdrawal value, and any stockholder, who was also a borrower from the Association, would have the right to set off against his loan the value of his stock as of the date your Department took possession.

I return herewith correspondence and papers relating to the request.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General.

SMALL LOAN'S ACT.

Small Loans Act— Usury—Act of June 17, 1915.

Under the Small Loans Act of June 17, 1915, P. L. 1012, a loan of more than $300 by any person, partnership, association or corporation to a single individual is unauthorized.

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

Honorable John S. Fisher, Commissioner of Banking, Harrisburg, Pa.

Sir: I have your inquiry as to the interpretation of the Act of June 17, 1915, P. L. 375, entitled "An Act regulating the business of loaning

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; fixing the rates of interest and charges therefor; requiring the licensing of lenders; and prescribing penalties for the violation of this Act."

Your question is whether the authority conferred by the Act is limited to a single loan not exceeding $300 to any individual or whether one individual may be given an unlimited number of loans, provided each loan does not exceed $300.

The language to be considered is found in Section 1 of the Act as follows:

> "It shall be lawful for any person, persons, partnership, association, or corporation within this Commonwealth, who shall comply with the requirements of this act, 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 and charge and collect for the loan thereof interest and fees as hereinafter provided."

The interest and fees provided are such as would otherwise be usurious.

This Act deals with an exception to the general law as well as to the principles of the common law. It should be construed accordingly. If the limit of $300 were to be applied only to each single loan and an individual could borrow any amount desired by dividing it into notes of $300 each, the limitation would be of little practical use. While the expression "*sums* of $300 or less" occurs in the language above quoted, the plural "*sums*" and the words "*to individuals*," which follow, are consistent with an interpretation restricting the loan of the prescribed sum to each individual borrower. This I think is the correct interpretation.

You are advised that the loan of more than $300 by any person, partnership, association or corporation to one individual is not authorized by this Act.

Yours very truly,

GEO. E. ALTER,
Attorney General.

BUILDING AND LOAN ASSOCIATIONS' LOANS.

Building and loan associations—Power to borrow money—Certificates of indebtedness—Temporary loans—Act of June 25, 1895.

1. Under the Act of June 25, 1895, P. L. 303, a building and loan association may temporarily borrow money by the issue of certificates of indebtedness, where it is necessary to meet demands occasioned when a series of stock has matured, or when applications for loans shall exceed the accumulations in the treasury.

2. The words "make temporary loans," as used in the act, must be interpreted as meaning "borrow" or "secure a loan."

Office of the Attorney General,
Harrisburg, Pa., October 26, 1921.

Honorable John W. Morrison, First Deputy Commissioner of Banking, Harrisburg, Pa.

Sir: In answer to your communication of the 19th instant, asking to be advised whether a building and loan association can issue Certificates of Indebtedness, I have the honor to submit the following opinion:

The question whether a building and loan association incorporated under and regulated by the law of our State can lawfully borrow money can arise only under a statute or statutes which are silent upon the subject. If the statutes expressly permit it the right is precisely measured by the extent of the license granted. *Endlich on Building Associations, par. 286, Ed. 1895.*

The Act of June 25, 1895, P. L. 303, extending the power of building and loan associations, provides, inter alia:

> "* * * They shall have the right, when a series of stock has matured, or when applications for loans by the stockholders thereof shall exceed the accumulations in the treasury, to make temporary loans of such sum or sums of money to meet such demands, not exceeding in the aggregate of such loan at any one time twenty-five per centum of the withdrawal value of the stock issued by said association * * *."

The words "make temporary loans" must be interpreted as meaning "borrow" or "secure a loan." The purpose for which money may be borrowed is limited to the cases enumerated in the excerpt cited from the Act of 1895. There is no sanction of the borrowing of money for other uses except it be an implied sanction of the temporary borrowing of such moneys as may be required to purchase real estate on which such association may hold a mortgage or lien, or the borrowing of such moneys as may be necessary to protect the property of the association.

The form of obligation which the association shall give to secure its creditors in such cases is not prescribed by the statutes, and there is no legal objection to a Certificate of Indebtedness, provided the purpose of its issue is sanctioned. Of course a Certificate of Indebtedness cannot be issued as a form of investment.

Very truly yours,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

IN RE LEGAL INVESTMENTS.

Bonds—First Mortgage—Trust Funds—Liability of Trustee—Fiduciaries Act of 1917.

Bonds, secured by a first mortgage made to a trustee, is not a legal investment in Pennsylvania. This is true whether the real estate is owned by an individual or a corporation. The Fiduciaries Act of 1917 prescribes how trust funds may be invested legally by a trustee. One who invests his money in a bond secured by a first mortgage does not invest in a mortgage.

Office of the Attorney General,
Harrisburg, Pa., November 4, 1921.

Honorable John S. Fisher, Commissioner of Banking, Harrisburg, Pa.

Sir: I have your communication of recent date asking to be advised whether certain first mortgage bonds described in a circular accompanying your letter are a legal investment by trustees. I understand that you desire an opinion in order that you may know whether banks and trust companies under the supervision of your Department may invest trust funds in these securities.

From the circular it appears that on July 1, 1921, an individual owning real estate in the City of Philadelphia duly made a first mortgage on the same to a trust company as trustee to secure an issue of four hundred and fifty $1,000 First Mortgage 7% Sinking Fund Gold Bonds maturing July 1, 1931. The mortgage was properly recorded and the bonds have been issued and certified by the trustee.

Section 41 of the Fiduciaries Act, approved June 7, 1917, P. L. 447, provides:

> "(a) 1. When a fiduciary shall have in his hands any moneys * * * to remain for a time in his possession * * * 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: Provided, That nothing herein contained shall authorize any fiduciary to make any investment contrary to the directions contained in the will of the decedent in regard to the investment of such moneys.
>
> "2. When a fiduciary shall have in his hands any moneys, * * * he may present a petition to the orphans' court having jurisdiction of his accounts stating the circumstances of the case and the amount or sum of money which he is desirous of investing; whereupon it shall be lawful for the court, upon due proof, aided if necessary by the report of a master, to make an order directing the investment of such moneys in real estate in this Commonwealth other than ground-rents or in the bonds or certificates of debt now created or hereafter to be created and issued according to law by any other State of the United States, or by any of the counties or cities of such other State, at such prices, or on such rates of interest and terms of payment, respectively, as the court shall think fit: * * * And provided further, That nothing herein contained shall authorize the court to make an order contrary to the directions contained in any will in regard to the investment of such moneys."

This is the present statutory guide for the investment of trust funds. A trustee can protect himself from risk in one of two ways: First, by investing the trust fund in the kind of securities described in (a) 1 above, which may be done without an order of the Court, and second, by making the investment in another kind of securities upon the order of the Court, as provided in (a) 2. The only exception to this is in the cases in which other authority is given by the instrument appointing the trustee.

Manifestly, the bonds in the present case do not fall within any class of securities described in the above cited section of the Act unless it be that they are comprehended within the meaning of the words "mortgages in Pennsylvania." If the question were an open one in this State, I should have no hesitation in concluding that the investment in these bonds is not an investment in a mortgage in the Commonwealth. One who buys one of the four hundred and fifty $1,000 bonds, secured though it be by a first mortgage given by a trustee, in my opinion, does not invest his money in a mortgage. The owner of the bond has no such independent control of the mortgage as he would have if he owned the mortgage. The question is not one of the safety of the investment, but one of the character thereof as required by the statute. It would have been a simple matter for the Legislature when it enacted the Fiduciaries Act to have authorized trustees to invest in bonds secured by mortgages

on real estate situate and owned by individuals in the Commonwealth, but it did not do so and thereby continued the policy of requiring the utmost conservatism in providing legal investments for trust funds.

The question whether a bond secured by a first mortgage on real estate is a mortgage is settled in Pennsylvania by the case of *Commonwealth ex. rel. McConnell, Appellant, 226 Pa. 244.* In that case the trustee of a lunatic invested several thousand dollars of the estate in the bonds of a brewing company. The bonds were secured by a mortgage. The brewing company went into bankruptcy and the bonds became worthless. The Auditor surcharged the Committee with the loss amounting to $11,460. Exceptions to the Auditor's report were overruled by the lower Court, and the Supreme Court held that the investment was illegal and in violation of the provisions of Article III, Section 22, of the present Constitution, which prohibits the General Assembly from authorizing the investment of trust funds by a trustee in the bonds or stocks of any private corporation.

There is in the above mentioned Section of the Constitution no inhibition against the authority of the Legislature to authorize trustees to invest trust funds in mortgages on corporate real estate, but in the above case the Court held that the investment, although secured by a mortgage on real estate, was investment in the bonds of a private corporation and for that reason illegal. The fact that the present bonds are secured by a mortgage on individually owned rather than corporate owned real estate does not alter the character of the investment from bond to mortgage, and until the decision in *Commonwealth ex rel. vs. McConnell* is overruled or the Legislature alters the law the bonds about which you inquire are not a legal investment for trust funds.

This conclusion is in harmony with the reasoning of Deputy Attorney General Bernard J. Myers in an opinion to your Department under date of August 16, 1920, in which your Department was advised that the investment by a trust company under the supervision of your Department in the bonds issued by private corporations and secured by a mortgage given to a trustee for the bondholders and covering real estate owned by the corporation, is not a legal investment for trustees under the Constitution and laws of the Commonwealth.

Very truly yours,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

OPINIONS TO THE COMMISSIONER OF BANKING.

For the Year 1922.

TRUST FUNDS.

Banks and banking—Bank with special charter—Trustee—Deposit of trust funds—Police powers—Supervision by Banking Commissioner.

Although a bank may, under a special charter, have had the right by an order of icourt, under special circumstances, to become its own depository of funds of which it ss trustee, such right is superseded by the general banking regulations of the Commispioner of Banking, which require all banking institutions under his supervision to deosit in other institutions all uninvested trust funds held by them as trustees.

Office of the Attorney General,
Harrisburg, Pa., January 5, 1922.

Honorable P. C. Cameron, Second Deputy Commissioner of Banking, Harrisburg, Pa.

Dear Sir: I have your letter of the 22d ultimo asking to be advised whether a certain bank, incorporated by Special Act of Assembly, acting in its capacity as trustee, has the right to deposit uninvested trust funds with itself.

It appears that this bank claims to be exempt from the regulations of the Banking Department requiring uninvested trust funds to be deposited in some other institution and properly earmarked as trust funds, because of the special provisions of its charter which, as renewed and now in force, authorizes it "to receive and become the depository of all trust funds and such other funds that may be paid into or be under the control of the several courts of this State and the laws of the same: Provided, that the said courts shall be satisfied of the security of the said depository."

The answer to your inquiry depends upon the rights and powers granted to this bank by its charter as affected by and subject to such general regulations as from time to time may be made by the Commonwealth with a view to the protection and security of the public and other individuals. The rights insured to private corporations by special charters are subject, always, to the police powers of the State under which regulations which affect these rights may be changed from time to time as experience may demonstrate the necessity.

Says Judge Cooley in his Chapter upon the Police Power of the State 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 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."

The limit to the exercise of the police power is that the regulations must have reference to the general welfare, and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges conferred by the charter.

The Act of May 21, 1919, P. L. 209, continuing the Banking Department, supersedes all other Acts upon the same subject and repeals unconstitutional Acts. Section 20 provides as follows:

> "Whenever it shall appear to the Commissioner of Banking that any corporation or person under the supervision of the Banking Department has violated any provision of this act or any law regulating the business of such corporation or person, or is conducting business in an unauthorized or unsafe manner, or that any such corporation has an impairment of capital, the Commissioner may issue an order, under his hand and seal of office, directing such corporation or person to discontinue such violation of law or such unauthorized or unsafe practices, or directing such corporation to make good any impairment or deficiency of capital, as the case may be, within a time, of not less than sixty days after notice, to be fixed by the Commissioner."

The power of the Banking Department to supervise and regulate the operation of banks, trust companies and others doing a banking business in Pennsylvania is beyond question. The Banking Commissioner may promulgate any reasonable rule and may enforce any reasonable regulation or order which in his judgment makes for greater safeguarding of depositers in banks, and for better protection of trusts administered by trust companies and banks exercising like power. Banks operating under charters granted by special Act of Assembly are subject to this regulatory power.

An examination of the Act incorporating the bank in question does not disclose any specific grant of power to accept a trust and keep the uninvested portion of the fund on deposit in its own banking department. It is conceded by the solicitor of this bank that no such authority exists in relation to any such trust except in cases where the court has named the bank as depository. It is contended that the following language of the Act incorporating this Bank gave it this special power:

> "To receive and become the depository of all trusts and such other funds that may be paid into, or be under the control of, the several courts of this State and the laws of the same. PROVIDED that the said courts shall be satisfied of the security of the said depository."

Here we have a statute granting, first, the power to receive trusts under the order of the several courts; and second, the power to become the depository of such trusts. To receive a trust is to become trustee. There is a clear line of demarcation between the powers and duties of the bank as depository, and its powers and duties as a trustee. In the former case it is subject to the control and order of the court, and in the latter it is subject to the supervision and regulation of the Banking Department. When the bank receives a deposit by order of the court the deposit remains subject to the control and order of the court. But no order of court as to a deposit with a bank, trustee, which involves the violation of reasonable and duly promulgated regulations of the Commissioner of Banking upon the handling of trust funds by banks under the supervision of his Department, can be sustained. When such a bank is appointed guardian or trustee, either by order of court or act of parties its operations are under the supervision of the Banking Department and it is subject to the rules of that Department regulating uninvested trust funds. This bank may be made a depository by order of the court. It may be appointed trustee by the court. But legally it may not be appointed trustee and depository of the uninvested trust funds of the same trust. The special provisions of its charter do not specifically grant such right or power, and the powers which were vested in the bank are subject to the regulatory supervision of the Banking Commissioner, vested in him by the Legislature under its police power.

You are advised, therefore, that this bank is subject to the regulations of your Department which require all banking institutions under its supervision to deposit in other institutions all uninvested trust funds held by it as trustee.

Yours very truly,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

BANK DIRECTORS.

Banks and banking—Cashier acting as director—Acts of April 16, 1850, May 12, 1871, and May 13, 1876.

1. Under the Special Act of May 12, 1871, P. L. (1872) 1296, a cashier of a bank incorporated under the act may act as one of its directors.

2. He is not forbidden so to act by the Act of April 16, 1850, P. L. 477, which provides that he shall not engage in any other calling.

Office of the Attorney General,
Harrisburg, Pa., January 13, 1922.

Honorable John W. Morrison, First Deputy Commissioner of Banking, Harrisburg, Pa.

Sir: There has been received by the Attorney General your request for an opinion whether the cashier of a bank incorporated under the special Act of the Legislature, approved May 12, 1871, P. L. 1872, page 1296, can legally serve as a director while filling the office of cashier.

There is no specific provision in the Act of incorporation prohibiting a director from serving as cashier of the bank. The Act of May 13, 1876, P. L. 161, providing for the incorporation of banking companies, contains a provision that no cashier, clerk or teller in any of the corporations organized under that Act shall be eligible as a director thereof. But banks incorporated under special Acts of Assembly are not subject to the provisions of the Act of 1876; nor can it be contended that serving both as cashier and director of a bank is prohibited by Article V of the Act of April 16, 1850, P. L. 477, providing that it shall not be lawful for the cashier of any bank to engage in any other profession, occupation or calling either directly or indirectly. This provision is practically the same as the provision of the Act of 1876, P. L. 161. It was held in *Solomon vs. Moyer, 71 Superior Ct. 4*, that incidental employment of a cashier in some other capacity does not constitute engaging in another profession, occupation or calling.

You are advised, therefore, that the statutory law does not prohibit a director of the bank in question from acting as its cashier. If your Department desired to promulgate such an order or regulation, the Banking Laws would warrant such action. In my opinion, however, it is better that there be no hard and fast rule upon the subject.

Very truly yours,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

VISITATION OF BANKING INSTITUTIONS.

Banks and banking—Commissioner of Banking—Visitorial powers—Private banks—Acts of June 19, 1911, May 21, 1919, and May 5, 1921.

1. An individual, partnership or unincorporated association, exempted from the operation of the Private Banking Act of June 19, 1911, P. L. 1060, as provided in section 8 of the act, is not subject to any visitorial power, inspection, examination or regulation by the Commissioner of Banking.

2. A corporation or person exempted from the operation of the Act of May 5, 1921, P. L. 374, as provided by section 12 of the act, is not exempt from supervision by the Banking Department under the powers vested in it by law.

3. The Banking Department should not undertake the supervision of the business and affairs of persons, partnerships and corporations exempt from such supervision by law, although requested to do so.

4. If any of those who operate under the provisions of the law exempting them from supervision by the Banking Department should advertise that they are subject thereto, notice should be served upon them by the department that, unless they discontinue such practice, public notice will be given that they are not under such supervision.

Office of the Attorney General,
Harrisburg, Pa., January 27, 1922.

Honorable P. G. Cameron, Second Deputy Commissioner of Banking, Harrisburg, Pa.

Sir: I have your communication of the 18th instant, containing three inquiries concerning the duties and powers of the Banking Department.

The first is as follows:

> "Is an individual, partnership, or unincorporated association, exempted from the operation of the Private Banking Act of June 19, 1911, as provided in Section 8 of said Act, subject to any visitorial power, inspection, examination or regulation by the Commissioner of Banking?"

The Act of 1911, P. L. 1060, referred to, provides in Section 1, inter alia,

> "That except as provided in Section eight (8) 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 from a Board, consisting of the State Treasurer, the Secretary of the Commonwealth, the Commissioner of Banking, hereinafter referred to as the 'Board,'—a license to engage in such business."

Section 8 of the same Act provides as follows:

> "The foregoing provisions shall not apply: * * * (four) to any individual, partnership, or unincorporated association who would otherwise be required to comply with the provisions of this act, who shall file with the Commissioner of Banking a bond, in the sum of one hundred thousand dollars, approved by the Board as to form and sufficiency for the purpose, and conditioned as in the first section prescribed, where the business is conducted in a city of the first or second class; and, if conducted elsewhere in the State, such bond shall be in the sum of fifty thousand dollars; or, in lieu thereof, money or securities, approved by the Commissioner of Banking, of the same amounts; nor (five) to any individual, partnership, or incorporated association licensed under the laws of this Commonwealth to do a brokerage business, holding a membership in a lawfully incorporated brokerage exchange, and doing only such banking as shall be incidental to such brokerage business. The books or records showing the deposit or account of any depositor with any individual, partnership, or unincorporated association filing a bond, money, or securities approved by the Board, as provided in this section, shall not be subject to any visitorial power, inspection, or examination by the Commissioner of Banking; nor to examination or inspection by, or production in, any department or agency of government, State or municipal; nor to inspection, examination, or production in any court in any judicial proceeding, except in cases of insolvency or bankruptcy, or a judicial proceeding or investigation involving the rights and liabilities of a creditor or depositor * * *"

It is too clear for argument that your first inquiry must be answered in the negative, unless the Commonwealth has by some other Act lodged in the Banking Department the authority of visitation, inspection and examination. All banking institutions operating under the laws of the Commonwealth are subject to such regulations as the Legislature may impose by the exercise of the police power. Private banks which operate by virtue of the exemption granted in Section 8 of the Act of 1911, are not beyond the reach of the police power. An examination of the statutes relating to the Banking Department, and in particular the Act of May 21, 1919, P. L. 209, relating to the organization, maintenance and operation of the Banking Department, discloses the fact that the supervision, duties and powers of the Banking Department so far as they relate to individuals, partnerships and unincorporated associations, extend and apply only to such as were at the time of the passage of the Act of 1919, or by subsequent legislation, shall be made, subject to the supervision of the Banking Department, and to individuals doing the business of building and loan associations, or a business in the nature

thereof. No Act of Assembly has subjected to the supervision of the Banking Department those individuals, partnerships or unincorporated associations exempted under Section 8 of the Act of 1911, and you are advised that your first inquiry must be answered in the negative.

Your second inquiry is as follows:

> "Is a corporation or person, exempted from the operation of the Act of May 5, 1921, as provided by Section 12 of said Act, subject to any visitorial power, inspection, examination or regulation by the Commissioner of Banking?"

The Act referred to provides in Section 2 thereof:

> "That, after the first day of October, one thousand nine hundred and twenty-one, no corporation or person shall, whether or not operating under a declaration of trust or other agreement, engage or continue, either directly or indirectly, in the business, within this Commonwealth, of receiving single payments, regular instalment payments, or contributions to be held or used in any plan or accumulation or investment, or of issuing, negotiating, offering for sale, or selling any contract on the partial payment or instalment plan, or of assuming fixed obligations, or issuing, in connection therewith, a contract based upon payments being made upon instalments or single payment, under which all or part of the total amount received is to be repaid at some future time, either with or without profit, unless such corporation or person is licensed to transact such business within this Commonwealth by the Commissioner in the manner hereinafter provided by the Act."

It further provides for an investigation by the Commissioner, the giving of bond or security in the sum of one hundred thousand dollars for the fulfilment of contracts, the filing of reports with the Banking Commissioner, and gives the Commissioner the same powers of supervision and examination of any corporation or person licensed under the provisions of the Act as are now or may hereafter be vested in him for the supervision and examination of banks, trust companies and other financial institutions.

Section 12 of the Act provides that the Act shall not apply to persons or corporations engaged in business of certain kinds (naming them), nor to banks and institutions subject to the supervision of the Banking Department or the supervision of the Insurance Commissioner of the Commonwealth. The effect of this section is to exempt all persons comprehended within its terms from the duty of making application for a

license under this Act and otherwise complying with the provisions respecting such licensees, but it does not follow that a corporation, or individual, or firm operating under the provisions of this section is not subject to any visitorial power, inspection, examination or regulation by the Commissioner of Banking. Under Section 4 of the Act of 1919, P. L. 209, relating to the organization and operation of the Banking Department, that Department is given supervision over all corporations, unincorporated associations, individuals and partnerships which are now or shall be by law made subject to the supervision of the Banking Department, and over "any individuals or associations of individuals doing the business of building and loan associations or a business in the nature thereof." The exemption granted by Section 12 of the Act of 1921, supra, is exemption from compliance with that Act and not exemption from supervision by the Banking Department under the powers vested in it by law.

Your third inquiry is as follows:

> "If any of the institutions above referred to are not subject to examination and supervision by the Commissioner of Banking, should the Commissioner of Banking, even though requested by the exempted institution to examine its business and affairs, accede to such request, in view of the responsibility entailed thereby and the lack of power to enforce a correction of any irregularity or unsatisfactory condition that might be disclosed."

I am of the opinion that it would be a mistake in policy for your Department to supervise and make examination of the business and affairs of persons, individuals and corporations coming within the exemption provided in the above named Acts of 1911 and 1921. If your Department should examine private Banks and other institutions upon the invitation of those conducting the same and should discover irregularity or that the business was in an unsafe condition, you would be powerless to close the institution or take such steps as are provided in the cases of institutions subject to your supervision. The result would be that private banks operating by reason of the exemption provided under Section 8 of the Act of 1911 and those operating under the exemption proprovided under section 12 of the Act of 1921, could advertise to the public that the Banking Department of the Commonwealth was exercising supervision over them and examining their affairs, but at the same time, the Banking Department would be without authority to take the business into its own hands and protect depositors if necessity arise.

I suggest that if your attention is called to the fact that any of those who operate under the provisions of the law exempting them from supervision by the Banking Department advertise that they are subject thereto, you should serve notice that unless they discontinue the practice your Department will publicly give notice that they are not under its supervision.

Very truly yours,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

NATIONAL BANKS AS EXECUTORS.

Banks and banking—Executors and administrators—Act of May 20, 1921.

A national bank cannot act as executor, administrator or testamentary trustee if its appointment was made on or after the date of the Act of May 20, 1921, P. L. 991, unless, prior to such appointment, it had qualified itself to act in accordance with the requirements of the act.

Office of the Attorney General,
Harrisburg, Pa., March 6, 1922.

Honorable John W. Morrison, First Deputy Banking Commissioner, Harrisburg, Pa.

Sir: The Attorney General is in receipt of your communication of the 27th ultimo asking to be advised whether a National Bank which was appointed administrator or executor on May 21, 1921 can legally act as such administrator or executor.

I understand that the purport of your inquiry is the effect of the Act approved May 20, 1921, P. L. 991, entitled:

> "An Act restricting the appointment of corporate fiduciaries by testators or by any court or, register of wills to corporations fully subject to supervision and examination by the Banking Department,"

upon the right of National Banks to act as executors or administrators.

The Act provides in Section 1 as follows:

> "That hereafter no person shall have power by any last will and testament or codicil or other testamentary writing to appoint as executor, guardian, trustee, or other fiduciary, any corporation other than a corporation organized and doing business under the laws of the Commonwealth of Pennsylvania and subject to supervision

> and examination by the Banking Department of this State, or a corporation organized and existing under the laws of the United States doing business in this State and by resolution of its board of directors duly adopted, a certified copy whereof shall have been placed on file with the Commissioner of Banking of this State, agreeing to place itself under and continue to be subject to supervision and examination by the State Banking Department in the same manner and to the same extent as corporations organized and existing under the laws of this State are or shall be subject; and any such appointment in violation of the provisions of this section contained in any last will and testament, codicil or other testamentary writing, made after the date of the approval of this act, shall be null and void."

Section 2 of the Act places similar restriction upon the power of any court or register of wills in this Commonwealth to appoint an executor, trustee, guardian, receiver, committee or other fiduciary.

Under this Act no National Bank can lawfully act as executor, administrator, guardian, trustee, committee, receiver or other fiduciary by an appointment by last will and testament or other testamentary writing or by a court or register of wills if such appointment was made on or after the twentieth day of May, 1921, the date upon which the Act went into effect, unless the bank prior to such appointment had qualified itself to so act in accordance with the requirements of the act.

Very truly yours,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

IN RE PRIVATE BANKS.

License——Sale of Steamship Tickets——Acts of June 19, 1911, P. L. 1060, and of July 17, 1919.

A co-partnership, organized in 1851, and continuously since that date the original members of the firm and their successors have conducted a private banking business, and at the date of the approval of the Act of June 19, 1911, P. L. 1060, was engaged as agent in the sale of steamship tickets, and in February, 1912, took out a license as a private banker under said Act, is exempt from the provisions of said Act, since the passage of July 17, 1919, and no license under the Act of 1911 is now necessary.

Office of the Attorney General,
Harrisburg, Pa., March 11, 1922.

Mr. G. H. Orth, Chief, Bureau of Private Banks, Banking Department, Harrisburg, Pa.

Sir: I have your letter of the 2d instant asking to be advised whether a certain firm of private bankers now licensed under the Act of June 1911, P. L. 1060, entitled:

> "An Act to provide for licensing and regulating private banking in the Commonwealth of Pennsylvania; * * *"

is required to take out the license provided for in said Act.

The facts set forth in the letter of the banking company to the Commissioner of Banking are as follows:

The banking company is a copartnership which was established in 1851, and continuously since that date the original members of the firm and their successors have conducted the business of private banking in the City of Philadelphia. At the date of the approval of the Act of 1911, supra, the company was engaged as agent in the sale of steamship tickets. In February, 1912, the company took out a licence as private banker under the Act of 1911, and is now operating under such license. They now claim exemption from the provisions of the Act of 1911.

Section 1 of the Act of 1911 enacts that except as provided in its eighth section no individual, partnership or unincorporated association shall, after the date upon which the Act became effective, engage, directly or indirectly, in the business of receiving deposits of money for any purpose without having first obtained from a board created by the Act a license to engage in such business.

Section 8 of the Act provides that the provisions relating to securing a license shall not apply, inter alia,—

> "(six) to any person, firm, partnership, or unincorporated association, now engaged in business as private bankers, when such person, firm, partnership, or unincorporated as-

> sociation, and his or their predecessor, predecessors, or one or more of the members in such private banking institutions, continuously and in the same locality, have conducted the business of private banking for a period of seven (7) years prior to the approval of this act, and such banking institution is not engaged in the sale, as agent or otherwise, of railroad or steamship tickets."

The company in question could not at that time claim exemption under the Act of 1911 because it was engaged in the sale of steamship tickets as agent.

On July 17, 1919, there was approved "An act requiring licenses to sell tickets or orders for transportation to or from foreign countries," under which no person, copartnership, association or corporation other than railroad or steamship companies may engage within this State in the sale of steamship tickets or orders for transportation, or advertise or hold themselves out as authorized or entitled to sell such steamship tickets or orders for transportation without being a citizen of the United States, and having first procured from the Commissioner of Banking a license to carry on such business. This Act contains the following:

> "Provided, however, That the issuance of such license shall not thereby impose on such licensee the necessity of obtaining any further license from the Commissioner of Banking or the board created by act, approved the nineteenth day of June, Anno Domini one thousand nine hundred and eleven, entitled 'An act to provide for licensing and regulating private banking in the Commonwealth of Pennsylvania; and providing penalties for the violation thereof,' for the conduct of any business in conjunction with the sale of steamship tickets or orders for transportation where by existing law such business as now conducted is not required to be licensed by the Commissioner of Banking or said board."

The effect of this provision upon Clause (six) of Section 8 of the Act of 1911 is to relieve from the necessity of taking out a license as private banker, persons, firms, partnerships and unincorporated associations which had been continuously engaged in the business of private banking in the same locality for a period of seven years prior to the approval of the Act of 1911, but which were by that clause and section of the Act of 1911 required to take out a private banker's license merely because they were also engaged in the sale as agent or otherwise of railroad or steamship tickets.

The clear intent of the Act of 1919, supra, was to require persons whether engaged in private banking or not to take out a license for the specific purpose of selling steamship tickets, and there is an equally manifest intent expressed in unmistakable language to read out of Clause (six), Section 8 of the Act of 1911 that part thereof which makes

non-engagement in the sale of steamship tickets a condition precedent to the right of persons referred to therein to continue the business of private banking without taking out a license therefor.

I am of opinion, therefore, that the company in question is, since the passage of the Act of 1919, supra, relieved from the requirement of taking out a license as a private banker under the Act of 1911, and that its request so to be relieved should be granted.

Very truly yours,

ROBERT S. GAWTHROP,
First Deputy Attorney General.

BANKS' RESERVE FUNDS.

Banks and banking—Deposit of reserves in other institutions—Act of May 8, 1907.

Under the Act of May 8, 1907, P. L. 189, a bank may deposit its reserve funds in the form of bonds with another banking institution approved by the Commissioner of Banking for safekeeping, convenience or availability for immediate use, provided such bonds are duly ear-marked and kept separate and apart from the assests of the depository, and are subject to the call, order or demand of the bank owning the same, and remain under its domination and control, and are free and unpledged for other purposes not in contemplation of the act requiring the creation and maintenance of a reserve fund.

Office of the Attorney General,
Harrisburg, Pa., April 19, 1922.

Honorable Peter G. Cameron, Second Deputy Commissioner of Banking, Harrisburg, Pa.

Sir: I acknowledge receipt of your communication of April 11, 1922, referring to Section 2 of the Act of Assembly approved May 8, 1907, P. L. 189, entitled "An Act to provide for the creation and maintenance of a reserve fund in all banks, etc." and inquiring whether bonds carried by such banking institutions as part of the legal reserve required by said Act of Assembly must be in the *immediate possession* of the banking institution in its own vaults, or whether such bonds may be placed or deposited for safe keeping or convenience in the custody of another banking institution, subject to the call, order, or demand of the bank so depositing the same.

Section 2 of the Act above referred to provides as follows:

> "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. The whole of such reserve fund may, and at least one-third thereof must, consist of either lawful money of the United States, gold certificates, silver certificates, notes or bills issued by any lawfully organized National Banking Association, or clearing-house certificates, representing specie or lawful money specially deposited for the purpose of any clearing-house association, held and owned by any such corporation as a member of a clearing-house association. One-third, or any part thereof, may consist of bonds of the United States, bonds of the Commonwealth of Pennsylvania, and bonds issued in compliance with law by any city, county, or borough of the Commonwealth of Pennsylvania, and bonds which now are or hereafter may be authorized by law as legal investments for savings banks or savings institutions in Pennsylvania, computed at their par value, and which bonds are the absolute property of such corporation. The balance of said reserve fund, over and above the part consisting of lawful money of the United States, gold certificates, silver certificates, notes and bills issued by any lawfully organized National Banking Association, or clearing-house certificates, representing specie or lawful money specially deposited for the purpose of any clearing-house association, held and owned by any such corporation as a member of a clearing-house association, and the part thereof consisting of bonds, not exceeding the limit above provided, may consist of moneys on deposit, subject to call, in any bank or trust company in the State of Pennsylvania which shall have been approved by the Commissioner of Banking, or in any bank or trust company in any other State, located in any city designated as a reserve city by or by virtue of the authority of the revised statutes of the United States and the amendments thereto, which shall have been approved by the Commissioner of Banking."

The expression used in the Act, "shall have *on hand* a reserve fund," etc., contemplates the having, by such bank, immediately available, for use in case of need, emergency, or stress, the reserve fund consisting of bonds, or moneys on deposit in other banks subject to call, as therein provided. The Act does not expressly direct that such bonds shall be in the actual physical custody or possession, or in the vaults or boxes, of such banking institution.

There might be situations where it might be either safer or more convenient for country banks to deposit their reserve bonds with the larger banks in the cities, so that in case of sudden need, emergency, or stress, these bonds might be made immediately available by "wire," for the purpose of obtaining funds from such correspondent banks. If these bonds were "*on hand*" in the sense that they remain in the vaults of

the bank carrying the same as a part of its reserve, they might not, in case of need, emergency, or stress, be immediately available for reserve purposes, but would perhaps have to be taken to the correspondent bank in some distant city for the purpose of obtaining funds thereon, thereby failing to meet immediately, the emergency requirement, for which the maintenance of the reserve is intended.

In my opinion, therefore, it is a sufficient compliance with the Act of Assembly if the reserve bonds are deposited or placed with another banking institution, approved by the Commissioner of Banking, for safe keeping, convenience, or availability for immediate use, provided, of course, such bonds are duly earmarked and kept separate and apart from the assets of the depository, and are subject to the call, order, or demand of the bank owning the same, and remain under its domination and control, and are free and unpledged for other purposes, not in contemplation of the Act of Assembly requiring the creation and maintenance of a reserve fund.

Very truly yours,

GEO. E. ALTER,
Attorney General.

FOREIGN TITLE INSURANCE COMPANIES.

Corporations—Foreign title insurance companies—Doing business in Pennsylvania.

1. A foreign title insurance company, duly registered and maintaining an office and agency in Pennsylvania, may lawfully engage in the business of title insurance within the State, and such company, though it cannot engage in the banking business, is within the supervision of the Banking Department of the State.

2. The powers expressed in the Act of May 9, 1889, P. L. 159, and supplements thereto, apply peculiarly to domestic companies, and do not extend to or enlarge in any way the business which foreign title insurance companies may otherwise lawfully do in this State.

Office of the Attorney General,
Harrisburg, Pa., March 24, 1922.

Honorable P. G. Cameron, Second Deputy Commissioner of Banking, Harrisburg, Pa.

Sir: Answering your communication of May 12, 1922, requesting an opinion as to whether or not a foreign title insurance company may lawfully engage in the business of title insurance in Pennsylvania, I beg to advise you as follows:

In the first place, the Commonwealth of Pennsylvania has full power either to exclude a foreign corporation, not engaged in interstate commerce, altogether, or it may impose any condition it pleases on a foreign corporation seeking to do business within the State.

A corporation is not a "citizen" within the purview of Section 2, Article IV of the Constitution of the United States, with respect to the "privileges and immunities" accorded to citizens of other States. *Lafayette Ins. Co. vs. French, 18 How. 404*; *Orient Ins. Co. vs. Draggs, 172 U. S. 557*; *List vs. Commonwealth, 118 Pa. 322*; *Bank of Augusta vs. Earle, 13 Peters 519*; *Paul vs. Virginia, 8 Wall. 168*; and a long line of similar authorities.

In pursuance of this paramount doctrine of the law, the Commonwealth of Pennsylvania has enacted legislation from time to time permitting foreign corporations to engage in business within the State, and has embodied conditions and regulations with respect thereto.

The Act of Assembly of April 22, 1874, P. L. 108, provided in Section 1 thereof that,—

> "No foreign corporation shall do any business in this commonwealth, until said corporation shall have established an office or offices, and appointed as an agent or agents for the transaction of its business therein."

Section 2 of the Act provides that,—

> "It shall not be lawful for any such corporation to do any business in this commonwealth, until it shall have filed in the office of the secretary of said corporation, and signed by the president or secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein; and the certificate of the secretary of the commonwealth, under the seal of the commonwealth, of the filing of such statement, shall be preserved for public inspection, by each of said agents, in each and every of said offices."

The Act of May 8, 1901, P. L. 150, further provides that foreign corporations shall pay a bonus and shall make annual reports to the Auditor General.

The Act of Assembly of March 28, 1808 (4 Sm. 537), cited in *1 Purdon's 447*, in Section 2 provides that,—

> "No company incorporated by the laws of any other of the United States shall be permitted to establish within this commonwealth, any banking-house, or office of discount and deposit * * *."

The Act of June 7, 1907, P. L. 446, required that all foreign corporations, including "*title insurance companies*," who shall engage in the business within the Commonwealth of selling bonds, securities, etc. shall first be licensed by the Commissioner of Banking to transact such business in the manner provided by the Act of Assembly.

While there is, therefore, a prohibition in our law against foreign corporations engaging within the State in the business of banking or maintaining a banking-house or office of discount and deposit, and likewise against the selling of bonds and securities without having first obtained a license from the Commissioner of Banking so to do, there is no such prohibition under the law with respect to conducting the business of title insurance within the limits of the Commonwealth, or pertaining to property within the Commonwealth, provided such foreign corporation is not also conducting a banking business or is engaged in the selling of securities, etc., and has otherwise complied with the law of the Commonwealth with respect to maintaining a local office and agent, and has also complied with the law with respect to the payment of bonus and the furnishing of official reports, etc.

This does not mean, however, that a foreign title insurance company engaged only in the business of title insurance in Pennsylvania may enjoy all of the rights, powers and privileges of title insurance companies incorporated under the provisions of the law of Pennsylvania. These powers, as expressed in the Act of Assembly of May 9, 1889, P. L. 159, and supplements thereto, apply peculiarly to domestic companies and do not extend to or enlarge in any way the business which foreign title insurance companies may otherwise lawfully do in Pennsylvania.

Nor is it intended that a foreign title insurance company limiting its business within the Commonwealth merely to title insurance may thereby avoid supervision of the State Banking Department.

The Banking Act of May 21, 1919, P. L. 209, provides in Section 4 thereof that the supervision of the Banking Department shall extend and apply to corporations "incorporated under the laws of this State or under the laws of any other State and authorized to transact business in this State," including "title insurance companies."

Attorney General Brown, in an opinion under date of May 4, 1915 (Opinions of the Attorney General, 1915-1916, p. 273), interpreting the Banking Department Act of February 11, 1895, similar in this respect to the later Banking Department Act of 1919, held that "title insurance companies," as such, without regard to any other powers authorized to be exercised by the Act of May 9, 1889, or otherwise, with respect to banking or trust company powers extended to them, come under the supervision of the Commissioner of Banking.

I am, therefore, of the opinion that a foreign title insurance company lawfully registered and duly maintaining an office and agency in the State of Pennsylvania, may lawfully engage in the business of title insurance within the State; and that such company, though it cannot engage in the banking business, comes within the supervision of the Banking Department.

Yours very truly,

FRED TAYLOR PUSEY,
Deputy Attorney General.

TRUST COMPANIES' MESSENGER SERVICE.

Trust companies—Messenger service—Branches—Act of April 29, 1874.

Trust companies incorporated under the General Corporation Law of April 29, 1874, P. L. 73, are not authorized to maintain messenger service outside of the cities where their principal offices are located, to collect deposits of money and to transact business for their real estate and trust departments.

Office of the Attorney General,
Harrisburg, Pa., June 7, 1922.

Honorable John W. Morrison, Acting Commissioner of Banking, Harrisburg, Pa.

Sir: In reply to your inquiry under date of April 25, 1922, as to whether a trust company incorporated under the General Corporation Act of April 29, 1874, may maintain messenger service outside of the city where its principal office is located, to collect deposits of money, and to transact business for its real estate and trust departments,—I beg to advise you as follows:

It has been uniformly held by the Attorney General's Department that trust companies incorporated under the Act of April 29, 1874, may lawfully maintain sub-offices or sub-agencies for the restricted purpose of receiving and paying out moneys, provided a full report of the operations is made to the principal place of business of any such trust company 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.

See Opinion of Attorney General Hensel, Branch Office 4 D. R. 54; also Opinion of Deputy Attorney General Kun, March 22, 1916; Opinions of Attorney General, 1915-16, page 281; Opinion of Deputy At-

torney General Davis, October 9, 1916; Opinions of Attorney General 1915-16, page 291; Opinion of Deputy Attorney General Myers, July 1, 1920, (not yet reported.)

Attorney General Hensel in his opinion on this subject remarked:

> "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, providing 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 sub-office, 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 the 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."

The foregoing powers were expressly granted to Banks of Discount by Act of Assembly of July 28, 1917, P. L. 1235, the Act, however, specifying that such sub-office or sub-agency may be established and maintained "in the City, Borough or Township" in which the principal office of such Bank is located.

The maintenance of a regular messenger service by a trust company as a customary and general method of carrying on its business of the purpose of receiving deposits and transacting the business of its real estate and trust departments is in effect the maintenance of innumerable roving branch agencies, which is quite different from the mere establishment of a definitely located sub-office or sub-agency, with a full report of its operations made to the principal place of business of the trust company at the close of the business day, so that the entire business operations of the company may at all times be brought within the view and supervision of the Banking Department.

The test of compliance with the spirit and purpose of the law with regard to the maintenance of sub-offices or sub-agencies, "or messenger service" by trust companies is not merely one of location within the city, borough or township, but also whether such companies doing a quasi banking business such as receiving deposits and paying out money, bring their entire business within the whole view and supervision of the Banking Department; and also transact their business at the location authorized by their charters.

Manifestly, such complete view and supervision as the law contemplates cannot be accomplished if such sub-office or sub-agency is

located or established beyond the locality in which the principal place of business of the corporation is located; or if the business of the trust company may be conducted by roving messenger service away from its authorized place of business.

While business conducted occasionally and under special circumstances, by messenger, agent or attorney, away from the principal office of the corporation may, and undoubtedly does, constitute a necessary and proper incident to the transaction of the usual business of a trust company,—any official recognition of the loose and careless method of doing a banking or trust company business by means of messenger service, as a practice or system of carrying on the same, would constitute a dangerous precedent, and would be a menace to the safety and security of the banking institutions or our Commonwealth. To countenance or permit it would seem clearly contrary to public policy.

I am, therefore, of the opinion that is it not within the contemplation of the banking laws of Pennsylvania that there should be any practice on the part of any trust company or bank to maintain a messenger service for the purpose of receiving deposits, paying out moneys or transacting business for its real estate or trust departments.

Very truly yours,

FRED TAYLOR PUSEY,
Deputy Attorney General.

INVESTMENT OF FUNDS BY TRUST COMPANIES.

Trusts—Trust funds—Mortgage trust funds—Assets of trust companies—Act of May 9, 1899.

Moneys deposited by customers of trust companies for investment in mortgages upon real estate, for which the companies issue "Mortgage Trust Certificates," are such trust funds as must be kept separate and apart from the assets of the trust companies in accordance with the provisions of clause V of the act of May 9, 1899, P. L. 159, and its supplements.

Office of the Attorney General,
Harrisburg, Pa. June 20, 1922.

Honorable Peter G. Cameron, Commissioner of Banking, Harrisburg, Pa.

Sir: I acknowledge receipt of your request for an opinion as to whether or not funds held by a trust company, and paid in by one of its customers for investment under a "mortgage trust fund certificate," should be kept separate and apart from the general assets of the trust

company, in accordance with the provisions of Clause V of the Act of Assembly of May 9, 1889, P. L. 159, and the supplement thereto approved June 27, 1895, P. L. 402, which provides as follows:

> "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."

The form of certificate issued by the trust company as submitted by you is in substance as follows:

"THE..... ...TRUST COMPANY
of....., Penna.

No... ..

MORTGAGE TRUST FUND CERTIFICATE

This Certifies that.... ....has deposited with this Company, in trust,..... ...Dollars, to be held, with other moneys received upon similar certificates, as a Mortgage Trust Fund, separate and apart from the assets of this Company and to be invested in first mortgages on real estate.

This certificate is transferable only on the books of the Company, and is payable on..... .....or at the option of the Company, on any regular interest period upon 30 days notice to the registered owner; together with interest from date at the rate of 4% per annum, payable semi-annually on the first days of June and December upon presentation of the attached coupons.

The... .....Trust Company hereby guarantees the payment of this certificate, principal and interest, in full, without deduction for State taxes, as now imposed by law.

In Witness Whereof, The..... .. .. .Trust Company of. .. .., Pa., has caused this certificate to be signed by its President, and attested by its Secretary, and its corporate seal to be hereunto affixed.

The.. .. ..Trust Company,
of..... ....., Penna.

Attest:

....*Secretary* .. ..*President.*"

I understand that this certificate is issued and delivered to the customer of the trust company, who makes the deposit for investment as aforesaid, and the trust company then places among its records the following form of declaration or certificate:

"THE.....TRUST COMPANY

To whom it may concern:

The BOND and MORTGAGE herewith for $..... from..... ..... to ..... dated.....19.., recorded in Mortgage Book..... No..... Page..... although standing in the name of this Company.....generally, is not the individual property of the Company, but is held by it in trust, for the following amounts, and for the Estates hereafter named, to wit:

.....,..... .....$.....,.....
.....,.....$.....,.....
....,..... .....$.....,.....

The.....Trust Company."

In my opinion, the moneys thus deposited by customers for investment are "trust funds" and should be kept separate and apart from the general assets of the trust company, and so designated that the trust to which they belong shall be clearly shown on the books and records of the trust company.

The character of the investment made by the customer is within the provision of Clause V of the Act of May 9, 1889, P. L. 189, supra, and the supplements thereto, and the funds so received and invested, or the mortgages representing such investments, should not, therefore, be carried by the trust company on its general ledger in its banking department as a general asset of the trust company.

As it was stated by the Auditor, whose report was affirmed by the Supreme Court in *Carmany's Appeal, In Lebanon Trust & Safe Deposit Bank's Assigned Estate, 166 Pa. 622*:

> "If the money of the cestui que trust had been invested in specific property or securities, although included with other moneys of the trustee, so that it could be followed into the specific property or security, and traced and earmarked by the claimant, he would undoubtedly be entitled to recover the full amount of his claim even as against other creditors, in the distribution of the estate of such trustee."

The Act of May 23, 1913, P. L. 354, Section 1, amending the Act of May 8, 1907, P. L. 192, relating to trust companies, also provides:

> "All trust money and property shall be kept separate, as provided by said act as supplemented, as aforesaid, and distributed to the beneficiaries accordingly."

In *Commonwealth vs. Tradesmen's Trust Company, 250 Pa. 375*, Mr. Justice Frazer, referring to the Act of May 8, 1907, supra, where a fund had been deposited for a specific purpose in connection with a building operation, remarked:

> "Under this act, it was clearly the duty of the trust company to keep the funds of the operation separate from its general funds.

Very truly yours,

FRED TAYLOR PUSEY,
Deputy Attorney General.

PRIVATE BANKERS' AND STEAMSHIP AGENTS' PLACE OF BUSINESS.

Private bankers—Steamship agents—Place of business—Transaction of business at places not designated in license certificate—Acts of June 19, 1911, and July 17, 1919.

Whether an individual, a copartnership or an unincorporated association is engaged in the business of private banking under the provisions of the Act of June 19, 1911, P. L. 1060, or in the business of selling steamship tickets under the Act of July 17, 1919, P. L. 1003, such individual, copartnership or association is expressly limited by law to engage in such business at the location specifically designated in, and authorized by, the licenses respectively issued therefor.

Office of the Attorney General,
Harrisburg, Pa., July 13, 1922.

Mr. G. H. Orth, Chief, Bureau of Private Banks, Department of Banking, Harrisburg, Pa.

Sir: I acknowledge receipt of your communication of July 5, 1922, inquiring whether or not a licenced private banker and steamship ticket agent may transact business at other than the address designated in his license certificate.

In the first instance the Act of Assembly of June 19, 1911, P. L. 1060, providing for the licensing and regulating of private banking in the Commonwealth of Pennsylvania, requires the licensing of individuals, partnerships or unincorporated associations engaging in the business of receiving deposits of money for safe-keeping, or for the purpose of transmission to another, or for any other purpose, to be obtained from a Board consisting of the State Treasurer, the Secretary of the Commonwealth and the Commissioner of Banking, and that before receiving a license:

> "the applicant shall file with the Commissioner of Banking a written statement in the form to be prescribed by the Commissioner of Banking, and verified under oath,

showing the amount of the assets and liabilities of the applicant, *designating the place where the applicant proposes to engage in business*, the names and addresses of all partners or members of the unincorporated association, etc."

The Act further specifies in Section 1 thereof that the said Board

"shall issue a license authorizing the applicant to carry on the aforesaid business *at the place designated in the application, and to be specified in the license certificate.* For such license the licensee shall pay a fee of fifty dollars. Such license shall not be transferred or assigned. *It shall not authorize the transaction of business at any place other than that described in the license certificate, except with the written approval of the Board.* Immediately upon receipt of the license certificate, issued by the Commissioner of Banking pursuant to this article, the licensee named therein shall cause such license certificate to be posted and at all times conspicuously displayed in the place of business for which it is issued, so that all persons visiting such place may readily see the same. It shall be unlawful for any person or partnership or unincorporated association holding such license certificate to post such certificate, or to permit such certificate to be posted, upon premises other than those designated therein, or to which it has been transferred pursuant to the provisions of this article, or knowingly to deface or destroy any such license certificate."

The Act of Assembly approved July 17, 1919, P. L. 1003, requiring licenses to sell steamship tickets or orders for transportation to or from foreign countries, provides

"That no person, copartnership, association, or corporation, other than railroad or steamship companies, shall hereafter engage within this State in the sale of steamship tickets or orders for transportation, or shall advertise or hold themselves out as authorized or entitled to sell such steamship tickets or orders for transportation, without being a citizen of the United States and having first procured from the Commissioner of Banking a license to carry on such business. Such license shall be granted, upon application to the Commissioner of Banking *designating the place where the business for which the license is sought to be carried on, etc.*"

This Act also further provides in Section 1 thereof that

"Every license shall contain the name of the licensee, the city, street and number of the house in which the licensee is authorized to carry on business, and the number and date of such license. Such license shall not be transferred or assigned, nor authorize the licensee or his agents to

> transact business or to advertise or hold himself or themselves out as authorized and entitled to transact such business *at any place other than that designated in the license.*"

It is, therefore, clear from the foregoing Acts that whether an individual, a copartnership, or an unincorporated association, is engaged in the business of private banking under the provisions of the Act of June 19, 1911, P. L. 1060, or in the business of selling steamship tickets or orders of transportation to or from foreign countries, under the Act of July 17, 1919, P. L. 1003, such individual, copartnership or association specifically designated in and authorized by the licenses respectively issued therefor.

The Private Bankers' Act of June 19, 1911, supra, enjoins the transaction of such business at any other place than that described in the license certificate, "except with the written approval of the Board." Therefore, such written approval of a change of location of the conduct of the business of private banking shall first be obtained from the Board above referred to, consisting of the State Treasurer, Secretary of the Commonwealth and the Commissioner of Banking; but, even this latitude is not extended in connection with the business of selling steamship tickets or orders for transportation to or from foreign countries. The license under the Act of July 17, 1919, supra, regulating this business, limits without qualification the transacting of such business to the particular place, viz., the city, street and number, designated in the license for the conduct of the business.

Very truly yours,

FRED TAYLOR PUSEY,
Deputy Attorney General.

OPINIONS TO THE STATE HIGHWAY COMMISSIONER.

OPINIONS TO THE STATE HIGHWAY COMMISSIONER.

For the Year 1921.

AUTOMOBILE FINES.

Automobiles—Fines—When payable to Commonwealth—Special Act of March 17, 1865, relating to Franklin and other counties—General Act of June 30, 1919.

1. Fines imposed in Franklin County for violations of the provisions of the Automobile Act of June 30, 1919, P. L. 678, other than for those relating to weight and speed, are payable under the terms of that act to the State Treasurer, and not for the use of the county law library, as provided by the local Act of March 17, 1865, P. L. 408.

2. The two acts are not inconsistent, and the latter does not repeal the former, inasmuch as they refer to different subjects.

Office of the Attorney General,
Harrisburg, Pa., November 4, 1921.

Mr. Benjamin G. Eynon, Registrar of Motor Vehicles, State Highway Department, Harrisburg, Pa.

Sir: There was duly received your communication of October 26, 1921, in which you state that notwithstanding the fact that you have notified the Clerk of the Court of Quarter Sessions of Franklin County to pay over to the State Treasurer the fines imposed by the Court of Quarter Sessions of said County upon defendants convicted of certain violations of an Act of Assembly entitled:

> "An Act relating to and regulating the use and operation of automobiles * * *"
> "Approved the thirtieth day of June, 1919,"

that officer has advised you that the fines will be paid over to the Treasurer of Franklin County for the use of the Law Library in accordance with the provisions of the Act of March 17, 1865, P. L. 408, and the Act of April 5, 1866, P. L. 522. You inquire whether the Commonwealth is entitled to these fines.

The Act of March 17, 1865, P. L. 408, provides:

> "That all fines and penalties, imposed by the several Courts of Franklin, Adams, Somerset and Fulton Counties, which, under existing laws, are not payable to the Commonwealth, for its use, are hereby directed to be paid into the Treasury of said Counties for the use of a Law Library * * *"

The Act of April 5, 1866, P. L. 522, provides:

> "That the true intent and meaning of the Act, entitled, 'An Act to appropriate certain fines and penalties imposed by the Courts of Franklin, Adams, Somerset and Fulton Counties,' approved March 17, 1865, is and is hereby declared to be to embrace under the terms fines and penalties all forfeited recognizances in the said Courts from the passage of said Act and hereafter."

Section 35 of the Act of June 30, 1919, P. L. 678, provides:

> "All fines and penalties collected under the provisions of this Act for violations of the same, and all bail forfeited shall be paid to the State Treasurer to be placed in a deposit fund to be available for the use of the State Highway Department, except those collected for violations of the provisions as to speed or weight, which shall be paid to the Treasurer of the city, borough, town or township wherein the violation occurred * * *"

I understand that the fines about which you inquire were not imposed in cases charging violations of the provisions of the latter Act as to speed or weight.

It appears that the local authorities of Franklin County take the position that upon the principle stated in the maxim *generalia specialibus non derogant* the Act of June 20, 1919, supra, does not operate to give the Commonwealth any fines which may be imposed under it by the Courts of Franklin County. Clearly, this position is untenable. There is no inconsistency between the Act of 1919 and these special Acts. They relate to different subjects. The former does not repeal the latter, but merely creates new offenses and provides that fines imposed for the same shall be paid to the State Treasurer. Each Act may be given its full effect without conflict with the other. The fines which are payable to the Treasurer of Franklin County under the Act of 1865, supra, are those

> "which, under existing laws, are not payable to the Commonwealth for its use."

I am of opinion that the words "under existing laws," as used in the Act, refer to the laws existing at the time of the imposition of the fines. The words must receive this liberal construction in order to effectuate the purpose of the Act. It would be a narrow construction to hold that the County of Franklin can receive only the fines imposed under Acts of Assembly in force at the time of the passage of the Act of 1865, and cannot receive fines imposed under subsequent Acts. Even under this liberal construction, however, the County of Franklin is not entitled to receive fines, imposed by its several Courts, which are payable to the Commonwealth. It follows, therefore, that the fines which are directed to be paid to the Commonwealth under the Act of 1919, supra,

cannot be held by the County of Franklin. This conclusion is in harmony with the opinion of Deputy Attorney General Hull to the Honorable Fred Rasmussen, Secretary of the Department of Agriculture, under date of July 21, 1921, advising that fines imposed by the Court of Quarter Sessions of Franklin County for violations of the Act of May 28, 1915, P. L. 587, are payable to a duly authorized agent of the Bureau of Animal Industry to be by him paid into the State Treasury.

There has come to may attention no decision by any Court in Pennsylvania in conflict with the opinion herein expressed. In *Commonwealth vs. Ryan, 30 D. R. 826*, Judge Stewart, of Northampton County, specially presiding in the County of Carbon, held that a fine imposed for violation of certain statutes relating to the practice of dentistry was payable to the Carbon County Law Library under an act similar to the Act of 1865 relating to Franklin County. In that case, however, the Act of Assembly imposing the fine made it payable to the State Dental Society, and not to the Commonwealth. In my opinion, the Court could not have reached the conclusion it did if the fines there imposed had been for the use of the Commonwealth and had been payable to the Commonwealth.

You are advised, therefore, to renew your request to the Clerk of the Court of Quarter Sessions of Franklin County and, in the event that it is not complied with, to notify this Department.

Very truly yours,

ROBERT G. GAWTHROP,
First Deputy Attorney General.

OPINIONS TO THE STATE HIGHWAY DEPARTMENT.

For the Year 1922.

REGISTRATION OF MOTOR VEHICLES.

Automobiles—Application for registration —Oath— United States Commissioner.

A United States Commissioner may administer the oath to an applicant for the registration of a motor vehicle.

Office of the Attorney General,
Harrisburg, Pa., May 3, 1922.

Mr. Benjamin G. Eynon, Registrar of Motor Vehicles, State Highway Department, Harrisburg, Pa.

Sir: This Department duly received your communication of the 24th ultimo in which you ask to be advised whether a United States Commissioner is authorized to administer the oath to an application for the registration of a motor vehicle.

Section 3 of the Motor Vehicle Act of June 30, 1919, P. L. 678, as amended by the Act of May 16, 1921, P. L. 582, provides that the application for a registration of a motor vehicle made on a blank provided by the Highway Department shall contain a "*sworn statement*" covering certain required information and be signed by the owner.

The Act of May 24, 1901, P. L. 300, authorizes and empowers each and every United States Commissioner duly appointed in and for the Eastern, Western or other district of Pennsylvania, "at or in any place or county within the Commonwealth to administer oaths and affirmations; to take affidavits * * * as fully to all intents and purposes whatsoever, and with like force and effect, as * * * any alderman, justice of the peace, notary public * * * within the said Commonwealth is or may hereafter be empowered by law to do. * * * to use his official seal, as such commissioner, in the attestation of all such acts," and to receive the same fees for such services as other officials receive therefor under the law.

There is nothing in the Motor Vehicle Act requiring that the oath to said "sworn statement" shall be administered by any particular official authorized by law to administer oaths and take affidavits. In the ab-

sence of such specific requirement, we must conclude that this oath may lawfully be administered by a United States Commissioner, duly appointed in and for any district of Pennsylvania, under the general power vested in him by the aforesaid Act of 1901, and you are accordingly so advised.

Very truly yours,

GEO. E. ALTER,

Attorney General.

IN RE MOTOR VEHICLES.

Speed Limits—Posting—Reasonable Care—Circumstances—Act of June 3, 1919 and of May 16, 1921.

Under the Motor Vehicle Law of June 30, 1919, P. L. 678, amended by the Act of May 16, 1921, relating to signs as to speed limits, the Act does not authorize a speed of 15 miles per hour where conditions are such that reasonable care under the circumstances requires a slower speed. The speed "shall not exceed" 15 miles per hour on any part of the highway properly marked by the signs specified in the proviso, to section eight, but, if at any point within such limits a speed as great as 15 miles per hour would not be consistent with the reasonable care required by the first sentence of the section, then a driver is limited to such lower rate of speed as is reasonable and proper under the circumstances.

Office of the Attorney General,
Harrisburg, Pa., June 14, 1922.

Mr. Benjamin G. Eynon, Registrar of Motor Vehicles, Harrisburg, Pa.

Sir: I have received from you the following inquiry:

> "A question has arisen as to whether or not when fifteen (15) mile speed limit signs are placed as provided under Section 19 of the motor law, approved June 30, 1919, as amended by Section 8 of an Act approved May 16, 1921, if the same conditions prevail as set forth in the first sentence of Section 19, as amended, 'No person shall operate a motor vehicle on the public highway, etc.,' if where fifteen (15) mile speed limit signs are placed and a speed of ten (10) miles an hour is reasonable and proper, would a motorist be guilty of a violation of this law if he drove his car at a rate of speed in excess of ten (10) miles per hour and not exceeding fifteen (15) miles per hour."

The first provision of Section 19 as amended is as follows:

> "'No person shall operate a motor vehicle on the public highways of the State recklessly or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highway, or so as to endanger property or the life or limb of any person."

This requires reasonable care under the circumstances, whatever those circumstances may be as existing at the time.

The proviso relating to a fifteen mile speed limit is at the end of the Section in the following language:

> "Provided, That the authorities having charge of the highways may, in dangerous or built-up sections or at school houses, churches, and public playgrounds, place signs marked 'fifteen (15) mile speed limit' in letters not less than five (5) inches in height. Such of these signs as are placed at the entrance to the city, borough, town, or village of the highways that are State highways shall also bear the name of the city, borough, town, or village, in letters of the stme size. Said signs shall be placed on the right-hand side of the highway, facing the traffic to be controlled, clearly legible therefrom, and at those places the speed limit shall not exceed a rate of one (1) mile in four (4) minutes for a distance beyond said sign of not more than one-eighth (1-8) of a mile; and, if such highway is still in a dangerous or built-up section, a second sign, similar to the above described, may be erected, and the speed limit shall not exceed the rate of one (1) mile in four (4) minutes for not more than one-eighth (1-8) of a mile beyond said sign; and as many signs may be erected as may be necessary. At the end of said dangerous or built-up sections, there shall be a sign erected reading 'end of fifteen (15) mile speed limit,' in letters not less than five (5) inches in height; said signs to be placed at right angles to the highway and facing the traffic to be controlled."

It is plain that the proviso does not authorize a speed of fifteen miles per hour where conditions are such that reasonable care under the circumstances requires a slower speed. The speed "*shall not exceed*" fifteen miles per hour on any part of the highway properly marked by the signs specified in the proviso,but, if at any point within such limits a speed as great as fifteen miles per hour would not be consistent with the reasonable care required by the first sentence of the Section, then a driver is limited to such lower rate of speed as is reasonable and proper under the circumstances.

Very truly yours,

GEO. E. ALTER,
Attorney General.

POWERS OF TOWNSHIP COMMISSIONER.

State Highway Department—Powers of township commissioner—Approved contracts, etc.—Acts of July 8, 1919, and May 17, 1921.

Under the Act of July 8, 1919, P. L. 770, creating in the Highway Department a Division of Township Highways in charge of a township commissioner, as amended by the Act of May 17, 1921, P. L. 826, the State Highway Department, through its township commissioner and assistant engineers in charge of the various districts, has a right (1) to approve or disapprove all contracts for the expenditure of township or county and township funds for the construction of township highways; (2) to supervise and direct all contract work on township highways to be paid for from such moneys; (3) to inspect and approve or disapprove all materials used in the construction of such roads.

Office of the Attorney General,
Harrisburg, Pa., June 15, 1922.

Honorable George H. Biles, Assistant Highway Commissioner, Harrisburg, Pa.

Sir: This Department has received your request for an opinion as to the extent of the powers of the Township Commissioner, with particular reference to his authority to supervise the construction of township highways where the township undertakes such construction at its own cost with certain financial aid from the county, or where the county undertakes to improve such roads at the joint expense of said county and a township or borough.

In answering this request it is necessary to consider the restrictions upon or conditions under which townships may expend their own funds jointly with county funds for the construction of township roads.

In 1919 there was created in the Highway Department a Division of Township Highways in charge of a Township Commissioner.

> "Section 1. Be it enacted, etc., That the State Highway Commissioner shall establish in the State Highway Department a Division of Township Highways, which shall be in charge of the Township Commissioner.
>
> * * * * * * * * * * *
>
> "Section 4. The Township Commissioner, under the direction of the State Highway Commissioner, shall:
>
> "First. Have general supervision of all township highways and bridges, and approve or disapprove all agreements and contracts made by township supervisors for the expenditure of township money or township, county, and State moneys, except for the construction, improvement, or maintenance of State highways and State-aid highways.
>
> (Amendment of Act of 1921, P. L. 826)

"Second. Approve plans and specifications and estimates for the erection and repair of township bridges and culverts and for the construction and maintenance of township highways. Plans and specifications for the construction or repair of township bridges or culverts shall not be approved unless the same conform to the standards of the State Highway Department. No contract for the repair or construction of any township bridge or culvert or for the reconstruction of a township road shall be valid unless such contract is in accordance with standard plans prescribed or unless plans, specifications, and estimates have been prepared or approved by the Township Commissioner.

"Third. Compel compliance with laws, rules, and regulations relating to such highways and bridges by township highway officers, and see that the same are carried into full force and effect."

This Township Commissioner is directed to divide the State into districts, each of which shall be in charge of an assistant engineer. Among the duties of these engineers are the following:

"First. Have the general charge of all township highways and bridges within his district, see that the same are improved, repaired, and maintained as provided by law and regulations of the Township Commissioner, and have the general supervision of the work of constructing, improving, and repairing township bridges and highways in his district, so far as it is practical to do so.

"Second. Visit and inspect highways and bridges in each township of his district at least once in each year or whenever directed by the Township Commissioner; and advise and direct how to repair, maintain, and improve such highways and bridges." (Amendment of Act of 1921, P. L. 826)

The authority of the Township Commissioner appears to be quite extensive, as he not only must approve or disapprove all agreements and contracts made by township supervisors for the expenditure of township moneys, but has similar duties in respect to contracts made by township supervisors for expenditures involving county and State moneys, except always of course, where such moneys are to be expended upon State highways or State-aid highways. All the plans and specifications and contracts must be in accordance with standard plans and contracts prescribed by the Township Commissioner. He is further required to compel all township highway officers to comply with the laws, rules and regulations, regulating such highways. It is impossible for the Highway Commissioner to accomplish these things unless he has the absolute right of supervision and inspection of the construction work. In addition to this, it is definitely provided that the Township

Commissioner, through the assistant engineer in charge of the district, is required to see that the township highways and bridges are improved, repaired, and maintained according to such rules and regulations as the Township Commissioner may prescribe, and he shall also have general supervision of the work of constructing, improving and repairing township bridges and highways.

In view of the express wording of the Acts and the evident intention of the Legislature, I am of the opinion the State Highway Department, through its Township Commissioner and assistant engineers in charge of the various districts, has the right (1) to approve or disapprove all contracts for the expenditure of township or county and township funds for the construction of township highways, (2) to supervise and direct all construction work on township highways to be paid for from such moneys, and (3) to inspect and approve or disapprove all materials to be used in the construction of such roads.

Very truly yours,

STERLING G. McNEES,
Deputy Attorney General.

MOTOR VEHICLES.

Placing of "fifteen mile speed limit" signs in dangerous or built-up sections or at schoolhouses, churches or public playgrounds—When effective—Acts of June 30, 1919, P. L. 678, Section 9, and May 16, 1921, P. L. 582.

When a speed limit of fifteen miles per hour has been established by the persons authorized to do so in a place and in the manner provided by the Acts of 1919 and 1921, such speed limit is effective at all hours.

Department of the Attorney General,
Harrisburg, Pa., June 22, 1922.

Mr. Benjamin G. Eynon, Registrar of Motor Vehicles, Harrisburg, Pa.

Sir: The Attorney General is in receipt of your recent letter referring to Section 19 of the Motor Vehicle Law of June 30, 1919, P. L. 678, as amended by the Act of May 16, 1921, P. L. 582. You inquire whether the placing of signs marked "fifteen mile speed limit" in the vicinity of schoolhouses, churches or public playgrounds are effective to fix that speed limit at all times, or merely during school hours.

The proviso at the end of the nineteenth section authorizes the persons in charge of the highways to erect signs and establish a speed-limit of fifteen mile per hour in dangerous or built-up sections, or at school-

houses, churches and public playgrounds. I find nothing in the Act which would indicate that such a limit, when established, is to be effective only during certain hour of the day.

I therefore advise you that when a speed-limit of fifteen miles per hour has been established by the persons authorized to do so, in a place and in the manner provided by Section 19 of the Act of June 30, 1919, P. L. 678 as amended by Act of May 16, 1921, P. L. 582, such limit is effective at all hours.

Very truly yours,

GEO. ROSS HULL,
First Deputy Attorney General.

MOTOR VEHICLE LICENSE.

Automobiles—Licenses—Owner's, operator's and chauffeur's licenses distinguished—Act of May 16, 1921.

1. Section 3 of the Act of June 30, 1919, P. L. 678, as amended by section 2 of the Act of May 16, 1921, P. L. 582, authorizing the holder of an owner's license to operate any motor vehicle, means a license to operate any motor vehicle legally registered in the owner's name, and this he can do either for pleasure or, under proper regulations, for compensation without procuring an additional license.

2. The rights under an operator's license are to drive without pay any motor vehicle of a registered owner; and those under a paid driver's or chauffeur's license to drive any motor vehicle of a registered owner and receive compensation therefor as an employment.

Office of the Attorney General,
Harrisburg, Pa., October 18, 1922.

Mr. Benjamin G. Eynon, Registrar of Motor Vehicles, State Highway Department, Harrisburg, Pa.

Dear Sir: I have your letter of October 4th, 1922 asking if an owner's driver's license entitles the holder or holders to legally operate any motor vehicle for the purpose of pleasure or compensation without having an operator's license.

Section 3 of the Act of 1921, P. L. 582, provides for the registration of motor vehicles upon blanks furnished by the State Highway Department, and that the application for such registration shall contain the full name and residence of the owner or owners * * * together with a sworn statement containing the name, manufacturer's number, motor number, and so forth, of the motor vehicle so registered. The Act further provides that the State Highway Department

> "shall issue to the owner or owners, not exceeding two, an owner's license which shall entitle the holder or holders * * * to lawfully operate any motor vehicle."

The registration certificate showing the name, address, and so forth, of the owner or owners, the name, type, manufacturer's number, motor number of the vehicle and the registration number thereof must at all times be carried with the motor vehicle for which registration has been issued, and this requirement indicates what motor vehicle the holder of the owner's license may operate.

I am of the opinion that the wording of the Act authorizing the holder of an owner's license to operate any motor vehicle means a license to operate any motor vehicle legally registered in the owner's name, and this he can do either for pleasure, or under the proper regulations, for compensation without procurring an additional license. The rights under an operator's license are to drive without pay any motor vehicle of a registered owner, and those under a paid driver's or chauffeur's license to drive any motor vehicle of a registered owner and receive compensation therefor as an employment. *Commonwealth vs. Cooper, 19 Dis. Rep. 271.*

Very truly yours,

J. W. BROWN,
Deputy Attorney General.

HEMPFIELD TOWNSHIP ROAD.

Road law—County roads—Contract between county and township—Approval of township commissioner—Acts of May 24, 1917, and May 11, 1921.

1. A township has a right to enter into a contract with the county commissioners to help to pay for the improvement of a county road without first obtaining the approval of the township commissioner, and it may make payments thereon as provided by section 2 of the Act of May 24, 1917, P. L. 291, without the approval of such commissioner.

2. Such road cannot, by the agreement, become a township road without compliance with the Act of May 11, 1921, P. L. 447, which provides a method by which county commissioners may have a county road vacated and returned to a township for maintenance and repair.

3. The State Highway Department has no jurisdiction over contracts made by county commissioners for the improvement of county roads.

Office of the Attorney General,
Harrisburg, Pa., October 25, 1922.

Honorable Joseph W. Hunter, Township Commissioner, State Highway Department, Harrisburg, Pa.

Sir: This Department has received your request for an opinion as to whether a township has the right to enter into a contract with the county to help pay for the construction of a county road without first

obtaining the approval of the Township Commissioner of the plans and specifications or to make payments without approval of estimates by said Commissioner.

In the case under consideration the Road Supervisors of Hempfield Township, Westmoreland County, entered into an agreement with the Commissioners of said county, wherein it is provided that the said Commissioners should have surveys, plans and estimates of cost for the permanent improvement of a public highway in said township, and also to take the proper legal proceedings for authority to construct and improve said road as a county road. It is further provided that said road should be constructed by the County of Westmoreland, and the contract for the same made in the name of the county.

The Road Supervisors under said agreement are to contribute to the cost of the improvement one-half of the contract price and the extras from the commencement of the construction, paying the total amount of monthly estimates until the one-half of the road has been constructed. After the completion of the road it is to be taken over by Hempfield Township through its Road Supervisors and forever kept and maintained as a township road. Legal proceedings under the Act of May 11, 1911, P. L. 244, to have the road mentioned in the agreement declared a county road were started and carried to a successful termination by the County Commissioners. It is, therefore, as a county road that this matter must be considered, and it is conceded that the Highway Department has no jurisdiction over contracts made by county commissioners for the improvement of county roads.

The Act of May 11, 1911, P. L. 244, the Act under which the road in Hempfield Township was made a county road, is still in force and a supplement to it was passed May 24, 1917, P. L. 291, wherein it is provided, inter alia:

> "Section 1. That the proper authorities of any borough or township * * *, be, and are hereby authorized to enter into a contract or contracts with the commissioners of any county in this Commonwealth, providing that the said county commissioners shall construct an improved highway or highways under the provisions of the act to which this is a supplement, and the expense or cost of said construction shall be borne jointly by the said borough, township * * * and the said county, in such ratio or proportions as may be agreed on in said contract or contracts."

> "Section 2. Payment for the construction of said highway or highways, as provided for in section one of this supplement, shall be made by the county, which shall be reimbursed by said borough, township, * * * in such sums

as agreed upon in said contract or contracts, upon presentation to them, from time to time, of estimates and bills for work already performed and paid for under the provisions of the act to which this is a supplement."

"Section 4. Any highway constructed jointly under the provisions of this supplement shall be repaired and maintained at the expense of the proper county; but nothing shall prevent the proper authorities of a borough, township, * * * from entering into a contract or contracts with the county commissioners of said improved highway, under such terms and conditions as may be mutually satisfactory."

Section 20 of said Act, as amended by the Act of May 11, 1921, P. L. 477, provides a method by which county commissioners may have a county road vacated and returned to a township for maintenance and repair.

The agreement between the County Commissioners of Westmoreland County and the Road Supervisors of Hempfield Township was entered into March 16,1920, after the road in question had become a county road and was subject to the provisions of the Act of May 11, 1911. The payments, however, which said agreement calls for the township to make are not in accordance with the Act. All payments must be made in the first instance by the County, which shall be reimbursed by the Township as provided in the Act, nor can the road, as provided in the agreement, be taken over by the Township and forever thereafter be maintained as a township road except in a legal way. This can be done only by taking the necessary legal proceedings as provided by Section 20 of the Act of 1911, and as amended by the Act of May 11, 1921, P. L. 477. After this is done and it becomes a township road, it will be subject to the supervision and control of the Township Commissioners.

To hold that the Road Supervisors of Hempfield Township cannot enter into an agreement with the County Commissioners without the approval of the Township Commissioner is to ignore the express provisions of the Act of 1911 and its supplement of 1917, and to set aside such agreement after it has been entered into would violate the obligations of a legal contract, to the serious injury of one of the parties thereto.

The Acts of July 22, 1913, P. L. 915, July 16, 1917, P. L. 1004, and of July 8, 1919, P. L. 770, giving authority to the Highway Department, have no bearing upon the matter now being considered as they all relate entirely to township roads and in no manner affect a county road.

I am, therefore, of the opinion that the Township of Hempfield had a right to enter into a contract with the County Commissioners to help to pay for the improvement of a county road without first obtaining the approval of the Township Commissioner, and has a right to make payments as provided by Section 2 of the Act of May 24, 1917, P. L. 291.

The views herein expressed are not in conflict with the opinion filed June 15, 1922, by Deputy Attorney General McNees, as that opinion was only as to the rights of the Highway Department over township roads.

Very truly yours,

J. W. BROWN,
Deputy Attorney General.

IN RE MOTOR LIGHTS.

State Highway Department—Approval of Device—Front Lights—Specifications—Recall of Approval.

The State Highway Department under a laboratory test, in conformity with standard specifications, having issued a certificate of approval of a device for controlling lights on motor vehicles, and having received the fee deemed necessary from the applicant, can not make an arbitrary change of specifications which will affect the device already approved.

Office of the Attorney General,
Harrisburg, Pa., November 14, 1922.

Mr. Benjamin G. Eynon, Resgistrar of Motor Vehicles, State Highway Department, Harrisburg, Pa.

Sir: Relative to your inquiry of October 10, 1922, as to whether the State Highway Department can recall the approval of a device for controlling front lights on a motor vehicle upon change of specifications and the failure of the device approved to meet the new specifications. The Act of June 30, 1919, 678, Section 20, and as amended by the Act of May 16, 1921, P. L. 582, provides as follows:

> "The State Highway Commissioner may, after laboratory test in conformity with standard specifications, approve certain devices for controlling the front lights on motor vehicles so that they shall comply with the provisions of this section, upon the payment of such fee as he may deem necessary to cover the actual cost of such tests, not to exceed the sum of fifty ($50) dollars, and may issue a certificate to the applicant, describing the device and certifying that such tests have been made, and that the device, when properly applied, complies with the requirements of this Act."

The State Highway Department under a laboratory test, in conformity with standard specifications, having issued a certificate of approval of a device for controlling front lights on motor vehicles, and having re-

ceived the fee deemed necessary from the applicant, can not make an arbitrary change of specifications which will affect the device already approved.

I am, therefore, of the opinion that an approval of a device cannot be recalled because the device does not meet with specifications not required or not in force when the approval was given.

Very truly yours,

J. W. BROWN,
Deputy Attorney General.

MOTOR VEHICLES.

Dealers in used motor vehicles—Transfer of license—Acts of June 30, 1919, P. L. 702, Section 9, and May 16, 1921, P. L. 657.

C. W. Lambert, a dealer in used motor vehicles in Ellwood City, has closed out his business. He is also interested in the same line of business at Beaver Falls. The State Highway Commissioner, upon application made, should transfer Mr. Lambert's present license so that he may not be required to take out a new license for Beaver Falls.

Office of the Attorney General,
Harrisburg, Pa., November 14, 1922.

Mr. Benjamin G. Eynon, Registrar of Motor Vehicles, State Highway Department, Harrisburg, Pa.

Sir: Your letter of October 31, 1922, in reference to dealers in used motor vehicles and the transfer of the license granted to a dealer has been received.

Mr. C. W. Lambert is engaged as a dealer in used motor vehicles in Ellwood City and as such dealer has the licesne required by the Act of June 30, 1919, P. L. 702 and as amended by the Act of May 16, 1921, P. L. 657. He is also interested in a business at Beaver Falls, known as the Sahli-Lambert Motor Company. He is about to close his business out at Ellwood City and would like to have his license as a dealer in used motor vehicles transferred to his business at Beaver Falls.

Section 9 of the Act of June 30, 1919, as amended by the Act of May 16, 1921, provides:

> "Any person carrying on or conducting the business of buying, selling or dealing in used motor vehicles and having received a license therefor, shall, before removing

> any one or more of his places of business, or before opening any additional place of business within the same municipal district, apply to the State Highway Commissioner and obtain a transfer or extension of license for which a fee of ten dollars ($10.00) shall be charged."

It will be observed that Mr. Lambert is not moving his place of business, nor is he opening an additional one within the same municipal district. He is closing the place where he dealt in used motor vehicles and intends to add that branch, namely, dealing in used motor vehicles, to his place of business already established at Beaver Falls, and only one place of business is to be conducted under his license.

The Act requires the application for a license to contain, among other things, the location of the place, or all the places at which such business is to be carried on or conducted. Nothing in the Act provides for the transfer of the license to a place other than within the same municipal district, but it appears to be only just and reasonable that a man, having paid $100.00 for a license, should enjoy the privileges thereunder unless some good reason is shown to the contrary, and the closing of one business and giving attention to another already established, does not seem to be a good reason to deprive him of that license.

I am, therefore, of the opinion that Mr. Lambert, having paid the license fee, should not be compelled to take out an entirely new license, but upon applying to the State Highway Commissioner should obtain a transfer thereof.

Very truly yours,

J. W. BROWN,
Deputy Attorney General.

CONSTABLES' REPORT ON ROADS.

Road law—Condition of roads—Constables' reports—Proceedings against supervisors—Jurisdiction of court—Acts of March 28, 1808, and July 14, 1917.

1. A constable has a right, and it is his duty, to return to the court any roads in his district which are not in proper condition.

2. The court has not right to fine or imprison supervisors without a trial upon the reutrn of a constable; but it may issue process based upon the constable's return to bring the offenders into court.

3. The remedy against the supervisors is by indictment or proceedings under the Acts of March 28, 1808, 4 Sm. Laws, 531, or July 14, 1917, P. L. 840.

Office of the Attorney General,
Harrisburg, Pa., November 15, 1922.

Mr. Joseph W. Hunter, Township Commissioner, State Highway Department, Harrisburg, Pa.

Sir: Your letter of October 19, 1922, asking to be advised upon the subject of the right of constables to report the condition of roads to the County Courts, and other matters contained in said letter, has been received by this Department.

The questions embodied in your letter are taken up in the order in which they are stated in your communication.

1. Has the constable a right to report the condition of roads to the County Courts?

There is no legislative enactment conferring upon constables this right, but fortunately the decisions of our Courts are such that the question is not a doubtful one. It is a common law power and is in the nature of an official information against offenders.

> "The office of constable is ancient, his duties important and powers large. His general duty is to keep the peace and for this purpose he may arrest, imprison, break open doors, and the like * * * and what is more to our present purpose, he is *bound to present to the term or last court the offenses* inquirable in those courts. Those are all common law powers, and the last, that of making a return, is in the nature of making an official information against the offenders; and besides being made under special oath at the time of the return, it is the equivalent of an oath and charge before a magistrate." *McCullough vs. Commonwealth, 67 Pa., 30.*

> "The office is not a mere perfunctory one. They are not to sit still until by accident crime comes stalking past. Their duties are important and their powers are large. They must keep the peace. 'They are bound to present to

the term or last court all offenses inquirable in those courts'. Their returus are official information against the offenders, upon which indictments are confirmed and presented to the Grand Jury without a preliminary hearing. Such return is equivalent to an oath and charge before a magistrate." In re *Grand Jury 4 Northampton, 374.*

"The neglect to keep in repair the public roads in any municipal district is a violation of public duty, and the person or municipal corporation charged with the duty is punishable by indictment at common law. * * * From time time out of mind it has been the practice * * * for constables to return such public offenses and for the court to permit the District Attorney to send an indictment before the Grand Jury without a previous hearing before a committing magistrate." *Com. vs. Bethlehem Boro. 15 Superior Ct., 158.*

"Where duties of a public nature are imposed upon municipal corporations they are liable to indictment for neglecting to properly discharge such duties * * * This indictment was based upon the return of the borough constable to the Court of Quarter Sessions. It was his duty to make the return." *Commonwealth vs. Bredin, Burgess, et al., 165 Pa. 224.*

2. Has the Judge a right to fine or imprison the Supervisors on the constable's report?

Supervisors may be indicted for neglect and refusal to keep in repair a public road so that its condition has become such as to amount to a public nuisance. The remedy by indictment, provided by the Act of March 28, 1908, 4 Sm. Laws 531, has not been repealed or superseded by later acts or by the 240th Section of the Act of July 14, 1917, P. L. 840. Or, supervisors may be proceeded against under the Act of 1917, Section 240 of which provides:

"Any township supervisor, township superintendent, road master or contractor employed to work on the roads, bridges and highways of any township of the second class, who shall violate any of the provisions of this Act, other than those for the violation of which specific penalties are provided, or who shall fail, neglect or refuse to carry out the provisions of this Act, shall upon conviction before a justice of the peace be sentenced to pay a fine of not more than fifty (50) dollars to be collected in the name of the township as other debts of like amount are collected. All such fines shall be paid to the township treasurer for the use of the road fund."

3. Has the Judge a right to send out a bench warrant by the Sheriff and drag the supervisors into the presence of the Courts?

Speaking of the return of the constable to the Court, it was said in Commonwealth *vs.* Doyle, 16 Superior Court, 171:

> "* * * When there lodged it is sufficient ground to authorize the court to issue process for the offender and to direct the District Attorney to submit a bill to the Grand Jury."
>
> "In this State the Court of Quarter Sessions which is a a Court of Record, and has jurisdiction to try offenders, takes the place of all other Courts at common law for the trial of ordinary offenders. The return to it is appropriate, and it becomes the duty of the court to take notice of the return. * * * We think it is sufficient ground to authorize the court to issue process to bring in the offender." *McCullough vs. Commonwealth, 67 Pa., 30.*

4. Has the Judge a right to condemn and pass judgment without being heard before a jury?

This question is answered in what was stated in the second question where the methods of proceeding against delinquent offenders are pointed out.

I am, therefore, of the opinion:

1. That a constable has a right and it is his duty to return to the Court any roads in his district which are not in proper condition.

2. A Judge has no right to fine or imprison supervisors upon the return of a constable. This can be done only by due process of law under the Act of March 28, 1908, 4 Sm. Laws, 531, by indictment.

3. The Court has a right to issue process based upon the constable's return to bring the offenders into Court.

4. The Court has not a right to fine supervisors guilty of neglect of duty without a trial.

Very truly yours,

J. W. BROWN,
Deputy Attorney General.

IN RE COAL UNDER HIGHWAY.

Taking Coal Under Highway——Vertical and Lateral Support——Damage——Remedy

An abutting owner cannot remove coal or any other material from under or adjacent to an established highway in such manner as to cause a subsidence or other injury thereto, for the highway is entitled to such support as will keep it in place both lateral and vertical. If the removal of coal at the side or underneath will destroy the highway, it may not be done.

Where a highway has been damaged by the subsidence of the surface due to the mining of coal, the proper method of procedure to have the road restored to its former condition is for the township supervisors to file a bill praying for a mandatory injunction to compel the restoration of the road to the condition that existed before the breaking of the surface and the subsidence occurred.

Office of the Attorney General,
Harrisburg, Pa., November 28, 1922.

Honorable Joseph W. Hunter, Township Commissioner, State Highway Department, Harrisburg, Pa.

Sir: Your letter of the 2d instant in reference to the condition of a road in Susquehanna Township, Cambria County, under which coal has been mined in such a manner as to cause a break in the surface and a subsidence, leaving the road in a dangerous condition for travel, has been received by this Department.

An abutting owner cannot remove coal or any other material from under or adjacent to an established highway in such manner as to cause a subsidence or other injury thereto, for the highway is entitled to such support as will keep it in place both lateral and vertical. If the removal of coal at the side or underneath will destroy the highway, it may not be done.

> "The preservation of lateral support to a highway, as constructed for the public use, is an obligation to the community, which rests upon the adjacent land-owner. It is an absolute right in the public in the maintenance of which the members of the community are concerned; and it is of no materiality whether the fee of the street or highway is in the municipality, or whether it holds and controls it by a lesser title."

Dillon on Municipal Corporations, Vol. III, 5th Edition, page 1824, Section 1153.

> "But the Court of Appeals of New York has held that the preservation of lateral support to a highway, as constructed and prepared for the public use, is an obligation to the community which rests upon the adjacent land-owner; and hence, although the municipality is under no

> obligation to afford lateral support to the abutting premises cannot, by digging or excavating upon his land, so affect the lateral support of the highway as to cause or threaten its subsidence."

Dillon on Municipal Corporations, Vol. IV, 5th Edition, page 2932, Section 1679.

New York Steam Company vs. Foundation Company, 95 N. Y. 4350.

> "If the removal of coal causes such a subsidence in a public street as to constitute a nuisance therein, it is no defense that the mining is skillfully done. An encroachment upon a highway is an invasion of public rights and cannot be sustained upon any theory of weighing the advantages and disadvantages of the respective parties; and where there is a severance of the surface from the subsurface, an established highway is entitled to the support of both."

Scranton vs. Peoples Coal Company, 256 Pa. 332, 336.

As the ownership of the coal is not in dispute, it is clear that when the road was laid out the owner had full dominion and control over the coal with the right of an absolute owner to it, subject, however, to the easement in favor of the public. He has the right to mine and remove it, but the removal must be done in such manner as not to injure the surface of the highway, or create a condition whereby injury may follow later. The owner undoubtedly retains the right to use his land, and so it has been held where one owns the fee in the minerals under the surface of the highway and the mines under the surface adjacent thereto he may work such mines, but must do so in such way as not to cause the road to subside. *17 English Ruling Cases, 554.*

The coal under the highway when removed disturbed the surface. The owner's right to do this was subordinate to the right of the public to the highway. The encroachment by the owner of the coal was illegal and an invasion of the rights of the public.

> "The rights and title of an abutting owner * * * are subject * * * to the easement and servitude in favor or the public authorities to occupy the space above and below the surface of the way for any purpose within the scope of public uses to which highways may be put."

Breisch vs. Locust Mountain Coal Company, 267 Pa. 546, 550.

In the case under consideration the road is in a dangerous condition by reason of the breaking and sinking of the brick surface laid on a concrete foundation, such breaking and sinking being caused by failure to maintain sufficient pillars or supports in a mine under the road. The question now arises what is the remedy for such injury. In *Breisch vs. Locust Mountain Coal Company, supra*, a case in which the surface of the road was destroyed by coal-mining operations, it was held:

> "The supervisors, as municipal authorities, were proper officers to ask for a compulsory mandate to redress the injury. It should not have been denied, as a clear legal right existed. Where there has been an invasion of a public right by the use, for private purposes, of that which belongs to the public, whether the injury be great or small, it is the continuing deprivation of that right which gives cause for equitable intervention to prevent the creation or the continuance of such wrongful exercise. This should be recognized for a broader reason where the injury is substantial and material, calculated not only to interfere with the right and comfort of the public as such, but possibly to the damage of individuals."

I am, therefore, of the opinion that the proper method of procedure to have the road restored to its former condition is to have the Supervisors of Susquehanna Township, Cambria County, file a Bill, praying for a Mandatory Injunction to compel the restoration of the road to the condition that existed before the breaking of the surface and the subsidence occurred.

Very truly yours,

J. W. BROWN,
Deputy Attorney General.

OPINIONS TO THE SECRETARY OF AGRICULTURE.

OPINIONS TO THE SECRETARY OF AGRICULTURE.

For the Year 1921.

IN RE MILK INSPECTION.

Health Authorities——Third Class Cities——License——Act of May 23, 1919, P. L. 275.

Inspectors in the employ of the Board of Health of a third class city who makes use of the Babcock test in the examination and testing of milk and cream are not required to be certified or licensed under the Act of May 23, 1919, P. L. 275.

Office of the Attorney General,
Harrisburg, Pa., April 6, 1921.

Honorable Fred Rasmussen, Secretary of Agriculture, Harrisburg, Pa.

Sir: I have your recent letter inquiring whether inspectors of the board of health of a third class city who operate the Babcock milk test are required to be certified or licensed by you.

There are two Acts of Assembly relating to the Babcock test—the Act of May 23, 1919, P. L. 278, which fixes the standards of glassware to be used, and the Act of May 23, 1919, P. L. 275, which regulates the use of the test by persons engaged in the business of buying milk or cream on the basis of, or with reference to, the amount of butterfat contained therein.

The former Act contains no provision relating to the certification or licensing of persons operating this test, and need not be considered here. The latter Act is entitled:

> "An act providing for the protection of the public health, and the prevention of fraud and deception, by regulating the weighing, testing, buying, and selling of milk and cream; providing for the examination and appointment of certified testers, and the issuing of licenses and making of tests; and providing penalties."

Although the title would indicate that this is a health measure, its provisions are designed principally to prevent fraud and deception. They prescribe the manner in which tests shall be made by persons, firms or corporations who are engaged in the business of buying milk or cream on the basis of the percentage of butterfat contained therein. They are intended to secure for the farmer or milk producer a square deal at the hands of the dairyman or dealer who makes the tests and pays for the milk or cream according to the results shown thereby.

The provisions of the Act are limited to persons, associations, copartnerships and corporations which are *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. Section 4, which is the only section relating to licenses, provides, in part, as follows:

> "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."

A careful consideration of this portion of the Act in the light of all the other provisions, leads to the conclusion that the Legislature intended that it should apply only to persons, firms and corporations engaged in business.

The board of health of a third class city and its inspectors, who are authorized by law to take samples and make tests, in order to determine whether the milk and cream which is being sold in such city complies with the requirements of State laws, city ordinances and board of health regulations governing the sale and distribution of milk, are not "engaged in the business of receiving or buying milk and cream" within the meaning of this Act.

I therefore advise you that inspectors in the employ of the board of health of a third class city who make use of the Babcock test in the examination and testing of milk and cream, are not required to be certified or licensed.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

IN RE MILK INSPECTORS.

License Fees——State Institutions——Boards of Health——Act of May 23, 1919, P. L. 275.

Licenses should not be issued by the Secretary of Agriculture to milk inspectors of state institutions and local boards of health, without the payment of the fee specified in the Act of May 23, 1919, P. L. 275.

Office of the Attorney General,
Harrisburg, Pa., July 21, 1921.

Honorable Fred Rasmussen, Secretary of Agriculture, Harrisburg, Pa.

Sir: This Department is in receipt of your communication inquiring whether licenses may be issued by you to the milk inspectors of State institutions and local Boards of Health without the payment of the fee specified in the Act of May 23, 1919, P. L. 275.

Section 4 of that Act provides:

> "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. * * *
>
> The said Department shall issue such certificate of proficiency in the name of the approved applicant * * * 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) 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. All moneys so collected shall be used to meet the expenses of the Department of Agriculture * * *"

The Act contains no express provision permitting the issuance of licenses to any person or class of persons without payment of the prescribed fee, and I can discover no ground upon which such a provision could be implied. It is suggested in your letter that inasmuch as the compensation of such inspectors is paid out of public funds and the work of their employers is not of a commercial character payment of the fee might not be required. In this connection, however, reference should be had to the opinion rendered to you by this Department under date of April 6, 1921, wherein you were advised that "inspectors in the employ of the board of health of a city who make use of the Babcock test in the examination and testing of milk and cream, are not required to be certified or licensed." The same rule applies to inspectors in the employ of state institutions. In that opinion we pointed out that the Act of 1919 did not apply to such boards or institutions. Since no li-

cense is by law required for such inspectors, and the fee is not paid by such boards and institutions, there is no reason for reading into the act a provision that such inspectors shall be licensed without payment of a fee. The certification and license is purely a personal matter with the inspectors. If the board or institution, by regulation or practice of its own, and in order to be assured of the competency of its inspectors, requires them first to obtain licenses, the fee is merely a part of the expense which they, in common with all other persons who seek to fill positions requiring training and skill, must pay in order to qualify themselves.

I therefore advise you that licenses should not be issued by you to the milk inspectors of State institutions and local Boards of Health, without the payment of the fee specified in the Act of May 23, 1919, P. L. 275.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

DEPARTMENT OF AGRICULTURE.

Disposition of fines imposed for violation of the Meat Hygiene Act of 1915—Acts of March 17, 1865, P. L. 408, and May 28, 1915, P. L. 587, Section 21.

Fines imposed by the Court of Quarter Sessions of Franklin County for violations of the Act of May 28, 1915, P. L. 587, are payable into the State Treasury and not into the County Treasury pursuant to the Special Act of 1865. The latter act applies only to fines imposed under then existing laws and not to fines imposed under subsequent statutes.

Office of the Attorney General,
Harrisburg, Pa., July 21, 1921.

Honorable Fred Rasmussen, Secretary of Agriculture, Harrisburg, Pa.

Sir: This Department is in receipt of your communication stating that fines were imposed upon three defendants by the Court of Quarter Sessions of Franklin County for violations of the Meat Hygiene Act of May 28, 1915, P. L. 587. Upon request of the State Veterinarian that the fines be paid over to him for the use of the Commonwealth, he was informed by the Clerk of the Court of Quarter Sessions that they had been paid over to the Treasurer of the Franklin County Law Library in accordance with law, and payment to the Commonwealth was refused. You inquire whether that was a proper disposition of the fines.

The Act of March 17, 1865, P. L. 408, provides:

> "That all fines and penalties, imposed by the several courts of Franklin, Adams, Somerset and Fulton counties, which, under existing laws, are not payable to the commonwealth, for its use, are hereby directed to be paid into the treasury of said counties, for the use of a law library * * *."

Section 21 of the Act of May 28, 1915, P. L. 587, after prescribing penalties for violations of the Act, continues:

> "The fines imposed as aforesaid shall be for the use of the Commonwealth, shall be paid to a duly authorized agent of the board, and shall be by the board paid into the State Treasury."

The answer to your inquiry depends upon the construction of these two provisions. The contention of the local authorities, that the fines should be paid to the Treasurer of the Franklin County Law Library, appears to be founded on two propositions: (1) That the term "all fines and penalties," as used in the special Act of 1865 includes fines imposed under subsequent statutes as well as under those existing at that time, and (2) That by reason of the maxim, *generalia specialibus non derogant*, the later general Act does not operate to give the Commonwealth any fines which may be imposed under it by the Courts of Franklin County.

If the above quoted provisions of the Acts of 1865 and 1915 can be construed so that neither is restricted in its operation, it is our clear duty to so construe them.

The language of every enactment must be so construed as far as possible as to be consistent with every other which it does not in expres terms modify or repeal. *Endlich on Interpretation of Statutes, Section 182, p. 251.*

Repeals by implication, and even amendments by implication, are not favored. Two Acts touching the same subject or class of subjects are to be construed in harmony so as to give full effect to both, if possible. A subsequent general Act does not repeal a prior special Act, "unless there be a clear and strong inconsistency between them," *Commonwealth vs. Erie Railway Co., 98 Pa. 127*, or a clear indication that the special Act was in the contemplation of the Legislature when the general Act was passed. *Endlich, Id., Section 223, p. 299.*

After careful consideration it seems clear that there is no inconsistency between these two enactments. Each may be given its full scope without conflict with the other.

It will be noted that those fines which are payable under the Act of 1865 to the Law Library are those "which *under existing laws*, are not payable to the Commonwealth, for its use." Under the most favorable

construction this would include (1) all fines which in 1865 were not required by law to be paid to the Commonwealth, and (2) all fines which may be imposed under subsequent Acts, if such Acts do not direct payment to the Commonwealth; but it would not include fines which are both imposed by later Acts and directed by later Acts to be paid to the Commonwealth.

The fines which are directed to be paid to the Commonwealth under the Act of 1915 are not fines "which, under existing laws (1865), are not payable to the Commonwealth," and are, therefore, not within those which the Act of 1865 directed to go to the Law Library. They do not fall within the terms of the Act of 1865, and there is, therefore, no inconsistency between the provisions of the two Acts. The latter does not repeal or modify the former, it merely creates a class of subjects similar to, but not falling within, the class created by the former Act. The Acts run in parallel lines, without meeting.

The Legislature of 1865 did not bind the hands of subsequent Legislatures so that they could not provide for the imposition of fines in Franklin County and the payment of the same to the Commonwealth, without repealing or modifying the Act of 1865. That Act merely granted to the Law Library fines not payable to the Commonwealth, and there is nothing in it which evidences an intent to give to the Law Library fines imposed by later Acts, and directed by later Acts to be paid to the Commonwealth.

I, therefore, advise you that fines imposed by the Court of Quarter Sessions of Franklin County for violations of the Act of May 28, 1915, P. L. 587, are payable to a duly authorized agent of the Bureau of Animal Industry to be by him paid into the State Treasury, and that the fines imposed, as stated in your letter, should be so paid. I would suggest that you renew your request to the Clerk of the Court of Quarter Sessions, and in the event it is not complied with that you notify this Department.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

DEPARTMENT OF AGRICULTURE.

Dogs—Authority of City of Philadelphia to enforce an ordinance requiring the muzzling of dogs—Acts of March 11, 1789, 2 Sm. L. 463, Sec. 16, and July 11, 1917, P. L. 818.

The City of Philadelphia under the powers contained in the Special Act of 1789, may enact and enforce an ordinance which requires all dogs running at large to be muzzled and wear a collar legibly inscribed with the owner's name and which declares all other dogs to be nuisances.

Office of the Attorney General,
Harrisburg, Pa., July 22, 1921.

Honorable Fred Rasmussen, Secretary of Agriculture, Harrisburg, Pa.

Sir: This Department is in receipt of your letter of July 8, enclosing a copy of a communication from the Department of Public Safety of the City of Philadelphia inquiring whether the City of Philadelphia may enforce an ordinance which requires all dogs running at large to be muzzled and wear a collar legibly inscribed with the owner's name and which declares all other dogs to be nuisances.

The Act of March 11, 1789, 2 Sm. L. 463, 3 Purdon 2792, still in force, provides in Section 16:

> "That the Mayor (Recorder, Alderman) and Common Councilmen (in Common Council assembled), shall have full power and authority to make, ordain, constitute and establish, such and so many laws, ordinances, regulations and constitutions (provided the same shall not be repugnant to the laws and constitution of this commonwealth), as shall be necessary or convenient for the government and welfare of the said City, and the same to enforce, put in use, and execution, by the proper officers, and at their pleasure to revoke, alter and make anew, as occasion may require."

Under this statute there is no doubt that the City of Philadelphia has power to enact and enforce an ordinance such as you refer to, unless such power has been taken away by the Act of July 11, 1917, P. L. 818, known as the "Dog Law of 1917."

That Act provides for a state wide system of licensing dogs, and imposes certain restrictions upon dogs and their owners, chiefly in the interest of livestock and poultry. Section 36 thereof provides:

> "This act is intended as a complete and uniform system throughout the Commonwealth for the licensing of dogs and the protection of livestock and poultry from injury by dogs; but nothing in this act shall interfere with any law for the protection and preservation of game * * *"

In Brazier *vs.* Philadelphia, 215 Pa. 297 (1906), the question was raised whether the motor vehicle act of 1905 superseded an ordinance of Philadelphia passed in 1902 upon the same subject. The Court there said (p. 300):

> "It is, of course, beyond all question that, if the statute and the ordinance are inconsistent, or, if the statute can fairly be regarded as intended to supplant the ordinance, the latter must give way and the statute only have effect given to it. Paramount authority of the lawmaking power of the state over the lawmaking power of the city must be conceded. The question, therefore, comes down to this: Is there any necessary incompatability between the statute and the ordinance, or does it sufficiently appear that the statute was intended to furnish the sole rule of conduct and regulation for the use of automobiles and similar vehicles? * * *
>
> We are, however, not convinced that, simply because the state has undertaken to impose certain regulations applicable to the entire commonwealth, this excludes the right of a city to impose other regulations adapted to its own peculiar conditions, provided these are not inconsistent or at variance with those of a general character prescribed for the entire commonwealth."

Section 36 of the Dog Law of 1917 was probably inserted in the act to avoid the situation which therefore existed when a license from both state and local authorities might be required. See *Dog Tags, 42 Pa. C. C. 513 (1914)*. By its terms it indicates that the uniformity desired extends to "the licensing of dogs and the protection of livestock and poultry from injury by dogs." There is no evidence of an intention to supplant local regulations in other respects. I have not seen the ordinance referred to, but assuming, as the letter states, that it relates only to the muzzling of dogs, requires the owner's name to be inscribed on the collar and declares that dogs which are not so decorated are public nuisances, it is not inconsistent with the Act of 1917. It does not require a license, but it does contain provisions which, in thickly populated districts, may be necessary in the interest of the public safety. In expressing the opinion that it is not inconsistent with the Act of 1917 I have given due consideration to the provisions of Section 37, which it is not necessary to discuss.

If there be provisions in the ordinance which are inconsistent with the Act of 1917 and which are not mentioned in the letter before me, then to the extent that they exist the ordinance must give way. *Brazier vs. Philadelphia, 215 Pa. 297, 302.*

I therefore advise you that the City of Philadelphia may enact and enforce an ordinance which requires all dogs running at large to be muzzled and wear a collar legibly inscribed with the owner's name and which declares all other dogs to be nuisances.

Very truly yours,
GEO. ROSS HULL,
Deputy Attorney General.

DEPARTMENT OF AGRICULTURE.

Authority to direct payment out of the State Treasury to the Carbon County Agricultural Association pursuant to the Act of July 25, 1917, of part of the moneys expended by it for premiums for exhibits of farm products produced in the State.

Act of July 25, 1917, P. L. 1195, Section 4.

The Carbon County Agricultural Association is not at present entitled to the benefits of the Act of 1917, and its application for payment of moneys expended for premiums awarded this year cannot lawfully be granted.

Office of the Attorney General,
Harrisburg, Pa., December 15, 1921.

Honorable Fred Rasmussen, Secretary of Agriculture, Harrisburg, Pa.

Sir: This Department is in receipt of your communication which states the following facts:

The Carbon County Industrial Society, which, prior to the present year, held agricultural exhibitions, is in process of liquidation. Its grounds and buildings were sold to the Carbon County Agricultural Association, which was incorporated on September 16, 1921. This new corporation held an agricultural exhibition September 27 to October 1, 1921, at which it gave premiums for exhibits of farm products produced in this State. It has made application, under the provisions of the Act of July 25, 1917, P. L. 1195, for payment out of the State Treasury of a part of the moneys thus expended. You inquire whether this application should be granted.

The Act of 1917 provides for payment to each incorporated agricultural association conforming to the requirements of that Act of an annual sum not exceeding one thousand dollars, equal to the amount paid by such association as premiums for exhibits at its annual exhibition.

Section 4 thereof provides as follows:

> "No county agricultural association hereafter incorporated shall be entitled to the benefits of this act until such association shall have held two consecutive annual

> exhibitions of the character designated in the preceding section; nor shall such association receive any appropriation for their third and fourth years, respectively, in excess of the amount it paid in premiums in the State, exclusive of premiums for trials of speed, during its second year; and such association, upon its incorporation, shall file with the Auditor General a declaration of its intention to apply for said premium money for its third year. Such association must also file its report during its first two years, the same as any other association. This section shall not apply to a county agricultural association, heretofore incorporated, owning their own buildings and grounds, which shall hold annual exhibitions of the character designated in section three. Nor shall this section apply to a county agricultural association, heretofore or hereafter incorporated, which shall resume the holding of annual exhibitions of the character designated in section three of this act, which exhibitions have been for a period of not more than two years temporarily discontinued."

The Carbon County Agricultural Association was incorporated after the approval of the Act of July 25, 1917, P. L. 1195. It has not yet held two consecutive annual exhibitions. It is, therefore, excluded from the benefits of the Act of 1917, unless it comes within one of the two exceptions mentioned in the section quoted.

The first of these exceptions includes only associations incorporated prior to the approval of the Act. The second includes only associations which have temporarily discontinued exhibitions and subsequently resumed them. Neither of them includes the Carbon County Agricultural Association. It is a separate and distinct corporation from the Carbon County Industrial Society, and there is no provision in the Act which can be construed to extend to it the benefits thereof, merely because it has purchased the grounds and buildings of the Society, and is conducting a similar work.

I, therefore, advise you that the Carbon County Agricultural Association is not at present entitled to the benefits of the Act of July 25, 1917, P. L. 1195, and its application for payment of moneys expended for premiums awarded this year, cannot lawfully be granted.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

IN RE INFECTED CATTLE.

Tuberculosis——Indemnity——Violation of Agreement——Milk Sold as Food——Act of July 22, 1913, P. L. 928.

An indemnity should not be paid the owner of cattle affected with tuberculosis, where he has violated an agreement with the United States Bureau of Animal Industry and the Pennsylvania Bureau that such cattle were to be killed.

Milk is included in the phrase "or other food" of the 16th Section of the Act of July 22, 1913, P. L. 928, so that one who sells milk for use as food for human beings from cows affected with tuberculosis is liable to prosecution.

Office of the Attorney General,
Harrisburg, Pa., December 22, 1921.

Honorable Fred Rasmussen, Secretary of Agriculture, Harrisburg, Pa.

Sir: This Department is in receipt of your communication making the following inquiries:

(1) When the owner of a herd of cattle has entered into an agreement with the United States Bureau of Animal Industry and the Pennsylvania Bureau of Animal Industry under the terms of which his cattle were to be subjected to the tuberculin test, the tubercular cattle killed and an indemnity paid therefor, and the owner was to observe certain precautions to prevent the spread of the disease to other cattle and to human beings, and subsequently the owner violates the agreement upon his part, should the indemnity be paid?

(2) When a test of a herd of cattle has been made and it is found that certain cows are afflicted with tuberculosis, and thereupon the premises whereon the cows are kept is quarantined and subsequently the owner removes from the premises the milk produced by the tubercular cows and sells the same as food for human beings without first having had the milk pasteurized, may the owner be prosecuted under the provisions of the Act of July 7, 1885, P. L. 260, Section 1, or July 22, 1913, P. L. 928, Section 32 or Section 16?

The first of these questions was discussed and determined in an opinion rendered by William M. Hargest, Deputy Attorney General, on January 25, 1912, *Opinions of the Attorney General, 1911-1912, page 279, 21 District Reports, 260.* There is nothing in the Act of July 22, 1913, P. L. 928, to alter the conclusion reached in that opinion. I, therefore, advise you that the indemnity referred to should not be paid to an owner who violates the terms of his agreement.

Upon the second inquiry it appears that the Act of July 7, 1885, P. L. 260, applied only in cities of the second and third classes. In *Reading City vs. Miller, 45 Super. Ct. 28*, the Court said that this Act was virtually repealed by subsequent legislation, and that its provisions were of doubtful constitutionality. It would, therefore, be inadvisable to bring a prosecution under this Act.

Section 32 of the Act of July 22, 1913, P. L. 928, forbids the sale of milk produced by a cow which has reacted to the tuberculin test, for use as food for animals. It does not forbid the sale of such milk for use as food for human beings. Under the facts stated in your second inquiry no prosecution under this Section could be sustained.

Section 16 of the Act of 1913, however, provides:

> "After the establishment of any quarantine authorized by this act, and the posting of notices required by law, it shall be unlawful for any person, without a special permit in writing from the State Veterinarian or the State Live-stock Sanitary Board, as the case may be, * * * *to remove from any quarantined area or premises any hay, straw, grain, fodder, or other food, or animals or poultry* * * *."

In *Commonwealth vs. Bomberger, 44 County Court Reports, 673*, it was held that milk was included within the phrase "or other food" in the above quoted Section, and that the removal of milk from the quarantined premises was a violation of that Section.

An examination of the quarantine order issued and posted in the case before you shows that the cows affected were placed in the rear of the owner's dairy barn and were there quarantined. The milking of these cows and the subsequent removal and sale of the milk was a clear violation of Section 16 of the Act of 1913, and the owner should accordingly be prosecuted under that Section.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

DEAD STOCK REDEMPTION.

Destruction of cattle—Power of Bureau of Animal Industry—Compensation for diseased cattle—Act of July 22, 1913, P. L. 928, Sections 21 and 27.

Indemnities under the Act of 1913 are to be paid to the owner only where the Bureau of Animal Industry has caused the animals to be killed. There is no provision for payment of such indemnity where the owner for his own reasons and purposes decides to thus dispose of diseased cattle. The issuing of a permit for the removal and slaughter of the diseased animals (which is expressly provided for by Section 27 of the Act,) is not an order or direction of the Bureau that the animals should be slaughtered.

Office of the Attorney General,
Harrisburg, Pa., December 22, 1921.

Honorable Fred Rasmussen, Secretary of Agriculture, Harrisburg, Pa.

Sir: This Department is in receipt of your communication stating the following facts:

The owner of a herd of cattle employed a veterinarian to apply to them the tuberculin test. The test showed that some of the cattle were affected with tuberculosis. The veterinarian, in accordance with law, reported the finding of tuberculosis to the Bureau of Animal Industry. The Bureau directed its local agent to establish a special quarantine, which was promptly done. Neither the Bureau nor its agent found that it was necessary in order to prevent the spread of disease that the cattle affected should be killed, and no order or direction to kill the cattle issued. Subsequently a permit was issued by the Bureau for removal and slaughter of some of the animals. The permit was issued at the request of a butcher whom the owner of the cattle had engaged to slaughter them. The cattle were slaughtered in the presence and under the supervision of the agent of the Bureau, in order that it might be determined whether the carcasses were fit for food purposes. The owner now makes claim for payment of the indemnity provided for in Section 21 of the Act of July 22, 1913, P. L. 928. You inquire whether this claim should be paid.

The said Act of 1913 gives to the State Livestock Sanitary Board the power to establish quarantines and to cause the destruction of animals, poultry and personal property. This power has now been transferred to the Bureau of Animal Industry of the Department of Agriculture. Either or both of these measures may be adopted as the Bureau may, in its discretion, deem necessary in order to effect the purposes of the Act.

Section 21 thereof provides, in part, as follows:

> "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, taking into consideration the condition of the animal as to disease, and the nature and extent of the disease, and its present and probable effect on the animal, and having regard to the probable sums to be derived from the sale of the carcass, hide, and offal."

It is clear from this provision that indemnities are to be paid only where the Bureau has caused the animals to be killed. There is no provision for payment where the owner for his own reasons and purposes decides to thus dispose of diseased cattle.

In the case before you the owner might have permitted the cattle to remain in quarantine until the quarantine order was revoked or until he was directed by the Bureau or its agent to kill them. He chose to slaughter them. The issuing of a permit for removal and slaughter,

which is expressly provided for by Section 27 of the Act of 1913, was not an order or direction by the Bureau that the animals should be slaughtered.

It follows that under the facts presented the claim of the owner for indemnity should not be paid. Substantially the same question was presented and decided in the same manner in an opinion rendered by this Department to the Secretary of the Livestock Sanitary Board on May 4, 1905, Attorney General's Opinions 1905-06, page 323, 31 Pa. C. C. 233, 14 D. R. 641.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

ANIMAL INDUSTRY.

Animals—Killing of cow—Rabies—Liability of Bureau of Animal Industry—Act of July 22, 1913.

1. Under the Act of July 22, 1913, P. L. 928, the Bureau of Animal Industry is not liable for the value of a cow killed while suffering from rabies in quarantine, where the cow was killed for humanitarian reasons, and not to prevent the spread of disease.

2. Not decided, whether the county commissioners are liable under the provisions of the Act of July 11, 1917, Sections 25, 28, P. L. 818, 825.

Office of the Attorney General,
Harrisburg, Pa., December 23, 1921.

Honorable Fred Rasmussen, Secretary of Agriculture, Harrisburg, Pa.

Sir: This Department is in receipt of your communication stating the following facts:

On May 24, 1921, five cattle owned by a farmer resident in Allegheny County were bitten by a dog. The dog was killed, and a subsequent examination of its brain in the laboratory of the Bureau of Animal Industry disclosed that the dog had rabies. Upon this discovery the five cattle were placed under quarantine. Twenty-eight days later one of these developed marked symptoms of rabies, and was killed at the direction of a practicing veterinarian, who had been employed by the owner, and who had been previously instructed by an agent of the Bureau of Animal Industry to kill any of the animals which developed such symptoms. It does not appear that the animal was killed without the consent or direction of the owner. The instruction to kill the animals under such circumstances was not made for the purpose of preventing the spread of the disease, but solely to prevent unnecessary suffering. A cow developing such violent symptoms cannot be cured,

and cannot live more than a few days. On September 1, 1921, another cow developed symptoms of rabies and was killed at the direction of an agent of the Bureau.

The owner of the cattle made claim upon the County Commissioners of Allegheny County for the payment of damages under the provisions of Sections 25-28 of the Act of July 11, 1917, P. L. 818. The County Commissioners, acting under advice of counsel, have declined to pay the damages thus claimed on the ground that indemnity should be paid to the owner by the Bureau of Animal Industry of the Department of Agriculture under the provisions of Sections 21 of the Act of July 22, 1913, P. L. 928. You inquire whether this Bureau should pay the indemnity.

The Act of July 22, 1913, P. L. 928, provided that in order to prevent, control and eradicate transmissible diseases of animals and poultry the State Livestock Sanitary Board (now the Bureau of Animal Industry) may establish quarantines, and may destroy animals, poultry and personal property. Either or both of these remedies may be applied by the Bureau to effect the purposes of the Act. When the existence of a transmissible disease is discovered, the establishment of a quarantine may be deemed by the Bureau a sufficient precaution against the spread of the disease. Or, on the other hand, such precaution may not be sufficient, and resort to the killing of the animals affected may be necessary or advantageous to carry out the purposes of the Act. It thus appears that the fact that an animal is killed after it has been placed in quarantine does not necessarily indicate that such action was necessary in order to prevent the spread of disease.

Section 21 of the Act cited provides in part as follows:

> "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, * * *."

Under these provisions the obligation to pay the indemnity referred to is imposed only in cases where the destruction of the domestic animal is deemed necessary for the prevention of the spread of disease. The mere fact that the animal at the time of its destruction is under quarantine imposes no liability upon the Bureau. Unless it appears that the animal was killed at the direction of the Bureau of Animal Industry for the purpose of preventing the spread of disease, the Bureau is not liable for the payment of indemnity under the Act. In the case before you I understand that the purpose of killing the animal was not to prevent the spread of disease but was purely for humanitarian reasons, and was done for these reasons, with the acquiescence and consent

of the owner. Inevitable death was thus hastened but the cause of the death was the bite of the dog, not the enforcement of the law. It follows that the Bureau of Animal Industry is not liable for the payment of the indemnity referred to in the Act of 1913.

It is beyond the province of this Department to express any opinion as to whether the County Commissioners of Allegheny County may be liable under the provisions of Sections 25-28 of the Act of July 11, 1917, P. L. 818. Any opinion from this Department upon that subject would not bind the Commissioners nor would it protect them in case they acted in accordance therewith. For this reason we decline to express any opinion upon that question.

I, therefore, specifically advise you that under the circumstances set forth in your letter, the Bureau of Animal Industry is not liable for the payment of any indemnity under the Act of July 22, 1913, P. L. 928.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

OPINIONS TO THE SECRETARY OF AGRICULTURE.

For the Year 1922.

DOG LICENSES.

Dog Licenses—Act of May 11, 1921—When moneys to be paid to State Treasurer.

All license fees collected by the several county treasurers in payment of dog licenses for the year beginning January 15, 1922, must be paid over to the State Treasurer in accordance with Sections 3 and 15 of the Dog Law of May 11, 1921, P. L. 522.

Office of the Attorney General,
Harrisburg, Pa., January 4, 1922.

Honorable Fred Rasmussen, Secretary of Agriculture, Harrisburg, Pa.

Sir: This Department is in receipt of your letter of December 28th inquiring what disposition the several County Treasurers should make of dog license fees collected prior to January 15, 1922, for the year beginning on that date.

The Act of May 11, 1921, known as the "Dog Law of 1921," is a comprehensive enactment relating to dogs and the protection of livestock and poultry. Excepting as to cities of the first and second classes, it repeals and supplies the Dog Law of 1917 (July 11, P. L. 818.)

Section 3 of the said Act of 1921 provides:

> "On or before the fifteenth day of January, one thousand nine hundred and twenty-two, 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 of his respective county, * * * for a license for each such dog owned or kept by him. Such application * * * shall be accompanied by a license fee of one dollar for each male dog and each spayed female dog; and by a license fee of two dollars for each unspayed female dog. The applicant shall also pay an additional fee of ten cents for the services of the county treasurer in issuing, recording, and reporting said license to the Secretary of Agriculture and remitting fees and fines to the State Treasurer."

Section 15 provides, in part, as follows:

> "The county treasurer shall keep an accurate record of all license fees * * * collected by him or paid over to him by any justice of the peace, alderman, magistrate, or notary public, and of all money received from the sale of dogs. * * * All such moneys received by the county treasurer shall be remitted to the State Treasurer on the first Monday of each calendar month, together with a report of each payor, on forms furnished by the Secretary of Agriculture. A duplicate copy of each report shall be furnished the Secretary of Agriculture at the time of making such remittance."

Section 35 provides, in part, as follows:

> "The Secretary of Agriculture is hereby authorized to advertise for bids and let contracts for all supplies necessary for carrying out the provisions of this act."

Section 40 provides as follows:

> "This act shall take effect on the fifteenth day of January, one thousand nine hundred and twenty-two, except that the Secretary of Agriculture may issue license blanks and tags, and the county treasurers may issue licenses for the year one thousand nine hundred and twenty-two, at any time after the passage of this act."

From these provisions and from a reading of the whole Act it is apparent that the Legislature intended that the Dog Law of 1917 should continue in full force and effect until January 15, 1922, excepting that all such provisions of the new Act as relate to the issuing of license tags, etc. and the collection of license fees for the year beginning on that date should become effective immediately upon the passage of the Act.

It is true that Section 40 mentions only the issuing of blanks, tags and licenses. It does not specifically mention the preparation of blanks and tags, nor the collection and payment of license fees. However, it is clear that before any licenses could be lawfully issued by the County Treasurers for 1922 the blanks and tags would have to be prepared and the license fees be paid. Section 40 necessarily contemplates that the provisions which are quoted above should become effective upon the approval of the Act.

I, therefore, advise you that all license fees collected by the several County Treasurers in payment of dog licenses for the year beginning January 15, 1922, should be paid over to the State Treasurer in accordance with Sections 3 and 15 of the Dog Law of 1921.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

DOG LICENSES.

Dog law—License fees—Deduction for damages to livestock—Act of May 11, 1921.

1. Fees collected by county treasurers prior to Jan. 15, 1922, for dog licenses issued under the Act of May 11, 1921, P. L. 522, must be paid over to the State Treasurer.

2. County treasurers are not permitted to deduct and withhold out of fees for dog licenses the amount of claims made prior to Jan. 15, 1922, upon county commissioners for damages done to livestock and poultry.

Office of the Attorney General,
Harrisburg, Pa., March 31, 1922.

Honorable Fred Rasmussen, Secretary of Agriculture, Harrisburg, Pa.

Sir: The Attorney General is in receipt of your communication enclosing a letter from the County Treasurer of Washington County under date of March 3, 1922, and also of a communication from the Auditor General enclosing a letter from the same official written on the same date. These letters present the following questions:

1. What disposition shall be made by the several County Treasurers of the fees paid to them prior to January 15, 1922 for dog licenses issued under the Act of May 11, 1921, P. L. 522, known as The Dog Law of 1921?

2. Are the County Treasurers permitted to deduct and withhold out of such fees the amount of claims made prior to January 15, 1922 upon the County Commissioners for damage done to livestock and poultry?

The first of these inquiries was answered in an opinion to you under date of January 4, 1922 wherein you were advised that so much of the Dog Law of 1921 as related to the issuance of licenses for the year 1922 and the collection of fees therefor, became effective prior to January 15, 1922 and "that all license fees collected by the several County Treasurers in payment for dog licenses for the year beginning January 15, 1922 should be paid over to the State Treasurer in accordance with Section 3 and 15 of The Dog Law of 1921."

The second inquiry must be answered in the negative. The Dog Law of 1921 supersedes The Dog Law of 1917 (Act of July 11, 1917, P. L. 818), except within cities of the first and second classes. Both of these acts provided for annual dogs licenses and established a license year beginning and ending on January 15th. Under the former the licenses were issued by the county commissioners of each county through the county treasurer, the license fees were paid into the county treasury for the use of the county, and claims for damage done to livestock and poultry by dogs were paid by the county. Under the Act of 1921 the licenses are issued by the Secretary of Agriculture through the several county treasurers, the license fees are paid into the State Treasury and consti-

tute a special fund known as the "Dog Fund" out of which claims for damage done to livestock and poultry will be paid. It was the evident purpose of both enactments that the fees collected from licenses should furnish the funds for payment of damage claims. On May 11, 1921 when the new act was approved the great majority of the licenses for the year ending January 15, 1922 had already been issued and the fees paid into the treasuries of the several counties. These fees were not transferred to the state treasury but were permitted to remain in the general funds of the counties, evidently for the purpose of paying claims arising under the Act of 1917. The new Act did not become effective immediately upon its approval, but it was provided in Section 40 thereof as follows:

> "This act shall take effect on the fifteenth day of January, one thousand nine hundred and twenty-two, except that the Secretary of Agriculture may issue license blanks and tags, and the county treasurers may issue licenses for the year one thousand nine hundred and twenty-two, at any time after the passage of this act."

Under this Section the provisions relating to the issuance of licenses and the payment of fees for the new year became effective at once, but the provisions relating to the payment of claims for damages, and other portions of the act not relating to the issuance of licenses did not become effective until January 15, 1922.

Accordingly during the period from May 11, 1921 until January 15, 1922 the several county treasurers were authorized to issue licenses and collect fees under both acts. Fees for the remainder of the current license year were receivable under the act of 1917 and were properly payable into the county treasury. All fees received under the new act, however, were received as agent of the Secretary of Agriculture under the provisions of the new act. No part of such fees belonged to the counties or was liable for the payment of any damage claims arising prior to January 15, 1922. They were moneys belonging to the Dog Fund of the State Treasury expressly collected for the payment of such claims as might arise after the indemnity provisions of the new act became effective.

Although this clearly appears from a reading of the other provisions of the Act of 1921, the language of Section 31 seems conclusive:

> "Any valid claims, or parts thereof, for loss or damage to sheep, horses, mules, cattle, swine, or poultry, which have accrued under the provisions of the Act, approved the eleventh day of July, one thousand nine hundred and seventeen, (Dog Law of 1917), at any time prior to the taking effect of this act, but shall not abate by reason of

the repeal of such act, but shall be paid out of the general fund of the proper county, and, for such purpose, the provisions of said act are hereby saved from repeal."

The time referred to in this section as the time of "the taking effect of this act" was not the date of the approval of the act, but the date specified in Section 40 when all of the provisions of the new act become fully effective. It is clear, therefore, that all claims for damages arising prior to January 15, 1922 must be paid by counties out of fees collected under the Dog Law of 1917, and that all fees collected for the new license year should be paid in full by the county treasurers into the State Treasury.

I, therefore, specifically advise you that the treasurers of the several counties should not deduct or withhold out of the fees received for 1922 dog licenses the amount of any claims made upon the county commissioners for damage done to livestock or poultry prior to January 15, 1922.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

DOGS.

Dog law—Fines—Remission of—Prosecution—Witness fees—Oaths—Auditors—Act of May 11, 1921.

1. Section 36 of the Act of May 11, 1921, P. L. 522, relating to dogs, is mandatory, and any magistrate who has found a defendant guilty of its violation is obliged to impose a fine, and has no power to remit or suspend payment of the same.

2. Any person who is capable of taking an oath in a court of justice is competent to become a prosecutor of any violation of the act.

3. In proceedings under the dog law, witness fees are payable at the rate of $2 per day, as provided by the General Act of May 23, 1919, P. L. 258.

4. Township auditors may administer oaths to witnesses in proceedings under the dog law, but agents of the Bureau of Animal Industry may not.

5. Supplies, such as carbon paper, files, envelopes and postage, for proceedings under the dog law must be supplied by the several county treasurers, and not by the Secretary of Agriculture.

Office of the Attorney General,
Harrisburg, Pa., April 13, 1922.

Honorable Fred Rasmussen, Secretary of Agriculture, Harrisburg, Pa.

Sir: The Attorney General is in receipt of your recent communications requesting an opinion upon the following questions which have arisen in the administration of the Act of May 11, 1921, P. L. 522, known as the "Dog Law of 1921":

1. May a magistrate, having found a defendant guilty of a violation of the Dog Law of 1921, omit the imposition of a fine, or, having imposed a fine, may he remit the same, collect his costs and discharge the defendant?

Section 36 of the said Act provides as follows:

> "Any person violating, or failing or refusing to comply with, any of the provisions of this act shall, upon conviction in a summary proceeding, be sentenced to pay a fine of not less than five dollars nor more than one hundred dollars, or to undergo an imprisonment not exceeding thirty days, or both."

This provision is mandatory, and any magistrate, having found a defendant guilty of a violation of the Act, is obliged to impose a fine of at least five dollars. Such fine having been imposed, the magistrate has no power to remit or suspend payment of the same. (Attorney General's Opinions 1903-04, page 106; Opinion to Benj. G. Eynon, Registrar of Motor Vehicles dated Sept. 28, 1920).

2. May a prosecution for violation of any of the provisions of the Dog Law of 1921, be brought by any person other than the Secretary of Agriculture, his officer or agent?

Section 35 of this Act charges the Secretary of Agriculture with the general enforcement of the law, and authorizes him to call to his aid any other department, bureau or commission of the State government. The duty thus imposed upon govermental officers does not, however, vest in them exclusive authority to prosecute violations of the Act. A similar question was decided in the case of *Commonwealth vs. Hamilton, 74 Superior Ct. 419, (1920)*, wherein Judge Henderson, said:

> "As a general rule every person who is capable of taking an oath in a court of justice is competent to become a prosecutor. Those only are disqualified from so doing who are incapable of taking an oath, or from infamy which presumes them unworthy of credit are generally incompetent to become witnesses: 1 Chitty, Criminal Law 2; Commonwealth *v.* Barr, 25 Pa. Superior Ct. 609. The mandate to the bureau to enforce the comprehensive provisions of the statute is not an exclusive authority to it to institute criminal prosecution thereon. * * * It is more consonant with the legislation of the State to hold that while the law requires the board to be active in procuring the enforcement of all its provisions, it is neither to be expected nor required to be exclusively responsible for criminal prosecutions thereon."

I, therefore, advise you that any person who is capable of taking an oath in a court of justice is competent to become a prosecutor of any violation of the Dog Law of 1921.

3. What fees shall be paid to witnesses examined by auditors or magistrates in proceedings to assess damages for injury to livestock or poultry?

No fees are specified by the provisions of the Dog Law of 1921, and I am of the opinion that the provisions of the general Act of May 23, 1919, P. L. 258 fixing witness fees of $2.00 per day are applicable to such proceedings.

4. Are township auditors and agents of the Bureau of Animal Industry authorized to administer oaths to witnesses heard in such proceedings?

Sections 26 to 30 of the Dog Law of 1921 provide a method of procedure for the ascertainment and payment of damages for injury done to livestock or poultry by dogs. Upon complaint made to any township auditor, or to any justice of the peace, alderman or magistrate of the township, town, borough or city an inquiry is to be instituted by such officer. While I cannot find any statute conferring upon township auditors the power to administer oaths generally, Section 26 of the Dog Law contains the following provision:

> "Such auditor, justice of the peace, alderman, or magistrate *shall examine, under oath or affirmation, any witness called before him.*"

The act, having authorized a township auditor to make the inquiry and to receive the sworn testimony of witnesses, confers upon him by implication the power to perform such acts as are reasonably necessary to conduct the proceeding. Among these acts is included the administering of an oath to witnesses called before him. The Supreme Court of Ohio, in *State vs. Townley, 67 Ohio State 21, 65 N. E. 149*, speaking of the power to administer oaths to witnesses called in judicial proceedings, said:

> "Therefore it is not necessary that there should be a statute empowering the Courts to administer oaths in the trial of cases. The power is implied in the jurisdiction to try cases, and to receive the testimony of witnesses under oath."

The agent of the Bureau of Animal Industry, however, occupies a different position from that of the township auditor in the proceeding. He attends as the representative of the Secretary of Agriculture and assists in determining the amount of the damage, but he is not authorized to receive a complaint or to receive the testimony of witnesses under oath. Accordingly there is no implied power conferred upon him. Furthermore, I find no statute conferring upon such agents the power to administer oaths generally.

I, therefore, advise you that in the proceedings under the Dog Law of 1921 to ascertain the damages to be allowed for injury done to livestock or poultry by dogs, a township auditor has power to administer oaths to witnesses called before him, but an Agent of the Bureau of Animal Industry has no such power.

5. Shall the Secretary of Agriculture furnish to the county treasurer supplies of carbon paper, files, envelopes and postage for use in connection with the issuance of dog licenses?

The Dog Law of 1921 imposes upon the several county treasurers the duty of acting as agents of the Commonwealth for the issuance of dog licenses. A fee of ten cents is allowed to them for the issuance of each license. No provision is made in the Act for the furnishing of supplies by the Secretary of Agriculture other than metal tags and license blanks. It is my opinion that such supplies as carbon paper, files, envelopes and postage must be supplied by the several county treasurers. (See Opinion of Hargest, Deputy Attorney General, to Secretary of Agriculture dated Jan. 31, 1918, printed at p. 25, Bulletin of Department of Agriculture, May, 1918).

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

DOG LICENSES.

Acts of May 11, 1921, P. L. 522, and June 30, 1919, P. L. 678, Section 9.

Dogs owned by a county prison are subject to payment of license fee. The Dog Law of 1921, does not exempt counties from such payment. Counties, however, are specifically exempt from motor license fees.

Office of the Attorney General,
Harrisburg, Pa., July 18, 1922.

Honorable Fred Rasmussen, Secretary of Agriculture, Harrisburg, Pa.

Sir: I am in receipt of a communication addressed to you by the State Veterinarian, which was referred to this Department. It inquires whether a fee should be paid for the license of dogs owned by a county prison.

There is nothing in the Dog Law of 1921 which exempts counties from payment, and inasmuch as the charge is a license fee and not a tax it does not fall within the rule that the State and its municipal subdivi-

sions are impliedly relieved from payment. In the case of motor license fees, to which the letter refers, it will be found that Section 9 of the Act of June 30, 1919, P. L. 678 specifically relieves counties etc. from payment of such registration fees.

I am of the opinion that in the absence of such exemption in the Dog Law of 1921 a fee must be paid for the license of the dogs in question. The letter of the State Veterinarian is returned herewith.

Very truly yours,

GEO. ROSS HULL,
First Deputy Attorney General.

OPINIONS TO THE DAIRY AND FOOD COMMISSIONER.

OPINIONS TO THE DAIRY AND FOOD COMMISSIONER.

For the Year 1921.

WRAPPING AND STAMPING OF OLEOMARGARINE.

Oleomargarine—Wrapping and marking— United States Treasury Decision, No. 3117.

The provisions of the Act of May 29, 1901, P. L. 327, requiring the wrapping and stamping of all packages of oleomargarine, apply to all such goods manufactured in this state and sold here, and to all such goods imported from other states the moment they are delivered at destination and before any sale takes place.

Office of the Attorney General,
Harrisburg, Pa., February 3, 1921.

Honorable James Foust, Director Bureau of Foods, Harrisburg, Pa.

Sir: This Department is in receipt of your request of yesterday for an opinion as to the effect of Treasury Decision No. 3117 of the Commissioner of United States Internal Revenue, approved by the Secretary of the Treasury January 15, 1921, upon the statutory regulation of this State requiring the wrapping and stamping of oleomargarine, sold within this State.

I have before me a circular letter issued by one of the large manufacturers of oleomargarine and sent to its customers (wholesalers) in this State, on January 29th. It bears at the top in red letters, as large as those which our law requires to be stamped on the wrappers of oleomargarine, this legend:

"NO RUBBER STAMP REQUIRED"

The letter continues:

> "The retail dealers require no rubber stamp when selling * * * oleomargarine in cartons * * * These brands are packed in cartons which conform to all regulations and according to a recent ruling of the office of the Commissioner of Internal Revenue may be sold to customers by the retail dealer without further marking or the use of a rubber stamp. It is not necessary to wrap cartons or enclose them in paper bags. Send in your orders for prompt shipment."

In view of the serious and widespread misunderstanding which may be created as to the affect of this Federal regulation upon sales of oleomargarine in this State, a brief review of the statute and case, law on the subject will be valuable.

The Treasury Decision referred to, is as follows:

"(T. D. 3117)
Oleomargarine.

Retail dealers in oleomargarine may sell properly branded cartons from the original manufacturer's package without further wrapping or branding.

TREASURY DEPARTMENT
Office of Commissioner of Internal Revenue,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Oleomargarine packed by the manufacturer in cartons which are branded with the word 'Oleomargarine' in conspicuous letters not less than one-quarter of an inch square, statement of net weight, and otherwise in conformity with the regulations, may be sold by retail oleomargarine dealers from the original stamped container without any further marking or branding of said cartons, or of the wrapper or paper bag used by the retailer in delivering such cartons to a customer. The statement of the name and address of the retail dealer need not appear on such cartons.

Retail dealers are cautioned to see that each carton of oleomargarine sold by them is in accordance with the regulations, or they will render themselves liable to the penaly imposed by Section 6 of the Oleomargarine Law for selling improperly branded package.

Regulations Number 9, Revised 1907, pages 65-66, Circular Number 414, Revised 1918, Article 12, are hereby amended accordingly.

WM. M. WILLIAMS,
Commissioner of Internal Revenue.

Approved:
January 15, 1921.

D. F. HOUSTON,
Secretary of the Treasury."

This decision is made under the authority vested in the Commissioner of Internal Revenue by the Act of Congress of August 2, 1886, Ch. 840, 20 Statutes at Large 210, U. S. Comp. Statutes, 1916, Sections 6215-6241, which Act is a Federal revenue measure, and does not in any way affect the enforcement of reasonable police regulations of the several States.

The Pennsylvania Act of May 29, 1901, P. L. 327, as amended by the Act of June 5, 1913, P. L. 412, provides, inter alia, in Section 4:

> "and when oleomargarine, butterine or other similar substance not in imitation of yellow butter, is sold from such tub or package, or otherwise, at retail, in print, roll or other form, before being delivered to the purchaser it shall be wrapped in wrappers, plainly stamped on the outside thereof with the word 'OLEOMARGARINE,' printed or stamped thereon in letters one-fourth inch square; and said wrapper shall also contain the name and address of the seller and the quantity sold, and no other words thereon, and the said word 'OLEOMARGARINE,' so stamped or printed on the said wrapper, shall not be in any manner concealed, but shall be in plain view of the purchaser at the time of purchase."

The Act of Congress of May 9, 1902, Ch. 784, 32 Statutes at Large 193, U. S. Comp. Statutes 1916, Section 8740 provides:

> "All articles known as oleomargarine, butterine, imitation, process, renovated, or adulterated butter, or imitation cheese, or any substance in the semblance of butter, or cheese not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream, transported into any State or Territory or the District of Columbia, and remaining therein for use, consumption, sale, or storage therein, shall, upon the arrival within the limits of such State or Territory, or the District of Columbia, be subject to the operation and effect of the laws of such State or Territory or the District of Columbia, enacted in the exercise of its police powers to the same extent and in the same manner as though such articles or substances had been produced in such State or Territory or the District of Columbia, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Oleomargarine sold in Pennsylvania may, for the purpose of this opinion, be divided into two classes; (1) that which is manufactured and sold within the State, and (2) that which is imported from other States or foreign countries.

As to the first class, it has been held that this State has the power to regulate or, if it choose, to prohibit entirely its sale. *Powell vs. Pennsylvania, 127 U. S. 678; 32 L. ed. 253 (1887).* The regulation of this much of the traffic was thus placed securely beyond the reach of Federal interference.

As to that which is manufactured elsewhere and imported into this State, it was held that in the absence of Congressional action the State could not prohibit or regulate the importance of such goods into this

State nor its sale in the original package. *Schollenberger vs. Pennsylvania, 171 U.S. 1, 43 L. ed. 49 (1898)*; *Leisy vs. Hardin, 135 U.S. 100, 34 L. ed. 128 (1889)*.

Thus the law stood prior to the Act of Congress of May 9, 1902, above quoted. The police power of the State could operate to regulate the sale of oleomargarine imported from other States, only after it had been commingled with the general mass of property in the State by means of a sale in the original package or by a breaking of such original package.

The effect of the Act of Congress of May 9, 1902, was to subject oleomargarine transported in interstate commerce to the police regulation of the State to which it was destined, immediately upon its delivery at destination, and before any sale takes place, whether such sale be in the original package or not.

This is settled by the numerous decisions of the Supreme Court of the United States in cases arising under the Act of August 8, 1890, Ch. 728, 26 Statutes at Large, 313, U. S. Comp. Statutes 1916, Section 8738, commonly known as the WILSON ACT. That Act related to sales of liquors imported into a State in interstate commerce. Except for the change of a few immaterial words, the Act of 1902, relating to oleomargarine, is a verbatim copy of that Act.

In *Wilkerson vs. Rahrer, 140 U. S. 545, 35 Law. ed. 572 (1890)*, it was held that such legislation was constitutional, that Congress has the power to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier time than would otherwise be the case, and that it was not necessary for the State to re-enact its police regulations previously made, in order to make them operative upon the sale of goods imported from other states.

The following quotations state clearly the effect of this legislation:

In *Vance vs. Vandercook Company, 170 U. S. 438, 42 La. ed. 1100, (1897)* Mr. Justice White said:

> "It is also certain that the settled doctrine is that the power to ship merchandise from one state into another carries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, any state regulation to the contrary notwithstanding; that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution, until by a sale in the original package they have been commingled with the general mass of property in the state.
>
> "This last proposition, however, whilst generically true, is no longer applicable to intoxicating liquors, since Congress, in the exercise of its lawful authority, has recognized

the power of the several states to control the incidental right of sale in the original packages, of intoxicating liquors shipped into one state from another, so as to enable the states to prevent the exercise by the receiver of the accessory right of selling intoxicating liquors in the original packages except in conformity to lawful state regulations. In other words, by virtue of the act of Congress the receiver of intoxicating liquors in one state, sent from another, can no longer assert a right to sell in defiance of the state law in the original packages, because Congress has recognized to the contrary.

* * * * * * * * * * *

"The scope and effect of this act of Congress have been settled. Re Rahrer (Wilkerson *v.* Rahrer), 140 U. S. 545 (35:572): Rhodes *v.* The State of Iowa, 170 U. S. 412 (ante, 1088).

"In the first of these cases the constitutional power of Congress to pass the enactment in question was upheld, and the purpose of Congress in adopting it was declared to have been to allow state laws to operate on liquor shipped into one state from another, so as to prevent the sale in the original package in violation of state laws. In the second case the same view was taken of the statute, and although it was decided that the power of the state did not attach to the intoxicating liquor when in course of transit and until receipt and delivery, it was yet reiterated that the obvious and plain meaning of the act of Congress was to allow the state laws to attach to intoxicating liquors received by interstate commerce shipments before sale in the original package, and therefore at such a time as to prevent such sale if made unlawful by the state law."

In *Delamater vs. South Dakota, 205 U. S. 93, 51 Law. ed. 725, (1906)* the same Justice said:

"It is settled by a line of decisions of this court, * * * that the purpose of the Wilson Act, as a regulation by Congress of interstate commerce, was to allow the states, as to intoxicating liquors, when the subject of such commerce, to exert ampler power than could have been exercised before the enactment of the statute. In other words, that Congress, sedulous to prevent its exclusive right to regulate commerce from interfering with the power of the states over intoxicating liquor, by the Wilson Act adopted a special rule enabling the states to extend their authority as to such liquor shipped from other states before it became commingled with the mass of other property in the state by a sale in the original package: Re Rahrer (Wilkerson *v.* Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct., Rep. 865; Rhodes *v.* Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Vance *v.* W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; American Exp. Co. *vs.* Iowa, 196 U. S. 133, 49 L. ed. 417,

> 25 Sup. Ct. Rep. 182; Adams Exp. Co. *v.* Iowa, 196 U. S. 147, 49 L. ed. 424, 25 Sup. Ct. Rep. 185; Pabst Brewing Co. *v.* Crenshaw, 198 U. S. 17, 49 L. ed. 925, 25 Sup. Ct. 552; Foppiano *v.* Speed, 199 U. S. 501, 50 L. ed. 288, 26 Sup. Ct. Rep. 138; Heyman *v.* Southern R. Co. 203 U. S. 270, ante, 178, 27 Sup. Ct. Rep. 104."

And again in *Rosenberger vs. Pacific Express Company, 241 U. S. 48, 60 Law. ed. 880, (1915)* Mr. Justice White said:

> "The Wilson act only modifies these controlling rules by causing interstate commerce shipments of intoxicating liquors to come under state control at an earlier date than they otherwise would; *that is, after delivery, but before sale in the original packages.*"

It is, therefore, well settled that, since the passage of the Act of Congress of 1902, relating to oleomargarine, when a shipment of such goods enters this State from another, the moment it is delivered to its destination and before any sale is made, or the original package broken, it becomes subject to the police power of this State, which requires that all packages sold shall be wrapped and stamped as provided by Section 4 of our Act of 1901.

I, therefore, specifically advise you that the provisions of the Pennsylvania Act of May 29, 1901, P. L. 327, requiring the wrapping and stamping of all packages of oleomargarine, apply to all such goods manufactured in this State and sold here, and apply to all such goods imported from other states the moment they are delivered at destination and before any sale takes place.

In view of the misunderstanding which has arisen by the circulars spread broadcast throughout the State, I would suggest that you give this ruling such publicity as in your discretion you deem necessary, and that thereafter you enforce vigorously the law of Pennsylvania relating to this matter.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

PURE FOOD LAW.

Sale of milk—Milk containing less than 12 per centum of solids—Dealer liable to prosecution—Acts of June 8, 1911, and June 2, 1915.

The Act of June 8, 1911, § 1, P. L. 762, makes it unlawful to sell milk having less than 12 per centum of milk solids, even though it contains more than the minimum amount of butter fat; and the amendment of June 2, 1915, P. L. 735, makes no change in this respect.

A dealer who sells milk which contains less than 12 per centum of milk solids is liable to prosecution under the act, even though he files an affidavit stating that nothing has been added to or taken from the milk in question, which is otherwise pure and wholesome.

Office of the Attorney General,
Harrisburg, Pa., July 27, 1921.

Honorable James Foust, Director, Bureau of Foods, Department of Agriculture, Harrisburg, Pa.

Sir: This Department is in receipt of your inquiry relative to the interpretation of the Act of June 2, 1915, P. L. 735, amending Section 3 of the Act of June 8, 1911, P. L. 762. You ask to be advised whether, in view of this amendment, you should prosecute a dealer who sells milk which contains three per centum of butter fat but less than twelve per centum of milk solids, if such dealer file with you an affidavit that nothing has been added to or taken from the milk in question, which is otherwise pure and wholesome, and is not below three per centum in butter fat.

Section 1, of the Act of 1911 declares:

> "That it shall be unlawful for any person * * * to sell * * * milk which contains any added water, or milk which has had the butter fat or any portion thereof removed therefrom, or milk to which has been added any substance for the purpose of increasing its consistency or thickness, or milk which contains less than three and one-quarter per centum of butter fat and less than twelve per centum of milk solids. * * *"

Your inquiry presents first the queston whether the word "and" in the last clause quoted above shall be read "and" or "or." If it mean "and," then the offense of selling milk below standard is not complete unless the milk is below standard *both* with respect to its butter fat and its milk solids. If the word "and" mean "or" then it is a violation of the Act to sell milk which is below the standard in *either* butter fat or milk solids.

Referring to the use of these conjunctions in penal statutes, Endlich: in his work on Interpretation of Statutes, says on page 415, Section 305,

> "Both words are interchangeable where the sense and object of the enactment require the one to be substituted for the other, in penal statutes as well as in others, and as against the offender as well as in his favor."

In Vol. 11, Ruling Case Law, 1101, it is said:

> "Pure food laws are enacted as a means of protecting the people against the fraud and imposition of manufacturers and vendors 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."

In *Com. vs. Kevin, 202 Pa. 23*, Mr. Justice Mestrezat, referring to another of our pure food statutes, said at page 27:

> "The purpose of the legislature in the passage of the act is most commendable and the statute should receive a construction by the courts that will fully and effectively accomplish the object of its enactment."

Viewing this statute as a police regulation enacted in the interest of the public health and for the purpose of preventing fraud and deception, there is no doubt that the Legislature intended to require that all milk sold should contain a minimum percentage of butter fat and should also contain a minimum percentage of milk solids; and that it should be unlawful to sell milk which is below the standard in either one or the other of those respects.

In my opinion, therefore, it is a violation of Section 1 of the Act of 1911 to sell milk having less than twelve per centum of milk solids, even though it contain more than the minimum amount of butter fat, and does not otherwise offend against the law.

This brings us to the interpretation of Section 3 of the Act of 1911, as amended by the Act of June 2, 1915, P. L. 735. It contains the following paragraph, excepting the words in parenthesis which I have inserted:

> "If a person accused of violating section one of this act (in any particular hereafter mentioned) shall furnish satisfactory affidavit that nothing had been added to or taken from the milk in question, which is otherwise pure and wholesome, and is not below three (3) per centum in butter fat, the Dairy and Food Commissioner shall file said affidavit with the records; and no prosecution shall be instituted against said person * * *."

Section 4 of the Act provides:

> "That the Dairy and Food Commissioner shall be charged with the enforcement of the provisions of this Act."

You are the officer charged with the enforcement of this law. Prior to the Act of 1915 it was your duty to prosecute a dealer whom you believed to be guilty of any of the several offenses described in Section 1. The amendment, however, authorizes and requires you to withhold prosecutions which it would otherwise be your duty to commence, if the person accused shall furnish a satisfactory affidavit of certain facts. These facts relate to certain specific offenses defined in Section 1, to-wit: adding something to milk, taking something from it, and selling it with a butter fat content of less than three per cent., but do not refer to the amount of milk solids contained in it.

If the amendment be construed so that the filing of an affidavit as to these particular matters would prevent a prosecution for selling milk with less than the required amount of milk solids, it would, in effect, amend Section 1 of the Act by striking out that requirement. I am convinced that this was not the legislative intent. The amendment did change the required percentage of butter fat from three and one-quarter per centum to three per centum, in cases where an affidavit is filed, and if the Legislature had intended to change the required percentage of milk solids or to strike out the requirement altogether, it would have done so expressly. In the absence of such expression the words which I have written in parenthesis are implied.

In my opinion, the amendment does not relate to or affect the requirement as to milk solids. Any prosecution for violation of that requirement is not prevented by the amendment.

From this it follows that when a dealer furnishes an affidavit you need not require him to make any reference therein to the amount of milk solids, and if he should insert such an averment you are nevertheless free to prosecute him for the sale of milk which falls below twelve per centum of milk solids.

I, therefore, specifically advise you that when a dealer sells milk which contains less than twelve per centum of milk solids you should bring your prosecution, even though he should file an affidavit stating "that nothing has been added to or taken from the milk in question, which is otherwise pure and wholesome, and it is not below three (3) per centum in butter fat."

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

OPINIONS TO THE COMMISSIONER OF FORESTRY.

OPINIONS TO THE COMMISSIONER OF FORESTRY.

For the Year 1921.

IN RE FEDERAL LANDS.

Public Service Commission——Game and Fish——Highways——Control——Jurisdiction——Act of May 11, 1911, P. L. 271.

The Public Service Commission of Pennsylvania has no power or jurisdiction over lands purchased by the United States Government under the provisions of the Act of May 11, 1911, P. L. 271.

The Game and Fish laws of the State of Pennsylvania will be superseded as to game and fish on lands purchased by the Federal Government by the laws of the United States.

The Pennsylvania State Highway Department has no powers over highways located on lands purchased by the Federal Government under the Act of May 11, 1911, P. L. 271, except such as the United States may permit it to exercise under control of the Secretary of Agriculture under Section 9 of the Act of March 1, 1911.

Office of the Attorney General,
Harrisburg, Pa., September 26, 1921.

Honorable Gifford Pinchot, Commissioner of Forestry, Harrisburg, Pa.

Sir: Your communication of September 13th, 1921, duly received. You request an opinion from this Department as to the powers remaining in the State over lands acquired by the United States under the Act of May 11, 1911, P. L. 271, as amended by the Act of April 21, 1921, Act No. 129. You ask particularly as to the jurisdiction of The Public Service Commission and of the State Highway Department over such lands, and whether or not the Pennsylvania Game and Fish Laws will apply in such territory.

Your three questions can be answered together, as the subject of the jurisdiction of the Commonwealth over the lands acquired by the United States covers all Departments of the State government.

The Act of May 11, 1911, P. L. 271, is entitled:

> "An act empowering the United States of America to acquire land in the State of Pennsylvania for National Forest Reserves, by purchase or by condemnation proceedings; and granting to the United States of America all rights necessary for control and regulation of such reserves."

The latter clause of this title is the part that is important in considering the questions you raise. It explicitly states that in this Act "all rights necessary for control and regulation of such reserves" are granted.

Section 3 of this Act is in these words:

> "That the said United States of America is hereby empowered to pass such laws, and to make or provide for the making of such rules, of both a civil and criminal nature, and provide punishment for the violation thereof, as in its judgment may be necessary for the management, control, and protection of such lands acquired from time to time by the United States of America under the provisions of this act: Provided, however, That the authority hereby given shall be subject to all the conditions and stipulations and reservations contained in this act."

The only exceptions to this wide grant of powers are those contained in the Act itself. In Section 1 it is provided:

> "That the Commonwealth of Pennsylvania shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases and such criminal process as may issue under the authority of the Commonwealth of Pennsylvania against any persons charged with the commission of any crime, without or within said jurisdiction, may be executed thereon in like manner as if this act had not been passed."

In Section 5 it is further provided that the powers of the Health Department, which were conferred upon it by the three Acts therein referred to, to-wit, Act of April 22, 1905, P. L. 260, Act of April 27, 1905, P. L. 312, and Act of May 14, 1909, P. L. 855, shall not be invalidated or said Acts repealed by this Act.

It is a rule of the Courts in the construction of statutes that "when powers, privileges, or property are granted by statute everything indispensable to their exercise or enjoyment is impliedly granted."

Endlich on the Interpretation of Statutes, Section 419:

> "Where an act confers jurisdiction, it impliedly grants, also, the power of doing all such acts, or employing such means, as are essentially necessary to its execution. *Cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit.*" *People vs. Chapin, 105 N. Y. 309.*

Where in this Act of May 11, 1911, the word "ceded" is not used as it is in the Act of March 17, 1905, P. L. 45, as to jurisdiction over post office sites, etc. acquired by the United States, and in various other Acts as to roads, arsenals, etc., applying the principles above cited to the provisions of this Act, all jurisdiction must impliedly be ceded by

the State which is necessary to carry out the powers which are expressly granted are very large, including both criminal and civil laws, rules and regulations, they carry with them all the necessary jurisdiction. Moreover, as the Act excepts certain rights and powers of the State from its operation, it would follow that all rights and powers not excepted were granted to the United States.

This view is strengthened by an examination of the Acts of Congress under which the United States will acquire this property, and regulate and control it after it is acquired.

The Act of Congress under which the United States proposes to acquire these lands is the Act of March 1, 1911, Chapter 186, 36 Statutes 962. In Section 6 of this Act the Secretary of Agriculture is authorized "to purchase such lands as in his judgment may be necessary to the regulation of the flow of navigable streams." In Section 7 such purchases are to be approved by the National Forest Reservation Commission. In Section 9, as amended, it is provided that all rights of way, easements and reservations retained by the owner from whom the United States receives title shall be subject to the rules and regulations prescribed by the Secretary of Agriculture for their occupation, use, protection and administration. In Section 10 it is provided that the United States may sell to actual settlers, tracts not exceeding eighty acres, and "in case of such sale the *jurisdiction over the lands sold shall, ipso facto, revert to the State in which the lands lie.*"

Section 11 provides that lands acquired under this Act shall be permanently reserved, held and administered as natural forest lands under the provisions of Section 24 of the Act of March 3, 1891, C. 561, 26 Statutes 1103. This Act is the general Act as to National Forests, and gives the United States full jurisdiction and control. But by Section 12 of the said Act of March 1, 1911, the jurisdiction of the State over the inhabitants of the forest lands shall not be affected, and such inhabitants are still citizens of the State.

Section 13, as amended, provides that twenty-five per cent. of receipts from each National Forest shall be paid to the State for the benefit of schools and roads.

Further, the Act of August 11, 1916, C. 313, 39 Statutes, provides for the protection of game and fish on such lands, and imposes penalties for unlawfully taking the same.

The general effect of the above cited provisions of the Acts of Congress is to give the United States, subject to the reservations noted, full jurisdiction and control of all the lands purchased thereunder, except when they are sold to actual settlers in limited areas, when the jurisdiction over the lands so sold, under Section 10 of the Act of March 1, 1911, *reverts* to State.

In answer to your three questions you are, therefore, advised:

First: That The Public Service Commission of Pennsylvania will have no power or jurisdiction over lands purchased by the United States under the provisions of the Act of May 11, 1911, P. L. 271.

Second: That the Game and Fish Laws of the State of Pennsylvania will be superseded as to game and fish in such lands by the laws of the United States.

Third: That the State Highway Department will have no powers over highways located on such lands except such as the United States may permit it to exercise under the control of the Secretary of Agriculture under Section 9 of the Act of March 1, 1911.

I remain,

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

RECREATIONAL PRIVILEGES IN STATE FOREST RESERVATIONS.

Disposition of funds derived from the granting of such privileges—Acts of February 25, 1901, P. L. 11, March 27, 1913, P. L. 12, June 4, 1915, P. L. 825, Sections 2701 and 2702, and May 17, 1921, P. L. 848.

Receipts from the granting of recreational privileges in State Forest Reservations are to be paid into the State Treasury and cannot be used to meet expenses incurred by the Department of Forestry in the maintenance of such recreational opportunities.

Office of the Attorney General,
Harrisburg, Pa., October 18, 1921.

Honorable Gifford Pinchot, Commissioner of Forestry, Harrisburg, Pa.

Sir: I received your letter of the 21st of September, last, requesting an opinion from this Department as to whether or not funds derived from the granting of recreational privileges in the State Forest Reservations are gross receipts, and as such available to meet expenses incurred by the Department of Forestry for their construction and maintenance, and the balance remaining being net receipts to be paid to the School Fund.

You refer to an opinion rendered you by this Department under date of June 16, 1920, as to net receipts of timber operations on the State Forest Reservations. But that opinion was distinctly limited to the emergency therein specified, and did not intend to be a rule for future guidance.

Act of May 17, 1921, P. L. 848, amending the Forestry Act of February 25, 1901, P. L. 11, does, as you state, largely increase and extend the powers of the State Forest Commission, and in the last part of Section 1, (g. clause) provides as follows:

> "And the State Forest Commission is further empowered to provide by rules for any utilization of the land and resources of State Forests compatible with the purposes for which the State Forests are created, namely, to provide a continuous supply of timber, lumber, wood, and other forest products; to protect the water sheds of the rivers and streams of the State; and to furnish opportunities for health and recreation to the general public."

But the leases of recreational privileges, such as you mention in your communication of the 21st of September are not granted by the State Forest Commission, or the Department of Forestry, under this Act, but under the Act of March 27, 1913, P. L. 12, which has never been repealed, and which is in these words:

> "Section 1. Be it enacted, etc., That the Department of Forestry is hereby authorized to lease, for a period of not exceeding ten years, on such terms and conditions as it may consider reasonable, to any citizen, church, organization, or school board of Pennsylvania, such portion of the State Forest as the Department may deem suitable, as a site for a temporary building to be used by such citizen or family for health and recreation, or as a site for church or school purposes.
>
> "Section 2. The receipts from such leasing shall be paid into the State Treasury. Eighty per centum thereof, so paid in, shall constitute a part of the State school fund of Pennsylvania."

In Section 2 of this Act it provides that the receipts from such leasing shall be paid into the State Treasury. This means *all* the receipts from such leasing, and not merely the *net* receipts, as you imply in your letter.

The amendments to Sections 2701 and 2702 of the School Code of 1911, made by the Act of June 4, 1915, P. L. 825, leave out the word "net" which originally appeared in those sections of the School Code of 1911, and in Section 2702, as amended, it now reads: "*All receipts* derived in any way from, or on account of, the State Forest Reservations * * * shall always be promptly paid to the State Treasurer, etc."

You are therefore advised that all the receipts from the granting of recreational privileges in the State Forest Reservations are to be paid over to the State Treasurer, and no deductions can be made on account of expenses incurred in the maintenance of such recreational opportunities by the Department of Forestry.

Yours respectfully,

WILLIAM I. SWOOPE,
Deputy Attorney General.

IN RE STATE FORESTS.

State Commission—Powers—Purchase of Lands—Deed in Escrow—Appropriation.

Under the authority conferred upon the State Forest Commission to acquire lands for forest reservations it has the right to purchase lands up to the limit of the appropriation made in any one of the periods of two years by the Legislature but it has no authority to bind the Commonwealth nor the next Legislature to pay for the lands which it may purchase to an amount exceeding this appropriation, nor has it authority to bind the State to pay taxes on lands to which it has no legal title.

Office of the Attorney General,
Harrisburg, Pa., November 29, 1921.

Honorable Gifford Pinchot, Commissioner of Forestry, Harrisburg, Pa.

Sir: I received your communication of the 21st inst. asking for an opinion from this Department upon the legality of the contract of purchase made by the State Forest Commission in pursuance of the following Resolution passed October 14, 1921:

> "RESOLVED, That the Department of Forestry acquire full title to 2210 acres and title in escrow to the remaining area of approximately 4800 acres, which has been offered for sale by the Receivers of the United Lumber Company, at a price of $7.00 per acre, and that the payment of 5 cents per acre in lieu of the 1922 and 1923 taxes be paid by the Commonwealth upon the area held in escrow."

You state in your letter that only a small balance of the appropriation made in 1919 when the option for this land was taken remains unexpended, and that, therefore, it will be necessary, if the matter is now to be completed, to have the deed for 4,800 acres deposited in escrow, the purchase money to be paid when the next Legislature makes an appropriation for that purpose. In the meantime the proposition is that the Commonwealth shall take possession of this land and make a payment of five cents per acre in lieu of the taxes for 1922 and 1923.

Under the authority conferred upon the State Forest Commission to acquire lands for forest reservations, it has the right to purchase lands up to the limit of the appropriation made in any one of the periods of two years by the Legislature, but it has no authority to bind the Commonwealth nor the next Legislature to pay for the lands which it may purchase to an amount exceeding the appropriation, nor has it the authority to bind the State to pay taxes on lands to which it has no legal title.

It follows, therefore, that the offer of the United Lumber Company to deposit the deed in escrow for the 4,800 acres for which there is no available appropriation, and that the State should pay the taxes for 1922 and

1923, cannot be accepted by the Commonwealth. No one has the right or could bind the next Legislature to make an appropriation, and, therefore, the delivery of the deed in escrow would be useless. "A delivery in escrow presupposes a valid contract." *Bosea vs. Lent, 90 N. Y. Supp. 41.* The delivery of a deed in escrow is upon condition that the purchase money shall be paid, and there is no way by which the State Forest Commission could bind the next Legislature to make the appropriation to pay the purchase money, nor is there any way by which the vendor could compel the Commonwealth to pay this purchase money. The delivery of the deed in escrow, therefore, would be unavailing for any purpose.

You are, therefore, advised to reject the offer of the United Lumber Company to deliver the deed for the 4,800 acres in escrow.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

OPINIONS TO THE COMMISSIONER OF FORESTRY.

For the Year 1922.

FOREST PROTECTION.

Fire Wardens—Compensation of—Act of May 17, 1921, P. L. 854, Section 405.

Local Forest Fire Wardens cannot receive compensation from the State in excess of $75.00 per month. Such Fire Warden who furnishes information which leads to the arrest and conviction of a person for causing an incendiary forest fire is not entitled to rewards offered by the Department of Forestry.

Office of the Attorney General,
Harrisburg, Pa., June 27, 1922.

Mr. Alfred E. Rupp, Chief, Bureau of Lands, Department of Forestry, Harrisburg, Pa.

Sir: I received your request for an opinion from this Department as to whether or not a local Forest Fire Warden, who has secured information which led to the arrest and conviction of a person causing a fire, is entitled to be paid the $250.00 reward, which the Department of Forestry has offered for information leading to the arrest and conviction of any person or persons responsible for an incendiary forest fire.

The amendatory Act of May 17, 1921, P. L. 854, Section 405, provides as follows:

> "Each local forest fire warden shall be paid at the rate per hour, to be fixed from time to time by the State Forest Commission, not exceeding a maximum of 50 cents per hour, for the time actually employed in the performance of his duties. He shall also be paid for the necessary expenses incurred in the performance of his duties. A local forest fire warden shall not be paid from the forest protection appropriation in any one month an amount in excess of $75.00 unless he shall have been regularly employed as a patrolman or otherwise."

This section limits the amount to be paid to any local fire warden to $75.00 a month, and he cannot be paid any more than this amount by the State.

You are, therefore, advised that a local Forest Fire Warden, who furnishes information which leads to the arrest and conviction of a person for causing an incendiary fire, is not entitled to the reward of $250.00 offered by the Bureau of Fire Protection.

I, herewith, return to you the papers submitted.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General

DEPARTMENT OF FORESTRY.

Authority to purchase from the contingent fund of the Department a memorial to one of the deceased Commissioners of Forestry—Act of May 27, 1921, Appropriation Acts, page 54.

A special appropriation from the Legislature is necessary for the purchase of a memorial to a deceased Commissioner of Forestry. This cannot be paid for out of amount appropriated to the Department for contingent expenses.

Office of the Attorney General,
Harrisburg, Pa., September 6, 1922.

Major R. Y. Stuart, Commissioner of Forestry, Harrisburg, Pa.

Sir: I have received your communication asking an opinion from this Department as to whether or not memorials to one of the deceased Commissioners of Forestry can be purchased from the contingent funds appropriated to the Forestry Department.

The General Appropriation Act of May 27, 1921, Appropriation Acts, page 54, contains this provision as to the contingent expenses of the Department of Forestry:

> "For the payment of the contingent expenses of the Department of Forestry and of the traveling and other necessary expenses of the members of the State Forest Commission, two years, the sum of twelve thousand dollars ($12,000)."

The word "contingent" as applied to expenses has been defined in an opinion from this Department under date of August 17, 1910, 37 Pa. C. C. Rep. at page 628, as follows:

> "The adjective 'contingent,' as used in appropriation bills to qualify the word 'expenses' or 'fund,' has a technical and well understood meaning. It is usual for the

> legislative bodies authorized by law to make appropriations, to enumerate the objects for which specific expenditures are to be made, and then to make a reasonable appropriation for the minor disbursements incidental to the proper operation of any department of government, which cannot well be foreseen and provided for by specific appropriations. For such minor disbursements a round sum is appropriated under the head of 'contingent expenses' or 'contingent fund.' Dunwiddie *v.* United States (U. S.), 22 Ct. Cl. 269."

It is, therefore, plain that contingent expenses only cover unforeseen expenses which arise in the conduct of the business of the Department and cannot be held to cover such memorials as you ask about. It is for the Legislature, not the Departments, to determine when public funds shall be used for memorial purposes.

You are, therefore, advised that a special appropriation from the Legislature would be necessary to purchase the memorials you inquire about, and that the same cannot be paid for out of the amount appropriated to your Department for contingent expenses.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

DEPARTMENT OF FORESTRY.

Chief Forest Fire Warden—Authority to use receipts from individual subscribers to telephone lines constructed by him to pay certain charges—Act of June 3, 1915, P. L. 797, Clauses (h) and (j).

The Chief Forest Fire Warden may use the receipts from the individual subscribers to telephone lines constructed by him to pay the annual attachment charge by the telephone companies. The surplus accruing to the Department from the subscribers' rental may be used in keeping the lines in repair.

Office of the Attorney General,
Harrisburg, Pa., September 26, 1922.

Major R. Y. Stuart, Commissioner of Forestry, Harrisburg, Pa.

Sir: Your communication of the 19th of September, asking for an opinion from this Department as to whether or not the Chief Forest Fire Warden may use the receipts from the individual subscribers to telephone lines to pay the annual attachment charge by the telephone companies and the surplus accruing to the Department from the subscribers' rental in keeping the lines in repair, is at hand.

Clause (h) of Section 102 of the Act of June 3, 1915, P. L. 797, provides:

> "He shall plan and put into effect as rapidly as convenient a system of fire-towers and observation stations, which shall cover the regions subject to forest fires, purchase the necessary material and equipment, and hire the necessary labor for the installation of the system,"

and Clause (j) of the same Section provides:

> "He may enter into agreements, with the consent of the Commissioner of Forestry, with persons, firms, corporations, or associations, upon satisfactory terms, for the successful accomplishment of forest fire prevention or control."

Under these clauses of the Act of 1915 it would appear that if telephone lines to the fire-towers authorized by the Acts are necessary the Chief Forest Fire Warden would be authorized to construct them. Under these clauses of the Act of Assembly if the Chief Forest Fire Warden is satisfied that it would add to the efficiency of the telephone lines to allow the local persons in the neighborhood of them to use them he might enter into such agreements with the persons who desire to use them as would secure the successful accomplishment of the purpose for which they were installed.

The agreement you submit seems to make plain that the ten dollars per annum to be paid by those you call subscribers is to be paid solely toward the cost of construction, maintenance and repair of the telephone line and for no other purpose. These provisions appear in the second clause of the agreement which you submit, and it would seem that this clause of the agreement answers the question which you ask.

You are, therefore, advised that under the terms of the form of agreement which you submit for the use of the telephone lines constructed by the Chief Forest Fire Warden the Chief Forest Fire Warden may use the receipts from the individual subscribers to pay the annual attachment charge by the telephone companies and the surplus accruing to the Department from the subscribers' rental in keeping the lines in repair.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

OPINIONS TO THE GAME COMMISSIONER.

OPINIONS TO THE GAME COMMISSIONER.

For the Year 1921.

IN RE DISTRICT ATTORNEY.

Criminal Law——District Attorney——Duties——Summary Conviction——Appeals——Courts Not of Record——Act of May 3, 1850, P. L. 654.

Whenever a case of summary conviction, which is begun by an official of the State, is appealed to the Court of Quarter Sessions, it is the official duty of the District Attorney of the county in which the case originates to appear in that court for the Commonwealth. Whether he should appear before the magaistrate or a court not of record in a prosecution for violation of the game laws not decided.

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

Honorable Seth E. Gordon, Secretary, Game Commission, Harrisburg, Pa.

Sir: Your communication of the 18th instant, asking to be advised whether or not it is the duty of the District Attorney of each county in the Commonwealth to represent your Department in cases of summary convictions of violations of the game laws before magistrates that are appealed to the Quarter Sessions, duly received.

This question does not seem yet to have been passed upon by the appellate courts of this State, nor by this Department. Attorney General Brown in 1915 addressed a letter to each of the sixty-seven District Attorneys then in office, requesting them to appear for the Commonwealth in all cases of appeals to the Quarter Sessions from summary convictions, but no official opinion was handed down. The Act of May 3d, 1850, P. L. 654, in creating the office of District Attorney, under that name, provides:

> "The officer so elected shall sign all bills of indictment and conduct in court all criminal or other prosecutions in the name of the Commonwealth, or when the State is a party, which arise in the county for which he is elected, and perform all the duties which now by law are to be performed by Deputy Attorneys General."

As this Act of Assembly refers to the duties previously performed by Deputy Attorneys General, it is first necessary to ascertain what such duties were. In People *vs.* Minor, 2 Lans. 396, the Court said: "The

Attorney General must be held, therefore, to have all the powers belonging to the office at common law, and such additional powers as the Legislature sees fit to confer on him. Prior to the Act of May 3, 1850, all the civil and criminal business of the Commonwealth was handled by the Attorney General assisted by his Deputies. The Act of 1850 merely gave to certain elected officers, from a different source the same power that the same officers under another designation and previously appointed, had exercised before.

Rowand vs. Commonwealth, 82 Pa., 405.

All the authorities hold that it was the duty of the Attorney General and his Deputies to represent the Commonwealth in all matters, both civil and criminal.

In the second place the Act of May 3d, 1850, in no way curtailed the duties of the District Attorneys, created by the Act, who were expressly declared to be Deputy Attorneys General for their respective counties. Justice Agnew so held in the following case when he said: "He (the District Attorney) is bound to follow the business of the Commonwealth into whatever Courts in the county that business is authorized by law to be tried.

Commonwealth vs. Hipple, 69 Pa., 15.

The words used in the Act of May 3d, 1850, are to "conduct in court all criminal or other prosecutions in the name of the Commonwealth, *or when the State is a party*, which arise in the county for which he is elected." It has been expressly held in this State that a summary conviction is a criminal proceeding.

Commonwealth vs. Antone, 22 Pa. Super Ct. 412.

Commonwealth vs. Barbone, 56 Pa. Super. Ct. 637.

Without at this time, giving any opinion as to whether or not it is the official duty of District Attorneys to appear in summary conviction proceedings in courts not of record, such as magistrate's courts, you are advised, in accordance with the above cited decisions and Acts of Assembly, that whenever a case of summary conviction, which is begun by an official of the State, is appealed to the court of Quarter Sessions, it is the official duty of the District Attorney of the county in which the case originates to appear in that court for the Commonwealth.

Yours respectfully,

WILLIAM I. SWOOPE,
Deputy Attorney General.

APPEALS FROM SUMMARY CONVICTIONS.

Summary convictions—Commonwealth's right of appeal.

If there had been a full hearing in the Court of Quarter Sessions of a case of summary conviction on appeal from a justice of the peace, the general rules of the criminal law apply, and the Commonwealth has no appeal; but if the court has quashed the proceedings or discharged the defendant without a full hearing on the merits, the Commonwealth can appeal to the Superior Court, the appeal being but a *certiorari* under the common law.

Semble. Under the Act of April 18, 1919, P. L. 72, on such appeals, the Superior Court will review all the testimony, or, in other words, the rule that the appeal in such cases amount only to a *certiorari* has been changed by the statute.

Office of the Attorney General,
Harrisburg, Pa., March 9, 1921.

Honorable Seth E. Gordon, Secretary, Game Commission, Harrisburg, Pa.

Sir: Your letter requesting an opinion from this Department as to whether or not the Commonwealth can appeal to the Superior Court from a decision of the Court of Quarter Sessions on an appeal by the defendant from a summary conviction by a Justice of the Peace, duly received.

This question has been the subject of much controversy, and there are many decisions of the courts which seem contradictory. The leading case is Commonwealth *vs.*Capp, 48Pa. 53, in which the Supreme Court said:

> "Nothwithstanding the generality and comprehensiveness of the language of the Act of Assembly of June 16th, 1836, defining the jurisdiction and powers of this court (Purd. 928), the construction given to it in The Commonwealth *v.* McGinnis, 2 Wh. 114, left in force the Act of April 13th, 1791, which forbade a writ of certiorari to any person indicted for crime or misdemeanor, except upon special allowance by the Supreme Court, or a judge thereof, or by consent of the attorney-general; and under that act writs were always quashed on motion when not so allowed; Commonwealth *v.* Meyer, 2 S. & R. 453; Marsh *v.* Commonwealth, 16 Id. 319.
>
> "And the 33d section of our Act of March 31st, 1860, Purd. 414, is a re-enactment of the Act of 1791. It may be laid down very confidently, therefore, that a defendant in a criminal case can have a writ of error, or certiorari, only by special allowance of this court, or of a judge thereof, or by consent of the attorney-general. But may not the Commonwealth have a writ without such allowance or consent? This is our present question.
>
> "There is nothing in the disabling provisos of the statutes to limit the right of the Commonwealth, and the

powers of this court, whether deduced from the common law, from the old provincial Act of 1722, or from legislation under our state constitutions, are quite competent to the review of any judicial record, when no statutory restraints have been imposed. See Commonwealth *v.* Simpson, 2 Grant's Cases 443."

This was followed by Commonwealth *vs.* Wallace, 114 Pa. 405, and in its opinion the Supreme Court further discussed the question:

"The Criminal Procedure Act of 1860, Section 33, provides that any person indicted, may remove the proceedings therein into the Supreme Court, provided that siad court, or one of the judges thereof, or the attorney general, allows the writ upon sufficient cause. Other sections provide for bills of exceptions by defendants, and allowance of writs of error on their application, in cases of felonious homicide. The Act of May 19th, 1874, provides that in the trial of all criminal cases, the defendant may except to any decision of the court, in the same manner as is provided and practiced in civil cases, and in case of nuisance, or forcible entry, or detainer, the Commonwealth also may except to any decision in like manner; and in cases exclusively triable in the courts of Oyer and Terminer and general jail delivery, 'the accused, after conviction and sentence, may remove the indictment, record, and all proceedings into the Supreme Court,' and in all other cases 'writs of error and certiorari may be issued to all criminal courts, when specially allowed by the Supreme Court or any judge thereof.'

"A view of the statutes reveals the purpose to secure to defendants, or accused persons, the right of removal and review; not to take away any right from the Commonwealth. For reasons patent to every one familiar with the character of cases of nuisance, forcible entry, and detainer, the Commonwealth, as well as the defendant, is clothed with right to except to decisions of the trial court; but that grant takes away no power as respects other cases. Since the Act of 1860, it has been decided that the powers of this court are competent to the review of any judicial record, when no statutory restraints have been imposed, and that the district attorney may take out a writ of error or certiorari without special allowance: Commonwealth V. Capp, 48 Pa. St. 53. In the conduct of criminal cases, the district attorney in each county is vested with all the powers which formerly belonged to the deputy attorney general: Gilroy *v.* Commonwealth, 105 Pa. St. 484. To erroneous decisions made in the trial which may cause the acquittal of the accused, except in the three misdemeanors already mentioned, the Commonwealth cannot except, and such decisions cannot be reviewed. But for error in quashing an indictment, arresting judgment after verdict of guilty, and the like, the Commonwealth may remove the record for review without special allowance of the proper writ."

In 1895 the Superior Court was created, and given jurisdiction over all appeals from the Quarter Sessions. This Court has rendered a number of decisions relating to the subject of appeals from decisions of the Quarter Sessions in cases of appeals from summary convictions. A summary conviction, while a statutory proceeding out of the common law, is a criminal proceeding, and subject to the general principles of the criminal law.

Commonwealth vs. Antone, 22 Pa. Supr. Ct. 412.

Commonwealth vs. Borbono, 56 Pa. Supr. Ct. 637.

And in relation to appeals in such proceedings, Judge Porter said, in *Commonwealth, Appellant, vs. Hazen, 20 Pa. Supr. Ct. 487*:

> "The defendant was arrested, at the suit of the Commonwealth, for killing a deer on the domain of the Blooming Grove Park Association, in Pike County, Pa. The complaint was heard by a justice of the peace and a fine and cost imposed by virtue of the provisons of the act incorporating the association. Failing to pay, the defendant was committed to the county jail. An appeal was taken and at the hearing in the court below, evidence was received on the part of the prosecution. No evidence was submitted by the defendant. The Court quashed and set aside the proceedings, and discharged the defendant on the ground that the legislation, under which the proceedings were had, was unconstitutional * * *
>
> "The order discharging the defendant and setting aside the proceedings is reversed, the proceeding is reinstated, and a procedendo is awarded."

And in the case of Commonwealth, Appellant, *v.* Immel, 33 Pa. Supr. Ct. 388, Judge Rice stated the case in these words:

> "The defendant was summarily convicted before a justice of the peace of violating sec. 26 of the Act of May 29, 1901, P. L. 302. Upon special allowance he took an appeal to the quarter sessions and upon his motion the court quashed the proceedings before the magistrate, annulled the sentence and discharged the defendant. The Court held, in an opinion filed by its learned president judge, 'that the defendant's acts are not contrary to the provisions of the section under which he was convicted.' The acts referred to by the learned judge are not such as were established by evidence adduced at a trial or hearing in the quarter sessions—for there was no trial or hearing there upon the merits—but the acts alleged in the information and in the evidence adduced before the justice of the peace as shown by his transcript * * *
>
> "Therefore the motion to quash the proceedings before the justice of the peace should have been overruled and the case heard upon such evidence as the commonwealth

and the defendant saw fit to adduce. The record must be remitted for the purpose of a hearing in accordance with the foregoing suggestions.

"The order is reversed and set aside and the record remitted with a procedendo."

In a very exhaustive opinion the same Judge said, in Commonwealth *vs.* Layton, Appellant, 45 Pa. Supr. Ct. 582:

> "Accordingly, it was held, in the case last cited, that a writ of error did not lie from the judgment of the quarter sessions upon an appeal (the statute allowed an appeal to the quarter sessions) by supervisors of roads from a summary conviction by a justice of the peace; the proceeding in the quarter sessions in such case not being according to the course of the common law. In the present case the jurisdiction of the quarter sessions was statutory in its origin. Neither the constitutional provision nor the act of 1876, granting and regulating the right of appeal from summary convictions by magistrates, gives the right to have the case tried by a jury: Com. *v.* Waldman, 140 Pa. 89; Com. *v.* Eichberg, 140 Pa. 158. When such a case is brought into the quarter sessions by appeal, the court proceeds in a summary method, and not in the course of the common law * * * True the Act of May 19, 1874, P. L. 219, authorizes bills of exceptions in criminal cases. But a summary conviction does not belong to the class of criminal cases that were triable according to the course of the common law, in the quarter sessions, at the time of the passage of the act of 1874. Nor do they appear to be within the remedial intention of that act. The context shows that the legislature had in contemplation cases triable before a jury, and not summary proceeding such as this. See Barnes *v.* Com. 11 W.N.C. 375; Com. *v.* James, 142 Pa. 32; Com. *v.* Smith, 200 Pa. 363 * * *
>
> "It follows from the foregoing review, that an appeal from a summary conviction by a justice of the peace is, in effect, but a certiorari, and brings up for review nothing but what appears upon the record, without a bill of exceptions."

The same Court held in the following case that on an appeal by the defendant from a judgment of the quarter sessions affirming a judgment of the justice of the peace in a summary conviction, the Appellate Court cannot consider the evidence or review the findings of fact based upon such evidence.

Com. v Zimmerman, 56 Pa. Supr. Ct. 311.

In the late case of *Pittsburgh v. Pierce, 69 Pa. Supr. Ct. 520*, Judge Porter held that the evidence could not be reviewed. But by the Act of Assembly approved April 18, 1919, P. L. 72, the Legislature has said that in all cases the Supreme and Superior Courts shall review all the testimony. I have not been able to find a decision as to the exact effect this Act has upon such appeals as we are here considering.

But, without at this time considering this Act of April 18, 1919, the above cited decisions establish first, that summary convictions are criminal proceedings and subject to the principles of the criminal law; second, that they are statutory proceedings outside of the common law; third, that the statutes permitting exceptions in criminal cases do not apply to summary convictions; fourth, that to erroneous decisions made in the trial of a defendant which may cause the acquittal of the defendant, except in cases of nuisance, forcible entry and detainer, the Commonwealth cannot except and such decisions cannot be reviewed; but for error in quashing the proceedings, discharging the defendant without a hearing, arresting judgment after verdict of guilty, and the like, the Commonwealth may remove the record for review.

Applying these principles to the question before us, if there has been a full hearing in the Court of Quarter Sessions of a case of summary conviction on appeal from a justice of the peace, the general rules of the criminal law apply, and the Commonwealth has no appeal; but if the Court of Quarter Sessions has discharged the defendant without a hearing of all the evidence in the case, or has quashed the proceedings, or has in any way discharged the defendant without a full hearing on the merits of the case, the Commonwealth can appeal to the Superior Court, the appeal being but a certiorari, under the common law.

Specifically advising you, therefore, in the case before the Quarter Sessions of Lackawanna County, if there was a full hearing by Judge Maxey of all the evidence in the case, and his decision was based on such evidence, the Commonwealth has no appeal.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

IN RE GAME LAWS.

Costs—— Unsuccessful Prosecutions——Appeals——County——Act of April 16, 1903, P. L. 213.

In all cases of violation of the game laws, where for any reason the officer of the Commonwealth shall fail to recover the costs of record from the defendant, the county in which the information was made, is liable for the same.

In all cases of violation of the game laws, where the defendant has appealed to the Court of Quarter Sessions from a Summary conviction, and has been discharged by the Court, the Act of April 16, 1903, P. L. 213, applies to the costs accruing in such appeal as well as the costs accruing before the Justice of the Peace, and the county is liable for the same.

Office of the Attorney General,
Harrisburg, Pa., April 27, 1921.

Honorable Seth E. Gordon, Secretary, Board of Game Commissioners, Harrisburg, Pa.

Sir: I received your communication of April 21, 1921, asking for an opinion from this Department as to the liability of the county for the costs accruing in cases of summary conviction in violation of the game laws, where the defendant is discharged, and second, as to the liability of the county in such cases where the defendant has taken an appeal to the Court of Quarter Sessions and has been discharged by the said Court.

The Act of April 16, 1903, P. L. 213, provides:

> "Whenever any officer of this Commonwealth, whose duty it is by the laws of this State to protect our game * * * shall, in good faith bring suit for violation of any of the laws relative to these subjects, and for any legal cause shall fail to recover the costs of record, the same shall be a charge upon the proper county, and shall be audited and paid as are costs of like character in said county."

What is meant by the term "costs of record" in this Act? A diligent search has not disclosed any definition either in text book or report in Pennsylvania or elsewhere of the term "costs of record." It cannot mean merely the costs of docketing or recording the case. Considering the purpose and the language of the Act, the only reasonable conclusion is that it means all of costs authorized to be taxed of record.

Construing all of the Acts together, in the absence of any definition of "costs of record" from the Appellate Courts, it is apparent that this term as used in the Act of April 16, 1903, means all of the costs of prosecution, which are authorized to be taxed of record.

Since the case of *Commonwealth vs. Dickinson 62 Pa. Super. Ct. 468*, while the Appellate Courts have not construed this act, there have been several cases in Quarter Sessions Courts construing the meaning of the

term "record costs." The last case was in Somerset County, *Commonmonwealth vs. Tressler, 67, Pittsburgh, page 474,* in which Judge Kooser held as follows:

> "The position of counsel for the defendant is that the county is liable under the Act of April 16th, 1903, P. L. 213.
>
> "In at least two cases the validity of this Act and the liability of counties under it for costs incurred in proceedings brought in good faith but resulting, as in this case, in the discharge of the defendant, without fixing him for liability, has been passed upon by the District Courts of the State. Viz., 33 C. C., 298; 17 D. R., 202.
>
> "In each of these cases the county was held liable for the costs. It appears from an examination of the Game and Fish Laws from an early date that it has been the steady purpose of the Legislature to charge upon the proper county costs of this kind.
>
> "Thus the Act of May 8th, 1876, P. L. 146; June 3rd, 1878, P. L. 160; May 22nd, 1889, P. L. 264; May 29th, 1901, P. L. 302, and the Act of May 22nd, 1905, P. L. 272, each provides that the costs in proceedings of this kind where they have been begun in good faith and the defendants have been discharged, should be paid by the county; and they have not distinguished between the costs due to officers and witnesses, and this intention of the legislature seems to be embodied in the Act of 1903, which has relation to nothing but fixing the liability for costs.
>
> "I am of the opinion therefore that the phrase 'costs of record' applies to all proper costs incurred at the hearing which includes the witness bill."

You are specifically advised, therefore, that in all cases of violation of the game laws, where, for any reason the officer of the Commonwealth shall fail to recover the costs of record from the defendant, the county is liable for the same.

Answering your second question as to the liability of the County where the defendant has appealed to the Court of Quarter Sessions and has been discharged by that Court, this Act of April 16, 1903, P. L. 213, applies to the costs accruing in such cases, as well as the costs accruing before the Justice of the Peace. There is nothing in the Act to restrict it to summary proceedings before a Justice of the Peace. The county is, therefore, liable in all such cases under this act.

Yours respectfully,

WILLIAM I. SWOOPE,
Deputy Attorney General.

BOARD OF GAME COMMISSIONERS.

Power to elect a Vice-president.

The Commission may elect or appoint a Vice-president or a Vice-chairman who shall perform all of the duties of the President, during his absence. No powers and duties may be delegated to the Vice-president, which he is to perform, in the presence of the President. The Vice-president and the Secretary together may sign the commissions issued to game protectors and others.

Office of the Attorney General,
Harrisburg, Pa., June 21, 1921.

Honorable Seth E. Gordon, Secretary, Game Commission, Harrisburg, Pa.

Sir: The Attorney General's Department has received your request for an opinion on the question as to whether or not the Game Commission may elect a Vice-president who shall have all of the powers and duties of the President of the Commission during his absence or any particular powers and duties which may be delegated to him.

We find that neither in the law creating the Game Commission nor in any of the amendments or supplements thereto is there any provision for the organization of the Commission. Game protectors are provided for, and it is set forth that one of them shall be known as the chief game protector, and that he shall also be Secretary of the Board. He is the executive officer of the game protectors and has direction, supervision and control of them. We do not believe he is the executive officer of the Game Commission, however. We find no such specification in the Act.

The situation is, therefore, that the Legislature has created a Commission without providing any method of organization, and without setting forth what officers it should have other than that of Secretary already mentioned. As there are no funds to be handled by the Commission except for transmission to the Treasurer of the Commonwealth it is not necessary that they have any treasurer, but to carry out the purposes of the Act it is necessary that they have an executive officer who can call the meetings together and preside over them, as well as to perform the many other functions which are incumbent upon the presiding officer.

We must, therefore, address ourselves to giving effect to the Act of the Legislature creating this Commission. In order to carry out the full intention of the Legislature as expressed in the Act, with its amendments and supplements, we believe that it is necessary for the Commission to organize itself into an effective body and to elect or appoint a presiding officer who may be known as the President or Chairman of the Commission. Such officer should have all the duties and powers regularly accompanying such office.

We now come to your question as to the establishment of the office of Vice-president and the powers and duties which would appertain thereto. Here again we are confronted with but one question, and that is how to best carry out the purpose of the Legislature in passing the laws under discussion. We have come to the conclusion that a Vice-president or Vice-chairman of said Commission may be elected or appointed by it, and that he may perform all of the duties of the President during the President's absence. We cannot say to you that powers and duties may be delegated to the Vice-president which he is to perform in the presence of the President. On such occasions it is the President's duty to perform all of the functions of the office, and we do not believe that he may divide up the work, giving certain portions to the Vice-president and retaining certain other portions for himself. We believe that the Vice-president may perform any of the functions of the office of President during his absence.

The other element of your inquiry concerns the validity of commissions issued to game protectors and others, if such commissions are signed by the Vice-president together with the Secretary. We find nothing in the law which requires the issuing of such commissions nor the signing thereof by any particular officer of the Commission. We believe a letter from the Secretary to such appointees, informing them of their employment, would be compliance with the law, but we believe further that the custom which you have adopted is quite a proper one, and if you desire to continue it and have such commissions signed by the President or Vice-president and the Secretary, we advise you that such additional signatures will not make the commission illegal or invalid.

Very truly yours,

STERLING G. McNEES,
Deputy Attorney General.

IN RE SUMMARY CONVICTIONS.

Appeals——Allowance by Court——Trial Without Jury——Indictment——Procedure.

When an appeal has been allowed by the Court of Quarter Sessions in a proceeding under the Act of May 8, 1909, P. L. 466, or under the Act of June 1, 1915, P. L. 644, both of which Acts provide that a defendant, an unnaturalized foreigner, shall be held to answer to a charge of misdemeanor for being in possession of firearms or dogs, by giving recognizance, the case shall be proceeded with in the Court of Quarter Sessions according to the common law, viz., by indictment and trial by jury.

By Article V, Section 14, of the Pennsylvania State Constitution, and the Act of April 17, 1876, P. L. 29, amended by the Act of July 11, 1917, P. L. 771, appeals from summary convictions must be first allowed by the court on cause shown.

Office of the Attorney General,
Harrisburg, Pa., October 18, 1921.

Honorable Seth E. Gordon, Secretary, Game Commission, Harrisburg, Pa.

Sir: Your request for an opinion from this Department as to the trial and procedure when defendants appeal to the Court of Quarter Sessions from a summary conviction before a Justice of the Peace under the provisions of the Act of May 8, 1909, P. L. 466, as amended by the Act of July 11, 1917, P. L. 779, prohibiting unnaturalized foreign born residents from being possessed of fire arms of any kind, and of the Act of June 1, 1915, P. L. 644, prohibiting unnaturalized foreign born residents from being possessed of dogs, duly received.

So far as procedure is concerned the provisions of these Acts as to appeals are as follows:

Section 7 of the Act of May 8, 1909, P. L. 466, is in these words:

> "* * * Any defendant refusing to pay such penalty, with the costs of prosecution, shall be committed to the common jail of the county, for a period of one day for each dollar of penalty imposed, unless he shall enter a good and sufficient recognizance, with one or more sureties, to pay such penalty within ten days, or to answer such complaint, upon the charge of misdemeanor, before the court of quarter sessions of the peace of the county in which the offense was committed; which said court, upon the conviction of the defendant of such offense, and on his failure to pay the penalty imposed, together with the costs of prosecution, shall commit such defendant to the common jail of the county for a period of one day for each dollar of penalty imposed. * * *"

Section 7 of the Act of June 1, 1915, P. L. 644, is in almost identical words:

> "* * * Any defendant refusing to pay such fine, with the costs of prosecution, shall be committed to the com-

> mon jail of the county, for a period of one day for each dollar of fine imposed, unless he shall enter a good and sufficient recognizance, with one or more sureties, to pay such fine within ten days, or to answer such complaint, upon the charge of misdemeanor, before the court of quarter sessions of the peace, county in which the offense was commited. * * *"

By Article V, Section 14, of the Pennsylvania State Constitution, and the Act of April 17, 1876, P. L. 29, amended by the Act of July 11, 1917, P. L. 771, appeals from summary convictions must be first allowed by the Court on cause shown.

Com. vs. McCann, 174 Pa. 19.

These conditions apply to all appeals from summary convictions, even when the Acts of Assembly, such as you inquire about, seem to provide for an appeal only on the giving of recognizance by the defendant.

Com. vs. Graeff, 28 Lanc. L. R. 113.

Com. vs. Preoziki, 46 Pa. C. C. 574.

Presuming that the appeal from summary convictions under the Acts you inquire about has been allowed by the Court of Quarter Sessions, and is properly in that Court, shall it, when the Acts declare it to be a misdeameanor, be the subject of indictment, and on a true bill being found by the grand jury shall it be tried before a petit jury, or be tried as the ordinary appeal from a summary conviction by the Court alone without a jury.

In ordinary cases of appeals from summary convictions they are tried as surety of the peace cases are tried before the Court without a jury.

Com. vs. Waldman, 140 Pa. 89.

But the Acts of 1909 and 1915, as to resident foreign born persons, expressly declare that these appeals shall be tried as misdemeanors in the Court of Quarter Sessions. The decisions of the Courts, however, have been contradictory as to the method of trial. For instance, Judge Copeland of Westmoreland County tried two cases under these laws without a jury.

Com. vs. Gatti, 29 Dist. Rep. 537, 539.

Com. vs. Fedyna, 25 Dist. Rep. 985.

But the Superior Court assumed in its opinion in the following case that proceeding by indictment was correct.

Com. vs. Maloof, 49 Pa. Superior Ct. 581.

Also the Supreme Court assumed in the following case that an indictment under the Act of May 8, 1909, P. L. 466, could be sustained, although the question was not directly at issue in this case.

Com. vs. Patsone, 231 Pa. 46.
Hoffman vs. Com., 123 Pa. 75.

On an appeal from proceedings instituted before a Justice of the Peace for wrongfully cutting down ornamental trees under the Act of June 8, 1881, P. L. 82, which declares on appeal the offense shall be a misdemeanor, the proper method of procedure is followed when the defendants are indicted, and the case tried *de novo*. Judge Wickham, in his opinion, said (p. 145):

> "The proceedings were instituted before a justice of the peace, as provided by the act of 1881, and carried by the defendants, on appeal, into the court of quarter sessions. There they were indicted and the case tried de novo. The method of procedure adopted in the quarter sessions, we think, was the correct one, looking at the peculiar phraseology of the statute. The act gives a defendant before the magistrate the right to an appeal, without a special allowance, and provides that he shall be held on bail to answer 'a charge of misdemeanor.' As a consequence, the right to have the grand jury pass on the charge and a traverse jury try it anew, if a true bill be found, cannot be denied. Where an offense is declared, by general words, a misdemeanor and made triable originally or on appeal in the quarter sessions without more, it must be assumed that it shall be tried as a misdemeanor, that is, disposed of according to the course of the common law, and not summarily before the judge or judges. This question was adverted to, but not decided in Hoffman *v.* Commonwealth, 123 Pa. 75."
>
> *Com. vs. Clark, 3 Pa. Superior Ct. 141.*

The later cases cited above state, however, that *all* appeals from summary convictions must first be allowed by the Court. The reasoning of this case was followed by Judge Endlich in the following case, which was a prosecution under the Compulsory Education Law of 1895. In his opinion the Judge said:

> "Without entering into an examination of the purpose and effect of sect. 14, art. v, of the constitution, of the relation to it and to the present proceeding of the Act of 1876, or of the validity of the particular provision made by the Acts of 1895 and 1897 for an appeal to this court, it is sufficient to advert to two principles which seem to make the defendant's contention here quite untenable. The offense created by the Acts of 1895 and 1897 is by them declared to be a misdemeanor and punished by fine. Since the Act of June 16, 1836, P. L. 784, the general jurisdiction of the Court of Quarter Sessions is understood to extend to "cases of fine, penalties or punishments imposed by any Act of Assembly, for offences, misdeameanors or delinquencies,' and it is its business 'to

inquire, by the oaths or affirmations of good and lawful men of the county, of all crimes, misdemeanors and offences whatever.' This court, therefore, having a general jurisdiction over the class of offences to which this defendant belongs, and he having invoked that general jurisdiction, it does not lie in his mouth thereafter to question it, the principle that consent cannot confer jurisdiction being inapplicable: In re Spring Street, 112 Pa. 258. Then, as to the method of procedure in this court, it is said in Com. *v.* Clark, 3 Pa. Superior Ct. 141, at pages 145-6: 'Where an offence is declared by general words a misdemeanor, and made triable originally or on appeal in the Quarter Sessions, without more, it must be assumed that it shall be tried as a misdemeanor; that is, disposed of according to the course of the common law, and not summarily before the judge or judges.' Accordingly, it was held there, where there had been a summary conviction under Act of June 8, 1881, P. L. 82, amended by Act of June 18, 1895, P. L. 196, and an appeal under the provisions thereof to the Quarter Sessions, that it was proper practice to proceed with the case de novo, by indictment, etc.—just as was done here. The decision in Com. *v.* Waldman, 140 Pa. 89, cited by defendant, simply declares that neither art. v, sect. 14, of the constitution, nor the Act of April 17, 1876, guarantees to an appellant under that Act any right to have his appeal tried by a jury. Com. *v.* Forrest, 3 District Reps., 800, and Com. *v.* Johnston, 16 W.N.C. 349, are to the same effect."

Com. vs. Hammer, 9 Dist. Rep. 251.

It seems to us that the reasoning of the last four cases cited is conclusive, and that when an Act of Assembly specifically makes the particular offense on appeal a misdemeanor, or states that the defendant shall answer to a charge of misdemeanor when such appeal is allowed by the Court of Quarter Sessions, it shall be tried there on indictment before a jury.

You are, therefore, advised that when an appeal has been allowed by the Court of Quarter Sessions in a proceeding under the Act of May 8, 1909, P. L. 466, or under the Act of June 1, 1915, P. L. 644, both of which Acts provide that a defendant shall be held to answer a charge of misdemeanor, on giving recognizance, the case shall be proceeded with in the Court of Quarter Sessions according to the common law, viz., by indictment and trial by jury.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

OPINIONS TO THE GAME COMMISSIONER.

For the Year 1922.

IN RE GAME RESERVES.

Petition to Open——Power of Commissioners——Acts of April 9, 1915, P. L. 73.

When the Board of Game Commissioners has proceeded under the Act of April 9, 1915, P. L. 73, to close a county to hunters for a fixed period, it cannot then be reopened for hunting until the expiration of said fixed period.

Office of the Attorney General,
Harrisburg, Pa., March 20, 1922.

Honorable John M. Phillips, Vice-President, Board of Game Commissioners, Harrisburg, Pa.

Sir: Your verbal request, to the Attorney General, for an opinion from this Department as to whether, when the Board of Game Commissioners has closed a county to hunting for a period of two years, they can during that period, on petition, open the county prior to the expiration of the said two year period, has been referred to me.

The Act of April 9, 1915, P. L. 73, provides in Section 1 as follows:

> "That from and after the passage of this act, the Board of Game Commissioners of this Commonwealth shall have the power and authority to close, for a term of years, to the purpose of hunting * * *, as may appear necessary to the citizens of any county of this Commonwealth, for the purpose of adding to the protection of such animals and birds, or either of them, and assist in their increase in the county wherein such citizens may reside."

And Section 2 provides:

> "That whenever at least two hundred citizens of any county in this Commonwealth shall, through written petition, certify to the Board of Game Commissioners that, in their opinion, an absolutely closed season is necessary to insure the better protection and consequent increase * * *"

and under the further provisions of this Section it is provided that advertisement shall be made in two newspapers and the Board of Game Commissioners shall hold a hearing and decide whether or not the county

shall be closed for the period requested. They shall then publish their decision, if it is in favor of closing the county, in three newspapers, when the county shall be closed under the penalty mentioned in the said notice.

There is nothing in this Act of Assembly about opening the county prior to the expiration of the period for which it was closed. As this power of the Board of Game Commissioners is wholly statutory, it is not possible to read into the Act anything that is not expressly stated therein.

You are, therefore, advised that when the Board of Game Commissioners has proceeded under the Act of April 9, 1915, P. L. 73, to close a county to hunters for a fixed period, it cannot then be reopened for hunting until the expiration of said fixed period.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

IN RE GAME.

Game Commissioners——Special Open Season on Does——Authority——Acts of 1917 and 1921.

The Board of Game Commissioners, under the Act of June 7, 1917, P. L. 572, as amended by the Act of May 5, 1921, P. L. 353, has no authority to declare a special open season on does during the last two days of the regular hunting season, or at any time.

Office of the Attorney General,
Harrisburg, Pa., June 13, 1922.

Honorable Seth E. Gordon, Secretary, Game Commission, Harrisburg, Pa.

Sir: I received your request for an opinion from this Department as to whether or not the Game Commission has authority to declare a special open season on does during the last two days of the regular season, under Section 22 of the Act of June 7, 1917, P. L. 572, as amended by the Act of May 5, 1921, P. L. 353.

The first part of this section provides as follows:

> "When it is proven to the satisfaction of the Board of Game Commissioners that either deer or elk or bear or rabbits or blackbirds or other game is excessively destroying property or otherwise becoming a nuisance in any section

> of the State, the said board shall have authority to at any time remove or to have removed said animals or birds from that neighborhood or to direct the killing of same, as the case may require."

Under this clause of this section the Board of Game Commissioners have authority to remove or to have removed or direct the killing of deer, elk, bear, rabbits, blackbirds or other game that is excessively destroying property, but there is nothing in this clause that gives authority to the Board to declare an open season.

The second clause of this Section covers the circumstances mentioned in your letter. It provides as follows:

> "Nothing in this act shall be so construed as to prevent any person, actually residing upon or cultivating lands within this Commonwealth, as either the owner or lessee, or the legitimate employe of such owner or lessee, from killing, in any manner or at any time, any deer or elk or bear or rabbit or raccoon or the birds commonly known as blackbirds, regardless of sex or age, which he may find on such lands actually engaged in the material destruction of cultivated fruit trees, cultivated crops, vegetables, live stock, poultry, or bee-hives, or, in the case of blackbirds, either the eggs or young of other birds, or anywhere on the property under their control immediately following such destruction. * * *"

Under this clause the persons occupying lands which are damaged by the deer or other game may kill them if they are prepared to prove that when so killed they were found on such lands actually engaged in the material destruction of property mentioned in the Act.

You are, therefore, advised that the Board of Game Commissioners have no authority to declare an open season for the last two days of the regular season, as set forth in your letter, or at any other time.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

IN RE HUNTING LICENSE.

Game Commissioners——Permit to Hunt——Revoking——Owner or Lessee——Adjoining Lands——Amended Act of April 21, 1921, P. L. 259.

Section 6 of the amended Act of April 21, 1921, P. L. 259, extends the punishment for violation of the game laws to include not only the penalties imposed by the Act of 1912, but also vests in the Board of Game Commissioners, in the exercise of its discretion, the power to revoke an offending hunter's license and to deny him the right to secure a license or hunt for game of any kind for a period of from one to five years.

The Board of Game Commissioners has not the power to include in its revocation of a hunter's license, a denial of the hunter's right to hunt upon his own property, or of which he is the lessee, or, with the consent of the owner thereof, upon property immediately adjacent thereto, as specified in Section 5 of the Act of April 17, 1913, P. L. 85.

Office of the Attorney General,
Harrisburg, Pa., November 9, 1922.

Honorable Seth E. Gordon, Secretary, Board of Game Commissioners, Harrisburg, Pa.

Sir: Replying to your communication of October 24th inquiring whether the Board of Game Commissioners can revoke a hunter's license and thereby legally prohibit him from hunting on his own property, or, with the consent of the owner, upon lands immediately adjacent thereto, under the provisions of the Act of April 17, 1913, P. L. 85, as amended by the Act of April 21, 1921, P. L. 259,—I beg to advise you that in my opinion the revocation of a hunter's license under the provisions of the above acts does not authorize you to include with such revocation, or to separately impose as a part of the penalty for violation of the Game Laws a legal prohibition against the person whose license is so revoked from hunting on his own land or lands adjacent thereto.

Section 5 of the Act of 1913, supra, provides that:

> "Nothing in this Act shall be construed to prevent any citizen of the United States, residing within this Commonwealth, from having a gun in his home; or from using such gun in defense of either person or property; or from shooting at targets; or from hunting for or shooting at, in any place in this Commonwealth, anything not protected by the laws of this Commonwealth; *or to prevent any bona fide owner or any bona fide lessee of lands within this Commonwealth, or any member of the family of such owner or lessee, such person being a citizen of the United States, residing upon and cultivating lands in this Commonwealth, from hunting thereon, or, by and with the consent of the owner thereof, from hunting upon the lands im-*

> *mediately adjacent and connected with his own lands*, without securing the license provided for by this act; it being distinctly understood that no right is conveyed by this act to hunt upon either private or public property in this Commonwealth contrary to the wishes of those who may own or control such property."

It will appear that a person may hunt upon his own land, or lands leased by him, or, with permission, upon his neighbor's lands adjacent thereto without license. The Act of Assembly distinctly omits such person from its provisions.

The proviso referred to creates an exception in the Act which excludes that kind of hunting from its provisions and penalties.

Section 6 of the amended Act of April 21, 1921, P. L. 259, extends the punishment for violation of the game laws to include not only the penalties imposed by the Act of 1913, but also vests in the Board of Game Commissioners, in the exercise of its discretion, the power to revoke an offending hunter's license and to deny him the right to secure a license or hunt for game of any kind for a period of from one to five years.

The amended Act, however, does not repeal or modify the provisions contained in Section 5 of the Act of 1913 that:

> "Nothing in this Act shall be construed to prevent * * * * * any bona fide owner or lessee, residing upon or cultivating lands * * * * * from hunting thereon, etc."

In my opinion this proviso must therefore stand. The punishment by revocation of a hunter's license, which carries with it a denial of his right to hunt generally, even upon his own property, can not be read into the Act by implication. The provision of the Act authorizing revocation of a license is penal in character and must be strictly construed against the Commonwealth; and irrespective of the application of this well known principle of law, the fact remains that the Act of Assembly expressly excepts from its provisions and penalties the right to hunt on private property, as therein specified.

I am, therefore, of the opinion that your Board has not the power to include in its revocation of a hunter's license, a denial of the hunter's right to hunt upon his own property, or of which he is the lessee, or, with the consent of the owner thereof, upon property immediately adjacent thereto, as specified in Section 5 of the Act of April 17, 1913, P. L. 85.

Very truly yours,

FRED TAYLOR PUSEY,
Deputy Attorney General.

OPINIONS TO THE DEPARTMENT OF LABOR AND INDUSTRY.

OPINIONS OF THE DEPARTMENT OF LABOR AND INDUSTRY.

For the Year 1921.

WORKMEN'S COMPENSATION ACT—FOREIGN CONSULS.

Workmen's Compensation Act of 1915—Payment of compensation to foreign consuls—Right of consuls to represent non-resident alien dependents—Act of June 26, 1919.

Where a consular officer represents an alien non-resident dependent in a proceeding under the Workmen's Compensation Act of June 2, 1915, §310, P. L. 736, his right to receive the compensation awarded, if he chooses to exercise it, excludes the power of the employer or the board, upon their own motion, to pay or direct payment to the dependent in any other manner.

This right, conferred by section 310 of the act, is not limited by section 307 (amended by the Act of June 26, 1919, P. L. 642) providing a general method for distributing compensation, nor by section 317, which authorizes an employer to pay an award to a bank, trust company or life insurance company as trustee.

Office of the Attorney General,
Harrisburg, Pa., January 12, 1921.

Honorable Clifford B. Connelley, Commissioner of Labor and Industry, Harrisburg, Pa.

Sir: This Department is in receipt of your communication to the Attorney General of the 3d inst. relative to the transmittal of compensation funds by Consular officers, under the Workmen's Compensation Act of June 2, 1915, P. L. 736. The question upon which you ask to be advised is stated as follows:

> "Cannot awards be made directly to the dependents, regardless of the fact that Consuls have filed the petition as attorneys in fact. If so, under these circumstances does the Board have the authority under Section 307 to direct that the money accruing under said award or agreement be paid to a trust company (a) in periodical installments or (b) in the full amount without discount as in Section 317 or (c) whether legislation will be necessary to accomplish this?"

The powers given Consular officers by the Workmen's Compensation Act are such as arise from the provision contained in Section 310 thereof reading as follows:

> "Non-resident alien dependents may be officially represented by the Consular officers of the nation of which such alien or aliens may be citizens or subjects, and in such cases the Consular officers shall have the right to receive, for distribution to such non-resident alien dependents, all compensation awarded hereunder, and the receipt of such Consular officers shall be a full discharge of all sums paid to and received by them."

Section 307 of the Act, as amended by the Act of June 26, 1919, P. L. 642, provides the general method for the distribution of compensation in case of the death of the employe. Section 317 authorizes an employer, with the approval of the Board, "where death or the nature of the injury makes the amount of future payments certain" to pay a sum equal to all future installments to a savings bank, trust company or life insurance company to be held in trust and distributed in the manner as therein directed. In the appointment of the trustee preferenec is to be given to the choice of the employe or dependent.

I am of the opinion that an employer or the Board does not possess the power to make or direct a payment of the compensation awarded on account of an alien non-resident dependent to the exclusion or in contravention of the right of a Consular officer who represents the dependent to receive it, as vested in him by virtue of the above quoted portion of Section 310. The intent of the Act upon this point is unmistakable, and there is nothing therein warranting a construction narrowing the full effect of the provision that such official "*shall have the right to receive*" the compensation awarded for distribution to the dependent. This language imports more than a mere permission that the award may be paid to the Consul; it denotes a definite right on his part to receive it whenever he undertakes to represent the dependent. Our law does not, and of course could not, impose any duty upon a Consular officer to assist in its administration, but it does, wherever he chooses to so act, constitute him the attorney for an alien non-resident dependent who is a citizen or subject of the nation of which he is a Consul, and when he exercises this right in any case we cannot strip him of any part of the statutory authority expressly bestowed upon him in connection therewith. He is not bound to accept the compensation allowed, but the employer or the Board cannot assume to go over his head where he stands ready to do so.

Section 310 of the Act deals with a specific and limited class of cases, and it is a familiar principle of statutory interpretation that:

> "Where there are, in an act, specific provisions relating to a particular subject, they must govern, in respect of that subject, as against general provisions in other parts

of the statute, although the latter, standing alone, would be broad enough to include the subject to which the more particular provisions relate."

Endlich on the Interpretation of Statutes, 216.

Inasmuch as the duty rests upon the land of which these alien non-resident dependents are citizens or subjects to care for them when in need and protect them generally, the foregoing provision of Section 310 of the Act was evidently based upon the thought that the accredited representative of that land is the competent and responsible agent through whom there can be most properly paid to such dependents the generous compensation allowed them under our law.

In accordance with the foregoing, you are, therefore, advised that where a Consular officer duly represents an alien non-resident dependent in a proceeding under the Workmen's Compensation Act, pursuant to the provisions of Section 310 thereof, his right to receive the compensation awarded, if he chooses to exercise it, excludes the power of the employer or the Board, upon their own motion, to pay or direct payment to the dependent in other manner. To take from him the right so given by the statute would require an amendment to its provision.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

FEMALE LABOR LAW.

Female Labor Law—Employment of women in printing establishments after 10 P. M.

Under Section 4 of the Act of July 25, 1913, P. L. 1024, providing that no female shall be employed or permitted to work in any manufacturing establishment before the hour of 6 A. M. or after 10 P. M., with certain exceptions, women may not be employed to operate linotype machines in a printing establishment, as such establishment is a manufacturing establishment within the meaning of the act.

Office of the Attorney General,
Harrisburg, Pa., May 16, 1921.

Honorable Clifford B. Connelley, Commissioner of Labor and Industry, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 28th ult. asking to be advised whether women may lawfully be employed to operate linotype machines in a printing establishment after ten o'clock P. M.

Section 4 of the Act of July 25, 1913, P. L. 1024, provides as follows:

> "No female shall be employed or permitted to work in any manufacturing establishment before the hour of six o'clock in the morning, or after the hour of ten o'clock in the evening of any day: Provided, That this section shall not apply to managers, superintendents or persons doing clerical or stenographic work."

The answer to the question submitted by you consequently depends upon whether such an establishment as above mentioned is a manufacturing one or not. This matter has been ruled in this Commonwealth in connection with the laws relating to tax on the capital stock of corporations.

In the case of the *Commonwealth vs. J.B. Lippincott Co., 7 Dauphin, 193*, it was decided that a corporation engaged in the printing and publishing of books and periodicals is a manufacturing one, and as such exempt from tax on its capital stock. The case of the *Commonwealth vs. Canfield Co., 7 Dauphin, 195*, is to the same effect. I understand that upon the principle laid down in the above cases a corporation publishing a newspaper is, for the purposes of taxation under the laws of this State, deemed a manufacturing corporation. It would seem, therefore, from the foregoing that it is now settled in this Commonwealth that a printing establishment is a manufacturing one within the meaning of our tax laws.

If the Commonwealth treats printing establishments as manufacturing establishments for the purpose of taxation, it is obvious that we could not logically treat them otherwise in regard to the laws regulating labor. A concern could not, on the one hand, be allowed exemption from a certain tax on the ground that it is a manufacturing enterprise and, on the other hand, allowed exemption from some provision in other statutes on the ground that it does not possess that character. Of course, the above quoted provision of the Act of 1913 relates to all manufacturing establishments, not simply to those organized in corporate form, the prohibition therein contained applying equally to all.

The purpose in view in the above provision of the Female Labor Law strengthens the reasons for holding the establishments here under consideration to be manufacturing establishments within its spirit and intent, and it is a familiar rule that a statute is to be construed in the light and furtherance of its purpose. This present conclusion tends to secure a fuller measure of the safeguards which the law throws around the employment of women.

You are, therefore, advised that it is not lawful for women to operate linotype machines in printing establishments "before the hour of six o'clock in the morning or after the hour of ten o'clock in the evening, of any day."

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

LABOR AND INDUSTRY.

Mattresses—The making and sale of—Requirements with regard to the tag attached to the mattress offered for sale—Acts of May 1, 1913, P. L. 134, Sections 3 and 6, and May 14, 1915, P. L. 510.

The statement contained on the mattress tag required by the Act of May 1, 1913, as amended, must strictly comply with the essential requirements of the Acts of 1913 and 1915, without regard to the requirements contained in similar laws of other states.

Office of the Attorney General,
Harrisburg, Pa., June 29, 1921.

Honorable Clifford B. Connelley, Commissioner of Labor and Industry, Harrisburg, Pa.

Sir: There was duly received your communication of the 9th inst. asking to be advised whether the form of a mattress tag forwarded with your communication complies with the requirements of the Mattress Law.

The said tag, omitting therefrom the name and address of the maker, reads as follows:

"Do Not Remove This Label
Under Penalty of Law

Size.....No. of Sections.....Weight.....
Manufactured of New Material

OFFICIAL STATEMENT

Materials Used in Filling:
This Article Contains
Entirely New Material
Consisting of 100% Cotton Felt.

Made by.....

Address.....

Vendor.....

Address.....

"This article is made in compliance with the Act of the Assembly of Pennsylvania, approved the 1st day of May 1913 as amended; also in compliance with the Act of the Legislature of New Jersey, approved March 4th, 1918; and with Chap. 590 Laws of 1920 of the State of New York; and with the Act of the State of California, approved the 7th day of June, 1915; and the Act of the General Assembly of the State of Missouri, approved the 26th day of May, 1919; and with the laws of all other states of the Union which have enacted sanitary bedding laws."

That portion of the tag beginning with the words "Official Statement" to and including the word "Address" is enclosed in border lines.

Section 3 of the Act of May 1, 1913, P. L. 134, regulating the making, sale, etc. of mattresses, as amended by the Act of May 14, 1915, P. L. 510, provides, inter alia, that all mattresses sold in this Commonwealth shall have written or printed thereon, or on a tag sewed thereto "a statement in the English language setting forth:

(a) The materials used in filling said mattress, and whether the same are, in whole or in part, new or old;

(b) The name and address of the maker, vendor, or successive vendors;

(c) And, upon a mattress of which prior use has been made, the words 'Second-Hand,' together with the date of sterilization and disinfection, and the name and address of the person or corporation sterilizing or disinfecting the same.

No additional information shall be contained in said statement."

Section 6 provides that:

"The statement required under section three of this act * * * in form shall be as follows:

OFFICIAL STATEMENT.

Materials used in filling.....

.....

.....

Made by.....

Address.....

Vendor.....

Address.....

This article is made in compliance with the act of Assembly of Pennsylvania approved the first day of May, one thousand nine hundred thirteen, as amended.

.....

.....

.....

The Commonwealth deems certain information an essential safeguard in the vending of mattresses, and by this Act provides an appropriate method for the furnishing of the same, being one that is wholly reasonable, imposing no undue hardship and well within a proper exercise of the police power of the State to demand. As the Act has not left with those charged with its enforcement or interpretation the duty of determining what information is needful, so it has not left to them to decide in what manner it shall accompany a sale of the article, but itself prescribes a definite method therefor.

There is no rule of statutory interpretation which would warrant a construction of the provisions relative thereto permitting anything other than a uniform observance of their strict letter.

In a ruling of this Department against some proposed additional information in the "statement," it was said in the course of an opinion rendered by the writer hereof, and reported in *20 Dauphin County Reports, page 31*:

> "No rule of interpretation would justify a departure from the literal terms of the Act's provisions in question. Their import is plain and their effect in full accord with the purpose of the Act. We cannot properly, by mere construction, modify or overthrow any of the safeguards thereby intended to be thrown around the manufacture and sale of mattresses. The prescribed requirements as to the form of the said 'statement' required to be placed upon mattresses and as to what it shall or shall not set forth, must be strictly complied with and rigidly followed. To hold otherwise, in order to meet the need of some special case, however meritorious, would be not only to set up a dangerous precedent of laxity in the construction or enforcement of the statute, but would be manifestly contrary to its express language."

A comparison of the label contained on the above tag with the above provisions of Sections 3 and 6 plainly discloses that this label is not in compliance with their requirements. This label is evidently framed as a blanket one to cover the requirements of a number of States upon this subject. However unobjectionable in itself information to accomplish that end may be, no additional information to effect such purpose can be lawfully included in, or constitute a part of, the "statement" required under our law.

Although a certain portion of the foregoing label is lined in and denominated the "Official Statement," it is manifest that in effect the contents of this label as a whole constitute the statement as thereby made. It violates the true intent of our statute, which contemplates a separate, distinct and independent "statement" containing certain enumerated information and none other, and that it be in a certain prescribed form. The inhibition against additional information being

contained in the "statement" implies that the "statement" shall not be contained in a more extensive one of which it forms an integral part. This would accomplish precisely what the Act forbids, and we cannot allow its plain mandate to be defeated either directly or indirectly.

It may further be noted that the said lined in portion of the label called the "Official Statement" would, if standing alone, fail to conform to the requirements of the Act in that it does not set forth that the article is made in compliance therewith. Pursuant to Section 6, prescribing the form of the "statement," this must appear therein. That this requirement of Section 6 is not also an express requirement of Section 3 does not render it less binding or permit this fact either to be left out of the "statement" or to be accompanied therein by additional information as to other laws. The provisions of these sections are to be construed together. They afford a clear and complete guide, easily understood and readily followed, as to the contents and form of the "statement" required upon mattresses sold in this Commonwealth.

Our law does not concern itself with the question of the requirements of other States; it sets up its own standard and its own way of conveying information relative thereto. It may well be that there is much useful information that the maker or vendor of a mattress may desire to bring to the attention of a prospective purchaser, but, if so, it must be done wholly independent of, and distinct from, the "statement" provided for under our law.

You are, therefore, advised that the statement contained in the above submitted mattress tag does not comply with the requirements of the Mattress Act in respect to the "statement" required and prescribed by said Act.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

OPINIONS TO THE DEPARTMENT OF LABOR AND INDUSTRY.

For the Year 1922.

IN RE BAKERIES.

Commissioner of Labor and Industry——Regulations——State Supervison——Owner——Employes——Act of July 9, 1919, P. L. 788.

A place in which the owner does his own work in the manufacturing and handling of bakery products, without the help of any employes therein in any capacity, is not a "bakery" within the definition of the Act of July 9, 1919, P. L. 788, and hence is not subject to its provisions.

Office of the Attorney General,
Harrisburg, Pa., April 12, 1922.

Honorable Clifford B. Connelley, Commissioner of Labor and Industry, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 6th inst. relative to the Act of July 9, 1919, P. L. 788, entitled:

> "An act to protect the health of the persons employed in bakeries by requiring the ventilation, drainage, sanitation, and purity of bakeries, the cleanliness of persons employed therein and of all bakery products, tools, implements, ingredients, and other things used in connection with their manufacture, delivery, and sale; by regulating and, in certain cases restricting, the use of such bakeries; by regulating the manufacture, sale, and delivery of such products; by requiring all persons employed or permitted to work therein to be certified as free from certain diseases and skin affections; by prohibiting the presence of all animals; by requiring a certificate of compliance, and regulating the issuance of same; by providing for the enforcement of this act; and by providing penalties for violations thereof."

The question submitted by you is whether the Act applies to a place in which the work is done by the owner with no outside help or employes, the particular case being where a man proposes to operate a bakery in a cellar seven feet high and to do his own work, the said Act by requiring a height of nine feet for a cellar bakery.

The language of the title of the Act shows that its primary purpose is to protect the health of the employes in bakeries, but it is obvious that in requiring sanitary conditions surrounding the manufacture and distribution of bakery products and excluding from bakeries operatives afflicted with communicable diseases the Act tends also to secure to the purchasing public a clean product.

The fact that its enforcement is charged upon the Department of Labor and Industry is in harmony with its purpose to protect the health of employes, since that Department is the one commonly charged with supervision over places where labor is employed.

Subsection A of Section 1 defines the term "bakery," as used therein, as follows:

> "The word 'bakery,' as used in this act, shall mean and include all buildings or parts of buildings, cellars, and basements, wherein labor is employed and which are used for the mixing and other preparation of all ingredients entering into the manufacture, as well as the manufacture and handling, of all bakery products intended for sale."

The scope of the Act as to what constitutes a bakery within its meaning is fixed by this definition. It is well settled that where an Act defines the meaning of any of its terms such definition must govern in its construction. It will be seen that the determination of the question under consideration turns upon the meaning of the clause contained in the above quoted portion reading—"wherein labor is employed." Only places where this condition obtains are to be deemed "bakeries" within the intent of the Act.

In my opinion, the said clause "wherein labor is employed" implies a situation where some one has the status and occupies the relation of an employe. I think any other construction would be a forced one. Labor is performed in all bakeries, none are self-operative. If the Act had intended to include all places where baking is done for sale, whether done alone by the owner or by the help of outside employes, it would have been needless to insert this clause, indeed, confusing to do so. If we were to construe the above quoted definition of "bakery" as including a place where the work is done by the owner alone without any employes, then we would give it precisely the same effect as it would bear had that phrase been omitted, and hence render the clause of no effect. We cannot thus delete an Act. We are bound to give all its parts and provisions their full effect. It is a matter of common knowledge that many thrifty women sell products baked by themselves in their own homes. To nullify the above clause would bring them within the Act, which I am sure was never intended.

The term "where labor is employed" is found in Section 14 of the Act of June 2, 1913, P. L. 396, creating the Department of Labor and Industry, and charging upon that Department the duty to see that such places are safe. It has there a definite and well understood meaning, and was presumably used with like import in the Bakery Act of 1919.

In view of the benefits arising from the aforesaid Act in safeguarding the public health, it may be regretted that such a case as the particular one occasioning your inquiry is not within its regulations, but to bring this about an appropriate amendment will be necessary.

You are, accordingly, advised that a place in which the owner does his own work in the manufacturing and handling of bakery products, without the help of any employes therein in any capacity, is not a "bakery" within the definition of said Act and hence not subject to its provisions.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

DEPARTMENT OF LABOR AND INDUSTRY.

Authority to pay out of a particular fund salaries of certain persons employed in the Workmen's Compensation Bureau—Act No. 429A, Appropriation Acts 1921, 284.

The Department of Labor and Industry may pay out of the appropriation provided for by said Act, the salaries of all persons exclusively engaged in adjusting claims against the Commonwealth for compensation for the injury or death of State employes and to pay the Bureau of Workmen's Compensation such amounts as it may justly charge for services rendered by its employes.

Office of the Attorney General,
Harrisburg, Pa., August 3, 1922.

Honorable Clifford B. Connolley, Commissioner of Labor and Industry, Harrisburg, Pa.

Sir: This Department has received your inquiry as to whether or not the Department of Labor and Industry may use any of the moneys provided by Act No. 429-A, 1921 Appropriation Acts 284, for the payment of salaries of certain persons now in the Workmen's Compensation Bureau, whose duties are to investigate and adjust claims against the Commonwealth for compensation for the injury or death of State employes.

Section 2 of this Act, as approved by the Governor, reads as follows:

> "That the sum of one hundred thousand dollars ($100,000), or so much thereof as may be necessary, be, and the same is hereby, specifically appropriated for the payment of any and all amounts of statutory medical, hospital, surgical, and burial expenses, and of workmen's compensation which may become due and payable during the biennial period beginning June first, Anno Domini one thousand nine hundred and twenty-one, and ending May thirty-first, one thousand nine hundred and twenty-three, to injured employes and dependents of deceased employes of the various departments of the Government of the Commonwealth of Pennsylvania upon claims arising under the provisions of the Workmen's Compensation Act of one thousand nine hundred and fifteen, and the amendments thereto and supplements thereof, and for the payment of actual expenses incurred by the Bureau of Workmen's Compensation in the investigation and adjustment of claims of such employes and dependents; said appropriation to be paid by the State Treasurer on the warrant of the Auditor General upon certificates furnished by the Commissioner or Acting Commissioner of Labor and Industry."

You will notice that among other things this money is appropriated for the payment of the actual expenses incurred by the Bureau of Workmen's Compensation in the investigation and adjustment of claims against the fund. I am satisfied that this will permit you to transfer against this fund the salaries of all persons exclusively engaged in such work and to pay to the Bureau of Workmen's Compensation such amounts as it may justly charge for services rendered by its employes.

To comply strictly with law you should make payments out of this fund only to the Bureau of Workmen's Compensation for expenses actually incurred by it and upon a detailed statement from the Bureau as to the items and amounts of such expenditures. The term "actual expenses" implies that the exact amount thereof is determined and that the Bureau of Workmen's Compensation has either paid it or become liable for its payment.

I am of the opinion, therefore, that you pay out of the appropriation of $100,000 provided for by Act No. 429-A, 1921, such expense as I have above described.

Very truly yours,

STERLING G. McNEES,
Deputy Attorney General.

WOMEN'S HOURS OF EMPLOYMENT.

Master and servant—Women—Hours of employment—Different employers—Act of July 25, 1923.

1. Whenever a woman has worked on any day in, or in connection with, any establishment for the number of hours fixed by the Act of July 25, 1913, P. L. 1024, as the maximum for a day's work, then she has exhausted for that day her permissible employment in, or in connection with, all establishments whatsoever.

2. Where a woman has worked for ten hours a day for one employer, and then goes to another, for whom she works three and one-half hours in addition, the second employer violates the act

Office of the Attorney General,
Harrisburg, Pa., November 8, 1922.

Honorable Clifford B. Connelley, Commissioner of Labor and Industry, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 25th inst., asking to be advised which employer in the following case violates the Female Labor Law. The case, as I understand it from the communication of the Chief of the Bureau of Inspection to you, a copy of which accompanies your communication, is as follows: Certain females who have worked in one mill for ten hours a day thereafter work on the same day in another mill operated by another employer for a further period of three and one-half hours. The total hours of work per week is not stated. The single question here submitted and passed upon is whether such an employment as the aforesaid of itself constitutes a violation of the provision of said law as to the hours of daily employment by the employer in the establishment in which the first ten hours of work was done or by the one in the establishment in which there was a further employment for the day of three and one-half hours. It appears that it is contended on behalf of the latter establishment that the said employment therein is not unlawful inasmuch as it is less than the daily maximum fixed by the law. In my opinion this contention is not well founded.

The Act of July 25, 1913, P. L. 1024, regulating the employment of females defines "establishment" as any place in the Commonwealth where work is done for compensation, excepting work in private homes and farming. Section 3 thereof contains, inter alia, the following provisions:

> "(a) No female shall be employed or permitted to work in, or in connection with, any establishment for more than six days in any one week or more than fifty-four hours in any one week, or more than ten hours in any one day.
>
> * * * * * * * * * * *

> "(b) Whenever any female shall be employed or permitted to work in, or in connection with, more than one establishment in any one week or in any one day, the aggregate number of hours during which she shall be employed or permitted to work in, or in connection with, such establishment shall not exceed the number of hours prescribed in this section for such females in any one week or any one day."

This Act safeguards the welfare of women, recognizing the harm arising from excessive employment. The power of the State to enact a reasonable regulation of this nature is abundant. The opinion of Attorney General Brown to the Commissioner of Labor and Industry, dated December 11, 1918, and found in the Report of the Attorney General for 1917-18, page 482, contains extensive citation of authorities on this point. To effect its purpose, the Act by the above quoted provisions fixes definite maximum hours of permissible employment whether it be confined to one or carried on in more than one establishment. In an opinion of First Deputy Attorney General (now Judge of the Superior Court) Keller in regard to female employes who took work home with them to do in the evening it was said:

> "Under the provisions of the act a woman may be employed for six days in the week for nine hours each day. This is all the work she may do in, or in connection with, any establishement. In addition to the work in such establishment she may do household work or other work in her own home, provided it is not in connection with the establishment in which she is employed during the week, and provided that when she is employed or permitted to work in or in connection with more than one establishment, the aggregate number of hours during which she shall be employed or permitted to work in or in connection with such establishments shall not exceed the number of hours prescribed for any one week or any one day.
>
> "The act not only forbids her employment in an establishment for more than six days in any one week, or more than fifty-four hours in any one week, or more than ten hours in any one day, but forbids her being permitted to work in connection with any establishment beyond the time limited above."

Attorney General's Report 1915-1916, page 347.

It is obvious that to allow female employes to work in one establishment the full amount of hours specified as the maximum for a day and then permit them to work in another establishment any additional period on the same day would open the door to the precise mischief against which this law seeks to close it. Whenever a woman has worked

on any day in or in connection with any establishment for the number of hours fixed by the Act as the maximum for a day's work, then there has been exhausted for that day her permissible employment in or in connection with all establishments whatsoever. A disability is imposed upon them all against her further employment thereon. The Act gives to no one a higher or prior right over another to employ women, but it does set a limit to their lawful employment in any establishment and the moment the line of that limit is crossed the Act is violated and an offense against it is thereupon committed by the then employer.

Applying the rule as above stated it will be seen that in the specific case here under consideration it is not the first ten hours employment in the day that offends against the provision of the Act fixing the daily hours of employment permitted, but that occurring thereafter. The said employes' lawful hours of daily employment were exhausted in the first of the said establishments and their further employment on that day either in that or any other is explicitly inhibited.

You are advised that a female who has worked in one establishment for ten hours on any day cannot thereafter on the same day be lawfully employed to work in or in connection with another establishment, and if so additionally employed that such second employment and not the first constitutes the violation of the provision of the said Act which fixes ten hours a day as the permissible limit for a day's work for such an employe.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

EMPLOYMENT OF MINORS IN COAL MINES.

Mines and mining—Employment of minors—Department of Mines——Department of Labor and Industry—Jurisdiction—"Establishment"—Acts of May 1, 1909, June 15, 1911, and May 13, 1915.

1. An act may define its own terms, and the meaning thus given to them controls in the construction.

2. The definition of the word "establishment" in the Act of May 13, 1915, P.L. 286, is broad enough to include a coal mine.

3. The Act of May 13, 1915, P. L. 286, in so far as it relates to the employment of minors in coal mines, supersedes the Act of May 1, 1909, P. L. 375, as amended by the Act of June 15, 1911, P. L. 983, and since the passage of the Act of 1915, the Department of Labor and Industry, and not the Department of Mines, has jurisdiction of minors so employed.

Office of the Attorney General,
Harrisburg, Pa., December 5, 1922.

Honorable Clifford B. Connelley, Commissioner of Labor and Industry, Harrisburg, Pa.

Sir: There was duly received your communication to the Attorney General of the 25th ult. requesting an opinion as to which Department, that of Labor and Industry or that of Mines, has jurisdiction over the employment of minors in coal mines, and whether the Child Labor Act of May 13, 1915, P. L. 286, repeals the Act of May 1, 1909, P. L. 375, as amended by that of June 15, 1911, P. L. 983, regulating the employment of minors in coal mines.

The said Act of 1909 as so amended provided that no minor under the age of fourteen years should be "employed, permitted or suffered to work in, about, or for any coal-breaker or washery, or in or about the outside workings of any coal-mine," prescribed the hours of employment therein for those under sixteen years of age, forbade the employment of those under that age "inside any coal-mines," and required employment certificates for those between the ages of fourteen and sixteen years. Its enforcement was imposed upon the Department of Mines.

The provisions of the said Child Labor Law of 1915 are so well known as to render it needless to here restate at length its various ones forbidding the employment of minors under the age of fourteen in any establishment, fixing the hours of lawful employment in any establishment for those under sixteen and prescribing certain attendance at school, forbidding the employment of minors of certain ages at certain employments, and requiring employment certificates for those under sixteen employed at any establishment. This Act defines the term "establishment," as used therein, to mean any place in the Commonwealth where work is done for compensation other than that on farms or domestic service in private homes. It is settled that an act can define its own

terms, and the meaning thus given to them controls in its construction. It was so ruled as to this very term "establishment," as used in another statute, by *Mc Nabb vs. Clear Springs Water Company, 239 Pa. 502*, and *McElhone vs. Philadelphia Quartette Club, 53 Pa. Super. Ct. 262*. In the former case it was said:

> "The legislature has thus defined what the word 'establishment' means, and having the power to deal with the subject, we are not at liberty to disregard what is so plainly written."

An establishment as thus defined by this Act of 1915 must clearly be held to include mines and mining operations. Moreover, Section 5 of the Act mentions employment "in any anthracite or bituminous coal-mine" among those enumerated as unlawful for minors under the age of sixteen years, thus showing an express intent that the Act extends to coal mines. I think it is entirely free from doubt that the employment of minors in, about or in connection with coal mines is subject to the provisions of the Child Labor Law of 1915. There is nothing whatever therein which would warrant a construction taking such employment from out its scope.

> "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."
>
> *City of Pittsburgh vs. Kalchtaler, 114 Pa. 547.*

The said Act of 1915 cites no acts specifically for repeal, but contains the usual general repealer that all acts or parts of acts inconsistent therewith are thereby repealed. This, of course, would have followed under the general rule of statutory construction. *Endlich on the Interpretation of Statutes, 182.* Any provision in any former act regulating the employment of minors inconsistent with or repugnant to those of this later act were thereby abrogated and can in no way modify its provisions or stand in the way of its enforcement.

While, in view of the foregoing conclusions, it may be unnecessary here to decide the question as to the repeal of the said Act of 1909, as amended by that of 1911, in its entirety, I am of the opinion that inasmuch as the subject of all its provisions is substantially covered by the said Act of 1915, it is superseded and in effect repealed by the later Act. In an opinion of this Department, rendered by the writer hereof, to the Commissioner of Labor and Industry on May 23, 1918, as to the employment of minors under eighteen years of age in quarries, which had been specifically forbidden under the Act of April 29, 1909, P. L. 283, as amended by the Acts of June 9, 1911, P. L. 832, and July 19,

1913, P. L. 862, but not by said Act of 1915, it was held that the said Act of April 29, 1909, as so amended, and which regulated generally the employment of minors and whose enforcement rested upon the Department of Labor and Industry, was repealed by the said Act of 1915 for the reason that:

> "We must presume that the Legislature did not intend that there should be in force at the same time two distinct acts covering the same subject matter, for that would not merely be idle and useless but misleading. The Act of 1915 manifestly was intended to be a general and complete revision of, and stand as a substitute for, the old law upon the subject of child labor."
>
> *Report of Attorney General 1917-18, page 462.*

Citation was made in that opinion from *Commonwealth vs. Mann, 168 Pa. 290*, in which it was said:

> "But if a statute embrace the essential provisions of an antecedent one on the same subject, and formulate a new system, the intention that the new shall be a substitute for the old is manifest, although there be no expressed intention to that effect."

The fact that the said Act of May 1, 1908, as amended by that of June 15, 1911, only dealt with employment of minors in or about coal mines and not with their employment in general does not, in my opinion, affect the applicability of the foregoing rule.

The enforcement of the said Act of 1915 is within the domain of the duty of the Department of Labor and Industry, a duty to enforce it also being charged upon the attendance officers of the various school districts and the police of the cities, boroughs and townships of the Commonwealth. Under Section 20 the State Superintendent of Public Instruction is also directed to proceed in the manner therein prescribed to have attendance officers appointed in school districts in order to secure therein effective enforcement of the Act. We cannot, of course, imply from the aforesaid duty of the Department of Labor and Industry any right or authority for its inspectors, officers or employes to enter coal mines. It is obvious that their presence there might not only be dangerous to themselves, but an actual menace to the safety of those working in the mines. It is unlikely, however, that the inability of the Labor and Industry inspectors to enter mines presents any serious difficulty in the discharge of their said duty. Minors employed in mines come and go, and it would be easily within the means of these inspectors to learn whether the Act as to them is being violated. Furthermore, it would be proper for the Department of Labor and Industry to call upon the De-

partment of Mines to furnish any information within its knowledge or obtainable by its helpful or necessary to its enforcement, and it would be the duty of the Department of Mines to furnish it. Full and ready co-operation on the part of all said officials, state or local, should be afforded to effect a complete observance of this salutary measure safeguarding the childhood of the Commonwealth and so vital to its welfare.

You are advised that the Child Labor Law of 1915 applies to coal mines and coal mining operations, and subjects the employment of minors therein or thereat to its provisions; that the provisions of the said Act of May 1, 1909, as amended are substantially superseded and hence, in effect, repealed by the said Act of 1915, and that it is within the province of the Department of Labor and Industry to enforce the provisions of the said Act of 1915 in the case of the employment of minors in, about or in connection with coal mines precisely as it is within its province to enforce it in the case of the employment of minors in other occupations.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

OPINIONS TO THE DEPARTMENT OF MINES.

OPINION TO THE DEPARTMENT OF MINES.

For the Year 1921.

BITUMINOUS MINE INSPECTORS.

Eligibility to retirement—Act of June 13, 1915, P. L. 973.

Bituminous mine inspectors are State officers and not State employees, and, therefore, not eligible to retirement under the Act of June 13, 1915, P. L. 973, as amended by the Act of June 7, 1917, P. L. 559.

Office of the Attorney General,
Harrisburg, Pa., February 3, 1921.

Honorable Seward E. Button, Chief of Department of Mines, Harrisburg, Pa.

Sir: This Department is in receipt of your recent communication inquiring whether bituminous Mine Inspectors are eligible to retirement, under the Act of June 13, 1915, P. L. 973, as amended by the Act of June 7, 1917, P. L. 559.

The provisions of those Acts extend their benefits to *State employes* and the *employes* of State institutions, but not to *State officers*. *In re State Pensions, Attorney General's Report, 1915-1916, page 407*, and *In re State Employes, 20 Dauphin, 255.*

> "In distinguishing between an office and an employment, the fact that the powers in question are created and conferred by law, is an important criterion; for though an employment may be created by law, it is not necessarily so, but is often, if not usually, the creature of contract. A public office, on the other hand, is never conferred by contract, but finds its source and limitations in some act or expression of the governmental power. * * * The most important characteristic which distinguishes an office from an employment or contract, is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public: that some portion of the sovereignty of the country, either legislative, executive or judicial, attaches, for the time being, to be exercised for the public benefit." *Mechem on Public Offices and Officers, page 5.*

Attorney General Carson, writing of a civil office, said (*28 Pa. C. C. 369, 373*):

> "It involves the idea of tenure, duration, fees, the emoluments and powers, as well as that of duty, and it imposes an authority to exercise some portion of the sovereign power of the State either in making, administering or executing the laws. An officer is one who holds such an office. An employe is one who receives no certificate of appointment, takes no oath of office, has no term or tenure of office, discharges no duties and exercises no powers depending directly on the authority of law, but simply performs such duties as are required of him by the persons employing him, and whose responsibility is limited to them, and this, too, although the person so employing him is a public officer, and his employment is in and about a public work or business."
>
> "An officer is distinguished from the employe in the greater importance, dignity and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public officer for misfeasance or nonfeasance in office, usually though not necessarily in the tenure of his position." *State ex rel. Kane vs. Johnson, 123 Mo. 43, 275 S. W. 399.*

A bituminous Mine Inspector is appointed and commissioned by the Governor for the term of four years. He is required to take an official oath and give an official bond. He is charged by law with the execution of a part of the police power of the State. He has the power, under certain circumstances, to make orders which must be obeyed by the owner and operators of mines and their employes. He is specifically vested by the law with the exercise of discretion in the performance of his duties.

While it is not conclusive, it is persuasive and significant that wherever his position is referred to in the Acts of Assembly, it is referred to as an "office," and the term "employment" is not used. *Act of June 9, 1911, P. L. 756, Articles XIX, XX, XXI; Mechem on Public Offices and Officers, page 8, Section 10.*

I, therefore, advise you that a bituminous Mine Inspector is a State officer and not a State employe, and that he is not eligible to retirement under the Act of June 13, 1915, P. L. 973, as amended by the Act of June 7, 1917, P. L. 559.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

OPINION TO THE DEPARTMENT OF MINES.

For the Year 1922.

IN RE COAL MINES.

State Department of Mines—— Non-Inflammable "Breakers"——Erection——Authority ——Ejusdem Generis——Rule——Act of June 2, 1921, P. L. 183.

It is lawful and proper for the State Department of Mines, in the exercise of the sound discretion vested in it by law, to authorize and permit the erection of a non-inflammable "breaker" within a distance of 200 feet of the opening of a coal mine. Such authorization is not in conflict with the provisions of Section 5, of the Act of June 2, 1921, P. L. 183.

The general rule laid down in the construction of statutes is that "where general words of a statute follow particular ones, the rule is to construe them as applicable to persons or things 'ejusdem generis',"—of the same kind. The word "other" following an enumeration of particulars, embraces enumerated particulars of a like nature only, and will be read as "other such like," unless a broader sense is obviously intended.

Office of the Attorney General,
Harrisburg, Pa., April 29, 1922.

Honorable Seward E. Button, Chief, Department of Mines, Harrisburg, Pa.

Sir: In reply to your communication of April 24, 1922, inquiring as to the Department of Mines in connection with the proposed erection of a non-inflammable "breaker," within a distance of 200 feet of the opening of a coal mines, I beg to advise you that, in my opinion, it will be lawful and proper for your Department, in the exercise of the sound discretion vested in it by law, to authorize and permit the erection of such a structure and that such authorization is not in conflict with the provisions of Section 5 of Article 4 of the Act of Assembly approved June 2, 1891, P. L. 183, which provides as follows:

> "No inflammable structure, other than a frame to sustain pulleys or sheaves, shall be erected over the en trance-trance of any opening connecting the surface with the underground workings of any mine, and no "breaker" or other inflammable structure for the preparation or storage of coal shall be erected nearer than two hundred (200) feet to any such opening, but this act shall not be construed to prohibit the erection of a fan drift for the purpose

> of ventilation, or of a trestle for the transportation of cars from any slope to such breaker or structure, neither shall it apply to any shaft or slope until the work of development and shipment of coal has commenced; Provided, That this section shall not apply to breakers that are now erected."

The exception "no 'breaker' " *or other inflammable structure* shall be erected within 200 feet of a mine opening, must be interpreted according to its intended meaning and purpose. At the time the Act of 1891 was approved all "breakers" were commonly wooden structures and, therefore, inflammable. The evident purpose of this provision of the Act of Assembly was to prevent the erection and maintenance of inflammable structures in proximity to mine openings.

I am advised that from the plans and information submitted to your Department the "breaker," proposed to be erected within a distance of 200 feet of a mine opening for practical reasons of necessity made apparent to your Department, will consist of a steel structure with metal roofs and sides with steel sash and with a floor of concrete with steel steps,—all non-inflammable materials, and that said structure will be otherwise entirely non-inflammable.

Numerous decisions of the courts have given us interpretations of the use of the alternative word "other" as used in the statute above referred to. The general rule laid down is that "where general words of a statute follow particular ones, the rule is to construe them as applicable to persons or things 'ejusdem generis',"—of the same kind. The rule is frequently known as Lord Tenterden's Rule, because of its application by him in the English case of *Sandiman vs. Breach, 7 B. & C. 99*, and with respect to the use of the word "other" may be more fully stated thus:

> "Where a statute * * * enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces 'other' will generally be read as 'other such like,' so that the persons or things therein comprised may be read as *ejusdem generis* with, and not of a quality superior to, or different from, those specifically enumerated. Kitchen *vs.* Shaw, 7 L. J. M. C. 16; 6. A. & E. 729; People ex rel Barnett *vs.* Bartlett, 169, III. Appl. 307 * * *.

> "The word 'other' used in a statute following an enumeration of particulars, embraces enumerated particulars of a like nature only, unless a broader sense is obviously intended. Union etc. Co. *vs.* Chicago, 199 Ill. 520."

Therefore, when the statute palpably intends to deal with *inflammable* structures and prohibits the erection of "breakers" or other inflammable structures within 200 feet of a mine opening, its meaning is clear that inflammable breakers are intended to be prohibited and not structures including breakers which are not inflammable, and not otherwise expressly prohibited by the statute.

Very truly yours,

GEORGE E. ALTER,
Attorney General.

OPINIONS TO THE COMMISSIONER OF HEALTH.

OPINIONS TO THE COMMISSIONER OF HEALTH.

For the Year 1921.

APPROPRIATIONS TO BOARDS OF HEALTH.

Health law--Boards of health--Failure of council or commissioners to make appropriations Act of June 12, 1913.

The mere failure of the council of a borough or of the commissioners of a first class borough to make an appropriation to the board of health for the administration of health laws, regulations and ordinances, is not in itself sufficient cause for the Commissioner of Health to take charge of the local health administration under the provisions of the Act of June 12, 1913, P. L. 471.

Office of the Attorney General,
Harrisburg, Pa., December 10, 1921.

Colonel Edward Martin, Commissioner of Health, Harrisburg, Pa.

Sir: This Department is in receipt of your recent letter inquiring whether the mere failure of the Council of a borough or of the Commissioners of a first class township to make an appropriation to the Board of Health for the administration of health laws, regulations and ordinances, is in itself sufficient cause for the Commissioner of Health to take charge of the local health administration under the provisions of the Act of June 12, 1913, P. L. 471. I am of the opinion that it is not.

Section 10 of that Act provides that the Commissioner of Health may take full charge of the administration of health laws in any borough or township of the first class, (1) whenever in his opinion "conditions found by him to exist in any borough or township of the first class in this Commonwealth shall constitute a menace to the lives and health of people living outside the corporate limits," or (2) "if it be known to him that any borough or township of the first class is without an existing or efficient Board of Health."

Neither of these conditions precedent is met by the mere failure of the Council or Commissioners to appropriate money. Such failure is not in itself a menace to the lives and health of people living outside the corporate limits, nor would it necessarily and inevitably result in the local district being without an efficient Board of Health. An efficient Board is one acting or having power to act effectually, one actually producing results. It would be possible, although perhaps not probable, for a Board of Health to secure necessary funds by enlisting the

support of public spirited citizens and of private organizations or corporations interested in the public welfare, and thereby to administer the health laws effectively without any aid from the Council or Commissioners. In such case it could not be said that the Board of Health was not efficient, was not acting effectively. Under the Act of Assembly the intervention of the Commissioner of Health is authorized only when the local Board of Health is not effectively enforcing the health laws. If, however, the Board of Health, by reason of the lack of appropriations, should fail to function efficiently, it would be the duty of the Commissioner of Health to take charge immediately.

I, therefore, advise you that the mere failure of the Council of a borough or the Commissioners of a first class township to make an appropriation to the Board of Health for the administration of health laws, regulations and ordinances is not in itself sufficient cause for the Commissioner of Health to take charge of the local health administration under the provisions of the Act of June 12, 1913, P. L. 471.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

BOARDS OF HEALTH MILK INSPECTION.

Health law—Milk inspection—First class townships—Contracts—Acts of June 12, 1913, and April 14, 1915.

1. The boards of health of several contiguous first class townships may, by separate contracts, employ the same milk inspector.

2. The Act of June 12, 1913, P. L. 471, amended by the Act of April 14, 1915, P. L. 114, does not prohibit such contracts.

Office of the Attorney General,
Harrisburg, Pa., December 10, 1921.

Honorable Edward Martin, Commissioner of Health, Harrisburg, Pa.

Sir: This Department is in receipt of your recent letter, inquiring whether it would be lawful for the Boards of Health of several contiguous first class townships to combine in the employment of a milk inspector and pay his salary and expenses by pro rating the same among the several municipalities. This inquiry involves (first), the question whether such Boards of Health have authority to employ a milk inspector, and (second), whether they may lawfully combine in the employment of the same inspector.

The Act of June 12, 1913, P. L. 471, as amended by the Act of April 14, 1913, P. L. 114, provides for the establishment and maintenance of Boards of Health in boroughs and first class townships, and prescribes their powers and duties. Section 6 thereof imposes upon such Boards the duty to enforce the laws of the Commonwealth and the regulations of the State Department of Health and authorizes them to make and enforce certain additional rules and regulations to prevent the introduction and spread of infectious or contagious diseases. The enumeration of these powers is followed by these provisions:

> "and to make all such other rules and regulations as they shall deem necessary for the preservation of the public health.
>
> * * * * * * * * * * *
>
> "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."

Without attempting to define the limits of the powers given by the clauses above quoted, it is clear that they include the power to make and enforce such rules and regulations as may be reasonably necessary to prevent the introduction and spread of contagious diseases through the medium of impure milk. The power to make and the duty to enforce such rules and regulations, which the Legislature has thus vested in the Board of Health, necessarily implies the power to employ and to pay such inspectors and other assistants as may be required for that purpose. The reference in Section 7 of the Act of 1913 to the "assistants, subordinates and workmen" of the Board of Health indicates that the Legislature contemplated the necessity of employing such persons to assist the Board.

In addition to the enforcement of rules and regulations made by the Board of Health, these inspectors may also assist in the enforcing of such State laws and regulations of the Board of Health respecting the sale and distribution of milk as have been or may hereafter be enacted or promulgated. There are several Acts (March 24, 1909, P. L. 63; June 8, 1911, P. L. 712; May 23, 1919, P. L. 275) which, although they are not primarily health laws, were enacted by the Legislature partly in the interest of the public health. Each of these Acts imposes upon one of the State Departments the duty of enforcing the same. That however, would not prevent the inspectors of the local Board of Health from assisting in the enforcement of these laws where it became necessary.

There is no provision in the law for joint action by several municipalities in the employment of a milk inspector and one of them could not lawfully pay for service rendered or expenses incurred in another. However, the power to employ an inspector carries with it the power to

contract for a part as well as for all of his time. It would, therefore, be lawful and proper for each of several Boards of Health to enter into separate contracts of employment with the same inspector for services within its district. In this manner the same desirable results would be obtained which might result from joint action.

I, therefore, advise you that the Board of Health of a first class township may employ a milk inspector, and that the Boards of Health of several townships may, by separate contracts, employ the same inspector.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

OPINIONS TO THE DEPARTMENT OF HEALTH.

For the Year 1922.

PUBLIC INSTRUCTION.

cShools——Medical Inspection of—Authority of Commissioner of Health to Discharge Inspectors Who Have Neglected Their Duty—Act of June 20, 1919, P. L. 511.

Medical inspectors appointed by local school boards in second, third or fourth class school districts, who have failed to do their duty, cannot be discharged by the Commissioner of Health, but he may appoint other inspectors for the remainder of the school term whose salaries shall be a binding obligation upon the school district.

Office of the Attorney General,
Harrisburg, Pa., January 5, 1922.

Mr. John G. Ziegler, Supervisor, School Sanitation, Department of Health, Harrisburg, Pa.

Sir: The Attorney General's Department is in receipt of the following inquiry from you:

> "In case a school district of either of the above classes appoints inspectors, but not a sufficient number to carry out the standard requirements for medical inspection as prescribed by the Commissioner of Health, or for any other reason the school district fails to fully carry out the requirements of the Commissioner of Health, has the said Commissioner of Health under the provision of this section and Section 1504 of the School Code the power to discharge inspectors appointed by the School Board, and to appoint properly qualified inspectors for the district and carry out the inspection according to standard requirements at the expense of said district."

While the authority of your department to require proper medical inspection has been somewhat broadened by certain amendments of 1921 yet your method of securing such inspection has not been changed since the amendment of June 20, 1919, P. L. 511. The Section as then amended reads as follows:

> "In every school district which is required by this act to provide medical inspection for its public schools, the secretary of the school board or the district superintendent of schools shall, on or before the first day of September of

each year, report to the Commissioner of Health the names of the medical inspectors or the name of the chief medical inspector, with the number of assistants or additional inspectors, appointed for the ensuing term, and if such medical inspection as is herein required is not furnished within thirty days after the beginning of the school term, the Commissioner of Health shall, after two weeks written notice to the board of school directors of such district, appoint a properly qualified medical inspector or inspectors for the district for the remainder of the school term, and shall fix the compensation for the same which shall be paid by the district,"

This section directs your entire procedure in securing proper inspection. You are not authorized to discharge any Inspectors which the school board may have appointed. Their discharge is a matter for those employing them. The persons whom you appoint must be paid by the school board for the rest of the term. If they desire to carry on their payroll those whom they have appointed and who have failed to do their duty they take their chance with their auditors and with the State Educational Department as to surcharge or other liability.

We, therefore, advise you that you may not discharge medical inspectors appointed by local school boards in second, third or fourth class school districts who have failed to do their duty but you may appoint other inspectors for the remainder of the school term whose salary shall be a binding obligation upon the school district.

Very truly yours,

STERLING G. McNEES,
Deputy Attorney General.

HEALTH.

Dental Hygienists—Licensing and Registration of by Dental Council—Act of March 19, 1921, P. L. 40, supplementing Act of May 7, 1907, P. L. 161.

No person may perform the operations of a Dental Hygienist in an industrial dental clinic unless such person shall first have been licensed by the State Dental Council.

Office of the Attorney General,
Harrisburg, Pa., January 6, 1922.

Colonel Edward Martin, Commissioner of Health, Harrisburg, Pa.

Sir: This Department is in receipt of your letter inquiring whether a dental hygienist may be employed in an industrial dental clinic without a license from the State Dental Council.

The Act of March 19, 1921, P. L. 40, which is a supplement to the Act of May 7, 1907, P. L. 161, provides for the licensing and registration of dental hygienists.

Section 3 provides that a person possessing the qualifications set forth therein may, upon application, be examined by the Board of Dental Examiners and after successful examination may be licensed as a dental hygienist by the Dental Council.

Section 4 provides that the license so received shall be recorded in the office of the Prothonotary of the Court of Common Pleas of the proper county. It provides further that any person who has been duly licensed and who has had eight months experience in a public or private institution may be registered with the Board of Dental Examiners, and shall then be known as a registered dental hygienist.

Thus the Act provides for *licensed* dental hygienists and *registered* dental hygienists. Under the provisions of Sections 1, 4 and 7 *licensed* dental hygienists may operate in public or private institutions, but only *registered* dental hygienists may operate in private offices. These provisions contemplate a course of training and experience which mut be completed before any person may practice as a dental hygienist in a private dental office, and a part of this training is eight months experience in a public or private institution.

Section 1 describes the various operations which may be performed by a qualified dental hygienist. It contains also this provision:

> "The dental hygienist may operate in public or private institutions, such as schools, hospitals, orphan asylums, and sanitariums, under the general supervision of a licensed and qualified dentist, but not otherwise, * * *"

Section 8 is as follows:

> "Any unlicensed person who shall perform any of the operations specified in this section as pertaining to the work of a dental hygienist shall be deemed to be practicing dentistry within the meaning of the act to which this is a supplement, and shall be subject to the penalties provided in section eight of said act for such unlicensed practice."

Neither the above quoted provision of Section 1 nor the provisions of Section 8 are entirely clear, and those of the latter section are poorly drawn. The former, if standing alone, might be construed to permit unlicensed persons to perform the operations of a dental hygienist in public or private institutions under the supervision of a licensed or qualified dentist. In view of the prohibition contained in Section 8, however, I am of the opinion that such a construction of the former

section is not warranted, and that the intent of the Act is that no unlicensed person shall be permitted to perform any of the operations of a dental hygienist in a public or private institution or elsewhere.

I believe that this is the only construction of the Act which will give due force and effect to all of its provisions.

In view of this conclusion it is not necessary to consider the question whether an industrial dental clinic is a public or private institution within the contemplation of Section 1 of the Act.

I, therefore, specifically advise you that no person may perform the operations of a dental hygienist in an industrial dental clinic unless such person shall first have been licensed by the State Dental Council.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

HEALTH EXAMINATION OF PRISONERS.

Prisoners—Examination for venereal disease—Police power—Act of April 26, 1921.

1. Prisoners in penal institutions cannot object to examination and treatment for venereal diseases as provided by the Act of April 26, 1921, P. L. 299.

2. The Act of 1921 is a proper exercise of the police power of the State, with which the courts will not interfere.

Office of the Attorney General,
Harrisburg, Pa., September 6, 1922.

Dr. S. Leon Gans, Director, Division of Venereal Diseases, Department of Health, Harrisburg, Pa.

Sir: Your letter asking for an opinion from this Department as to whether or not prisoners can object to the examination and treatment for venereal diseases provided for in the Act of April 26, 1921, P. L. 299, Section 1, duly received.

The first Section of this Act of April 26, 1921, reads as follows:

> "That all persons who shall be convicted of crime or pending trial, and confined or imprisoned in any State, county, or city penal or reformatory institution or place of detention, shall be examined for, and, if infected, treated for, venereal diseases by the attending physician of such institution or by duly constituted health authorities or their deputies."

So far as I have been able to find, this Act has not yet been construed by our Courts, but the principles governing the exercise of the police power of the Commonwealth in regard to other Acts passed for the protection of public health apply to this law. The Supreme Court of the United States in the case of *Lawton vs. Steele, 152 U. S. 133*, said that the object of police power is—

> "* * * Universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay or otherwise endangering the lives of passersby; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restrictions of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."

The only requirement as to such Acts to protect the public health is that they shall be reasonable and proper for the object aimed at. This question of the reasonableness of such an Act of Assembly is primarily a subject for the determination of the Legislature, and the courts will not review the legislative judgment as to reasonableness except when it is manifest that the law in which the legislature has embodied its will is arbitrary or enacted in bad faith. *Coppage vs. Kansas, 236 U. S. 1.*

It would seem that the same reasons which induced the courts to hold that the Acts of Assembly requiring the vaccination of school children, and adults, under certain conditions, would apply to the Act as to the examination for venereal diseases. Compulsory vaccination as a means to prevent the spread of smallpox has been enforced in many states by statutes making vaccination a condition of the children's right to enter or remain in public schools. *Jacobson vs. Massachusetts, 197 U. S. 11.*

Applying these principles to the Act in question, it would seem that the prisoners must submit to any proper examination for venereal

diseases that is reasonably necessary under the circumstances. Therefore, if it is necessary to insert a needle into a vein for the purpose of extracting blood therefrom, the prisoner must, under this Act, submit to having the needle inserted and the blood extracted. The sole question seems to be whether such an operation and examination are reasonably necessary under the circumstances and to carry out the intention of the Legislature in passing this law.

You are, therefore, advised that prisoners in penal institutions who come under the terms of the Act of April 26, 1921, P. L. 299, must submit to whatever is a reasonable and proper examination and treatment to carry out the purposes of this Act of Assembly.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

BOROUGH SEWERS.

Boroughs—Sewers—Arrangements with State normal schools—Cost of construction—Rentals—Acts of May 14, 1915, July 6, 1917, and June 7, 1919.

1. Under the General Borough Code of May 14, 1915, P. L. 312, a borough can only enter into agreements with municipalities and townships for the construction of sewers. It cannot enter into a contract with a State normal school for that purpose.

2. Under the Act of July 6, 1917, P. L. 704, a borough may construct a sewer and retain title thereto and accept from a corporation or individual a fixed sum for the construction cost in lieu of annual rental.

3. If a portion of the property to be served lies in a neighboring township, the borough may construct the sewer under the Act of June 7, 1919, P. L. 426, and charge the owner with an annual rental, but it cannot accept from the owner a part of the construction cost.

4. The words "municipalities, persons and corporations," as used in the Act of June 7, 1919, P. L. 426, is broad enough to include State normal schools.

Office of the Attorney General,
Harrisburg, Pa., November 23, 1922.

Department of Health, Harrisburg, Pa.

Gentlemen: This Department has received your inquiry as to the legal right of the Borough of Slippery Rock to enter into an agreement with Slippery Rock Normal School for the construction and operation of a public sewer, and also as to the same rights of West Chester Borough to enter into a similar agreement with the West Chester Normal School.

The facts are the same in both cases except that a considerable part of the property of the Slippery Rock Normal School, which would be served by the proposed sewer, lies in Slipperty Rock Township adjoining Slippery Rock Borough, while in the West Chester case all of the property of West Chester Normal School, which is to be served by the proposed sewer, lies within West Chester Borough.

The proposition in each case is for the Borough and the Normal School Trustees to enter into an agreement to share the cost of construction of the sewers. This would immediately raise a question as to the title to them after their completion. I am inclined to think that such an arrangement would not be legal, nor would it be a practical solution of the difficulty. There is, however, a method provided by law whereby boroughs may enter into an agreement for a reimbursement for part of the cost of such sewer construction.

The general Borough Code of 1915 in Chapter 6, Article 12, Section 13, gives boroughs authority to enter into agreements with municipalities or townships for the purpose of building sewers and sewage disposal plants. This right does not extend to agreements between boroughs and any persons or corporations other than municipalities or townships. Its provision for the joint maintenance of such a sewer, as well as for the actual construction thereof, would, therefore, be limited to agreements between borough and other municipalities or townships. This Act, however, was later supplemented by the addition of a further section in 1917 which provides as follows:

> "Whenever any borough has constructed, wholly or partially, any sewer or sewer system, or has acquired the same at public expense, the council of such borough may provide, by ordinance, for the collection of an annual renal or charge for the use of such sewer or sewer system from the owners of property served by it. Such council may, at their discretion, in lieu of such annual rental or charge, provide for the payment by such owners of a fixed sum."
>
> *Borough Code, Article 12, Chapter 6, as supplemented by Act of 1917, P. L. 709, Section 15.*

Under this Act it appears that a borough may proceed to construct such a sewer as the one under consideration, and may thereafter by ordinance fix a certain sum which owners of property adjacent to such sewer are bound to pay to the municipality. Title to the sewer, the responsibility for its continued operation and proper maintenance would rest with the borough. They would be relieved of a part of the cost of construction by a contribution, such as they might fix, from the property owners. While I do not believe the later sections of the Act providing for liens against the property so charged would be effective against State

owned property, I understand that the Normal Schools in both of these cases are willing to pay the amounts assessed against them and that, therefore, enforced collection would not be necessary.

It, therefore, appears that West Chester Borough may proceed to construct such a sewer, having at the same time an understanding with the West Chester Normal School as to what proportion they shall pay and that it may thereafter by ordinance fix such an amount and that such an amount may legally be paid by the Normal School authorities to the borough. It should be borne in mind that title to said sewer is entirely in the Borough of West Chester.

As to Slippery Rock Borough we find that the fact that a part of the property to be served lies in Slippery Rock Township will not prohibit the borough from entering into a contract with the Slipperty Rock Normal School. Authority for such a contract is not found in the same Act of Assembly. It is conferred, however, by the Act of 1919 which reads as follows:

> "That whenever any borough is maintaining and operating a sewerage system and sewage purification or disposal works, it shall be lawful for such borough to supply sewerage service to municipalities, persons, and corporations, outside the limits of such borough, and to enter into contracts for such service at rates not less than those required to be paid by persons and corporations within the limits of such borough, but no such privilege shall conflict with the rights of any sewer company or the rights of any other borough."

I am satisfied that "municipalities, persons and corporations" were intended to be broad enough to include a State Normal School and that this Act gives ample authority to the Borough of Slippery Rock to make an arrangement similar to that above approved in the West Chester case, except that in the Slippery Rock case the contract should provide for service payments rather than a contribution to the original cost. The working out of an equitable service charge will not be difficult.

I am of the opinion, therefore, that both of these boroughs may enter into such agreements with their respective Normal Schools for sewerage service as are outlined above.

Very truly yours,

STERLING G. McNEES,
Deputy Attorney General.

OPINIONS TO THE COMMISSIONER OF PUBLIC WELFARE.

OPINIONS TO THE COMMISSIONER OF PUBLIC WELFARE

For the Year 1921.

DEPARTMENT OF PUBLIC WELFARE.

Authority to establish and carry on industries for the inmates in the State Hospital for the Criminal Insane at Farview.

Acts of May 11, 1905, P. L. 400, and its amendments, May 28, 1907, P. L. 290, and May 25, 1921, P. L. 1144.

The State Hospital for the Criminal Insane at Farview is not a "correctional institution," and its inmates are not prisoners, but are committed to and detained therein for care and treatment as insane.

The Department of Public Welfare is without power to establish and carry on any industry in the State Hospital for the Criminal Insane at Farview.

Office of the Attorney General,
Harrisburg, Pa., September 27, 1921.

Dr. John M. Baldy, Commissioner of Public Welfare, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 21st inst. asking to be advised whether the Department of Public Welfare has the power to establish and carry on industries in the State Hospital for the Criminal Insane at Farview.

The said Hospital was created by the Act of May 11, 1905, P. L. 400, and its amendments, for "the care and treatment of the criminal insane." In addition to those committed directly, patients may be transferred thereto from other State insane hospitals. The said Hospital is by virtue of Sections 8 and 9 of Act approved May 25, 1921, P. L. 1144, creating the Department of Public Welfare and defining its powers and duties, under the supervision of said Department.

Section 21 of the said Act of 1921 empowers said Department to establish, maintain and carry on industries in certain institutions, being as set forth in subsection (a):

> "* * * The Eastern Penitentiary, the Western Penitentiary, the Pennsylvania Industrial Reformatory at Huntingdon, and such other correctional institutions of this Commonwealth as it may deem proper, in which industries all persons sentenced to the Eastern or Western Penitentiary or to the Pennsylvania Industrial Re-

> formatory at Huntingdon or to such other correctional institution of the Commonwealth, who are physically capable of such labor, may be employed at labor for not to exceed eight hours each day, other than Sundays and public holidays."

It will be seen that the question submitted by you turns for its answer upon the point whether the said Hospital is to be deemed a "correctional institution" within the intent of the above quoted provision of the Act of 1921. The word "correctional" is defined by the Standard Dictionary as follows:

> "Tending to or intended for correction or punishment; as, correctional courts, methods, or institutions. A house of correction."

An insane hospital is not in popular usage and understanding regarded as a "house of correction." The term "correctional institution," as used above, imports a reformatory wherein are corrected the criminal or wayward tendencies of its inmates, and not a place for the treatment of the mentally unsound. The State Industrial Home for Women at Muncy is an apt example of the kind of institution contemplated.

It will be noted that institutions within the scope of Section 21 of the Act of 1921 are those to which persons are "sentenced," and they are referred to in subsequent portions of the section as "prisoners." Persons are not sentenced to the State Hospital for the Criminal Insane, and its inmates are in no sense prisoners, but are committed to and detained therein for care and treatment as insane.

The Act of May 28, 1907, P. L. 290, as amended, provides a system of employment for the inmates of institutions maintained in whole or in part by the State for the insane, feeble-minded or epileptic. The aforesaid Hospital is within its provisions, and any industries carried on therein must be in accordance with and pursuant to its terms. The system of labor which the Department of Public Welfare is authorized to establish and carry on does not supplant that provided for under the said Act of 1907, and we cannot presume that two systems may be carried on in the same institution.

You are, therefore, advised that the Department of Public Welfare has no power to establish and carry on any industry in the State Hospital for the Criminal Insane.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

DEPARTMENT OF PUBLIC WELFARE.

Right to pay salaries of certain inspectors out of the "Manufacturing Fund" provided for under Section 21, Act of May 25, 1921, P. L. 1144, creating said Department.

The salaries of inspectors doing the work of inspection connected with prison labor, required by Section 12 of the Act of 1921, or other general supervision, cannot be paid out of the "Manufacturing Fund" provided for in Section 21 of said Act.

The salaries of inspectors of industries established in any institution pursuant to Section 21 of said Act, and the cost of any inspection or supervision of the institution arising out of, incident to or occasioned by such industries may lawfully be paid therefrom.

Office of the Attorney General,
Harrisburg, Pa., September 29, 1921.

Dr. John M. Baldy, Commissioner of Public Welfare, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 22d inst. requesting an opinion as to the right to pay the salaries of certain inspectors out of the "Manufacturing Fund" provided for under Section 21 of Act approved May 25, 1921, P. L. 1144, creating the Department of Public Welfare.

Section 21 of said Act makes it the duty of said Department and gives to it the power to establish, maintain and carry on industries in the Penitentiaries, Huntingdon Reformatory and other correctional institutions in which the persons sentenced to these institutions may be employed. The powers of this Department in respect thereto are substantially the same as those possessed by the Prison Labor Commission abolished by said Act. The scope of the powers of that Commission, however, did not extend beyond the industries themselves, while the Department of Public Welfare exercises a general supervision over these institutions, and along with others under its supervision causes their inspection in accordance with the provisions of Section 12 of the Act. The Department determines the character of the industries to be established and of the equipment therefor, sells the products in the prescribed market, exercises supervision over the labor of inmates employed, and makes quarterly reports to the Auditor General showing the receipts and disbursements.

Subsection (d) of Section 21, relating to the "Manufacturing Fund," reads as follows:

> "To maintain a fund, known as the manufacturing fund, out of which the machinery, equipment, and material, required or used in the carrying on of the industries in the said penitentiaries, reformatory, or other institution, under the provisions hereof, shall be purchased, and into which all the receipts from the sale as aforesaid of the products of such industries shall be paid, and from which

> fund shall be paid all the wages, as hereinafter provided, for the labor of the inmates of said penitentiaries, reformatory, or other institution, in such industries. The department shall have the custody of the said fund, and make or direct all disbursements therefrom."

Other than the foregoing, the Act is silent as to what may or may not be paid out of the "Manufacturing Fund." The question submitted by you is whether there may be paid out of the said Fund the salaries of the inspectors who will do the "inspection of prisons and correctional institutions in connection with prison labor and all of the activities which may be germane to the subject."

I do not think that because certain items are expressly enumerated to be paid from the "Manufacturing Fund" this is to be construed as conclusively inhibiting the payment therefrom of other expenses upon the principle of *expressio unius est exclusio alterius*. Anything essential to the performance of the duties imposed upon the Department in connection with these industries may be paid therefrom as otherwise the execution of the whole system relative thereto might come to a standstill. The purpose of the industries provided for under Section 21 of the Act is not to raise revenue to run the institution or primarily to afford the inmate a means to earn money; the true object is the welfare of the inmate; to train him in gainful occupations, to inculcate habits of thrift and industry as a corrective of his criminal and wayward tendencies and to prevent the physical and moral mischief of idleness.

I am of the opinion, therefore, that the cost of any inspection or supervision of the industry itself or any survey or inspection of the institution or study of its inmates to determine what industry best suits the situation or will be most helpful to the inmate may be charged to the "Manufacturing Fund." I am further, however, of the opinion that the salaries of the inspectors doing the work of inspection as required by Section 12 of the Act could not be so paid. In other words, the industries carried on in an institution cannot lawfully bear the burden of the kind of inspection which must be made of all institutions under the supervision of the Department, and which is not peculiar to those in which industries are established, but that it can properly bear the expense of the inspection especially arising out of, or necessarily connected with, the industry or of the institution itself occasioned by the presence therein of the industry. The industry may rightfully be called upon to pay what it costs, but nothing beyond that.

The conclusion herein reached is in harmony with that in an opinion rendered by Deputy Attorney General Kun to the Chairman of the Prison Labor Commission, dated July 27, 1917, in which he said:

> "It seems hardly necessary to state that the employment of persons in and about manufacturing is as necessary thereto as the material, equipment and machinery

used therein, so that it may fairly and reasonably be concluded that as a necessary incident to the employment of the inmates of the correctional institutions of the State in manufacturing, which is the duty imposed upon your Commission, the salaries and expenses of persons employed in connection therewith may properly be paid out of the Manufacturing Fund."

You are, therefore, advised that the salaries of the inspectors doing the inspection required by Section 12 of the Act or other general supervision cannot be paid out of the "Manufacturing Fund" provided for in Section 21 of the Act, but that the salaries of the inspectors of the industries established in any institution pursuant to Section 21, or the cost of any inspection or supervision of the institution arising out of or incident to or occasioned by such industries may lawfully be paid therefrom.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

DEPARTMENT OF PUBLIC WELFARE.

Authority to transfer inmates from one penitentiary to another.

Acts of March 24, 1921, P. L. 48, and May 25, 1921, P. L. 1144, Section 13.

The Department of Public Welfare has no authority to order the transfer of an inmate from one penitentiary to another, or to compel either institution to accept a transfer of inmates from the other. All such transfers must be made in strict conformity with the Act of March 24, 1921, P. L. 48.

Office of the Attorney General,
Harrisburg, Pa., October 19, 1921.

Dr. John M. Baldy, Commissioner of Public Welfare, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 11th inst. asking to be advised whether the Department of Public Welfare has the power to transfer inmates from one Penitentiary to the other. Your inquiry is occasioned by one to you from the Secretary of the Board of Inspectors of the Eastern Penitentiary, it appearing that the Eastern Penitentiary desires to transfer certain of its inmates to the Western Penitentiary which the latter is unwilling to receive.

Act approved March 24, 1921, P. L. 48, provides the complete and exclusive method by which convicts confined in either State Penitentiary may be transferred to the other. A reference to its provisions will show that one of the conditions of such a transfer is the approval of the Board of Inspectors of each institution. The need for such a requirement is

apparent as the officials of the institution to which a transfer is proposed to be made are in the best position to judge whether its facilities are adequate to care for additional inmates.

The specific authority of the Department of Public Welfare in this matter arises from subsection (g), paragraph 2, Section 13 of Act approved May 25, 1921, P. L. 1144, creating the Department of Public Welfare, which reads as follows:

> "(g) To supervise the transfer of inmates of one penitentiary to another under any law providing therefor."

The Standard Dictionary defines the word "supervise" to mean:

> "To have a general oversight of, especially as an officer vested with authority; superintend, inspect."

We cannot imply from the term "supervise," as used in the above quoted provision of the Act creating the Department of Public Welfare, the power to order a transfer of the inmates confined in one Penitentiary to the other, or to compel either Penitentiary to receive a transfer of inmates from the other. The purpose of the authority given to the Welfare Department in this matter was not to supersede the control vested in the Board of Inspectors of the said Institutions by virtue of Act No. 23, approved March 24, 1921, but to see that the provisions of said Act are faithfully observed and to safeguard against abuses thereunder. It is in harmony with the general supervisory power of said Department over the penal institutions of the Commonwealth.

You are, therefore, advised that the Department of Public Welfare has no authority to order the transfer of any inmate from one Penitentiary to the other, or to compel either institution to accept a transfer of inmates from the other, but that all such transfers must be made in strict accordance with the provisions of Act approved March 24, 1921, P. L. 48.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

DEPARTMENT OF PUBLIC WELFARE.

Power and duty with regard to the importation of dependent, delinquent and defective children into the State.

Acts of July 11, 1917, P. L. 769, July 17, 1919, P. L. 1027, and May 25, 1921, P. L. 1144.

No general rule can be laid down as to how the Department of Public Welfare should enforce the Act of 1917. Each case must be decided according to its facts. The Act should be enforced along the lines followed by the Board of Charities. The Act of 1917 is woefully inadequate and should be amended so as to make it more effective.

Office of the Attorney General,
Harrisburg, Pa., October 26, 1921.

Dr. John M. Baldy, Commissioner of Public Welfare, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 18th inst. relative to the enforcement of the Act of July 11, 1917, P. L. 769, as amended by that of July 17, 1919, P. L. 1027, regulating the importation of dependent, delinquent and defective children into this State. Accompanying your communication are reports of the Acting Assistant Director of the Children's Bureau concerning five children brought into this State from New York, and especially covering the conditions existing in the homes in which these children live. As I understand they were brought here without the consent of the Board of Public Charities or the bond prescribed by said Act. They do not appear to be defectives or public charges and are too young to be delinquents. One of these children was brought into the State in June, 1920, one in January and two about April of this year. The other date is not given.

You ask to be advised what proceeding the Department of Public Welfare should take "to correct the conditions existing" in these cases, whether it should remove the children to New York and deliver them to the persons from whom they were brought into this State or what disposition it should make of them, whether there is any way that penalties can reach the people of other States for sending children into this and failing to comply with said Act, and what procedure to follow in the enforcement of the Act.

The object of the said Act of 1917 was to protect the Commonwealth against the burdens which might arise from bringing in from other States certain classes of children. The title to the Act discloses no intent to do more than to regulate the "importation into this State" of such children, and its scope must be restricted to, and its provisions construed in accord with, its title. Section 1 makes its unlawful for—

> "Any person, corporation, association, or institution to bring or send, or cause to be brought or sent, into the State of Pennsylvania, any dependent or delinquent or de-

> fective child, for the purpose of placing such child in any home in Pennsylvania, or procuring the placing of such child in any home in Pennsylvania, by indenture, adoption or otherwise,"

without obtaining the consent of the Board of Public Charities and otherwise conforming to the Act and the rules made thereunder.

The Act applies only to the enumerated classes of children. The duties of the person or organization bringing into this State any such child may be gathered from the conditions of the bond required to be given pursuant to Section 2 of the Act, which reads as follows:

> "Such person, corporation, association, or institution, before bringing or sending, or causing to be brought or sent, any such child into this State, shall first give an indemnity bond in favor of the State of Pennsylvania, in the penal sum of one thousand dollars, to be approved by said Board of Public Charities, conditioned as follows: That they will not send or bring, or cause to be brought or sent, into this State any child that is incorrigible or one that is of unsound mind or body; that they will at once, upon the placement of such child, report to the Board of Public Charities its name and age, and the name and residence of the person with whom it is placed; that, if any such child shall, before it reaches the age of twenty-one years, become a public charge, they will, within thirty days after written notice shall have been given them of such fact by the Board of Public Charities, remove such child from the State; and if any such dependent child shall be convicted of crime or misdemeanor and imprisoned within three years from the time of its arrival within the State, such person, corporation, association, or institution will remove from the State such child immediately upon its being released from such imprisonment; and upon failure after thirty days notice and demand to remove any such child who shall have either become a public charge as aforesaid or who shall have been convicted as aforementioned, in either event, such person, corporation, association, or institution shall at once and thereby forfeit the sum of one thousand dollars as a penalty therefor, to be recovered upon such bond by a suit in the name of the State of Pennsylvania; that they will place or cause to be placed each of such dependent children under written contract which will secure to such child a proper home and will make the person so receiving such child responsible for its proper care, education, and training; that they will properly supervise the care and training of each of such children and that each of such children shall be visited, at least twice a year, by a responsible agent of the person, corporation, association, or institution so placing or causing to be placed such child as herein provided; that they

will make to the said Board of Public Charities such reports of their work as said board from time to time may require."

The foregoing provisions of the said Act show that they are contemplated to cover persons or organizations bringing or sending children of the aforesaid classes into this State to place them here, and that the bond to be given may cover all such children sent by them into the State, it not being necessary to give a separate bond in each case. If the child commits a crime or becomes a public charge the person or organization bringing it in is obligated to remove it from the State, and on failure to do so is liable to the prescribed penalty recoverable on the bond. Presumably the party placing the child out stipulates for the right to take back from the person with whom placed if a removal is required. It will be noted that removal may be had for two causes, viz., the commission of a crime by the child within three years after it is brought into the State, or if it becomes *"a public charge."* The Act is silent as to removal of the child for any other reason, and since it expressly names the aforesaid two grounds as causes for a removal, we must conclude that they are the only ones for which removal may be enforced under the Act.

Section 3 of the Act authorizes the Board of Public Charities to make rules "for the proper placing out, indenture, adoption, removal, and supervision of such children" and *"for the removal of children convicted of crime or misdemeanors, or who may become public charges."* This is to be read in connection with the conditions of the bond as prescribed in Section 2 and strengthens the conclusion that the Act provides for removal from the State only for the aforesaid causes. This is in harmony with its object to protect the Commonwealth against those who are dependent, defective or delinquent. It provides no machinery by which a removal can be enforced for other reasons, the bond being security through which it can be effected for the said reasons.

Section 4 makes a violation of any of the provisions of the Act a misdemeanor punishable by a fine not to exceed $100. It will be seen, therefore, that two penalties are provided—one on the bond, and one by a fine. Any one bringing in such a child without the proper consent and required bond would be liable to the penalty provided in Section 4. I do not think, however, that this offense is an extraditable one. We can recover on the bond whether the person giving it is here or elsewhere, but we are helpless as to the penalty under Section 4 unless we find the offender and get service upon him within this State.

I am very doubtful whether the language of the Act taken as a whole would reach the case of a citizen of this State going out and bringing back a child to live in his own home. The tenor of Sections 1 and 2 clearly imports a bringing or sending of a child into the State by some one other than the person with whom the child is to live, as witness for

example the clause in the latter Section "that they will place or cause to be placed each of such children under written contract, which will secure a proper home" etc. I have not overlooked the provision contained in Section 5 which expressly excepts from the provisions of the Act a relative bringing a child here to live in his own home which might be construed as showing an intent to include every one but relatives doing this. But we can not by the express exclusion of Section 5 read something into the other provisions not there. To deny a citizen the right to do this is in derogation of a common law right, and any law purporting to effect such an end must be given a strict construction. Especially would it be difficult to sustain a prosecution against a citizen who brought in a child not delinquent or defective and which he maintained in his own home without public assistance.

The Act did not give the Board of Public Charities the power itself to remove a child from the State; it could direct the one bringing it in to do so for the enumerated causes and for failure to do so a penalty could be recovered on the bond, and it could proceed to prosecute any one bringing in a child without its consent and failing to give a bond, but, as above pointed out, this prosecution can only reach a person found in this State. The penalties of the Act are directed to the one bringing the child in, not to the one with whom it is living here.

The Department of Public Welfare succeeded to the powers of the Board of Public Charities and by express provision contained in paragraph 4, Section 13 of the Act creating the Department is charged with the enforcement of the said Act of 1917, but its powers rise no higher in respect to it than those possessed by said Board. It has no power to take such children back to the State from which they were brought. A moments reflection will show that it could not do this as it has no way to compel the citizen of another State who sent the child here to once more take it. The Act creating the Department by subsections (e) and (f) of Section 9 gives it jurisdiction over institutions, associations and societies into whose care may be committed dependent, delinquent or neglected children and over homes and premises where a business is made of keeping infants, but I know of no provision which authorizes the Department to take and place out children.

No general rule could be laid down as to how the Department should enforce the Act of 1917. Each case must be decided and dealt with according to its own facts. It has been in force upwards of four years, and it would be wise to continue to enforce it along the lines followed by the Board of Public Charities.

In the cases referred to in the accompanying report it does not appear who brought all of the said children into this State, the persons who have them or the persons in New York from whom they came. In one case it is stated that the woman who has the child went and got it. The chil-

dren, as above mentioned, are not defective and are too young to be delinquent. They do not appear to be charges upon the public. In one case the mother is paying for the child's maintenance. That is clearly not within the Act as the child could not be deemed dependent. Inasmuch as no bond was given and the offense created by Section 4 of the Act is not one for which we could obtain extradition, I see no way to reach by penalties persons not in this State who brought these children into it. In any cases where the person who has the child also brought it in, I would advise against a prosecution under said Act of 1917 for the reasons given above. Even if a conviction in such case could be had and sustained and a fine imposed, this would not result in removing the child from the State or give any power to your Department to dispose of it.

The Act of 1917 is woefully inadequate. Its penalties should reach the person who takes such a child here, without complying with the Act, as well as the one who brings it here. A bond should be required from such person. The Department should be given specific authority to take such a child and place it in some proper institution or home where necessary for its welfare. It is urged that the Department should take steps to have the Act amended at the next session of the Legislature in a way to make it more effective both to guard against such children being brought here from other States, and to insure their proper care when so brought.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

DEPARTMENT OF PUBLIC WELFARE.

Authority to furnish through the State Printer free of cost a system of bookkeeping of the loose-leaf type to State-aid institutions.

Act of May 25, 1921, P. L. 1144, Sections 9, 14, 23 and 27.

The Department of Public Welfare may furnish free of cost to institutions receiving State-aid loose-leaf forms for a system of bookkeeping prescribed by it and used in said institution.

Office of the Attorney General,
Harrisburg, Pa., December 19, 1921.

Dr. J. M. Baldy, Commissioner of Public Welfare, Harrisburg, Pa.

Sir: There was duly received your communication of the 7th inst. stating that the Department of Public Welfare has devised and intends to put into effect a system of bookkeeping of the loose-leaf type in institutions receiving State aid in order to furnish the Department the

information essential to make recommendations for appropriations, and that it desires to furnish the loose leaves therefor free of cost to the institutions. You ask to be advised whether the said Department has the authority so to furnish the same through the State Printer.

Section 14 of Act approved May 25, 1921, P. L. 1144, creating the Department of Public Welfare and defining its duties and powers, provides, inter alia, that those in charge of the institutions under its supervision as enumerated in Section 9 "shall keep such records and make such reports relating or pertaining to" these institutions as the Department may require. The term "records," as used therein, is broad enough to cover what is commonly known as "bookkeeping." I take it that your communication more particularly relates to those institutions coming within subsection (b) of Section 9 and being "all charitable institutions within this Commonwealth which receive aid from the Commonwealth." It is not material to the question here under consideration that by virtue of the proviso contained in this subsection the powers of the Department as to the institutions embraced therein are restricted to those exercised by the Board of Public Charities and Committee on Lunacy, all of whose powers are now vested in the Department, since by Section 3 of the Act of May 1, 1913, amending Section 8 of the Act of April 24, 1869, P. L. 90, creating that Board, there was given to the Commissioners constituting it the power to "prescribe to all institutions receiving State aid a method of keeping their books." It is thus clear that the Department has ample authority to prescribe a system of bookkeeping for institutions receiving State aid.

Section 23 of the Act of 1921 directs the Department of Public Welfare to furnish blank forms for the making of all the reports required by the Act, and Section 27 provides that the "printing and binding for the *proper enforcement of the duties and the carrying out the powers of the department* shall be done by the State Printer upon order of the Superintendent of Public Printing and Binding, upon requisition by the Commissioner."

The said Act of 1921 is silent as to whether the Department of Public Welfare may furnish blank forms for keeping the "records" it may require to be kept in the institutions under its supervision, being, as above noted, expressly directed to do this in the case of the "reports" provided for thereunder. In my opinion its authority to supply them may fairly be inferred. The need of an adequate system of bookkeeping in institutions asking aid from the State is apparent, in view of the requirement contained in Section 15 of the Act of 1921 to the effect that the Commissioner of Public Welfare shall examine all applications for such aid, and make report thereon to the Governor and Legislature with his recommendations. A very serious and important duty rests upon the Commissioner in this connection. Without a proper system of

bookkeeping in these institutions there could not be that intelligent and comprehensive recommendation on his part which the Act contemplates as a guidance in making appropriations. The State's interest in this matter annually runs into the millions.

It is a familiar principle that where a duty is imposed the power to carry it out, if not expressly given, may be implied.

> "Where an Act confers a jurisdiction, it impliedly grants also the power of doing all such acts, or employing such means, as are essentially necessary to its execution."
>
> *Endlich on the Interpretation of Statutes, 419.*

Simply to devise and prescribe a system of bookkeeping to be used in institutions aided by the State without also furnishing to them the means to carry it out would probably in some instances altogether and in many instances measurably result in failure to get it carried out. To penalize those failing to do so would not avail. The cost to the institutions, if required to provide this at their own expense, might be unduly burdensome in some cases.

You are advised that if the Department of Public Welfare finds that it is necessary for the proper enforcement of its duties and the carrying out of its powers to furnish free of cost to institutions receiving State aid the aforesaid loose-leaf forms for a system of bookkeeping prescribed by it and used in said institutions, it has the authority so to do, and for that purpose to make due requisition therefor under the provisions of Section 27 of the said Act of 1921.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

OPINIONS TO THE COMMISSIONER OF PUBLIC WELFARE.

For the Year 1922.

PUBLIC WELFARE.

Public Institutions—Boards of Visitation—Appointed by the Courts—Status under the Act of May 25, 1921, P. L. 1144, Creating the Department of Public Welfare.

The Act of 1921, creating the Department of Public Welfare, in no wise altered or affected the power or duty of the Courts to appoint Boards of Visitation of any institution, society or association. Said Act did not legislate out of existence any boards so appointed nor change the powers or duties of such boards as prescribed by the law under their appointment was made. Such reports as heretofore were required to be made to the Board of Public Charities are now required to be made to the Department of Public Welfare.

Office of the Attorney General,
Harrisburg, Pa., January 4, 1922.

Dr. J. M. Baldy, Commissioner of Public Welfare, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 21st ultimo relative to Boards of Visitation for certain institutions. You ask to be advised: (a) whether the Act creating the Department of Public Welfare legislated out of existence such boards appointed by the courts, (b) whether the said Act affected the powers of the courts to appoint such boards, and (c) what relationship do boards so appointed bear to the said Department.

Act approved May 25, 1921, P. L. 1144, creating the Department of Public Welfare, does not expressly or by implication repeal or affect any act or provision thereof authorizing any court to appoint Boards of Visitation for any institution, association or society. The powers and duties of the courts in respect thereto remain precisely the same as before its passage. It, furthermore, is not to be construed as being in derogation of any powers or in diminution of any duty of boards so appointed. They likewise remain the same as before its passage, except that any reports that had been required to be made to the Board of Public Charities abolished by said Act are now to be made to the Department of Public Welfare. Sub-section 7 of Section 14 of said Act empowering the Department to appoint Boards of Visitation for institutions under its supervision is not in conflict with the power of the

courts to appoint boards or an exercise of any duty imposed on those so appointed. To what extent the boards appointed by the Department may cover ground covered by the court-appointed boards is a matter of administrative discretion on the part of the Department.

The relation of the Boards of Visitation appointed by the courts with the Department of Public Welfare is the same as that had with the Board of Public Charities to whose functions the Department has succeeded.

In accordance with the foregoing you are advised that the Act creating the Department of Public Welfare in nowise altered or affected the powers or duty or the courts to appoint Boards of Visitation for any institution, society or association, and did not legislate out of existence any boards so appointed nor change the powers or duties of such boards as prescribed by the law under which their appointment is made, except that any reports as were required to be made by them to the Board of Public Charities are now under the law creating the Department of Public Welfare required to be made to said Department.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

PUBLIC WELFARE.

Department of Public Welfare—Authority to establish and carry on industries in county prisons or county correctional institutions—Acts of May 25, 1921, P. L. 1144, Sections 8, 9, 21 and 34.

Department of Public Welfare may operate industries within the general class of "State Institutions," but has no authority to establish and carry on industries in county prisons or county correctional institutions.

Office of the Attorney General,
Harrisburg, Pa., January 4, 1922.

Dr. John M. Baldy, Commissioner of Public Welfare, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 27th ult. requesting an opinion as to whether the Department of Public Welfare has authority to establish and carry on industries in county prisons or county correctional institutions. It appears that this question has been raised in connection with the Philadelphia Institution at Holmesburg.

The power of the Department of Public Welfare to establish and carry on industries arises from the provisions contained in Section 21 of Act approved May 25, 1921, P. L. 1144 creating and defining the powers

and duties of the said Department. The institutions in which it may establish industries are under subsection (a) of said Section: "the Eastern Penitentiary, the Western Penitentiary, the Pennsylvania Industrial Reformatory at Huntingdon, *and such other correctional institutions of this Commonwealth as it may deem proper.*"

The term "other correctional institutions of this Commonwealth" is to be construed as meaning correctional institutions whose relationship to the Commonwealth is of like character as that of the institutions named. This construction accords with a familar rule. The word "of," as used therein, is not synonymous with "in" or "within," but in the light of the context and the Act as a whole imports "belonging to, established and managed by," the Commonwealth. The Act distinctly recognizes and classifies certain institutions as "State Institutions," defining them in Section 8. The enumerated ones in which the Department may operate industries are within that class, and the other ones in which by virtue of the above quoted provision it may in its discretion also carry on industries must likewise fall within that general class. It will be observed under Section 9 of the Act, prescribing the domain of the supervision vested in the Department, that various subsections thereof describe the institutions referred to therein as "within this Commonwealth" not as "of" it, and that under subsection (d), dealing with municipal institutions, county institutions are spoken of as "maintained by any county * * * of this Commonwealth."

An examination of the Act as a whole tends to confirm the above conclusion. Under Section 34 all the equipment and accounts of the Prison Labor Commission, whose activities never extended beyond the two Penitentiaries and the Huntingdon Reformatory, were required to be turned over to the Department and become a part of the "manufacturing fund" provided for in subsection (d) of Section 21. The Department is required to make quarterly reports to the Auditor General of the receipts, disbursements, etc. in connection with the industries established by it, all plainly contemplating a system in State Institutions.

You are, therefore, advised that the Department of Public Welfare has no authority to establish and carry on industries in county prisons or county correctional institutions.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

PUBLIC WELFARE.

Maintenance in State Institutions of Indigent Persons Committed Thereto—Acts of April 16, 1903, P. L. 211, May 28, 1907, P. L. 288 and May 20, 1921, P. L. 973.

Counties are liable for payment of the actual additional expenses, occasioned by the presence of the indigent persons committed therefrom, actually and necessarily incurred in their restraint, and for their due and proper care and treatment.

No part of any appropriation made for the maintenance of the indigent insane can be used for the maintenance of habitual addicts to the use of alcoholic liquors or intoxicating drugs.

Office of the Attorney General,
Harrisburg, Pa., January 5, 1922.

Dr. William C. Sandy, Director, Bureau of Mental Health, Department of Public Welfare, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 28th ult. in re maintenance in State Institutions of indigent persons committed thereto pursuant to the provisions of the hereinafter mentioned Act. As I understand, an opinion is requested—(1) as to what is payable by a county on account of the maintenance of such person, and (2) whether any part of an appropriation made for the maintenance of the indigent insane can be used therefor.

This question involves the construction of the amendment made by Act approved May 20, 1921, P. L. 973, to the Act of April 16, 1903, P. L. 211, as amended by the one of May 28, 1907, P. L. 288, providing for the committment to a hospital or asylum of habitual addicts to the use of alcoholic liquors or intoxicating drugs, by adding thereto the following provisions:

> "But if at such hearing the court finds that the inebriate is indigent, and that the wife, husband, or parent is unable to pay the cost and expense of the restraint, care, and treatment in the hospital or asylum, it shall so certify in the order committing the inebriate, whereupon the cost and restraint, care, and treatment of said indigent inebriate shall be borne and paid by the county from which the inebriate is committed, and any overhead charges shall be paid by the State when the inebriate is committed to a public State institution."

This amendment applies only to indigent persons duly so found and certified, the Act remaining unchanged as to other persons. It will be seen that as to indigents the cost of their maintenance in State Institutions is divided between the county from which committed and the State, the county to pay the cost of "restraint, care and treatment," and the State "any overhead charges."

The only question that could be raised as to the respective share of county and State in the matter of maintenance would be as to precisely what is meant by "overhead charges." That term, as commonly used, is more readily understood than capable of an exact definition applicable to every case. As used above it is fairly to be construed to mean all the expenses of the maintenance and up-keep of the plant, that is the Institution and its equipment, and those continuing expenses to which it would be put in its operation as a whole whether any particular inmate was in it or not, as distinguished from those incident to an individual inmate and necessarily arising fron his restraint, care and treatment, such as his food, clothing, medicines, special medical services, nursing and the like. The former are assumed by the State, the latter are to be paid by the proper county. The fair intent of the Act, as I view it, is to impose upon the county the actual additional expenses occasioned by the presence of the inmate in the Institution and actually and necessarily incurred in his restraint, and for his due and proper care and treatment. What the amount so payable by the county would be in any case is a matter to be ascertained and determined by a due system of accounting.

The situation here presented is somewhat analagous to that in respect to the liability of counties for their inmates in Penitentiaries. Under the Act of April 29, 1829, P. L. 341, as amended by that of February 27, 1833, P. L. 55, a county is chargeable for the expenses of "keeping" the convicts therefrom in the Penitentiary, but not for "maintenance," the term "maintenance" apparently relating to the Institution itself which the State maintains, while the maintenance of the inmates therein is denominated "keeping."

I find no provision anywhere for an appropriation to cover any of the aforesaid "overhead charges" to be borne by the State, but, notwithstanding that, it will be incumbent upon State Institutions to receive committments thereto under said Act. There is nothing in the Act or in the Act making an appropriation for the maintenance of the indigent insane which would warrant any payment from that appropriation for the above purpose. This becomes patent when we reflect that there may be commitments under the Act to State Institutions which do not receive indigent insane.

You are accordingly advised:

(1) That counties are liable, and bills should be rendered to them, for any indigent person committed therefrom to a State Institution under the provisions of the above quoted amendment to said Act to an amount ascertained and determined in accordance with the rule as above stated governing the share of the county on account of maintenance.

(2) That no part of any appropriation made for the maintenance of the indigent insane can be used for the maintenance of indigent addicts committed under the aforesaid Act.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

PUBLIC WELFARE.

Department of Public Welfare—Authority to remove insane from certain county poorhouses to State insane asylums where the local poor authorities desire to discontinue the maintenance of such persons in the local institutions.

Acts of May 25, 1921, P. L. 1144, Section 13, Paragraph 2; May 7. 1874, P. L. 118, Section 2; and June 13, 1883, P. L. 92, Section 2.

The Department of Public Welfare should not employ the proceedings provided for under the Acts of 1874 and 1883, where the local authorities fail or are unwilling to proceed to remove their indigent insane to State hospitals. Where the local authorities desire such removals to be made, and particularly where it is proposed to discontinue the maintenance of insane in the local institutions, it is incumbent on the local authorities to act and to take the necessary steps.

Office of the Attorney General,
Harrisburg, Pa., May 23, 1922.

Dr. John M. Baldy, Commissioner of Public Welfare, Harrisburg, Pa.

Sir: I beg to advise you as follows in answer to the question orally submitted by you as to the proceedings to be instituted by the Department of Public Welfare to remove all the insane from certain county poorhouses to State insane asylums where the local poor authorities desire to discontinue to keep and maintain such persons in the local institutions.

Under Section 13, paragraph 2, subsection (a) of the Act of May 25, 1921, P. L. 1144, creating the Department of Public Welfare, that Department is given the power to apply to the Court for the transfer of insane persons from County institutions or who are otherwise in the custody and control of the poor authorities to the State insane asylums. The proceedings are to be had under and in accordance with the provisions of the Act of May 7, 1874, P. L. 119, the Act of June 13, 1883, P. L. 92, or other law relative thereto. Section 2 of the first of these two Acts reads as follows:

> "Whenever the board of public charities shall be satisfied or have good reason to believe that any insane person in any county or district almshouse, or in the care of any person under the direction of the poor directors of any district, cannot there receive proper care and treatment, or is probably curable, said board, or their representatives in the proper county, shall make application to the president judge of the proper county, in term time, or at chambers, setting forth that such insane person cannot receive proper care and treatment, or is probably curable; and said judge shall, if the statements alleged are sustained by affidavit of petitioners, make decree that the officers in charge of such persons transfer him or her to one of the hospitals for the insane, receiving aid from the state, where such person shall be received and maintained in the manner provided by law, at the expense of the district from which such person is transferred; such expenses to be recovered by such district from such persons as may be liable by existing laws for the support of such insane person."

Section 1 of the second Act reads as follows:

> "That whenever the State Board of Commissioners of Public Charities shall deem it expeditent to transfer any such indigent insane person, in county poor houses or almshouses or otherwise in the custody of the directors or overseers of the poor, to the State hospitals for the insane, for care and treatment, the State Board of Commissioners of Public Charities, shall petition the president judge, of the court of common pleas of the proper county, who shall enter a rule, upon filing said petition upon said directors or overseers of the poor, to show cause why said insane person shall not be removed to said State hospital, and if, upon hearing, he shall deem it best, he shall make an order directing the removal of said insane person to the State Hospital for the proper district."

It will be seen that the proceedings under these Acts are in the nature of adverse ones against the control or discretion of the local poor authorities. The proceeding is contemplated only where the poor authorities fail or refuse to remove to or keep in a State hospital a person whose welfare would in the opinion of the Department be best subserved therein. It is not one that is contemplated or needed where these local authorities desire or propose of their own motion and stand willing to do this. It appears to me that in such cases they should of themselves take the steps required under the law to do this and be guided therein by their own Counsel, and that the Department of Public Welfare should only come in and compel this to be done through the Court where the poor districts will not do it. It is not for the Attorney General to advise the local authorities as to what proceedings by them are necessary to carry this out or act as counsel in the proceedings. They should be

guided therein as to their powers and duties by their own Counsel. As a general proposition I think that the Department of Public Welfare while giving to the local authorities the benefit of all helpful aid and suggestions should leave to the local authorities the largest measure of action compatible with the welfare of these public charges.

In my opinion, therefore, the Department of Public Welfare should only resort to the proceedings provided for under the above mentioned Acts where the local authorities fail or are themselves unwilling to proceed to remove their indigent insane to State hospitals in cases where this would be the best for these persons, and that where the local authorities desire that such removals be made, expecially where it is proposed to discontinue entirely the keeping of the insane in the local institutions, those authorities should proceed to act and take the steps necessary to effect this.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

MAINTENANCE OF DEAF, DUMB AND BLIND PUPILS.

School law—Deaf, dumb and blind pupils—Maintenance in institutions—Payment by school districts.

School districts and institutions for the deaf, dumb and blind may enter into lawful contracts for the maintenance and education by the latter of deaf, dumb and blind pupils at the expense of the former, where such pupils are in excess of the number provided for by appropriations to such institutions respectively.

Office of the Attorney General,
Harrisburg, Pa., August 21, 1922.

Dr. John M. Baldy, Commissioner of Public Welfare, Harrisburg, Pa.

Sir: I have your inquiry as to the liability of resident school districts for the cost of the education of pupils enrolled in (1) the Pennsylvania Institution for the Deaf and Dumb, Mount Airy, Philadelphia, (2) the Pennsylvania Institution for the Instruction of the Blind, (3) the Western Pennsylvania Institution for the Blind, located at Pittsburgh, Pennsylvania, and (4) the Western Pennsylvania Institution for the Instruction of the Deaf and Dumb.

So far as liability for such expense is concerned there are two classes of pupils—first, those who come within the number for whom an appropriation has been made to the institution in which they are enrolled, and second, those attending the institution in excess of the number provided for by direct appropriation.

In considering the first question it is necessary to take each institution separately because the laws making the appropriations thereto are not similar.

The Appropriation Act for the Pennsylvania Institution for the Deaf and Dumb, (Mount Airy), reads as follows:

> "That the sum of four hundred and four thousand dollars ($404,000), or so much thereof as may be necessary, is hereby specifically appropriated to the Pennsylvania Institution for the Deaf and Dumb, located at Mount Airy, Philadelphia, for the two fiscal years beginning June first, one thousand nine hundred and twenty-one, for the education and maintenance of not more than five hundred and five deaf children, residents of the State, at an annual rate not exceeding four hundred dollars ($400) per capita; and that the further sum of six thousand dollars ($6,000) is hereby specifically appropriated to said institution for the education and maintenance of three pupils who are deaf, dumb and blind for the two fiscal years beginning June first, one thousand nine hundred and twenty-one; * * *"
>
> *Appropriation Acts 1921, No. 82-A.*

So far as the appropriation is concerned this institution is limited to five hundred and five deaf pupils, to be maintained and educated at a rate not to exceed $400 per capita, and three deaf, dumb and blind pupils for whose maintenance and education $6,000 is appropriated. If it does not cost $400 per capita for the deaf children the number cannot be increased, but the unexpended balance reverts to the Treasury. The same is true of the cost of maintaining and educating the three deaf, dumb and blind pupils, any unexpended balance reverts to the Treasury of Pennsylvania. As the appropriation for all of the five hundred and eight pupils provided for is for education as well as maintenance, I would advise that this institution cannot charge the resident school district for the education of any deaf pupils coming within the limitation of five hundred and five, or deaf, dumb and blind pupils coming within the limitation of three.

The Pennsylvania Institution for the Instruction of the Blind is provided for as follows:

> "That the sum of one hundred and thirty one thousand two hundred and fifty dollars ($131,250), or so much thereof as may be necessary, is hereby specifically appropriated to the Pennsylvania Institution for the Instruction of the Blind, for the two fiscal years beginning June first, one thousand nine hundred and twenty-one (1921), toward the education and maintenance of one hundred and seventy-five State pupils, resident in the State, to be paid quarterly at the annual rate of three hundred and seventy-five

> dollars ($375) per pupil; but, if in any quarter less than one hundred and seventy-five such pupils shall be enrolled in the school, whatever portion of this appropriation shall remain in the treasury may be drawn for the education and maintenance of any other such pupil or pupils up to the total of one hundred and seventy-five in any other quarter of either of said years."
> *Appropriation Acts 1921, No. 83-A.*

The Pennsylvania Institution for the Blind cannot charge the resident school district for the education of any pupils coming within the limitation of one hundred and seventy-five, nor may it charge such school district for the education of any pupils in excess of this limit so long as there remain funds from any quarter still unused, which exist because the number of pupils was less than one hundred and seventy-five during that quarter. If the one hundred and seventy-five pupils are maintained and educated for less than $375 per capita per annum the saving goes back into the Treasury, but if there are less than one hundred and seventy-five pupils enrolled in any quarter the saving may be used for the maintenance of extra pupils during any other quarter of the two years, and the school district may not be charged with the education of any of these extra pupils.

The law providing for the Western Pennsylvania Institution for the Blind is as follows:

> "That the sum of one hundred and eight thousand dollars, ($108,000), or so much thereof as may be necessary is hereby specifically appropriated to the Western Pennsylvania Institution of the Blind, for the two fiscal years beginning June first, one thousand nine hundred twenty-one (1921), toward the education and maintenance of one hundred and thirty-five State pupils, resident in the State, at an annual rate not exceeding four hundred dollars ($400) per pupil, or so much thereof as may be necessary: Provided, That if any money appropriated for the maintenance of pupils shall remain in the treasury on account of a decrease in the cost per capita through good management, the same may be drawn for maintenance of an extra number of pupils whose maintenance would amount to the said balance, not exceeding the per capita allowed in the act."
>
> *Appropriation Acts 1921, No. 85-A.*

Under this Act the Western Pennsylvania Institution for the Blind may not charge the resident school district for the education of any pupils within the limitation of one hundred and thirty-five, nor for any additional pupils who may be maintained out of savings from economy in the management of the institution.

The Western Pennsylvania Institution for the Instruction of the Deaf and Dumb is provided for in the following language:

> "That the sum of two hundred and thirty eight thousand dollars ($238,000), or so much thereof as may be necessary, be, and the same is hereby, specifically appropriated to the Western Pennsylvania Institution for the Instruction of the Deaf and Dumb, for the two fiscal years beginning June first, one thousand nine hundred and twenty-one, for the education and maintenance of two hundred and eight State pupils at an annual rate not exceeding the sum of four hundred and twenty-five dollars ($425.00) per pupil, or so much thereof as may be necessary."
>
> *Appropriation Acts 1921, No. 86-A.*

This institution is limited as to the number of pupils it may accept under the appropriation and as to the amount it may expend per pupil. If it does not have the full quota of pupils, or if the amount per capita for expenses provided for is not actually expended, the balance reverts to the Treasury. It may not charge the resident school district for the education of any pupils coming within the limitation of two hundred and eight.

In considering that phase of your question concerning charging school districts for the education of pupils enrolled in these institutions in excess of the specified number in the Appropriation Acts it will not be necessary to discuss them separately. The law requiring the school districts to educate such children as are eligible for enrollment in these institutions reads as follows:

> "The county or district superintendent of schools shall submit to the board or boards of school directors plans for establishing and maintaining special classes in the public schools or special public schools for the proper education and training of all such children reported to him as fit subjects for special education and training, and it shall be the duty of the board of directors of any district having such children to provide and maintain, or to jointly provide and maintain with neighboring districts, such special classes or schools: Provided, however, That if it is not feasible to form a special class within a minimum attendance of ten children in any district, or if for any other reason it is not feasible to provide such education for any such child in the public schools of the district, the board of school directors of that district, the shall, if the parents or guardians of said child give written consent, secure such proper education and training outside the public schools of the district, or in special institutions, on terms and conditions not inconsistent with the terms of this act or of any other act then in force applicable to such children.

"School districts maintaining special classes in the public schools or special public schools or providing special education, as hereinbefore specified in this section, shall receive reimbursement, as hereinafter provided, so long as such classes, such schools, and such special education are approved by the State Board of Education as to location, constitution and size of classes, conditions of admission and discharge of pupils, equipment, courses of study, methods of instruction, and qualifications of teachers.

"The State Superintendent of Public Instruction shall superintend the organization of such classes and shall enforce the provisions of this act."

Act of July 22, 1919, P. L. 1090.

Under this section districts have ample authority to enter into agreements with any of the four institutions under discussion to educate any pupils in the institutions not provided for by appropriation. Does the institution have the right to enter into such agreements with the school district? I think it does. There is no limitation upon the number of pupils who may attend such institutions, except in so far as the appropriation for their maintenance and education is concerned. The institutions may accept other pupils if the expense thereof is provided from sources other than the regular appropriation. This has been the practice for many years. The institution could, therefore, make an arrangment with local school boards for the education of pupils, in addition to its regular number provided for by appropriation, at the expense of the school district, and it could refuse to accept such pupils unless the school board entered into an arrangement to pay the cost of their education.

I am of the opinion that it is legal for a school district and any of the institutions named to make an agreement for the education of such pupils as are of the class for which the institution is intended, in excess of the number provided for by appropriation.

Very truly yours,

STERLING G. McNEES,
Deputy Attorney General.

DEPARTMENT OF PUBLIC WELFARE.

State Institutions for Feeble-Minded of Western Pennsylvania, at Polk,—Authority to proceed with the construction of an isolating hospital under Appropriation Acts No. 54-A, of 1919, P. L. 102, and 57-A, of 1921, P. L. 120.

The State Institution for Feeble-minded of Western Pennsylvania, at Polk, "cannot legally award contracts for the erection of a nurses' home or an isolating hospital under the Acts referred to, unless such contracts are for the entire "erection" and equipment" of the nurses' home or the entire "erection, completion and equipment" of the isolating hospital.

Office of the Attorney General,
Harrisburg, Pa., August 29, 1922.

Dr. John M. Baldy, Commissioner of Public Welfare, Harrisburg, Pa.

Sir: This Department is in receipt of your inquiry of August 21st, as to whether or not the State Institution for Feeble-minded of Western Pennsylvania, at Polk, may proceed with the construction of an isolating hospital under Act No. 54-A, Appropriation Acts 1919, P. L. 102, and with the construction of a nurses' home under Act No. 57-A, Appropriation Acts 1921, P. L. 120, where the appropriation in neither case is large enough to complete the project.

I find that the appropriation for the erection of an isolating hospital is provided for as follows:

> "That the sum of thirty-two thousand dollars ($32,000.00), or so much thereof as may be necessary, is hereby specifically appropriated to the trustees of the State Institution for Feeble-Minded of Western Pennsylvania, at Polk, Pennsylvania, for the following purposes:
> "For the erection, completion and equipment of an isolating hospital for the isolation of cases of contagious diseases, the sum of twelve thousand dollars ($12,000), together with the unexpended sum of ten thousand dollars ($10,000.00), appropriated by the General Assembly of one thousand nine hundred and fifteen for like purposes, which is hereby reappropriated for said purposes. * * *"

You will notice that the Act provides for the erection, completion and equipment of this hospital. I am of the opinion that you could not legally spend this money for the erection of part of a building. You must be able to complete and equip the hospital within the appropriation or you would not have legal authority to begin it. Any contract let under this appropriation should be for the purposes set forth in the law and not a part of such purposes.

The nurses' home referred to is provided for as follows:

> "That the sum of eighty-four thousand five hundred dollars ($84,500), or so much thereof as may be necessary, is hereby appropriated to the State Institution for Feeble-Minded of Western Pennsylvania, at Polk, Pennsylvania, for the following purposes:
>
> * * * * * * * * * * *
>
> "For the erection and equipment of a nurses' home, the sum of twenty thousand dollars ($20,000), or so much thereof as may be necessary."

The same general rule applies in the case of this appropriation. It is made for the erection and equipment of a nurses' home. It was not intended that it should be used for part of the purposes set forth in the Act. The Legislature and the Governor of the Commonwealth are presumed to be conservant with costs and to have felt that the amount appropriated was sufficient for the purposes set forth in the bill. The institution cannot now change this plainly expressed purpose and use the money contrary to the directions of the Appropriation Act.

I am of the opinion, therefore, and so advise you that the institution at Polk cannot legally let contracts toward the erection of a nurses' home or an isolating hospital under the particular Acts of Assembly designated unless such contracts are for the entire "erection and equipment" of the nurses' home or the entire "erection, completion and equipment" of the isolating hospital.

Very truly yours,

STERLING G. McNEES,
Deputy Attorney General.

IN RE PUBLIC FUNDS.

Charitable Corporations—Public Expense—Powers of the Court—Charter—Act of July 19, 1917, P. L. 1120.

"Public funds" are defined to mean "taxes, customs, etc., appropriated by the government to the discharge of its obligations." A fund voluntarily assumed by a community or some organization does not partake of that nature.

The term "public expense," as used in the Act of July 19, 1917, P. L. 1120, relating to the incorporation of certain institutions, means expenses payable out of public funds, and does not include voluntary contributions by a community or by a church, fraternal organization or other association.

Office of the Attorney General,
Harrisburg, Pa., September 11, 1922.

Dr. John M. Baldy, Commissioner of Public Welfare, Harrisburg, Pa.

Sir: This Department duly received your communication of the 29th ult. asking to be advised as to the meaning of the term "public expense" as found in the Act of July 19, 1917, P. L. 1120, relating to the incorporation of certain institutions. It provides that whenever an application for a charter for an institution in which indigent persons are to be treated or maintained "*in whole or in part at public expense*" is filed in the court of common pleas, the prothonotary of the court shall transmit a certified copy thereof to the Board of Public Charities, which shall thereupon advise the court whether in its opinion there is need for such an institution, with the reasons for its conclusion. The Act further provides that the court shall not approve the application unless it finds there is need for the institution in the community in which it is to be carried on, but that "the recommendation of the Board of Public Charities as to such necessity shall not be conclusive upon said court." The purpose of the Act was to give to the court in acting upon an application for a charter for such an institution the benefit of the expert knowledge of the said Board, whose powers and duties thereunder are now vested in the Department of Public Welfare.

The precise question you ask to be advised upon is whether the term "public expense," as used in the Act, is to be construed as including moneys voluntarily contributed by a community in which the institution is to be carried on or contributed by a church or some fraternal organization or other association. In my opinion it is not to be so construed. What is contemplated is an expense payable out of the public funds, as, for example, the aid given by the State for the care or treatment of indigents or an expense imposed by law upon a poor district for that purpose. One voluntarily assumed by a community or some organization does not partake of that nature. Contributions

such as the aforesaid are charitable and benevolent donations and not charges or exactions upon the public payable out of public funds. Public funds have been defined to mean "taxes, customs, etc. appropriated by the government to the discharge of its obligations." *Words and Phrases, Vol. 6, 5788.*

It is to be noted, however, that the opinion of the Department of the Attorney General is not controlling upon the action of the court in any case in which such an application as the aforesaid may be made for a charter. The court can put its own construction upon the meaning of the said term, and your Department should be governed thereby and give its opinion and reasons as to the need of the institution in any case asked by any court.

You are advised that it is the opinion of the Department of the Attorney General that the term "public expense," as used in the aforesaid Act, means expenses payable out of public funds, and does not include voluntary contributions by a community or by a church, fraternal organization or other association.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

DEPARTMENT OF PUBLIC WELFARE.

Act of July 11, 1917, P. L. 769, regulating the importation into this State of dependent, delinquent and defective children, construed.

The Act of 1917 does not apply to the case of a child of the class within its purview placed in an institution in this State, provided the child be not removed therefrom and placed out in this State in accordance with its provisions. The Act implies to a child placed elsewhere in the State after first having been an inmate of an institution.

Office of the Attorney General,
Harrisburg, Pa., September 11, 1922.

Dr. John M. Baldy, Commissioner of Public Welfare, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 29th ult. relative to the Act of July 11, 1917, P. L. 769, regulating the importation into this State of dependent, delinquent and defective children. It makes it unlawful for any one to bring or send, or cause to be brought or sent, into this State any such child "for the purpose of placing such child in any home in Pennsylvania, by indenture, adop-

tion or otherwise, or to abandon such a child after being brought or sent into the State of Pennsylvania" except in the manner and upon the conditions prescribed by said Act.

You ask to be advised whether the word "home," as used therein and contained in the above quoted portion thereof, applies not only to private homes but to institutional ones. Standing alone it is clear that it would be regarded as broad enough to cover both classes. A limitation, however, is set as to institutions, inter alia, upon the application of the Act by virtue of Section 5 thereof, reading in part as follows:

> "That the provision of this act shall not apply * * * to the placing of a child in any institution in this State; provided it is not removed therefrom and placed out in this State, except in accordance with the provisions of this act."

This plainly removes from the Act the case of a child placed in an institution, provided it is not taken from it and placed out in this State otherwise than in conformity with the Act. The purpose of this is obvious. An institution is presumably such a proper and responsible home in which a child may be reared that it was deemed needless to exact the requirements of this statute as to it, in order that the Commonwealth be safeguarded against that from which the Act seeks to protect it. No institution, however, can be a channel through which children may flow into other homes of this State contrary to the Act. The above limitation is not an absolute one, but based upon the express proviso or condition that the child shall not be removed from the institution and placed out in this State except in accordance with the provisions of this Act. If this condition is violated then the limitation falls and the Act applies. In the placing of such a child out into another home here there must be precisely the same compliance with the law in order to relieve the placing of the child with the institution from its requirements as though the child had been originally placed in such other home on being brought into this State.

You are advised that the aforesaid Act does not apply to the case of a child of the class within its purview placed in an institution in this State, provided the child be not removed therefrom and placed out in this State except in accordance with its provisions, but that the placing of the child out elsewhere in this State after first being put in the institution renders the case subject to the Act. In effect only those cases are beyond the scope of the Act where the child remains in the institution and is never placed outside it in this State.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

COUNTY PRISON INSPECTION.

Prisons—Inspection—"Condition"—Duty of Commissioner of Public Welfare—Certificate to district attorney—Words and phrases—Act of May 25, 1921.

1. Whenever a condition is found to exist in any county prison, which, in the opinion of the Commissioner of Public Welfare, is unlawful or is detrimental to the proper maintenance or management of such institution, or to the proper care and welfare of its inmates, it is the duty of the commissioner to direct those in charge to correct such condition in a prescribed way and within a time fixed, and upon their failure to do so, to certify the facts in the form indicated by the Act of May 25, 1921, P. L. 1144, to the district attorney.

2. The word "condition" used in the act can fairly be held to mean not merely the state of physical equipment of the plant, but the character of the discipline, method of maintenance and general care of the inmates.

Office of the Attorney General,
Harrisburg, Pa., December 20, 1922.

Dr. J. M. Baldy, Commissioner of Public Welfare, Harrisburg, Pa.

Sir: There was duly received your communication of the fifth instant to the Attorney General, relative to the power and duty of the Commissioner of Public Welfare under Section 12 of the Act of 1921 creating the Department of Public Welfare in the case of a county prison. A specific case is stated as to whether it would be within the power of the Commissioner to direct its correction and if not made, to then certify the facts to the district attorney with a "request" that he proceed to bring about a remedy. For the reasons hereinafter given it is deemed sufficient simply to point out the general rule for your guidance.

Section 9 of that Act subjects county prisons to the supervision of the said Department. Section 12 of the Act makes it the duty of the said Commissioner to inspect or cause to be inspected, at least once a year, all institutions within the jurisdiction of said Department, with the right to enter them for such purpose, and requires those in the management or control thereof to afford to the Commissioner or his representatives full opportunity to make the required inspection. It further provides that:

> "Whenever, upon such visitation, examination, and inspection of any penitentiary, prison, reformatory, almshouse or poorhouse, any condition is found to exist therein which, in the opinion of the commissioner, is unlawful or detrimental to the proper maintenance, discipline, hygienic conditions of such penitentiary, or to the proper care, maintenance, custody, and welfare of the inmates thereof or the persons committed thereto or being treated, detained, or residing therein,"

it shall be the duty of the Commissioner to direct those in control to correct the objectionable condition in the way and within the time fixed. Should those in management fail to comply with such direction, it is then the further duty of the Commissioner to "certify the facts in the case to the district attorney of the proper county, whose duty it shall be thereupon to proceed by indictment or otherwise to remedy the said objectionable condition."

The foregoing provisions are plain and explicit. It is thereby made the duty of the Commissioner of Public Welfare to proceed in the manner prescribed for the correction of any condition found in any of the aforesaid institutions which in his opinion is detrimental to the proper operation of the institution or the care or welfare of its inmates. The only question as I see that might arise thereunder is as to the extent of the import to be given to the word "condition."

The word "condition" is defined by the New Standard Dictionary as meaning, inter alia:

> "The state or mode in which a person or thing exists; especially, the manner in which persons or things are situated in relation to their environment. The position or case of a person or thing; plight";

and by the Century Dictionary as:

> "The particular mode of being of a person or thing; situation, with reference either to internal or external circumstances; existing state or case; plight; circumstances."

In view of the remedial aim of the aforesaid provisons of the said Act, I am of the opinion, that the word "condition" should be given broad meaning and said provisions a liberal interpretation. This word as here used can fairly be held to mean, not merely the state of the physical equipment of the plant in which persons are confined, but the character of the discipline, method of maintenance and general care of the inmates. Whatever affects their welfare is within the purview.

The certification of the facts by the Commissioner to the district attorney should properly include a clear statement of the exact condition complained of, the correction thereof as directed by the Commissioner and the failure or extent of the failure of those in control to carry it out.

What Section 12 of the said Act contemplates is that there shall be a thorough going inspection and visitation of all institutions within its scope by the Commissioner who is given full authority to learn all about their management and the care of their inmates, and then, in the case of the ones enumerated above, if there is not a compliance with his direction to correct objectionable conditions, the facts obtained by this inspec-

tion as thus found by one having expert knowledge shall go before the proper county authorities for their action. In this responsible and searching fashion additional scrutiny is exercised over such institutions in order that the welfare of the inmates thereof shall be more surely safeguarded.

Answering your specific question, you are advised that whenever any condition, as that term is above defined, is found to exist in any county prison which in the opinion of the Commissioner of Public Welfare is unlawful or is detrimental to the proper maintenance or management of such institution or to the proper care and welfare of its inmates, it is the duty of the Commissioner to direct those in charge to correct such condition in a prescribed way and within a time fixed, and upon their failure to do so, to thereupon certify the facts, in the form above indicated, to the district attorney of the proper county.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

OPINION TO THE INSURANCE COMMISSIONER.

OPINION TO THE INSURANCE COMMISSIONER.

For the Year 1922.

IN RE INSURANCE INSPECTION.

State Commissioner——Governor——Appointment of Examiners and Investigators——Licensed Brokers and Agents——Act of June 12, 1919, P. L. 453.

The State Insurance Commissioner with the approval of the Governor has authority under the Act of June 12, 1919, P. L. 453, to appoint additional examiners and investigators for special and temporary service, throughout the State, for the purpose of investigating the business reputation and career and ascertaining the fitness of applicants desiring to be licensed as insurance agents or brokers under the laws of the Commonwealth, to serve with or without compensation.

Office of the Attorney General,
Harrisburg, Pa., October 30, 1922.

Honorable Thomas B. Donaldson, Insurance Commissioner, Harrisburg, Pa.

My dear Sir: Receipt is acknowledged of your communication of October 24th inquiring whether you can appoint with the approval of the Governor, additional examiners and investigators for special and temporary service, locally throughout the State, for the special purpose of investigating the business reputation and career and ascertaining the fitness of applicants desiring to be licensed as insurance agents or brokers under the laws of the Commonwealth, and who will advise and assist your Department in examining and passing upon the qualifications of such applicants,—such appointees to serve your Department without compensation.

In reply thereto I beg to advise you that under the Insurance Act of 1921, approved May 17, 1921, P. L. 789, the powers and discretion vested in you in licensing insurance agents and brokers are exceedingly broad and comprehensive. You are charged with the responsibility before licensing such agents or brokers, of ascertaining by due inquiry whether an applicant for a license "is of good business reputation, and of experience in underwriting, other than soliciting, and is worthy of a license," and that such applicant "is reasonably familiar with the insurance laws of the Commonwealth."

To perform these duties imposed upon your Department you are duly authorized and empowered by Act of Assembly No. 228, approved June 12, 1919, P. L. 453, to employ "additional examiners, special deputies or clerks, with the approval of the Governor, for special or temporary services, at salaries not to exceed $300.00 per month for each month employed. Said salaries shall be paid semi-monthly by the State Treasurer upon warrant of the Auditor General."

Your communication further indicates that through Insurance Advisory Boards locally organized throughout the State, you are able to obtain the services of competent, trustworthy and experienced persons who are interested in according protection to the insuring public, who upon being designated with the approval of the Governor, as special examiners for the purposes aforesaid, will accept such appointments and perform the services desired by your Department under your supervision and direction, without money consideration or other remuneration from the Commonwealth.

In my opinion the Acts of Assembly above referred to authorize and empower you to select and employ additional special examiners in the manner aforesaid, irrespective of the fact that they may be willing to serve without compensation. The fact that you are permitted to accord compensation "not to exceed $300. per month," while imposing a limitation on your power of employment and providing compensation therefor, surely does not preclude you from appointing in the manner aforesaid, with their consent and acceptance, such persons as special or additional examiners, as you, in your judgment may require to carry out the purpose of the insurance laws, even though such appointees serve without salary. If you may appoint and accord a salary, "not exceeding $300.00 per month," you may undoubtedly designate any less compensation, whether it be at the rate of $50.00 per month, or $1.00 or one cent, and it, therefore, reasonably and logically follows that if such appointee accepts and consents to serve without compensation, he is nevertheless a duly obligated appointee of your Department to perform the services stipulated, and is subject to your direction and supervision; and it of course follows that such appointments may be vacated or terminated at will.

The fact that such appointees may be officers or members of the so-called Insurance Advisory Boards is unimportant, from the standpoint of the legality of their appointment. The Advisory Boards, I understand, are unofficial Associations composed of persons interested in the various subjects of the insurance business, who have been locally organized in various communities of the State, largely at your instance and under your direction and influence, to co-operate in conjunction with the Insurance Federation of Pennsylvania, also an unofficial Asso-

ciation devoted to insurance interests,--for the purpose of extending protection to the insuring public and advancing in an educational way matters pertaining to the various subjects of insurance.

The question of policy in designating employes of your Department, in the manner indicated, is one for your consideration and not for the Attorney General's Department.

Very truly yours,

FRED TAYLOR PUSEY,
Deputy Attorney General.

OPINIONS TO DEPARTMENT OF INTERNAL AFFAIRS.

OPINIONS TO DEPARTMENT OF INTERNAL AFFAIRS.

For the Year 1921.

IN RE SMALL PACKAGES.

Bureau of Standards——Merchandise——Wrapping and Marking——Bread——Acts of 1797 and 1913.

The Act of April 1, 1797, 3 Sm. L. 294, Section 2, is still in force and was not repealed by the Act of July 24, 1913, P. L. 965, so that packages of bread should be marked with the weight and shall be sold by the pound avoirdupois.

Under Section 7, of the Act of July 24, 1913, P. L. 965, all articles, in package form, can be sold by numerical count, if such term of numerical count is applicable to the contents of the package, and will inform the purchaser of the package as to the quantity of the particular article therein contained.

The State Bureau of Standards, under the Act of July 24, 1913, P. L. 965, may adopt rules and regulations as to the marking of packages and where reasonable, may exempt small packages of merchandise from the requirement that packages must be marked in one of three specific ways, viz., in terms of weight, measure or numerical count.

Office of the Attorney General,
Harrisburg, Pa., September 27, 1921.

Honorable William B. McGrady, Chief, Bureau of Standards, Harrisburg, Pa.

Sir: Your letter of recent date was received. You request an opinion from this Department as to the interpretation of Section 7 of the Act of July 24, 1913, P. L. 965, known as the *Commodites Act*, which section reads as follows:

> "If in package form, the quantity of the contents shall be plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: Provided, however, That reasonable variations shall be permitted; and tolerances and also exemptions as to small packages shall be established by rules and regulations made by the Chief of the Pennsylvania Bureau of Standards."

You state as a fact that a number of commodities, such as bread, cakes, soap etc., are put up in wrapped paper packages, and marked "One Loaf of Bread," "One Cake," "One Cake of Soap," and that some of your inspectors claim that such goods should be marked to designate the net weight of the same, and should not be sold by *numerical count.*

As to bread, there is an old Act of Assembly in this State which requires that bread shall be sold by the *pound avoirdupois*. This is the Act of April 1, 1797, 3 Smith's Laws 294, Section 2. I cannot find that this Act has ever been repealed. It is still in force, and the above cited section of the Act of 1913 does not necessarily repeal it. It would, therefore, follow that packages of bread should be marked with the weight.

As to other articles, not specifically mentioned in particular Acts of Assembly, if in package form, this section of the Act of July 24, 1913, provides that they must be marked on the outside of the package in one of three ways, to wit: in terms of weight, measure or numerical count. This requirement is intended to be applied with respect to the nature of the thing being sold. An applicable term should be used, one which will inform the purchaser. It would be no use to the purchaser if the only information on the outside of the package was that it contained "one cake of soap." "One dozen of eggs" would be an applicable marking of a package, but "one dozen of potatoes" would give no information. Under the second clause of this section the Bureau of Standards may adopt rules and regulations as to the marking of packages, and, where reasonable, may exempt small packages from this requirement.

You are advised, therefore, in answer to your inquiry, that under Section 7 of the Act of July 24, 1913, P. L. 965, all articles, in package form, can be sold by numerical count, if such term of numerical count is applicable to the contents of the package, and will inform the purchaser of the package as to the quantity of the particular article therein contained.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

OIL TANKS.

Oil tanks—Weights and Measures.

Oil tanks, used by producers of oil to store oil and from which oil is bought and run by refining companies, are not measures within the meaning of the Act of July 11, 1917, P. L. 799.

Office of the Attorney General,
Harrisburg, Pa., September 30, 1921.

Mr. William B. McGrady, Chief, Bureau of Standards, Department of Internal Affairs, Harrisburg, Pa.

Sir: Your communication asking for an opinion from this Department as to whether tanks used by producers of oil in which to store

their oil and from which it is bought and run by the refining companies can be classed as measures under the Act of July 24, 1913, P. L. 960, as amended by the Act of July 11, 1917, P. L. 799, duly received.

In reply would say that the amendment of July 11, 1917, P. L. 799, to this Act provides as follows:

> "The 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, including instruments and devices for weighing at coal-mines, and seal the same if found to be correct. Such test shall include all appliances connected or used with such instruments or devices."

This amendment added to the instruments and devices to be tested all instruments and devices for weighing in coal mines. This was put in the Act because of an opinion rendered by this Department on July 7, 1914, and reported in *24 District Reports, page 79*, in which this Department held that there was no authority for the inspectors testing scales used by mine companies for the purpose of weighing the coal produced by the miners and thereby fixing the amount of wages payable to the miners. It was said in this opinion that the determination of these questions depends upon whether the scales in question may be said to be "used in weighing or measuring anything sold or to be sold," and it was held that the Act was intended to apply only to instruments and devices used in weighing or measuring anything sold or to be sold. These same words as to weighing instruments and devices used in measuring anything sold or to be sold are used in the amendment of 1917 cited above.

In North Carolina it was held that the Act as to weights and measures did not apply to scales used by a railway company for weighing freight, and thereby fixing the cost of transportation. *Nance vs. Southern Ry. Co., 63 S. E. Rep. 116.*

Furthermore, the Act of May 5, 1921, Act No. 187, provides that the Bureau of Standard is given power to approve the "types" of all weights and measures and devices connected therewith, and to regulate and control the manufacture and sale of the same.

The question you raise, therefore, is whether or not oil tanks used for the storage of oil and from which it is bought and run by the refining companies can be classed as measures from which the oil is sold, under the above cited Acts of Assembly. From a published report of Allen W. Corwin, Sealer of Weights and Measures of the County of Allegheny,

in the State of New York, I quote the following account of oil tanks, how they are used, and the methods adopted to measure their capacity and the quantity of oil contained within them:

> "Allegany County has approximately ten thousand producing oil wells with a daily production of sixteen hundred barrels of forty-two gallons each. The oil is pumped from the wells into storage tanks made of wood, or more recently of steel, with a capacity of ten to one hundred barrels. One storage tank usually serves several wells. These storage tanks are connected by pipe lines to the main oil line leading to the refinery which may be hundreds or thousands of miles away.
>
> "The quantity of oil for which the producer is paid is determined by measuring the oil in the storage tank. When a new tank is set it is measured, this process being known in the oil country as 'strapping a tank.' This consists of taking the outside circumference at several points—depth, thickness of stave of wood, and any other necessary information which may apply to that particular tank. From this information a sheet is prepared called a 'tank table,' giving the name and number of the tank, owner of lease and land, and a table giving the capacity of the tank for each foot, inch and fraction of an inch of depth of the tank beginning at the bottom. In the calculation of this table the purchasing oil company is allowed 2 per cent. over for waste. When the tank is full the oil company's gauger is notified. The gauger measures the depth of oil in the tank before and after the oil is run into the line. These measurements are made with a 'gauge pole' which is made of wood, about three-fourths of an inch square and graduated in feet, inches and fractions of an inch.
>
> "The process of emptying a tank into the line is called 'Running a tank.' The gauger makes in duplicate a 'Run ticket' giving the date, number of the tank, depth of oil before and after running, and if in cold weather the temperature. By referring the run ticket to the tank table the amount of oil run can be readily computed. In cold weather it is necessary to heat the oil before running it into the line, and a deduction is made for expansion by computing from the temperature before and after heating.
>
> "It is not difficult to compute the capacity of a steel tank of uniform diameter, but a wooden tank with varying diameters, inside wood, staves of different thickness, and irregularly shaped in most every way, is not so easily calculated."

I am informed that the oil tanks used for storage purposes in the oil fields of Pennsylvania vary in capacity from five to one thousand barrels.

The word "standard" is thus defined by the Appellate Court of Delaware:

> "Standard *ex vi termini* implies a measure or test which has the general concurrence or recognition of the class of persons engaged in the particular business or trade under consideration."
>
> *Penn Steel Casting & Machine Company vs. Iron Company, 41 Atl. 236-238.*

"Measure" is defined in the Century Dictionary as—

> "A unit or standard to determine linear or other dimensions, or other quantity of objects, by the comparison of them with it; a standard for the determination of a unit of reckoning."

By Act of Assembly barrels are standardized, and containers for fruits and vegetables are standardized, but there is yet no standardization of oil tanks.

It seems to have been generally agreed in all the decisions of the different States that Weights and Measures laws were for testing the weights and measures used in small sales, such as those made by retail grocers, butchers, etc.

Bartlett, J. said in the following case:

> "It is a requirement that when the provisions and other commodities are sold by weight or measure, the balance or measures used shall be such as have been stamped by the municipal authorities as correct and true. * * * In no event can the court resort to implication to read into a statute a penal ordinance or prohibition not expressed therein. In the clause of the ordinance under consideration there is no express provision forbidding the sale of meat or provisions by the jar. * * * Such provision cannot be inserted by implication."
>
> *City of New York vs. Fredericks, 206 N. Y. 618.*

Oil tanks used for storage purposes from which the oil is run to the refineries and sold to them come under none of these definitions of measures. Like the scales used by the check-weighman in mines they are not within the purview of the original law, and if they are to be included must be included by amendment. We are strengthened in this conclusion by the practice of the other States containing oil fields. Oil tanks are not covered by the Weights and Measures Acts of Tennessee. In Texas they are not included in the Weights and Measures Laws, and are inspected only when oil is sold by the tank. The laws of these States are similar to our own as to weights and measures.

You are, therefore, specifically advised that tanks such as mentioned in your letter, used by the producers of oil in which to store their oil and from which it is bought and run by the refining companies, cannot be classed as measures under the Weights and Measures Law of July 24, 1913, as amended by the Act of July 11, 1917, P. L. 799.

Very truly yours,

WILLIAM I. SWOOPE
Deputy Attorney General.

WEST PENN POWER COMPANY.

Land law—Mineral rights under navigable river—Failure to pay purchase money to Commonwealth—Latches—Statute of limitations—Act of April 11, 1848.

Where a corporation has secured a warrant and survey for mineral rights under a navigable river, but has failed for fifty-seven years to pay the purchase money due the Commonwealth, it has been guilty of laches that, both under the ten years' limitation in section 3 of the Act of April 11, 1848, P. L. 533, and under the general principles of law, the Commonwealth has a right to consider that the company has abandoned its claim.

Office of the Attorney General,
Harrisburg, Pa., November 2, 1921.

Honorable James F. Woodward, Secretary of Internal Affairs, Harrisburg, Pa.

Sir: I received your request for an opinion from this Department as to whether or not the West Penn Power Company, a corporation, was legally entitled to a patent for the mineral rights underlying one hundred acres of the bed of the Allegheny River in Allegheny County, Pennsylvania, by virtue of a warrant granted A. M. Fulton, June 2, 1864, survey made July 6, 1864 and returned to the Land Office and accepted May 15, 1865.

The Allegheny River was declared a navigable river and public highway by Act of March 21, 1798, 3 Smith's Laws, P. L. 320.

The Act of April 11, 1848, P. L. 533, authorized the Surveyor General to issue warrants for not exceeding one hundred acres of the bed of any of the public navigable rivers of this Commonwealth, under the limitations therein specified, survey to be had thereunder, and return thereof to be made. The first clause of Section 2 of this Act is in these words:

"That from and after the issuing of said warrant, the right to dig and mine for iron, coal, limestone, sand and gravel, fire clay and other minerals, shall vest and be in the party in whose favor the said warrant or warrants shall issue, his heirs or assigns":

Section 3 provides a limitation as follows:

"That the person or persons so holding said warrant or warrants, his or their heirs or assigns, shall and may at any time within ten years from the date of the same, have and receive a patent for the said land, under the seal of the commonwealth, in the usual form, granting to them, their heirs and assigns, the right to dig and mine iron, coal, limestone, sand and gravel, fire clay or any other mineral, on his or their paying into the treasury of the commonwealth the usual price per acre of public lands, and the usual fees, with interest from the date of the said warrant, subject to the restrictions contained in the second section of this act":

This Act was repealed by the Act of March 29, 1849, P. L. 255, but the repeal was repealed so far as relates to Allegheny County by the Act of April 16, 1856, P. L. 356, and as to Fayette County by the Act of April 18, 1864, P. L. 437, which latter Act was held valid in an opinion by this Department under date of November 24, 1891, (Opinions 1891, page 43). The Act of April 16, 1856, P. L. 365, makes a limitation as to this privilege; namely, that "the quantity included in any one warrant shall not exceed one hundred acres."

The general policy of the Commonwealth was declared in the Acts of 1897, March 23, 1905, P. L. 67 and the Act of May 3, 1909, P. L. 413, to be to prohibit the granting of warrants or other office rights in the beds of navigable rivers. Section 3 of the Act of May 3, 1909, is in these words:

"That on and after the passage of this act, there shall be no warrants or other office rights granted in any of the counties of the Commonwealth for lands in the beds of navigable rivers, or in beds of streams which are by law declared public highways."

Sections 5 and 6 apply to pending cases, and provide as follows:

"This act shall not be construed to affect any pre-emption rights which may have been acquired under existing laws, or the right of any person who may have an application for vacant land pending with the Secretary of Internal Affairs, of the date of the approval of this act."

"That the Secretary of Internal Affairs is hereby authorized and empowered to accept any and all surveys, regularly made and returned to the Department of Internal Affairs, in pursuance of any warrant, location, actual

> settlement, or order of survey, without limitation as to the quantity of excess or surplus over the amount specified in the warrant or application: Provided, That the purchase money and interest on such excess be paid into the State Treasury at the rate stipulated in the warrant, or as otherwise required by law, prior to the acceptance of the return of survey and issuance of a patent thereon: And provided further, That no acceptance of a return of survey shall, in any case, prejudice or affect the right or title of any other person in or to such excess or surplus land by virtue of a prior warrant, location, actual settlement, or order of survey thereon."

The facts in the case before us are that a lien was entered on the Lien Docket of Allegheny County for the unpaid purchase money, but the purchase money has never been paid, and no patent has ever been issued.

The query you make is whether at this late day the warrantee can demand a patent under the warrant and survey made in 1864, fifty-seven years ago.

The Supreme Court, opinion by Mr. Justice Trunkey (page 576 of opinion), thus defined the rights of a warrantee under the Act of April 11, 1848.

> "The Act of April 11th, 1848, provided for application, survey and grant of a quantity not exceeding one hundred acres of the bed of any navigable river, beginning at a point designated in the application, at low water mark on the bank of said river and pursuing the course of said river at low water mark to a designated point, thence at right angles across said river to low water mark, thence along the shore at low water mark to a point opposite the place of beginning. A warrantee under this Act has the 'right to dig and mine for iron, coal, limestone, sand and gravel, fire clay and other minerals,' but he takes no title to the soil or sand or anything in the bed of the river. His grant is confined within the limits of low water mark, and this recognizes the principle that a grant of land by the Commonwealth, bounded on one side by a large navigable river, vests in the grantee the entire land to the line of low water mark."
> *Pennsylvania Coal Co. v. Winchester, 109 Pa. 572.*

In this passage it will be noted that there are *three* things to be secured by the warrantee before his title is perfected, namely, a warrant, a survey, and a grant or patent. The patent is in effect a deed from the Commonwealth, and until it is granted, the warrantee has but an incomplete title. In an earlier case, *Brandt v. McKeever 18 Pa. 70*, the Supreme Court held that a grant under this Act of 1848 was only a license to mine, and that the property in the minerals did not pass until the minerals were taken and appropriated.

In the case before us, the warrantee has obtained two of the three things necessary, but has not secured his patent nor has he paid the purchase money. The Act of 1848 in Section 3 says that the warrantee, his heirs or assigns, shall at any time within *ten years* from the date of the warrant, on payment to the Commonwealth of the purchase money, receive a patent. In this case, the warrantee has waited fifty-seven years before asking for the patent, and in our opinion has been guilty of such laches that both under the ten years limitation in Section 3 of the Act of 1848, and under the general principles of the law, the Commonwealth had a right to consider that he and his assigns had abandoned their claim, and no longer laid claim to the minerals for which the warrant was issued.

This conclusion is strengthened by reference to an opinion of Attorney General Hensel (see Opinions 1891, page 18) in which he held, even in a case where the prior warrantee had paid the purchase money, but had been negligent in pursuing his rights, that the Commonwealth had a right to consider he had abandoned his claim, and to issue a warrant to another applicant. In this opinion, Mr. Hensel said:

> "It is a principle often announced in the decisions of the supreme court, and may be considered as the settled law of the commonwealth, that he who obtains a warrant for the purpose of locating land thereunder, must follow up the requisites necessary to put the title out of the commonwealth with due diligence, and it is the duty of the holder of a warrant, descriptive or indescriptive, to have his warrant with survey returned to the office of the Secretary of Internal Affairs within a reasonable time. This is essential in order that the commonwealth may have precise knowledge of the land that has been actually appropriated to it, and be paid for any surplus that has been surveyed into it. McGowan *v.* Ahl, 53 Pa. St. 84. The survey must be returned within a period that has been fixed, not to exceed seven years. Chambers *v.* Mifflin, 1 Penna. R. 78; Star *v.* Bradford, 2 id. 384; Stranch *v.* Shoemaker, 1 W. and S. 166; Wilhelm *v.* Shoop, 6 Barr. 21.
>
> "The doctrine established by the courts in considering the question of the relation that a warrantee bears to the commonwealth is, that whilst a duty is imposed upon a warrantee to proceed expeditiously and within a reasonable time to have a survey made and his rights definitely ascertained and fixed by patent, any indulgence shown by the commonwealth is a matter of grace as against one who is careless and negligent of his rights."

In accordance with these decisions, you are therefore advised that The West Penn Power Company, a corporation having allowed a period of fifty-seven years to go by, since a warrant was issued to the applicant under whom it claims, under the Act of April 11, 1848, P. L. 533, and

never having paid the purchase money to the Commonwealth, is guilty of laches as well as of failure to comply with the statutory requirement and is not now entitled to a patent for the mineral rights under the one hundred acres of the bed of the Allegheny River, which was surveyed under said warrant.

Yours respectfully,

WILLIAM I. SWOOPE,
Deputy Attorney General.

DEPARTMENT OF INTERNAL AFFAIRS.

Authority to have printed by some person other than the State Printer a book containing Industrial Statistics and Information.

Acts of July 23, 1919, P. L. 1128, Section 2, and April 20, 1921, P. L. 193, Section 3.

The Superintendent of Public Printing and Binding, upon proper request from the Department, is required to print the annual report on Statistics and Information compiled by the Bureau of Statistics and Information under the Act of April 20, 1921.

Office of the Attorney General,
Harrisburg, Pa., December 6, 1921.

Honorable James F. Woodward, Secretary of Internal Affairs, Harrisburg, Pa.

Sir: Your verbal request for information from this Department as to whether or not you have authority to have printed by some person other than the State Printer a book containing Industrial Statistics and Information, has been considered.

The publication and distribution of the book which you have in mind is not only authorized but directed by Section 3 of Act of April 20, 1921, P. L. 193, a part of which is as follows:

> "* * * The Secretary of Internal Affairs shall have a complete, summarized, and systematized report of the statistics and information collected and compiled by the bureau published annually, and shall otherwise provide for making such information available for the use and benefit of the public as he may find necessary."

The law governing your right to have such printing done by persons other than the regular contractor is contained in Section 2 of the Act of July 23, 1919, P. L. 1128, as follows:

> "It shall be unlawful for any officer of the State Government, or for any legislative committee, or for any commission or commissioner authorized by law, to have

> any printing done at the expense of the Commonwealth except by the contractor, unless the Superintendent of Public Printing and Binding is required to order printing done elsewhere because of the inability of the contractor to do the work, or it is necessary in order to expedite the printing, for the Superintendent of Public Printing and Binding to authorize the contractor to have the printing done elsewhere."

It seems plain, therefore, that the report which you desire to publish is directly authorized by law and that the Superintendent of Public Printing and Binding is required to have it printed.

You are advised that the Superintendent of Public Printing and Binding upon a proper request from you is required to have printed your annual report on Statistics and Information compiled by the Bureau of Statistics and Information under Act of April 20, 1921, and if he finds the regular contractor unable to do the work he can proceed to have it done elsewhere.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

OPINIONS TO THE DEPARTMENT OF INTERNAL AFFAIRS.

For the Year 1922.

PENNSYLVANIA STATE PARK AND HARBOR COMMISSION OF ERIE.

Authority to acquire land by condemnation proceedings—Act of May 27, 1921, P. L. 1180, Sections 9 and 11.

The State Park and Harbor Commission of Erie may acquire lands for park purposes by gift or by purchase. There is no provision in law for such acquirement by proceedings under the right of eminent domain.

Office of the Attorney General,
Harrisburg, Pa., June 13, 1922.

Mr. James H. Craig, Deputy Secretary of Internal Affairs, Harrisburg, Pa.

Sir: I have your verbal request for an opinion from this Department as to whether or not the Pennsylvania State Park and Harbor Commission of Erie has the power to acquire land for an approach to the peninsula by condemnation proceedings.

The Act of May 27, 1921, P. L. 1180, creating the Pennsylvania State Park and Harbor Commission of Erie, provides three ways by which the property to be included in the Park shall be acquired. In Section 9 it states that the Commonwealth of Pennsylvania dedicates to the use of the public for park purposes the land described in the said Section. In Section 11 it provides as follows:

> "The commission is also authorized to accept gifts of lands, buildings, money, or other articles of whatever kind or description, to be used in the improvement of said park and harbor, and to acquire lands by purchase as may be necessary. No such purchase to be made, however, except with the approval of the Governor."

Under Section 11, therefore, lands for park purposes can be acquired in two ways, by gift or by purchase, the latter subject to the approval of the Governor. There is no provision in this Act of Assembly providing for condemnation proceedings or the acquiring of lands by proceedings under right of eminent domain. As these Acts conferring

statutory powers must be strictly construed, you are advised that as the Act does not authorize the Pennsylvania State Park and Harbor Commission of Erie to acquire lands by condemnation proceedings, such proceedings cannot be instituted by the Commission.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

DEPARTMENT OF INTERNAL AFFAIRS.

Payment of war tax on an automobile purchased by the Department for its official use.

The Federal Government, under Section 900 of the Revenue Act of 1918, has power to levy the "war tax" against the manufacturer of an automobile, collectible upon the sales price when sold, to whomsoever, it is sold.

The Federal Government is without power to levy a "war tax" directly against a State. A manufacturer may save himself from loss in his contract with the purchaser by fixing the sales price at such figure as will give him a reasonable profit over and above his expenses, including the tax, even though the automobile be sold to the State. The manufacturer having refunded to the State the amount of war tax included in the sale price, should be reimbursed.

Office of the Attorney General,
Harrisburg, Pa., December 27, 1922.

Honorable James F. Woodward, Secretary of Internal Affairs, Harrisburg, Pa.

Sir: In reply to advice sought as to legality of payment by your Department of claim of The Winton Company, manufacturers of motor cars, of Cleveland, Ohio, of the sum of $151.75, war tax on Winton Automobile, Model 24, Motor No. 28354, purchased on October 11, 1919, by the Commonwealth for use in its business, through your Department, I beg to advise:

The law seems to have been already authoritatively declared by this Department that the Commonwealth is not liable for Federal tax (war revenue tax) on the price of an automobile truck purchased for one of its Departments. (See Opinion of Daugherty, Deputy Attorney General, delivered November 27, 1917, 65 Pittsburgh Law Journal 761: 20 Dauphin County Reports 327).

The syllabus of the above opinion is as follows:

> "The Commonwealth of Pennsylvania is not liable for Federal tax on the price of an automobile truck purchased for one of its departments."

This opinion by Mr. Daugherty was based upon authorities of the Federal Courts holding that the Federal Government is without authority to tax the means, agencies and instrumentalities of a State.

Other opinions by the Department in line with the principle contained in the ruling of Mr. Daugherty are opinions by Hargest, Second Deputy Attorney General, delivered December 7, 1914, reported in 43 Pa. C. C. Rep., p. 285, and Bell, Attorney General (December 14, 1914) 18 Dauphin 26.

In the case of *Buffington v. Day, 11 Wal. 113 (1870), (20 L. Ed. 122)*, the Court, in passing on the question whether an Act of Congress could so operate as to tax the salary of a State Judge, held that it could not so operate, and, in a very lucid opinion delivered at December Term, 1870, by Mr. Justice Nelson, said, in part:

> "The general government, and the states, although both exist within the same territorial limits, are separable and distinct sovereignties, acting separately and independently of each other, within their respective spheres, * * *
>
> "* * * Such being the separate and independent condition of the states in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired; should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. * * *
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> * * * * * * * * * * *
>
> "* * * And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are necessarily, and, for the sake of self-preservation, exempt from taxation by the states, why are not those of the states depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of

> self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. * * *
>
> "* * *'the power to tax involves the power to destroy'."

To the same effect is the decision of the Supreme Court of the United States in the case of *Pollock v. The Farmers Loan & Trust Co., 157 U. S. 429*, decided in 1894, as well as rule quoted by *Judge Cooley in his work on Constitutional Limitations, p. 681 et seq.*

So that if the claim presented by The Winton Company is to be considered only as a claim against the Commonwealth for "war tax" levied on an automobile, the legality of payment by the Commonwealth must be denied, on the ground that the Federal Government is without power to levy such tax against a State.

But this claim seems to be presented from a somewhat different angle. The war tax is not levied by the Federal Government against the State, nor is the State called upon by the Act to pay the war tax. The tax is not upon the automobile. It is imposed by the Act upon the *manufacturer*, and, under Article 10 of Regulation 47, as revised in December, 1920 (and in 1921 substantially the same), relating to the excise taxes on sales by the manufacturer under Section 900 of the Revenue Act of 1918 (the Act in operation at the time of the sale), it is specifically ruled that—

> "The tax applies to articles enumerated in Section 900 etc. (automobiles of the character of the purchase in this case being included) * * * When sold * * * to a state or political subdivision thereof, even though they are to be paid for entirely out of public moneys and are to be used in carrying on of governmental operations."

It seems to us there can be no doubt about the government having power to levy the war tax against the manufacturer of an automobile collectible upon the sales price when sold, no matter to whom he sells it.

The question then arises, how is the manufacturer to save himself from loss? The practical and logical answer would seem to be, by his contract with the purchaser. There could be no valid legal objection that we recall to a manufacturer who is required to pay a war tax on all his automobiles fixing his sales price at such figure as will give him a reasonable profit over and above his expenses, including the tax, even though it be sold to a State.

What was the contract price which the State agreed to pay The Winton Company? Was it a sum total equal to the amount they have already received plus the amount of the war tax? If so, why is their claim not well founded?

Would the fact that the amount of tax paid by the manufacturer increases the price to the State *pro tanto* be the same as a tax against the State? We think not. The tax was levied upon the manufacturer. He builds the car. He pays a tax when he makes the sale.

In the opinion hereinbefore referred to of *Deputy Attorney General Daugherty, 20 Dauphin 327, (p. 330)*, we find the following:

> "While the Commonwealth might agree to assume the payment of such a tax (that is, we take it, in the contract of purchase), I find no evidence of such an agreement, every inference from your correspondence and the company's invoice is to the contrary."

In that instance Deputy Attorney General Daugherty decided the Commonwealth was not, therefore, liable. If the same fact be true in this case, then the same ruling would apply.

But we find the facts in that respect vary in the two cases. In that the company quoted a price on a motor truck of $1,875.00. The truck was shipped on October 15th, and on the day of its receipt the company directed a letter to the Commissioner of Fisheries (for whose Department the truck was purchased) stating that "it would be necessary for it (the automobile company) to collect three per cent. war revenue tax, and further stating as follows:

> "We are, therefore, enclosing you our invoice for this amount, which will be $56.25, and would like to have you add the same to the amount of your bill."

That, it will be seen, was a plain case where a price was quoted, and after delivery to the purchaser, the manufacturer begs the buyer, to pay an additional sum of $56.25 and add same to the amount of the purchase price.

If we properly gather the facts from the case in hand (we have information only from the correspondence and bills), the automobile herein referred to was purchased on the 11th of October, 1919, but we find attached to the papers an invoice or bill dated October 4, 1919, which evidently submitted a total price or figure to be charged for the automobile of $4,924.43, an amount which included said war tax. Further, there was a receipt bearing same date, filled out in blank for said amount, ready to be signed upon acceptance and payment of the price. Moreover, said price was paid by the Department to The Winton Company, but, on the supposition that that part of the price charged equal to the tax was a war tax levied on a car sold to the Department of Internal Affairs to be used for work in said Department, and was therefore a charge from the payment of which, because of that fact, the State, and therefore the manufacturer, would be exempt, a certificate setting forth that fact was made out by the Secretary of Internal Affairs, upon which

the manufacturer, The Winton Company, refunded to the State said amount now claimed. Later, learning that said war tax was collectible by the Federal Government, not from the State (because of said rule), but from the manufacturer, notwithstanding the rule, the question is, whether the manufacturer shall be reimbursed for such amount.

Under the facts and circumstances of this particular case, we think the manufacturer should be paid, and therefore advise payment to said The Winton Company, of said claim.

Very truly yours,

PAUL J. SHERWOOD,
Deputy Attorney General.

OPINIONS TO COMMISSIONER OF FISHERIES.

OPINIONS TO COMMISSIONER OF FISHERIES.

For the Year 1921.

IN RE JUVENILES.

Fines——Commonwealth——Collection——Order of Court——Acts of April 23, 1903, P. L. 274, and of June 9, 1911, P. L. 836.

In a prosecution under the Juvenile Court Act of April 23, 1903, P. L. 274, where the offender is under 16 years of age unless the Court has made an order in regard to the fine, there is no way by which the Commonwealth can proceed to collect the fine imposed.

Office of the Attorney General,
Harrisburg, Pa., April 12, 1921.

Honorable N. R. Buller, Commissioner of Fisheries, Harrisburg, Pa.

Sir: I received your communication of the 5th instant asking for an opinion from this Department as to whether or not, when the court has paroled children under sixteen years of age under the Juvenile Court Act of 1903, there is any way for the Commonwealth to collect the fine imposed by the Magistrate.

Attorney General Carson, in an opinion under date of September 23, 1903, reported in *28 Penna. County Reports, page 481*, held that children under the age of sixteen years are subject to the criminal law of the State and can be arrested and committed for offenses against the Game or Fish Laws. The Commonwealth's officers are at liberty to pursue the ordinary course of making an arrest, no matter what the age of the offender, provided the evidence is such as to satisfy the officer that it is his duty to act. It is then the duty of the magistrate to commit the child, and to set the machinery of the court in motion by a proper certificate under Section 2, Clause 2, of the Act of April 23, 1903, P. L.274, known as the Juvenile Court Act. The burden will then be thrown upon the court, whose action is regulated by the Statute.

Under the Act of *June 9, 1911, P. L. 836*, it is provided in Section 1 as follows:

> "That the judges of the juvenile courts of the several counties of this Commonwealth shall have power, upon the disposition of any case heard or tried therein, to make an order disposing of the question of the payment of the costs, including fees of magistrates, constables, clerks of

> the courts, sheriffs and witnesses; and may impose them on the county or on the complainant, if, after hearing it be found that the complaint was made without proper cause, or upon the parent or parents, or guardian, or custodian of the child, if, after hearing it be found that they were at fault, and are of ability to pay; but all such costs shall, after hearing and order in the case, be immediately chargeable to and paid by the proper county; Provided, That the county shall be liable only for the costs of such witnesses as the probation officer, general or special, shall certify were subpoenaed by his order, and were in attendance and necessary to the trial of the case, or such witnesses as the court shall certify were in attendance and necessary."

You will note that there is nothing contained in this Act as to the question of fines in the case of juvenile offenders. It, therefore, follows that unless the court in deciding the case makes some provision by which the parent agrees or the guardian of the child, if of ability, is required to pay the fine, there is no way of collecting the fine from the defendant when the defendant is under sixteen years of age.

You are, therefore, specifically advised in this case, that unless the court has made an order in regard to the fine, there is no way by which the Commonwealth can proceed to collect the same.

Yours very truly,

WILLIAM I. SWOOPE,
Deputy Attorney General.

IN RE FISHING.

Licenses——Aliens—— Non-Residents——Coming from other States——Acts of 1919 and 1915.

An alien cannot be granted a license to fish in Pennsylvania under the act of July 8, 1919, P. L. 778, as that act defines a "person" to be "citizens of the United States not citizens of Pennsylvania."

An unnaturalized foreigner, who has been in Pennsylvania less than ten consecutive days, cannot be prosecuted for fishing under either the act of July 8, 1919, P. L. 778 or the act of April 21, 1915, P. L. 160, however, an alien coming from another State would be subject to all the various provisions of the Fish laws.

Office of the Attorney General,
Harrisburg, Pa., May 24, 1921.

Honorable N. R. Buller, Commissioner of Fisheries, Harrisburg, Pa.

Sir: Your communication of the 5th inst. duly received. You request an opinion from this Department as to two questions:

First: Whether or not the Act of July 8, 1919, P. L. 778, known as the "Non-Resident Fisherman's License Act," will allow non-resident aliens to fish in this State without a license?

Second: Whether non-resident aliens can be prosecuted for fishing in this State under the Act of April 21, 1915, P. L. 160, prohibiting aliens from fishing in the waters of Pennsylvania?

Answering your first question, would say that the Act of July 8, 1919, P. L. 778, in Section 1 defines the word "person," as used in this Act, to be "citizens of the United States not citizens of Pennsylvania, without regard to age." And in Section 3 provides that "no person, except as hereinafter provided, shall angle or fish at any time in any of the waters of this Commonwealth or in the waters abounding or adjacent thereto without having first secured a license as hereinafter provided."

It is plain, therefore, that this Act limits the privilege of taking out non-resident fisherman's licenses to citizens of the United States, and an unnaturalized foreigner, an alien, is not a citizen of the United States, and, therefore, cannot avail himself of the provisions of this Act.

In reply to your second question, the Act of April 21, 1915, P. L. 160, states that "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," and in Section 2 defines "resident," as used in this Act, to be "any unnaturalized foreign-born person who shall reside or live within the boundaries of the Commonwealth of Pennsylvania for ten consecutive days, shall be considered a resident, and shall be liable to the penalties imposed for violation of the provisions of this Act."

This Act, therefore, applies only to unnaturalized foreign-born persons who have been residents of this State for ten consecutive days. An unnaturalized foreign-born person, who has been here less than ten consecutive days, could not be prosecuted under this Act.

However, an alien coming from another State would be subject to all the various provisions of the Fish Laws, as to seasons for fishing, prohibiting fishing on Sunday, and prohibiting certain methods of fishing. But specifically answering your two questions, an unnaturalized foreigner, who has been in this State less than ten consecutive days, could not be prosecuted under either of the two Acts you inquire about.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

DEPARTMENT OF FISHERIES.

Status of "Resident Fish License Fund."
Acts of April 17, 1913, P. L. 85, Section 12, and May 16, 1921, P. L. 559, Section 18.

The "Resident Fish License Fund," created under the provisions of the Act of May 16, 1921, is a continuing fund to the amount limited in Section 18 of said Act. The unexpended balance remaining at the close of the fiscal year will not revert to the general fund in the State Treasury, but will continue to be held for the use of the Department of Fisheries for the purposes specified in the Act.

Office of the Attorney General,
Harrisburg, Pa., October 26, 1921.

Honorable N. R. Buller, Commissioner of Fisheries, Harrisburg, Pa.

Sir: Your verbal request for an opinion from this Department as to whether or not the "Resident Fish License Fund," created by Section 18 of the Act of May 16, 1921 P. L. 559 reverts to the general funds of the State at the end of the fiscal year, or is a continuing fund for the use of the Department of Fisheries, was received this morning.

The portion of Section 18 of the Act of May 16, 1921, which concerns your questions is in these words:

> "All license fees, fines, and penalties collected under the provisions of this act, and paid into the State Treasury, not in excess of four hundred thousand dollars ($400,000) in any one year, shall be kept separate and apart in a fund known as the 'Resident Fish License Fund,' and shall be used solely under the direction of the Department of Fisheries for the purpose of the payment of the salaries * * *.
>
> "All moneys in such separate fund from time to time, not in excess of four hundred thousand dollars ($400,000) in any one year, are hereby specifically appropriated to the Department of Fisheries, and may be expended for the purposes hereinbefore enumerated. The Auditor General shall, upon requisition from time to time of the Commissioner of Fisheries, draw his warrant on the State Treasurer for the amount specified in such requisition, not exceeding, however, the amount in such fund at the time of making such requisition. All moneys collected under the provisions of this act and not payable into the resident fish license fund, shall be paid into the general fund of the State Treasury."

The Supreme Court in *Commonwealth v. Powell 249 Pa. 144*, held a similar Act as to a special fund for the use of the Highway Department constitutional, and in the opinion by Mr. Justice Potter said, inter alia:

> "* * * It merely provides that a certain fund, over which these officers had no previous control, shall be paid into the state treasury 'for safe keeping,' and kept there as a separate fund. It also prescribes the manner in which it is to be withdrawn from the treasury. * * * In the case at bar, the act fixes the maximum, beyond which the payments cannot go, that being the total amount of the moneys paid into the state treasury under its provisions. The auditor general is expressly forbidden to draw his warrant in payment of any requisition which exceeds the amount in the 'separate fund' at the time it is made. The statute does not provide that the money derived from registration and license fees shall be paid into the state treasury generally, so as to become part of the general revenues of the Commonwealth. The state treasury is merely made a depository for such fees. They are to be paid into it 'for safe keeping' and are to be 'placed in a separate fund' available for the use of the State Highway Department. The act then expressly appropriates or dedicates the fund to be thus created to the construction, maintenance, improvement and repair of the highways. **When a fund is thus created and dedicated to a particular use by an act of assembly, which provides for its safe keeping and prescribes how it shall be made available, no further legislation is needed to make the act effective. Whether it be called an appropriation, or a dedication of a particular fund, makes no essential difference, because the fund being set apart for the specified use must be so held and paid out in the manner prescribed as long as the act which provides for its creation remains in force."

In an opinion to the Game Commission under date of February 6, 1913, on the Act of April 17, 1913, P. L. 85 and the special fund created by Section 12 of that Act, it was said:

"The Board of Game Commissioners comes under the third class; i. e., no funds are appropriated to the work and activities of your Commission except the income from hunters' licenses, fines and penalties and other revenue raised through the activities of your Board. The Act of April 17, 1913, P. L. 85, in Section 12, provides that all license fees, fines and penalties collected under the provisions of the Act shall be paid to the State Treasurer, 'who shall keep the moneys thus collected as a fund separate and apart solely for the purpose of wild bird and game protection, and for the purchase and propagation of game under the supervision of the Board of Game Commissioners of the Commonwealth of Pennsylvania and the payment of bounties under the provisions of the law.'

"By this Act the Legislature has adopted a definite policy, founded on good reasons, whereby the income produced from a certain class shall be devoted and restricted in its expenditure to the purposes and reasons for which the burden was imposed upon that class."

And in an opinion to the Governor under date of May 21, 1919, Attorney General Schaffer said:

"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."

As Section 18 of the Act of May 16, 1921, Act No. 257 is almost identical with the other Acts above cited creating funds for special purposes, the above quoted decisions apply to the questions you ask.

You are, therefore, advised that the "Resident Fish License Fund," created under the provisions of the Act of May 16, 1921, P. L. 559, is a continuing fund, to the amount limited in Section 18 of said Act, and the unexpended balance remaining at the close of the fiscal year will not revert to the general funds of the State Treasury, but will continue to be held for the use of the Department of Fisheries for the purposes specified in the Act.

Very truly yours,

WILLIAM I. SWOOPE,

Deputy Attorney General.

OPINION TO THE COMMISSIONER OF FISHERIES.

For the Year 1922.

IN RE FISHERMAN'S LICENSES.

County Treasurer—Compensation—Blanks and Record Books—Act of May 16, 1921.

Under the Resident Fisherman's Act of May 16, 1921, county treasurers are empowered to issued these licenses and collect from each applicant ten cents as compensation for their services. As the State furnishes all the balanks and records books, this is the only compensation county treasurers are entitled to collect.

Office of the Attorney General,
Harrisburg, Pa., January 4, 1922.

Honorable N. R. Buller, Commissioner of Fisheries, Harrisburg, Pa.

Sir: Your communication of December 29th last, received, asking for an opinion from this Department as to whether or not, under the Resident Fisherman's License Act of May 16th, 1921, Act No. 257, the County Treasurers, who are empowered to issue these licenses, and collect from each applicant ten cents for their own use for services rendered in issuing the same, can claim from the Department of Fisheries additional allowances for expenses and services, such as compensation for making up the weekly lists of licenses under Section 7, carbon paper, envelopes and postage.

A careful perusal of the Act of May 16th, 1921, convincingly shows that the intention of the Legislature was that only those things were to be supplied the County Treasurers which are expressly mentioned in the Act. Section 5 provides that the Commissioner of Fisheries shall furnish to the County Treasurers the blank forms on which the licenses shall be issued. Section 6 provides that every County Treasurer shall be furnished with a book in which to keep a record of the licenses issued. Section 7 provides that blanks shall be furnished every County Treasurer on which to make his weekly report to the Commissioner of Fisheries. Section 8 provides that forms shall be furnished the County Treasurer to report to the State Treasurer and the Commissioner of Fisheries, the license fees received by him under this Act. Section 18 of this Act enumerates the purposes for which the said license fees may be expended, and does not provide that any of the fund may be expended for the expenses incurred by the County Treasurers in making their reports.

It is a principle of the construction of statutes that "when a statute requires the performance of a service, it implies no provision that the person performing it shall be remunerated."

Endlich on the Interpretation of Statutes, Section 422.

A public official takes his office *cum onere*, and must perform all the duties which the laws of the Commonwealth impose upon him. The Act of May 16, 1921, expressly provides the supplies which are to be furnished each County Treasurer under this Act, and the amount of compensation he is to receive for his services in issuing the licenses authorized in said Act. It follows, that no other allowance for either compensation or expenses can be made to him.

You are, therefore, advised that, when the Commissioner of Fisheries has furnished, to every County Treasurer at the expense of the Commonwealth, all the balanks and the record book mentioned in the Act, the Commonwealth is not liable for any of the other expenses of the County Treasurer in carrying out the provisions of the Resident Fisherman's License Act of 1921.

Yours respectfully,

WILLIAM I. SWOOPE,
Deputy Attorney General.

FISH.

Resident Fisherman's License to fish in waters bounding this Commonwealth—Act of May 16, 1921, P. L. 559.

No citizen can fish in that portion of the Delaware River which is included within the boundary of Pennsylvania without obtaining a Resident Fisherman's License in the manner provided by the Act.

Office of the Attorney General,
Harrisburg, Pa., October 3, 1922.

Honorable N. R. Buller, Commissioner of Fisheries, Harrisburg, Pa.

Sir: In reply to your oral request for an opinion from this Department as to whether or not citizens require a license to fish in the Delaware River, would say that the third section of the Resident Fisherman's License Act of May 16, 1921, P. L. 559, provides:

> "No person, except as hereinafter provided, shall angle or fish, at any time, in any of the waters of this Commonwealth, or in the waters bounding or adjacent thereto, without having first secured a license as hereinafter provided."

This Act expressly states that it applies to the boundary waters of the State of Pennsylvania, one of which is the Delaware River. It has been held by this Department under date of January 16, 1914, in an opinion rendered to the Game Commission and reported in *42 C. C. Rep. at page 341*, that to hunt game on the Delaware River requires a resident hunter's license issued by the public authorities of this State, and it gives the holder a right to hunt only to the boundary line between the States of Pennsylvania and New Jersey. This opinion also holds that while there is an agreement between the States of Pennsylvania and New Jersey that the River Delaware is and should continue to be and remain a common highway, the right of hunting is not included in this right of way, and therefore, the State of Pennsylvania has jurisdiction over the hunting on this river to the boundary line between the two States.

You are, therefore, advised that no citizen can fish in that portion of the Delaware River which is included within the boundary of Pennsylvania without obtaining a Resident Fisherman's License in the manner provided by law.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

OPINIONS TO DEPARTMENT OF PUBLIC INSTRUCTION.

OPINIONS TO DEPARTMENT OF PUBLIC INSTRUCTION.

For the Year 1921.

IN RE SCHOOL COSTS.

Transportation——Consolidated School——Commonwealth Funds——Act of June 18, 1919, P. L. 498.

The Commonwealth may reimburse a school district for part of its transportation costs to a school which was consolidated or made up of several other schools in the year 1903, provided such consolidated school is an approved local consolidated school, as defined in Section 4 of the Act of June 18, 1919, P. L. 498.

Office of the Attorney General,
Harrisburg, Pa., January 4, 1921.

Honorable Sterling G. McNees, Assistant to the Superintendent, Department of Public Instruction, Harrisburg, Pa.

Sir: You have asked for an opinion as to whether or not the State may reimburse a school district for part of its transportation costs to a school which was consolidated or made up of several other schools in 1903.

The Act approved the eighteenth day of June, A. D. 1919, P. L. 498, defines a consolidated school to be—

> "A public elementary school formed by uniting two or more public elementary schools which prior to such union were maintained in separate buildings, and which after said union is housed in one school plant and taught by two or more teachers."

Section 4 of said Act provides:

> "Consolidated or joint consolidated schools shall, so long as they are approved by the State Board of Education as to organization, control, location, equipment, courses of study, qualifications of teachers, methods of instruction, condition of admission, expenditures of money, methods and means of transportation and the contracts providing therefor, constitute approved local or joint consolidated schools. School districts maintaining such approved local or joint consolidated school shall receive reimbursement as hereinafter provided.

> "The Commonwealth, in order to aid in the establishment and maintenance of approved local or joint consolidated schools, shall, as provided in this act, pay annually, from the treasury to school districts and unions of school districts maintaining such schools, an amount equal to one-half the sum which has been expended during the previous school year by such a school district or districts for transporting pupils of said consolidated schools to and from said consolidated schools: Provided, That said sum shall not include amounts paid for the purchase and repair of the vehicle or vehicles used for transporting these pupils: And provided further, That no one school district shall receive more than three thousand dollars ($3,000) in any one school year from the funds provided in this act. * * *"

In my opinion, the provisions of the Act hereinbefore quoted authorize the Commonwealth to reimburse a school district to an amount equal to one-half the sum such district expended during the previous school year for transporting pupils of a consolidated school made up of several other schools in 1903.

The Act sets forth that such reimbursement is to be made by the Commonwealth in order not only to aid in the establishment of such consolidated school, but also to aid in the maintenance of an approved consolidated school.

You are, therefore, advised that the Commonwealth may reimburse a school district for part of its transportation costs to a school which was consolidated or made up of several other schools in the year 1903, provided such consolidated school is an approved local consolidated school, as defined in Section 4 of the Act of 1919, hereinbefore quoted.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General.

IN RE MEDICAL STUDIES.

Preparatory Course——Accomplishment — Period of Time — Training——Act of 1921.

The pre-medical education required under Section 5, of Act No. 100, 1921, contemplates that each applicant shall have completed the amount of work specified in the standard four years' course and that it is not necessary that he shall have devoted four years to this accomplishment. The requirement is not one of time but rather of amount of accomplishment.

Office of the Attorney General,
Harrisburg, Pa., November 28, 1921.

Dr. Thomas E. Finegan, Superintendent of Public Instruction, Harrisburg, Pa.

Sir: I have your request for an interpretation of the part of Section 5 of Act No. 100, 1921 which reads as follows:

> "Applicants for licensure under the provisions of this act shall furnish * * * satisfactory proof that he or she * * * has had a general education of not less than a standard four years high school course, or its equivalent, and not less than one year of college credits in chemistry, biology, and physics, all of which have been received before admission to medical study."

Your particular question is whether or not a pupil who has completed the regular four year course in high school in three and one-half years should be required to attend a high school another one-half year making a total of four years.

We believe no such requirement is necessary. The law does not state that applicants for admission to the study of medicine must attend a high school for four years, but on the contrary, does state that such applicants must have a general education of not less than a standard four years high school course, "or its equivalent." This may, in our opinion, be obtained in various ways other than by attendance at a high school for four years. The requirement is not one of time but rather of amount of preparation.

The argument advanced against this position in the letter which you enclose, that if this period is reduced the medical training and hospital periods may be reduced is not sound. It does not follow because the high school requirement may be satisfied in less than four years, that the other requirements may also be curtailed. The law specifically provides that this shall not be done. However, when we consider the requirement as to medical education, we find that the law very definitely says that such applicant shall attend "four graded courses of not less than thirty-two weeks of not less than thirty-five hours each * * * in different calendar years" in some proper medical school. We need

hardly say to you that this requirement could not be changed by reducing the number of courses, weeks, hours or calendar years. The hospital experience required has also been definitely set forth as not less than a year and could not be shortened.

We are of the opinion, and you are herewith advised, that the premedical education required under Section 5 of the Act contemplates that each applicant shall have completed the amount of work specified in a standard four years course and that it is not necessary that he shall have devoted four years to this accomplishment.

Very truly yours,

STERLING G. McNEES,
Deputy Attorney General.

OPINION TO THE DEPARTMENT OF PUBLIC INSTRUCTION.

For the Year 1922.

DEPARTMENT OF PUBLIC INSTRUCTION.

State Normal Schools—Authority of Trustees to use surplus earnings derived from the board and lodging of students for the purpose of making extended repairs and additions to the buildings—State Council of Education—Power to authorize purchase of additional land for buildings from such surplus earnings—Acts of May 27, 1921, Appropriation Acts, page 41; 1911, P. L. 309, Section 2020; 1911, P. L. 309, Section 2019; 1911, P. L. 309, Section 2034, and 1919, P. L. 75.

The Trustees of State Normal Schools may not use the surplus earnings derived from board and lodging of students for the purpose of making extended repairs and additions to the buildings, but may use such surplus for necessary upkeep and repairs.

The State Council of Education may authorize the purchase of any real estate or any other property deemed necessary and proper for the use of State Normal Schools out of the surplus earnings of the institution.

Office of the Attorney General,
Harrisburg, Pa., November 14, 1922.

Dr. Thomas E. Finegan, Superintendent of Public Instruction, Harrisburg, Pa.

Sir: The Attorney General's Department has received your inquiry concerning the disposition of certain moneys now in the possession of some of the State Normal Schools.

The questions, as I understand them are:

1. May the Board of Trustees of a State Normal School which has received from students more money for Board and lodging than the actual cost thereof set up a depreciation account out of this balance and use it for the purpose of making extended repairs to the buildings, additions to the buildings and other similar purposes?

2. May the State Council of Education authorize the purchase of additional land or buildings out of such funds when such additional lands or buildings are necessary for the best interests of the Institutions?

The situation may be clarified by a general discussion involving both questions with separate conclusions drawn therefrom. The Normal Schools are now State owned Institutions receiving their principal support from State appropriations.

> "And provided further, That the sum of two million nine hundred and ninety-three thousand dollars ($2,993,000) is hereby set apart out of said amount for the several normal schools, recognized and accepted as such under the laws of this commonwealsh, for instructional, operating, and maintenance expenses of the several normal schools, to be paid on requisition of the Superintendent of Public Instruction:
>
> "And provided further, That out of the amount hereby appropriated, there shall be set apart the sum of five hundred thousand dollars ($500,000) for necessary additions, extensions, alterations, equipment, and repairs to the several State normal schools in the Commonwealth:
>
> "And provided further, That out of the amount hereby appropriated, there shall be set apart the sum of eight hundred twenty-five thousand dollars ($825,000) for the payment and liquidation of the mortgage indebtedness of the several State normal schools in the Commonwealth." *1921 Appropriation Acts, page 41.*

You will note that the first paragraph provides for "instructional, operating and maintenance expenses" and that the second paragraph provides for "necessary additions, extensions, alterations, equipment and repairs." The third paragraph has no application to the questions before us.

The Normal Schools of the State are now operated exclusively for the training of those who have agreed to teach in the Public Schools in the Commonwealth for not less than two (2) years. Many of these students secure boarding and room at the Institution, others secure part of their meals there and room at home or elsewhere. There may be some students who room at the Institution and secure their board elsewhere.

> "The tuition of all students at the State Normal Schools, who are not less than seventeen years of age, and who sign an agreement to teach in the public schools of this Commonwealth for not less than two years, and who are pursuing regular courses in pedagogy therein, shall be paid by the Commonwealth, and sufficient appropriations shall be made for this purpose * * *" *1911 P. L. 309, Section 2020.*

It has never undertaken to bear the cost of rooms or boarding and it would be manifestly unfair to do so, because the students could not all

benefit equally thereby. In order that these expenses may be met by the students themselves the Boards of Trustees of the Normal Schools have been given the authority to fix the cost of boarding.

> "The cost of boarding and tuition shall be fixed by the trustees of the several State Normal Schools, with the approval of the Superintendent of Public Instruction, but no difference in the charge for boarding and tuition shall be made in favor of any students pursuing similar studies." *1911 P. L. 309, Section 2019.*

It is our opinion that this authority includes the fixing of the cost of rooms, as well as the actual cost of meals.

> "The term 'board' includes the ordinary necessaries of life, and must be considered as being synonymous with the word 'entertainment,' in the act.'" *Scattergood v. Waterman, 2 Miles (Phila.) 323.*

The Century Dictionary and Cyclopedia says that "Board" is the "provision for a person's daily meals, or food and lodging, especially as furnished by agreement or for a price: applied also to the like provision for horses and other animals." Board without lodging is often distinguished either as "day-board or table-board." It defines a "boarder" as "one who gets his meals, or both meals and lodging in the house of another for a price agreed upon." "Boarding" is said by this authority to be "the practice of obtaining one's food, or both food and lodging, in the home of another for a stipulated charge." The "Boarding School" is one "which provides board for its pupils. a school at which the pupils are fed and lodged."

Other authorities have also construed the term "board or boarding" as "one who has food or diet or lodging in another's family for reward." *Ambler vs. Skinner, 30 New York Superior Court, 561.*

"Boarder. Ordinarily one who has food and lodging in another's house or family for a stipulated price." *8 C. J. 1131.*

"Boarding. The practice of obtaining one's food or both food and lodging in the home of another for a stipulated charge." *8 C. J. 1131.*

The various Boards of Trustees of the Normal Schools have, therefore, proceeded to fix the cost of boarding, including rooming costs, which charges have been approved by the Superintendent of Public Instruction. By careful and economical management some of the Institutions have been able to reduce the actual costs to them of furnishing board and rooms to students so that they have had a surplus at the end of the year.

It is the proper distribution of this surplus which now engages our attention. It may be regarded as earnings of the Institution. The Institution is authorized to conduct dormitories and dining rooms and

to charge for the services therein rendered. All of the income which they derive therefrom may be considered as earnings, and all of the income in excess of the cost of such services is net earnings.

The Legislature contemplated that there would be such earnings and made provision for their disposition:

> "Upon the payment of the purchase money to the stockholders of any such Normal School, properly executed deeds of conveyance for all of its real estate, together with all its other property, shall be delivered to the Commonwealth, and thereafter such State Normal School shall be owned, controlled, maintained, as a State institution; and the State Board of Education is hereby vested with full power and authority to purchase, in the name of the Commonwealth, for any such Normal School, *from the earnings thereof* and from moneys received from the lease, grant, sale, or conveyance, hereafter in this section authorized, or from moneys specifically appropriated therefor by the Commonwealth, any real estate or other property deemed necessary and proper for the use of any such Normal School; and to lease, grant, sell, and convey, by agreement, deed, or other proper instrument of writing, the real estate or other property of any such Normal School, or any portion thereof, when it appears that the same shall be no longer needed for the use thereof or that the interest of the Commonwealth or its citizens will be promoted thereby. The proceeds from any such lease, grant, sale, or conveyance, shall be paid direct to the State Treasurer, who shall hold such proceeds in a special fund, which fund shall be available to the State Board of Education to purchase land for the Normal School whose land or part thereof was leased, granted, sold, or conveyed, as hereinbefore provided, or for betterments of, or repairs to, the property thereof, as the State Board of Education may deem necessary. Such money shall be paid on warrants signed by the president of the State Board of Education, and itemized vouchers for all expenditures from such money shall be filed with the Auditor General." *1911 P. L. 309, Section 2034 as amended by 1919 P. L. 75.*

It appears from this section of the law that the State Council of Education may use the earnings which we have just defined for the purchase of any real estate or other property deemed necessary and proper for the use of any such Normal School. No provision is made for the expenditure of this fund by the State Council of Education for maintenance, depreciation, operation or other similar purposes. It would seem that if the State Council is to use this money it must be used for what are known as capital expenditures.

It will be noted that where there are proceeds derived from the lease, grant, sale or conveyance of any of the lands of a State Normal School,

the State Council may use such proceeds, not only for the purchase of additional land, but also, for betterments or repairs to the property. This provision seems to be intentionally omitted from the purposes for which earnings may be expended.

Our answer to the first question must be in the negative insofar as any such expenditures are in the nature of capital outlay and in the affirmative insofar as such expenditures are in the nature of upkeep, repairs, etc., which may be charged as a part of the cost of service rendered. Repapering of the dormitories could be done by the trustees and charged to a depreciation or replacement account, new carpet, painting, replacement of china or kitchen utensils are all a part of the cost of board and room service. An addition to a building could not be so classed. I understand that in your accounting system you have so classified these various items that it will not be difficult to know which ones may be paid for by the trustees under their duty to maintain the Institution.

Whatever part of the earnings which are net earnings may not be expended by the Board of Trustees. The money left after all the costs of board and dormitory are paid, including proper upkeep, are at the disposal of the State Council of Education.

Our answer to the second question therefore, is that the State Council of Education may authorize the purchase of any real estate or other property deemed necessary and proper for the use of the Normal School out of the earnings of the Institution.

Very truly yours,

STERLING G. McNEES,

Deputy Attorney General.

OPINIONS TO DEPARTMENT OF PUBLIC GROUNDS AND BUILDINGS.

OPINIONS TO DEPARTMENT OF PUBLIC GROUNDS AND BUILDINGS.

For the Year 1921,

PUBLIC GROUNDS AND BUILDINGS.

Automobile owned by the Commonwealth and used in the operation of the Homeopathic State Hospital at Allentown—Disposition of after recovery from thieves who had rendered it unfit for use—Act of May 14, 1915, P. L. 524, Secs. 3 and 5.

An automobile owned by the Commonwealth and used by one of its hospitals, which, when recovered, is found to have been damaged while in the hands of persons who stole it, falls within the purview of the Act of May 14, 1915, P. L. 524, and moneys from the State Insurance Fund created by the Act may be used to repair, restore or replace it. If the Board in its discretion finds that the automobile has been so damaged that its repair or restoration would be unprofitable or unwise they may replace it with another one of the same or similar character, and the damaged car may be delivered in part payment of the purchase of a new car to replace it.

Office of the Attorney General,
Harrisburg, Pa., June 30, 1921.

Honorable Samuel B. Rambo, Assistant Deputy Superintendent, Department of Public Grounds and Buildings, Harrisburg, Pa.

Sir: This Department is in receipt of your letter stating that an automobile owned by the Commonwealth and used in the operation of the Homeopathic State Hospital at Allentown was stolen and wrecked by the thieves. When recovered, it was in such condition that it would not have been profitable to repair it for use by the Hospital. It has some value which a dealer is willing to allow in the purchase of a new car of the same model and manufacture. You inquire: (1) Whether the damage sustained comes within the provisions of the Act of May 14, 1915, P. L. 524, creating an "Insurance Fund" for state property, and (2) Whether the remains of the wrecked car should be delivered to the Board of Public Grounds and Buildings to be used by them in part payment of the purchase price of a new car.

1. The Act of May 14, 1915, P. L. 524, created 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 * * * ."

Section 3 thereof provides:

> "The said fund hereby created shall be available for expenditure * * * for the rebuilding, restoration or replacement of buildings, structures, equipment or other property owned by the Commonwealth, and damaged or destroyed by fire or other casualty, and for no other purpose whatsoever."

Other provisions of the Act provide what procedure shall be followed to secure the replacement or restoration of property after loss.

In an opinion rendered to the State Highway Commissioner on October 4, 1916 (Official Opinions 1915-1916, p. 268), Deputy Attorney General Keller said:

> "The word 'casualty' is defined in The Century Dictionary as 'chance, or what happens by chance; accident; contingency. An unfortunate chance or accident.'
>
> "In McCarthy *vs.* New York and Erie R. R. Co., 30 Pa. 247, the word 'casualty' was said to be synonymous with 'accident' and 'misfortune.'
>
> "As commonly understood, however, 'theft' is not a casualty.
>
> "* * * The use of the words 'damaged or destroyed' by fire or other casualty, tends to confirm this view, for stolen property is not, strictly speaking, either damaged or destroyed. It may be recovered intact and uninjured.
>
> "I am of the opinion, therefore, upon consideration of the whole Act of 1915, that theft of an automobile is not such a casualty as was intended to be covered by the Act."

If the automobile concerning which you inquire had not been recovered at all, the loss, which in such case would have arisen solely from the theft, could not have been paid out of the fund created by the Act of 1915. But the car was recovered and was found to have been "damaged" by an "accident." The fact that the accident and the resulting damage occurred while the machine was in the possession of persons who had stolen it, is not material. I am of the opinion that it is "property damaged by casualty," within the meaning of that term as used in the Act of 1915.

2. Should the remains of the wrecked car be delivered to the Board of Public Grounds and Buildings to be used in part payment of the purchase price of a new car?

Section 5 of the Act of 1915 provides that when a loss occurs, the department or institution having custody or control of the property shall report to the Superintendent of Public Grounds and Buildings, who shall make an investigation and report to the Board of Public Grounds and Buildings, which may in its discretion authorize the rebuilding, restor-

ation or replacement of the property damaged or destroyed, "such rebuilding, restoration or replacement to be in substantial accord with the original character, use, and purpose of the property damaged or destroyed."

If, after report by the Superintendent, the Board does not deem it wise to repair the damaged car, it is specifically authorized to replace it with another of the same or similar character.

There is no express provision in the Act stating that property damaged by casualty shall be delivered to the Board of Public Grounds and Buildings in order that it may realize the salvage value. Such a provision, however, is to be implied from the nature and purpose of the Act. The "Insurance Fund" is to be used to restore the property of any department or institution to the same condition in which it was prior to the occurrence of a casualty. The portion of Section 5 quoted above restricts the use of the Fund to the restoration of property in substantial accord with its original character, and the Board, as agent of the Fund, is authorized to use its moneys for this purpose only. If, when a replacement is to be made, the damaged property remains in the possession of the institution which had custody of it at the time of the casualty, and that institution receives new property to replace it, the result is that the moneys of the Insurance Fund are used to add to the property of the institution to the extent of the salvage value of the damaged property. This, in my opinion, is contrary to the intent of the Act of 1915. The automobile in question should be held subject to the order of the Board, and if its greatest value will be realized by applying it in part payment of the purchase of a new car to replace it, it should be so disposed of.

I, therefore, advise you that:

1. An automobile owned by the Commonwealth and used by one of its hospitals, which, when recovered, is found to have been damaged by accident while in the hands of persons who stole it, is "property * * * damaged by * * * casualty" within the meaning of the Act of May 14, 1915, P. L. 524, and moneys from the State Insurance Fund created by that Act may be used to repair, restore or replace it.

2. If, after report by the Superintendent, the Board of Public Grounds and Buildings in its discretion finds that the automobile has been so damaged that its repair or restoration would be unprofitable or unwise, they may replace it with another of the same or similar character. The damaged car should be held subject to the order of the Board as agent of the Insurance Fund, and if its greatest value may be realized by delivering it in part payment of the purchase of a new car to replace it, it should be so disposed of.

Very truly yours,
GEO. ROSS HULL,
Deputy Attorney General.

OPINION TO DEPARTMENT OF PUBLIC GROUNDS AND BUILDINGS.

For the Year 1922.

INSURANCE.

Insurance Fund— Use in the preparation of a site for a new building replacing one destroyed by fire—Act of 1915, P. L. 524, Sections 1, 3 and 5.

The Superintendent of Public Grounds and Buildings may not legally expend moneys from the Insurance Fund created by the Act of 1915, for the grading or preparation of a site for a building destroyed by fire in order to make the site a fit one. The use of this Fund is limited strictly to the rebuilding, restoration or replacement of structures, buildings, equipment or other property owned by the Commonwealth.

Office of the Attorney General,
Harrisburg, Pa., November 28, 1922.

Honorable T. W. Templeton, Superintendent of Public Grounds and Buildings, Harrisburg, Pa.

Sir: This Department has received your communication concerning the use of moneys from the Insurance Fund for the preparation of a site for a new building replacing one destroyed by fire.

As I understand it, the immediate question is whether or not moneys from this Fund may be used for the purpose of grading and otherwise improving the land immediately adjacent to the proposed new building which you are erecting at the State Institution for Feeble-Minded of Eastern Pennsylvania at Pennhurst, Pennsylvania.

A fire having destroyed a large barn belonging to this Institution, the Board of Trustees made the proper report of the loss thereof to the Superintendent of Public Grounds and Buildings in order that the barn might be replaced from the Insurance Fund in accordance with the Act of 1915, P. L. 524. It appears that it was desirable to change the site of the building, and that in so doing a considerable amount of clearing and grading was required to prepare this site for the erection of the new barn. May the cost of the preparation of this site be met from the Insurance Fund?

We find that the law affecting this question reads as follows:

"Section 1. * * * That, for the purpose of creating a fund for the rebuilding, restoration, and replacement of any structures, buildings, equipment, or other property owned by the Commonwealth of Pennsylvania are hereby specifically dedicated, appropriated, and set apart, to constitute a fund separate and apart from all other funds of the Commonwealth, and to be known as the Insurance Fund, * * *."

* * * * * * * * * * *

"Section 3. The said fund hereby created shall be available for expenditure, in the manner hereinafter provided, for the rebuilding, restoration, or replacement of buildings, structures, equipment, or other property owned by the Commonwealth, and damaged or destroyed by fire or other casualty, and for no other purpose whatsoever. * * *

* * * * * * * * * * *

"Section 5. Whenever loss or damage by fire or other casualty shall occur to any structure, building, equipment, or other property owned by the Commonwealth of Pennsylvania, the department, board of trustees, overseers, commissioners, or other branch of the State government having control or custody thereof, shall make report of such loss or damage to the Superintendent of Public Grounds and Buildings; setting forth specifically the use and character of the structure, building, equipment, or other property damaged or destroyed, the original cost thereof, the estimated amount of the loss or damage, and cost of restoration, rebuilding, or replacement, and such other data and information as may be required by the said Superintendent of Public Grounds and Buildings, who shall make such examination and investigation as may be necessary and report the result thereof to the Board of Commissioners of Public Grounds and Buildings; whereupon the Board of Commissioners of Public Grounds and Buildings may, in its discretion, authorize the rebuilding, restoration, or replacement of the property damaged or destroyed; and, for that purpose, is hereby authorized to have plans and specifications prepared, and contracts executed, and to supervise the erection, construction, or replacement thereof, under the supervision of the Superintendent of Public Grounds and Buildings, or other duly authorized agent of the Board of Public Grounds and Buildings; such rebuilding, restoration, or replacement to be in substantial accord with the original character, use, and purpose of the property damaged or destroyed: Provided, That the provisions of this act shall not apply to armory buildings owned by the Commonwealth of Pennsylvania, and under the supervision of the Armory Board of the State of Pennsylvania."

You will notice that the use of this fund is limited strictly to the rebuilding, restoration, or replacement of structures, buildings, equipment or other property owned by the Commonwealth. The Act is so worded that where buildings are partially destroyed or damaged they may be restored without complete rebuilding. They may also be rebuilt out of materials remaining undamaged or they may be completely replaced by the use of entirely new materials.

It was intended in creating the Insurance Fund that it should offer the same protection for the property of the Commonwealth as would insurance policies formerly held in various companies. The Act provides that after the complete establishment of the Fund no insurance may be taken out on State property. A consideration of the uses of this Fund, as prescribed in the Act, leads us to the conclusion that they are analogous to the uses of the proceeds of the ordinary fire insurance policy. The purpose is to make whole the owners of the property destroyed. They are to be placed in the same position in which they were before the fire occurred. They should neither lose nor profit by such fire. It is not necessary to say that this can never be absolutely accomplished, but it should be your plan to approximate it as nearly as possible.

It would serve no good purpose to restrict such rebuilding absolutely to the site of the old building as it may be clear that a new site would be much more desirable. No change in the site of the building, however, should be allowed to be made at any additional charge upon the Insurance Fund. This Fund is liable only for the restoration of the building as it was prior to the fire. The cost of so restoring it should be definitely determined and should not be allowed to be materially increased by reason of any change in location. The new site proposed for the barn in the case under consideration was not damaged by fire, and it would not be proper to expend any sum of money from the Insurance Fund for its preparation to receive the new structure.

I am of the opinion, therefore, that you may not legally expend moneys from the Insurance Fund for the grading or preparation of a site for a building destroyed by fire in order to make the site a fit one or for other than such work as is absolutely essential in order to erect the building itself.

Very truly yours,

STERLING G. McNEES,
Deputy Attorney General.

OPINIONS TO THE DEPARTMENT OF STATE POLICE.

OPINION TO THE DEPARTMENT OF STATE POLICE.

(BUREAU OF FIRE PROTECTION)

For the Year 1921.

IN RE CONFESSIONS.

Criminal Law——Statement by Defendant——Duress——Voluntarily Made——Evidence at Trial.

Every member of the state police force appointed under the Act of June 3, 1919, P. L. 366, has the powers and duties provided by the Act of July 1, 1919, P. L. 710, as to the investigation of the origin or circumstances of fires and fire prevention.

Any confession made by a defendant under arrest for a criminal offense, if it is proved to the satisfaction of the court that the confession was made voluntarily, with a full knowledge of his rights, and without any duress exercised by the police officers, would be admissible at the trial.

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

Major C. M. Wilhelm, Chief, Bureau of Fire Protection, Department of State Police, Harrisburg, Pa.

Sir: You ask an opinion from this Department as to the following two questions:

1. Whether members of the State Police Force appointed under the provisions of Section 6, Act of June 3, 1919, P. L. 366, are within the meaning of "The Department of State Police or its Assistants," as used in Section 4 of the Act of July 1, 1919, P. L. 710.

2. Whether, under the circumstances, the said section of the Act of July 1, 1919, prohibits the use of confessions, obtained in the manner outlined, in criminal prosecutions against these defendants.

In reply to your first inquiry, as to whether the members of the State Police Force are constituent members of the "Department of State Police," the Act of June 3, 1919, P. L. 366, organizing the Department of State Police, states that the head of the Department shall be a superintendent, appointed by the Governor, and the Superintendent shall appoint the members of the State Police Force.

In construing this Act is must all be construed together to effectuate the intention of the Legislature. The Department of State Police by the very terms of the Act comprises all the officials therein mentioned; every one of them, from a private in the five troops of State Police up

to the Superintendent, is part and parcel of the Department, and included in subsequent Acts of Assembly when the words "Department of State Police" are used.

The Act of July 1, 1919, P. L. 710, relating to fires and fire prevention, imposes duties and confers powers upon the Department of State Police as a Department. While in the first section of the Act it authorizes the Superintendent of State Police to appoint fire chiefs and certain others as assistants to the Department, this does not affect the provisions of this Act as to the duties and powers conferred upon the Department of State Police as a whole, including, as I said above, all members of the force.

You are, therefore, advised that every member of the State Police Force has the powers and duties provided in this Act as to the investigation of the origin or circumstances of fires, etc.

Your second inquiry relates to the use in a criminal prosecution of confessions obtained from persons arrested by the State Police under the Act of July 1, 1919, P. L. 710.

Section 4 of said Act provides as follows:

> "* * *The Department of State Police or its assistants shall have the power to summon witnesses, and compel them to attend before them or either of them, and to testify in relation to any matter which is, by the provisions of this act, a subject of inquiry and investigation; and may require the production of any books, papers or documents deemed pertinent or necessary to the inquiry; and shall have the power to administer oaths and affirmations to any person appearing as a witness before them. Such examination may be public or private, as the officers conducting the investigation may determine.
>
> "No person shall be excused from attending before the said Department of State Police or its assistants when summoned so to attend; nor, when ordered so to do, shall he be excused from testifying or producing any books, papers or documents before such department, upon any investigation, proceeding, or inquiry instituted under the provisions of this act, upon the ground or for the reason that the testimony or the evidence, documentary or otherwise, required of him, may tend to convict him of a crime or subject him to a penalty or forfeiture; but no person shall be prosecuted, or subjected to a penalty or forfeiture, for or on account of any transaction, matter, or thing concerning which he may have been required so to testify or produce evidence, documentary or otherwise; and no testimony, so given or produced, shall be received against him upon any criminal investigation or proceedings. * * "

Such Acts of Assembly as this are only held constitutional under Article I, Section 9, of our Constitution, which provides:

> "In all criminal prosecutions the accused * * * cannot be compelled to give evidence against himself. * * *"

when they afford absolute immunity from future prosecutions for the offenses to which the question relates.

The celebrated case of *Counselman vs. Hitchcock, 142 U. S. 547*, settled this question. The Supreme Court of the United States said in this case:

> "The principle applies equally to any compulsory disclosures of his guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally for the purpose of establishing facts involved in an issue between other parties."

It was also held in this case that the privilege of the accused extends to all kinds of criminal hearings, and not only to those before a court and jury. This case was followed in Pennsylvania in construing Section 9 of Article I of our Constitution in *Commonwealth vs. Cameron, 229 Pa. 592*, wherein it was indicated that the privilege of "the accused" is not confined to the person on trial. It was held there that the accused might be convicted, by other evidence than his own, of bribery under Section 32 of Article III of our Constitution, although he had been compelled to testify upon the trial of other defendants.

In *Pennock vs. West, 43 Pa. C. C. 16*, Judge Ralston decided that the Act of May 9, 1913, P. L. 197, as to the examination of a judgment debtor, is not unconstitutional since the Act afford complete immunity to the defendant for anything he may say.

Under these decisions, therefore, this Act of July 1, 1919, P. L. 710, is constitutional and does not conflict with the privilege of the accused because it contains the provision that—

> "No person shall be prosecuted, or subjected to a penalty or forfeiture, for or on account of any transaction, matter, or thing concerning which he may have been required so to testify or produce evidence."

You state in your letter that a State policeman arrested certain persons on suspicion of felony, and the persons so arrested were taken to police headquarters and there examined, after being warned that any statement which they might make would be used against them in a criminal prosecution. The persons so examined were not examined under oath, neither were they required to testify or appear by reason of subpoena, but were under arrest. In the several cases voluntary confessions were secured and reduced to writing and signed by the defendants.

Whether or not the confessions mentioned in your letter are admissible as evidence against these defendants in a criminal prosecution depends wholly upon their voluntary character. Our Supreme Court in a recent case, *Commonwealth vs. Tenbroeck, 265 Pa. 251*, has decided that any statement of a defendant, if *voluntary*, can be used against him. The question of whether or not a confession is voluntary depends upon the circumstances of each particular case. It is a mixed question of law and fact to be decided by the Court.

> "The statement that a confession which has been extorted by threats or procured by promises is not voluntary, and hence is inadmissible as likely to be untrue, is not difficult to understand. But it is very difficult to ascertain what language used to the prisoner would, under the particular circumstances of each case, constitute such a threat or promise. * * *
>
> "* * * Thus, if there is an express promise that a confession will benefit the accused, or a threat, though somewhat vague and indefinite in character, the confession will be involuntary."
>
> *Underhill on Criminal Evidence, Section 128.*
>
> "The mere fact that the defendant was under arrest, or was in the charge of armed police officers when he made his confession, * * * will not make a confession involuntary. * * *
>
> "* * * The same rule applies to all statements made by the accused after his arrest to persons having him in custody, for, however strong the testimony of the police officials is that a confession was free and voluntary, a suspicion and a doubt of its voluntary character remain which persist until it shall be clearly shown that the accused was not threatened and that he was fully advised of his rights."
>
> *Underhill on Criminal Evidence, Section 129.*

Of course, if in the case you ask about the police officers were acting under the provisions of this Act of July 1, 1919, P. L. 710, nothing that the accused said would be admissible under Section 4, but if the accused in all the preliminary examination was fully informed of his his rights and explicitly told that he need not answer any questions unless he wished to do so, and it appears from all the circumstances of the case that he was not under duress, threat or fear, and that no promises were made to him, the confession would be admissible.

Specifically answering your question then, if it is proved to the satisfaction of the Court that the confessions made by the defendants in the cases you ask about were voluntary, made with a full knowledge of their rights, and without any duress exercised by the police officers, they would be admissible on the trial of these cases.

Very truly yours,

WILLIAM I. SWOOPE,

Deputy Attorney General.

OPINIONS TO THE DEPARTMENT OF STATE POLICE.

For the Year 1922.

GASOLINE STORAGE.

Statutes—Construction—"Buildings"—"Premises"—Acts of July 1, 1919, and May 11, 1921.

1. Under the Act of July 1, 1919, P. L. 710, as amended by the Act of May 11, 1921, P. L. 500, the Bureau of Fire Protection has jurisdiction not only over all "buildings" in which inflammable or explosive substances are stored, but over all "premises" in which said substances may be placed.

2. The word "premises," as applied to the occupancy of real property, embraces any definite portion of land and the building and appurtenant structures over which the owner or occupant has the right to, and does, exercise authority and control.

3. Particular phrases left doubtful by an act itself are to be construed as synonymous with, or analogous to, the same phrases used in other statutes upon the same subject in such connections or surroundings as define their meaning beyond question or point emphatically to a certain interpretation.

Office of the Attorney General,
Harrisburg, Pa., March 27, 1922.

Mr. Charles D. Wolfe, Bureau of Fire Protection, Department of State Police, Harrisburg, Pa.

Sir: I received your request for an opinion from this Department as to the validity of the "Regulations Governing the Saving, Using, Storage, Sale and Keeping of Gasoline," etc. recently issued by the Department of State Police under the Act of July 1, 1919, P. L. 710, and the amendment of May 11, 1921, P. L. 500.

The fourth clause 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, gunpowder, 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."

The first sentence of Section 3, as amended by the Act of May 11, 1921, P. L. 500, is in these words:

> "The Department of State Police or its assistants, upon the complaint of any person, or whenever it or they shall deem it necessary, shall inspect *the buildings and premises.*"

Further on in this section are the words—"the owner or occupant of such premises or building." In the second paragraph of this section in one place the words "occupant of the premises" are inserted, in another place "owner of the premises." At the end of Section 4 the words are "enter any building or premises within its or their jurisdiction."

It seems plain from the use in this Act of the words "building" and "premises" in its various clauses that the intention of the Legislature was to confer upon the Bureau of Fire Protection jurisdiction not only over all "buildings" in which inflammable or explosive substances are stored, but over all "premises" in which said substances may be placed.

This conclusion is in harmony with the rules laid down by the Courts in the construction of statutes.

> "The method is to ascertain the meaning of any particular phrase or provision in the light of every direction made upon the subject matter it refers to by the Legislature up to the time when the court is called upon to pronounce its judgment. It requires particular phrases, left doubtful by the act itself, to be construed as synonymous with, or analogous to, the same phrases used in other statutes upon the same subject in such connections or surroundings as define their meaning beyond question, or point emphatically to a certain interpretation. It requires gaps left in the act, not amounting to casue omissi, to be filled from the materials supplied by other statutes upon the same subject and in harmony with them. It requires words capable of several meanings, the choice among which is not determined by the use of words in a definite and unmistakable sense in one of the other statutes, to be so construed, if possible, as to preserve in force and effect, side by side with them, the words of earlier statutes, to the avoidance of an interpretation which would raise a repugnancy between the earlier and the later statute, fatal to the former. The effect is to preserve harmony and consistency in the entire body of the legislation upon a given subject matter."
>
> *Endlich on the Interpretation of Statutes, Section 63.*

This view is strengthened by the judicial definitions of the word "premises."

> "As applied to the occupancy of real property it embraces any definite portion of land and the building and appurtenant structures, over which the owner or occupant

> has the right and does exercise authority and control. Kunkel *v.* Abell, 64 H. E. 303, 304, 170 Ind. 305."
>
> *Words and Phrases, Second Series, Vol. 3, page 1144.*
>
> "The words 'building' and 'premises' are sometimes used interchangeably in prohibitive clauses of insurance policies. These words were so used in the clause of a policy prohibiting the keeping of explosives. Fenefick *v.* Norwich Union Fire Ins. Sec., 103 S. W. 957, 959, 205 No. 294."
>
> *Ibid, page 1145.*

The regulations submitted to me, so far as covering both "premises" and "buildings," are, therefore, valid.

The general rule in regard to rules and regulations promulgated under an Act of Assembly is—

> "* * * That the Legislature intended to give only such powers as were necessary to carry out the objects of the enactment, and not any larger powers than were necessary for that purpose. * * * The principle is that rules and by-laws are construed like other provisions encroaching on the ordinary rights of persons. They must, on pain of invalidity, be reasonable, and not in excess of the statutory power authorizing them, or repugnant to that statute or to the general principles of law."
>
> *Endlich on the Interpretation of Statutes, Section 352.*

These principles were affirmed in the late case of *Goldwin's Appeal, 265 Pa. 335*, where our Supreme Court said: "The Board of Censors in classifying such pictures (by a regulation) and placing them under its condemnation, is exercising its judgment," and the authority conferred upon it by the Act.

As the Regulations submitted seem reasonable and adapted to the purposes intended by the Legislature, you are advised that they are a valid exercise of the authority conferred upon your Department by the first section of the Act of July 1, 1919, P. L. 710.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

STATE POLICE.

State Police of Crawford and Erie Counties—Powers of—Act of April 3, 1873, P. L. 1061.

The State Police of Crawford and Erie Counties have only such powers as are vested in them by the Act above stated. They do not have the powers of policemen as to arrests, generally, and have only such power as to arrest and detention for the recovery of stolen horses and other property and for the detention of thieves in those counties.

Office of the Attorney General,
Harrisburg, Pa., June 27, 1922.

Captain William K. Mair, Deputy Superintendent of State Police, Harrisburg, Pa.

Sir: I received your letter of the 20th instant, asking an opinion from this Department as to whether or not the members of the Company known as the State Police of Crawford and Erie Counties have the general powers of a policeman of the City of Philadelphia, solely for the recovery of stolen horses and other property and for the detection of thieves, or to make arrests generally.

"The State Police of Crawford and Erie Counties" is a corporation of persons who desire to associate themselves together for the recovery of stolen horses and other property, and for the detection of thieves in those counties. This corporation was chartered by a special Act of Assembly approved the third day of April 1873, P. L. 1061. This Act of Assembly in Section 1 states "the purpose of incorporation to be the recovery of stolen horses and other property and for the detection of thieves in Crawford and Erie Counties, Pennsylvania." It is true that in Section 3 of this Act it is stated "that each and every member of said corporation shall have the power of arrest, detention, etc. as allowed by law to the police of the City of Philadelphia." But this is an Act of Assembly chartering a corporation for the purposes therein mentioned and is to be strictly construed.

The general rules with reference to the powers of a corporation are well established.

> "First all powers not affirmatively granted either expressly or impliedly are denied. A corporation has such powers, and such only, as are conferred upon it by the Act of incorporation or its incorporation papers; all powers not either expressly or impliedly given are impliedly prohibited." *Machen on Corporation, Section 67.*

Moreover, it has been held in Pennsylvania that:

> "As regards enactments of a local or personal character, which confer any exceptional exemption from a common

> burden or invest private persons or bodies, for their own benefit and profit, with privileges and powers interfering with the property or rights of others, they are construed more strictly, perhaps, than any other kind of enactment."
>
> *Endlich on the Interpretation of Statutes, Section 354.*

Further:

> "A corporation, indeed, constituted by statute for certain purposes, is regarded as so entirely the creature of the statute, that acts done by it without the prescribed formalities, or for objects foreign to those for which it was formed, would be, in general, null and void."
>
> *Chambers vs. Manchester, 5 B. & S. 588.*

Applying these two principles to the special Act of Assembly of April 3, 1873, it would appear that the purpose for which this corporation of State Police of Crawford and Erie Counties is formed is for the recovery of stolen horses and other property and for the detection of thieves. The Act must be construed with reference to these purposes.

The members of this corporation can have no other powers than such powers as are necessary to carry out the purposes for which the corporation was chartered. It follows, therefore, that the third section conferring upon the members of this corporation the same power of arrest, detention etc. as allowed the police of the City of Philadelphia, is to be interpreted with reference to the purposes for which the corporation was formed, and they have the powers of the police of the City of Philadelphia as to arrests, detention etc. only for the arrest of horse thieves and other thieves, and for the detection of such offenders.

It clearly is not the intention of the Legislature in this section to confer upon the members of this corporation formed for special purposes all the general powers of policemen.

You are, therefore, advised that the members of the corporation known as the "State Police of Crawford and Erie Counties" have the powers of policemen as to arrest and detention solely for the recovery of stolen horses and other property and the detection of thieves in those Counties, and do not have the powers of policemen as to arrests generally.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

OPINIONS TO THE BOARD OF OPTOMETRICAL EDUCATION, EXAMINATION AND LICENSURE.

OPINIONS TO THE BOARD OF OPTOMETRICAL EDUCATION, EXAMINATION AND LICENSURE.

For the Year 1921.

STATE BOARD OF OPTOMETRICAL EXAMINERS.

Limited examination for license to practice optometry—Acts of March 30, 1917, P. L. 21, Section 5, and May 17, 1921, P. L. 823.

Persons who are now eligible to take a limited examination for a license to practice optometry are such as were unavoidably absent from the State at the time of the passage of the Act of 1917, or when limited examinations were held thereunder, or at the time were physically handicapped and unable to take such examination. The Board must determine from evidence furnished by the applicant whether his case falls within the purview of the amendment to the Optometry Act.

Office of the Attorney General,
Harrisburg, Pa., July 27, 1921.

Mr. Chester H. Johnson, Secretary, Board of Optometrical Education, Examination and Licensure, York, Pennsylvania.

Sir: This Department is in receipt of your communication of the 23d instant relative to the right of a certain person to take a limited examination for a license to practice optometry. As I understand, this present question arises under the provisions of Act No 286, approved May 17, 1921, amending Section 5 of the Act of March 30, 1917, P. L. 21, regulating the practice of optometry in this Commonwealth.

It was ruled by this Department in an opinion to you, rendered by the writer hereof, under date of January 29, 1919, that the time within which a limited examination could be taken under the provisions of Section 5 of the Act of 1917 expired on July 1, 1918. The said Act of 1921 amends Section 5 of the Act of 1917 by adding thereto, inter alia, the following:

> "The board shall also permit the taking of limited examinations by, and the license of, any person who shall apply therefor before the first day of January, one thousand nine hundred and twenty-two, who at the time of the passage of the act to which this is an amendment or the time when the limited examinations under said act were held was unavoidably absent from this State on account of service in the army or navy of the United States or who was at such time or times otherwise unavoidably

absent from this State or was physically handicapped and unable to take such examination: Provided, however, That any such person shall have engaged in the practice of optometry in this Commonwealth for two full years prior to the passage of the act to which this is an amendment or for one year in this Commonwealth and one year in another state and shall be of good character."

There is no doubt as to the meaning and effect of this amendment to the Act of 1917. It does not operate to extend the time within which a limited examination may be taken by *any* person, but simply extends it for *such* persons as are therein specified. Indeed, by expressly giving to certain persons the right to take such an examination on or before January 1, 1922, it impliedly excludes therefrom all other persons. As one of the prerequisites of a right to take a limited examination it must now be affirmatively shown that at the time of the passage of the Act of 1917 or at the time the limited examinations were held thereunder the applicant was unavoidably absent from the State in the military service of the country or otherwise so absent or was physically handicapped and unable to take the examination. It will be incumbent upon an applicant claiming to come within the provisions of Section 5 of the Act of 1917, as amended by the Act of 1921, to furnish to the Board satisfactory proof of the facts entitling him thereto before it can lawfully permit the applicant to take the examination. The duty to find the facts from the evidence offered rests upon the Board.

The purpose of the foregoing amendment to Section 5 of the Act of 1917 was to afford relief to certain deserving persons who, through no fault of their own, were prevented from taking the limited examination, and it should receive as liberal a construction as is possible consistent with its language in order to effectuate its remedial aim, but it cannot be broadened to let in other classes than those there expressly enumerated.

You are, therefore, advised that only those are now eligible to take a limited examination for a license to practice optometry who at the time of the passage of the said Act of 1917 or at the time the limited examinations were held thereunder were unavoidably absent from the State in the manner set forth in the above quoted provision of the Act of 1921, amending Section 5 of the said Act of 1917 or at such time or times were physically handicapped and unable to take such examination, and that it is the duty of the Board to determine from the evidence furnished by an applicant for such examination whether his case comes within the terms of the aforesaid amendment to the Optometry Act.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

OPTOMETRY.

Right to take a limited or standard examination to practice optometry—Acts of March 30, 1917, P. L. 21, and May 17, 1921, P. L. 823.

One who practiced optometry in Pennsylvania for eighteen months during the years 1903 and 1904, and subsequently resided and practiced optometry in Ireland, may not take either the limited or standard examination to practice optometry in this Commonwealth pursuant to the amendment of 1921 made to Section 5 of the Act of 1917.

Office of the Attorney General,
Harrisburg, Pa., September 7, 1921.

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 16th ult., asking to be advised whether a certain person who had studied optometry in this Commonwealth, and practiced here for eighteen months in the years 1903 and 1904 but since then has resided and practiced optometry in Ireland is entitled to take either the limited or standard examination to practice optometry in this Commonwealth by virtue of and pursuant to the amendment made to Section 5 of the Optometry Act, approved March 30, 1917, P. L. 21 by Act approved May 17, 1921, P. L. 823.

Section 5 of the Optometry Act of 1917 as amended by the said Act of 1921 extends, upon the conditions specified, the right to take a limited examination before January 1, 1922 to any person who at the time of the passage of the Optometry Act of 1917 or at the times the limited examinations were held thereunder was unavoidably absent from this State on account of service in the army or navy of the United States or was "otherwise unavoidably absent from this State or was physically handicapped and unable to take such examination," and the right to take a standard examination to any person who at the time of the passage of the said Optometry Act of 1917 was so absent from this State in the military service, "or otherwise unavoidably absent from this State or was physically handicapped and unable to take the examination."

I do not understand that there is any claim in the present case upon the ground of physical disability. I am of the opinion that this case is not within the purview of the amendment to Section 5 of the Optometry Act as made by said Act of 1921 for the reason that the absence from this Commonwealth is not such as is contemplated and required. Not any absence from the State brings a case within its provisions, but only one of the time and nature specified. The term "*unavoidably absent from this State*" within its intent means an unavoidable absence from

this State by one who was a resident of the State, and not an absence therefrom by reason or in consequence of being a resident of another State or country. If a foreign residence were to be deemed an unavoidable absence from this State within the intendment of the amendment made by the Act of 1921 it would, in effect, result in extending its provision in respect to absences from this State to non-residents generally. Neither the purpose nor the language of the amendment justifies such a construction.

In view of the foregoing conclusion it is needless to discuss or pass upon other features of this present case.

You are accordingly advised that, under the facts as above stated, the amendment made to the Optometry Act of 1917 by the aforesaid Act of 1921 does not give to the said person the right to take a limited or any additional right to take a standard examination to practice optometry in this Commonwealth.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

OPINION TO THE BOARD OF OPTOMETRICAL EDUCATION, EXAMINATION AND LICENSURE.

For the Year 1922.

IN RE OPTOMETRY.

Education——Requirements——Schooling at Home or Abroad——Acts of March 30, 1919, P. L. 21, and of May 17, 1921, P. L. 823.

The Optometry Act of March 30, 1917, P. L. 21, as amended by the Act of May 17, 1921, P. L. 823, impose no conditions as to locality where an applicant for a standard examination for a license to practice optometry receives the education prescribed as among the prerequisites to the right to take it, but that such education wherever received must strictly measure up to that prescribed by the Act.

Office of the Attorney General,
Harrisburg, Pa., May 3, 1922.

Mr. Chester H. Johnson, Secretary, Board of Optometrical Education, Examination and Licensure, York, Pa.

Sir: There was duly received your communication of the 26th ultimo in re case of an applicant to take a standard examination to practice optometry who was educated in a foreign country. The particular instance mentioned in your communication is that of one who was educated in Germany and who states in his affidavit that he has had "six years in High School in what is known in that country as Industrial Technical College and Polytechnic College in Munich. These courses included Theoretic Optics as well as the study of Geometry and Trigonometry and higher Physics."

As I understand, the Optometry Board desires to be advised whether this is sufficient to entitle the applicant to take the examination.

Section 5 of the Optometry Act of March 30, 1917, P. L. 21, as amended by that of May 17, 1921, P. L. 823, dealing with the several qualifications entitling one to take an examination to practice optometry contains, inter alia, the following provision:

> "Any person over the age of twenty-one years, of good moral character, who has had a preliminary education equivalent to two years of the course of high school whose standard is approved by the Bureau of Professional Education of the Department of Public Instruction—which preliminary education shall be ascertained by examination or by acceptable certificate as to credentials for work

> done in such approved institution—and has graduated from a school or college of optometry, approved by the Board of Optometrical Education, Examination, and Licensure, which maintains a course in optometry of not less than two years, * * * shall be entitled to take a standard examination."

It will be seen that no conditions are imposed as to where the aforesaid prescribed education is to be received. The test is as to its extent and nature. It will also be seen that the educational prerequisite covered and required by the above provision of the Act is of a two fold character, consisting of a certain amount of general or academic education called a "preliminary education," and a certain amount of professional education. This preliminary education must be the equivalent to two years of the course of high school whose standard is approved as aforesaid. It need not be obtained in such a high school, but must be the equal of what would be afforded in the aforesaid course therein. If the applicant possesses this preliminary education, which is to be ascertained either by examination or due certificate of the institution he attended, it is immaterial where or how he gained it.

As to the second above mentioned prerequisite entitling one to take a standard examination, the provision of the Act is clear and unmistakable. The applicant must have *graduated from a school or college of optometry approved by the Board and maintaining a course in optometry of not less than two years.* No amount of general or academic education can be taken in lieu of this professional one. The reason for this is plain. Learning in other fields, however liberal or extensive, would not qualify one to practice optometry. The Board has no power to depart from this requirement, which is a prerequisite in every case, whether the applicant was trained at home or abroad. It has no power to approve a school or college unless it be one of the kind and course expressly prescribed by the Act.

You are accordingly advised that the Act imposes no condition as to the locality where an applicant for a standard examination for a license to practice optometry receives the education prescribed by the above quoted provision thereof as among the prerequisites to the right to take it, but that such education wherever received must strictly measure up to that prescribed by the Act, and that no other education of whatever character, whether received here or abroad, can be accepted in lieu of the express requirement that the applicant shall be a graduate of a school or college of optometry approved by the Board, and maintaining at least a two years course in optometry.

Very truly yours,

EMERSON COLLINS,

Deputy Attorney General.

OPINIONS TO PENITENTIARIES.

OPINIONS TO PENITENTIARIES.

For the Year 1921.

PENAL INSTITUTIONS.

Gratuities and clothing provided to convicts on their discharge from the State Penitentiary—Act of March 24, 1921, P. L. 48, Section 1.

Where convicts are transferred from one penitentiary to another to serve out the unexpired balance of their sentences, pursuant to said act, the penitentiary to which the transfer is made should pay the gratuity and furnish the clothing allowable by the law to convicts upon their discharge.

Office of the Attorney General,
Harrisburg, Pa., June 29, 1921.

Mr. Robert J. McKenty, Warden, Eastern State Penitentiary of Pennsylvania, Philadelphia, Pa.

Sir: This Department is in receipt of your communication of the 22d instant relative to the gratuities and clothing given to convicts on their discharge from the Penitentiary.

The question you wish to be advised upon is—where inmates imprisoned in one Penitentiary are transferred to another to serve out the unexpired balance of their respective sentences, which Penitentiary should pay the gratuity and furnish the clothing allowable by law to convicts upon their discharge from a Penitentiary.

The Act, No. 23, approved the 24th day of March, 1921, providing for the transfer of convicts from one State Penitentiary to another provides, in Section 1 thereof, inter alia, that—

> "* * * Any convict so transferred shall serve out the unexpired term of his or her sentence in the penitentiary to which transferred, in accordance with the laws in force with reference to the punishment of persons convicted of crime and sentenced to the State penitentiaries, and as though such convict had been duly committed originally to the penitentiary to which transferred under the provisions of this act, and had already served there for such time as had been served in the penitentiary from which transferred."

The intention and effect of this Act are clear. It operates to make the status of convicts transferred under its provisions in the institution to which transferred precisely the same as though they had been originally

sentenced to it. The powers and duties of the institution from which the transfer is made terminate as to the convicts transferred, and are assumed and charged upon the one to which the transfer is made. Such duty cannot be imposed upon a penitentiary without its consent, as the approval of the inspectors of both is a condition of the transfer. The imprisonment, the discharge, the parole, and everything incidental thereto are to be proceeded with by the penitentiary to which the convicts are transferred in like manner as if they had been first committed thereto, with full credit to them in all respects for their service in the penitentiary from which transferred as if the same had been had in the institution to which the transfer is made, the record of all which accompanies the transfer. The discharge is not from the penitentiary to which the convicts were originally committed, but from the one to which they are transferred and from which they will be released. It follows that the latter is the one to pay the gratuity and furnish the clothing upon their discharge.

Specifically answering your question, you are advised that where convicts are transferred from one penitentiary to another, pursuant to the provisions of the aforesaid act, it belongs to the one to which their transfer is made to pay the gratuity and furnish the clothing allowable by law to convicts upon their discharge from the penitentiary.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

WESTERN STATE PENITENTIARY.

Salaries of prisoners' storekeeper and chauffeur payable by the counties—Acts of April 23, 1829, P. L. 341, and February 27, 1833, P. L. 55.

Salaries of prisoners' storekeeper and chauffeur should be charged to the counties as part of the "expenses of keeping convicts" and not be paid by the Commonwealth.

Office of the Attorney General,
Harrisburg, Pa., September 7, 1921.

Honorable John Francies, Warden, Western Penitentiary, Pittsburgh, Pa.

Sir: This Department is in receipt of your communication of the 19th ult., asking to be advised as to the validity of the action of the Board of Inspectors of the Western State Penitentiary recently taken transferring from the state payroll to that of the counties the positions

of "Prisoners' Storekeeper" and chauffeur at the Institution at Pittsburgh and chauffeur at the one in Centre County. It is stated that the duties of the "Prisoners' Storekeeper" are to purchase and handle certain supplies for the prisoners and that the chauffeurs perform no service as guards, their entire time being taken in operating the automobiles at the Institutions.

It was said in an opinion rendered by Deputy Attorney General Hargest to the Secretary of the Western Penitentiary, dated April 28, 1916, (Attorney General's Reports 1915-1916) page 529, construing the Act of April 23, 1829, P. L. 341, as amended by the Act of February 27, 1833, P. L. 55, imposing upon the counties the "expenses of keeping the convicts," that "It is difficult to determine what would be considered keeping the prisoners chargeable to the counties and what should be considered maintenance not so chargeable," but it was therein ruled that the cost of books and stationery for the inmates was chargeable to the counties as an expense of keeping the prisoners, an appropriation made for such purpose having proved insufficient. A former opinion of this Department to the Warden of the Western Penitentiary dated October 15, 1913, reported in 42 C. C. Rep., 193, was cited holding that certain repairs should be charged to the counties as maintenance.

Under the principle followed in the foregoing it is clear that the salary of the Prisoners' Storekeeper should be charged to the counties, and I am also of the opinion that the salaries of the said chauffeurs are likewise properly so chargeable. The motor car has become a practical necessity at such an institution as the Western Penitentiary, and it is probably that the economies and efficiency affected by it more than compensate for its cost and operation. The labor of its driver can fairly be classed along with and as forming a part of that engaged at the institution in keeping the convicts and paid as such. It is an expense incident to their keeping. By reference to the Act No. 75A, approved May 27. 1921, making an appropriaton to the Western Penitentiary it will beseen that the only item contained therein for the payment of salaries is that for the "salaries of officers." The said chauffeurs are not "officers" of the penitentiary and hence should not be paid out of said appropriaation. It was the evident intent to leave this expense for the counties to pay.

You are accordingly advised that the aforesaid action of the Board of Inspectors was valid and that the salaries of the above mentioned employes should be charged to the counties.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

OPINIONS TO PENITENTIARIES.

For the Year 1922.

PRISONERS UNDER SENTENCE OF DEATH.

Criminal law—Custody of prisoners—Respite by Governor—Act of June 19, 1913.

1. Convicts under sentence of death, delivered to the custody of the warden of a penitentiary under the provisions of the Act of June 19, 1913, P. L. 528, cannot be lawfully returned to the counties from which they came upon a respite granted by the Governor.

2. A respite by the Governor cannot be construed as a lawful discharge from custody within the meaning of the act.

Office of the Attorney General,
Harrisburg, Pa., August 2, 1922.

Honorable John Francies, Warden, Western Penitentiary, Pittsburgh, Pa.

Sir: This Department is in receipt of your communication of the 24th ultimo asking to be advised whether, after persons convicted of murder and sentenced to death have been delivered into the custody of the Warden of the Western Penitentiary, and the Governor grants a respite, such convicts should "be returned to the counties from whence they came by the officials who brought them to the Penitentiary until such time as further action is taken by the Governor." It appears that your inquiry is occasioned by the fact that the guarding of these respited prisoners necessitates withdrawing officers from their regular duties and that the Institution is short of officers, as well as the fact that the cells in the electrocution building are limited in number.

The question submitted by you arises under the Act of June 19, 1913, P. L. 528, "Fixing the penalty for murder in the first degree," etc. Section 2 of this Act directs the clerk of the court in which a person shall have been convicted of murder and sentenced to death, to transmit to the Governor a complete record of the case, and Section 3 directs the Governor upon receipt of this record to issue his warrant directed to the Warden of the Western Penitentiary commanding him to cause such convict to be executed within the week named in the warrant in the manner prescribed by the Act.

Section 4 of the Act reads 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 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 pentitentiary, 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."

The language of the provision contained in this section bearing upon the point raised in your communication is so plain as to render the answer to your question altogether free from doubt. Once the convict is delivered into the custody of the warden of the Western Penitentiary pursuant to the provisions of the Act, such convict must be kept in the said penitentiary "until the death penalty shall be inflicted, or until lawfully discharged from such custody." A staying of the execution by the Governor does not constitute a discharge from or in any way affect the custody with which the warden is charged, or operate to change the place of confinement during the time a respite may run. We must assume that had the Act intended that upon a respite granted by the Governor, the convict should be returned to the county from which received or be delivered to other custody, there would have been a specific provision to that effect, and in its absence we must conclude that it is not so intended. The Act is one whose requirements must be strictly observed. I understand that the ruling hereby made is in conformity with the practice heretofore followed.

You are, therefore, advised that convicts delivered to the custody of the warden of the Western Penitentiary under the provisons of the aforesaid Act can not lawfully be returned to the custody from which received by the warden upon a respite granted by the Governor, the custody imposed by the Act upon the warden and the manner and place of confinement not being affected thereby.

Very truly yours,

EMERSON COLLINS,

Deputy Attorney General.

PENAL INSTITUTIONS.

Western Penitentiary—Right of authorities to parole under certain specified circumstances —Acts of June 19, 1911, P. L. 1055 and June 3, 1915, P. L. 788, Section 10.

Where a convict was sentenced in Allegheny County to undergo imprisonment in the Western Penitentiary for not less than two nor more than three years, and subsequently escaped from the penitentiary, was recaptured, and for the escape was sentenced by the Centre County Court to undergo imprisonment for a minimum period of two years and maximum period of three years, the latter sentence to commence on the expiration of the former sentence; such convict is not entitled to parole on the first sentence and must serve the full maximum of the first sentence. He is only eligible for parole on his second sentence.

Office of the Attorney General,
Harrisburg, Pa., June 20, 1921.

Mr. John M. Egan, Parole Officer, State Penitentiary for the Western District of Pennsylvania, Pittsburgh, Pa.

Sir: There was duly received your communication to the Attorney General of the 2d inst. asking to be advised relative to the parole of a certain convict in the Western Penitentiary. The facts as stated in your communication are as follows:

The said convict was sentenced on March 28, 1917, by the Allegheny County Court to undergo an imprisonment in the Western Penitentiary of not less than two and not more than three years. He was transferred to the New Western Penitentiary at Rockview, from which he excaped on October 18, 1917, was recaptured and for said escape sentenced by the Centre County Court on April 8, 1918, to undergo an imprisonment for a "minimum period of two years and maximum period of three years. This sentence to commence on expiration of former sentence of March 28, 1917, Allegheny County."

On September 18, 1921, he will have served four years imprisonment, being the minimum of both sentences. You ask to be advised whether he will be eligible to be paroled on that date, or whether he must serve the maximum sentence imposed by the Allegheny County Court.

This question arises under the Act of June 19, 1911, P. L. 1055, relating to the parole of convicts, as amended by the Act of June 3, 1915, P. L. 788. Section 10 of that Act provides for cases where a convict is convicted of crime while on parole, but the Act makes no specific provision in cases where the convict is convicted of a crime committed during his imprisonment.

It has been ruled by this Department that, under the provision of Section 10 of the Act, upon conviction of crime while on parole there is to be no further release upon parole for the first sentence, and that the

full remainder thereof is to be served. Where the second sentence is to the penitentiary, the remainder of the sentence first imposed is to precede the commencement of the service of the second. (Opinion of Deputy Attorney General Hargest to Dr. C. D. Hart, Secretary Board of Inspectors of Eastern Penitentiary, dated December 26, 1916, Attorney General's Report 1915-1916, page 537; opinion of Deputy Attorney General Swoope to Mr. J. W. McKenty, Parole Officer of Eastern Penitentiary, dated August 10, 1920.)

It may well be that the silence of the Act as to cases where the crime is committed during imprisonment is upon the reasonable assumption that any provision relative thereto is needless, upon the ground that such an offense would negative any thought of a recommendation for a parole. Good conduct is the basis for any such recommendation. It certainly is difficult to see why a more lenient rule should obtain in the case of one who commits the crime of escaping from prison than that in the case of one committing a crime while out on parole.

I am of the opinion that it would be contrary to the spirit and true intent of the Act to hold that a parole should be allowed on a sentence to defeat the serving of which the convict committed and was convicted of the crime of making an escape from the prison.

As above stated, the Centre County sentence was made to begin upon the termination of the Allegheny County sentence. That sentence did not terminate until the expiration of the maximum period thereof, which was three years.

It was said in the case of *Commonwealth vs. Kalck, 239 Pa. 533*, that "a sentence for an indefinite term must be deemed a sentence for the maximum term prescribed by law as a punishment for the offense committed." It will, therefore, be seen that not only would a parole on the first sentence in such a case as is here under consideration be violative of the spirit of the Act, but it is practically incapable of application.

You are, therefore, advised that a convict in such a case as the foregoing must serve the full maximum of his first sentence, and that he is only eligible for parole on his second sentence.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

SENTENCE AND COMMITMENT OF PRISONERS.

Criminal law—Sentence—Simple imprisonment—Penitentiary—Wrongful commitment —No power in inspectors to object.

1. Where a prisoner has been convicted and sentenced to simple imprisonment, but has been improperly committed to the penitentiary, the inspectors of the penitentiary have no standing to refuse to accept him.

2. In such case, the question can be raised by the prisoner upon *habeus corpus* proceedings, but until raised and disposed of, the prisoner must be held under the commitment.

Office of the Attorney General,
Harrisburg, Pa., October 9, 1922.

Honorable J. Washington Logue, Secretary, Board of Inspectors, Eastern State Penitentiary, Philadelphia, Pa.

Sir: This Department is in receipt of your communication of the 27th ult. to the Attorney General, asking to be advised whether the Board of Inspectors of the Eastern State Penitentiary has the power to refuse to accept prisoners committed to the Penitentiary for the reason that the commitment shows that the offense for which the prisoner was convicted is only punishable by simple imprisonment.

It appears that your inquiry is prompted by the fact that the Penitentiary is now greatly overcrowded, and that many are sentenced thereto for offenses of the above mentioned character. It is respectfully suggested that it might be well, if deemed wise by the Board, to inform the several Courts of the existing condition of the institution in order that they might have this information before them when imposing sentences.

It is needless for the purpose of this opinion to discuss or cite at length the statutes and decisions relative to when under the Penal Laws of this Commonwealth the penalty permits imprisonment in the penitentiary and when only in county prisons. In *Commonwealth vs. Fetterman, 26 Super. Ct. 569*, the law was stated as follows:

> "When the penalty is simple imprisonment, for whatever period, the place of confinement is the county jail. When the penalty is imprisonment at labor, by separate or solitary confinement, and the sentence is for one year or more, the place is either the penitentiary or a suitable county prison; when the sentence is for less than a year, the place is a suitable county prison, or, in the absence of such prison, simple imprisonment in the county jail is to be substituted. Thus 'imprisonment' or 'simple imprisonment' means confinement in the county jail; 'imprisonment at labor, by separate or solitary confinement' means imprisonment in the penitentiary or in a suitable county prison."

To the same effect is the case of *Commonwealth vs. Francies, 250 Pa. 350*, where the Court upon habeas corpus proceedings directed the discharge of a prisoner erroneously sentenced to a penitentiary.

In *Commonwealth vs. Francies, 73 Super. Ct. 285*, the Court said of a sentence to the penitentiary where the imprisonment should have been in the county jail—

> "The sentence and commitment were erroneous, but not absolutely void, and the warden of the penitentiary would not be liable in an action of trespass for the detention of the relator,"

and further held that although erroneously committed the prisoner could not raise the question of the regularity of his sentence by escaping from the place of his confinement.

It is settled that the Court in imposing a sentence is limited to the punishment prescribed by the Act for whose violation the conviction was had: *Commonwealth vs. Barge, 11 Pa. 164.* The question submitted by you, however, relates not to the power of the Court, but to the power of the Board of Inspectors of the Penitentiary. Can this Board undertake to review the action of the Court in imposing sentences to the penitentiary in such cases as those to which your inquiry is directed, and if it determines that there has been a transgression of power therein on the part of the Court thereupon refuse to accept the prisoners so sentenced? I am of the opinion that the Board does not possess such power. We are not without authority to sustain this conclusion. An opinion of Assistant Attorney General (now Judge) Hargest to the Secretary of the Board of Inspectors of the Eastern State Penitentiary, dated May 18, 1910, and reported in *19 District Reports 481*, deals with cases where the Court had imposed flat sentences of ten years, apparently ignoring the Act of May 10, 1909, P. L. 495, providing for the imposition of a maximum and minimum sentence and the provision relating to a certain maximum sentence for a third conviction. He held that, notwithstanding the failure of the Court to observe the said requirements of the law, it was the duty of the Inspectors to accept the prisoners under the sentences as imposed, saying:

> "These prisoners are committed by a regular commitment from a court of competent authority. There is nothing for the penitentiary to do except to hold the prisoners in accordance with such commitment. If the sentence is improper, such question can be raised by the prisoners upon *habeas corpus* proceedings, but, until raised and disposed of, the prisoners must be held under the commitment."

The question in these cases was again raised and ruled upon in an opinion by Attorney General Bell, reported in *20 District Reports 471*, in which he reaffirms the ruling of this Department as made by Assistant Attorney General Hargest, saying:

> "I find no reason to change or modify that conclusion, but I understand your question goes further, and you ask now to be advised whether the penitentiary can refuse to receive a prisoner who is not sentenced to the minimum and maximum, as provided by the Act of 1909.
>
> "It has been decided that 'error of fact or law in an order of commitment made by a court having jurisdiction does not render it void, even though it makes it voidable; an imprisonment under such an order is legal until it is set aside': Fleming *v.* Cincinnatus Bills, 3 Ore. 286.
>
> "It may be that such a sentence is illegal, but having been imposed by a court of competent jurisdiction, it is not for the penitentiary authorities, but for the courts, to pass upon its legality, and, if illegal, to set the same aside and impose a proper and lawful sentence. I am, therefore, of opinion, and advise you, that you have no authority to decline to receive the prisoner."

There was a like ruling in an opinion of Attorney General Bell found in *21 District Reports 880.*

The principle laid down in the above cited opinions of this Department, and delivered for it by those whose utterances are justly entitled to a great weight, is applicable to and governs in this present case. We must conclude, and you are so advised, that the Board of Inspectors of the Eastern State Penitentiary is not vested with authority to refuse to receive prisoners for the reason that the commitment shows that the offense was one punishable by simple imprisonment. It cannot adjudicate the legality of such a sentence. As above pointed out, and as recognized in your communication, the prisoner himself has the right in a due proceeding to test out the validity of the sentence and have the matter regularly passed upon by the Court.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

PENAL INSTITUTIONS.

Western Penitentiary of Pennsylvania—Superintendent of Construction—Payment of traveling expenses between Rockview and Pittsburgh—Act of March 30, 1911, P. L. 32.

The Superintendent of Construction of the new Western Penitentiary of Pennsylvania may lawfully be reimbursed for traveling expenses incurred and paid by him in traveling between Rockview (the site of the new penitentiary) to Pittsburgh (the location of the old penitentiary) whenever such trips became necessary in the due discharge of his duties as Superintendent of Construction, unless it is otherwise stipulated by the terms of his appointment and compensation.

Office of the Attorney General,
Harrisburg, Pa., December 20, 1922.

Honorable John Francies, Superintendent of Construction, New Western Penitentiary of Pennsylvania, Pittsburgh, Pa.

Sir: This Department is in receipt of your communication of the 14th inst., asking to be advised whether as Superintendent of Construction of the New Western Penitentiary of Pennsylvania, you are entitled to traveling expenses between Rockview and Pittsburgh. It is stated in your communication that it is necessary for you as such Superintendent of Construction to travel from time to time to your "office in Pittsburgh, maintained by the Board of Inspectors, at the old penitentiary, where much of the accounting is done and where frequent conferences with the Board of Inspectors, are necessary." I take it from your communication that your principal office or place of official residence as such Superintendent of Construction is at Rockview where the work of construction is being carried on, and which would seem to be the right one, for the best administration of the duties of that position. This position was created and exists by virtue of the provision contained in Section 3 of the Act of March 30, 1911, P. L. 32, providing for the erection of the said new penitentiary, and which reads as follows:

> "A superintendent of construction for the building of said penitentiary shall be appointed by the Governor * *. The compensation of the said superintendent of construction shall be fixed by the Board, subject to the approval of the Governor."

I do not have before me the terms of the resolution or action of the said Board of Inspectors, as approved by the Governor, fixing your compensation as Superintendent of Construction. I assume that they are silent as to the payment of such expenses as the aforesaid, and if so, I am of the opinion that you are entitled thereto. The cost of traveling from Rockview to Pittsburgh and return by the Superintendent of Construction when it is actually necessary for him to make such trip

in order properly to attend to the duties of his office, is a burden that we could not presume is imposed upon him. The presumption is the other way. It would be an expense attaching to, and to be borne by the office and not the holder of it, unless it be specifically stipulated that he is to bear it as a condition of his appointment or in the fixing of his compensation. The expenses necessarily incident to the administration of an office are not payable by the incumbent of the office out of his salary in the absence of some express intent to that effect.

You are advised that, unless the terms of your compensation or appointment, as made and fixed as aforesaid, specifically stipulate otherwise, you can lawfully be reimbursed for the traveling expenses incurred and paid by you in traveling from Rockview to Pittsburgh and back for the said purposes mentioned in your communication, and above stated, whenever such trip is taken by you, and may become necessary for the due discharge of your duties, as such Superintendent of Construction.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

OPINIONS TO HOSPITALS.

OPINIONS TO HOSPITALS.

For the Year 1921.

AUTHORITY OF BOARDS OF TRUSTEES OF STATE INSTITUTIONS.

Acts of May 14, 1915, P. L. 524 and July 18, 1901, P. L. 775.

The Board of Trustees of the State Hospital of the Northern Anthractie Coal Region of Pennsylvania may purchase insurance policies covering loss or damage by fire or other casualty to property owned by the Commonwealth and under their custody and control. They may also purchase insurance against loss or damage to such property arising from any cause other than fire or casualty, but may not purchase ordinary boiler insurance.

The Board is not liable as a body corporate for injury to the person or loss or damage to the property of others when caused by the negligence of the agents, servants or employees of the Institution, and neither are the members of the Board personally liable to persons for injury or damage resulting from the negligent operation of an automobile by an agent, servant or employee of the Institution, unless the Trustees contribute to such negligence.

The agents, servants and employees of the Institution are personally liable for injury or damage resulting from the negligent operation of an automobile in the service of the Institution.

Office of the Attorney General,
Harrisburg, Pa., January 13, 1921.

Mr. P. Silas Walter, Secretary, State Hospital of the Northern Anthracite Coal Region of Pennsylvania, Scranton, Pa.

Sir: The inquiries contained in recent communications received by this Department from you and from officers of other State Institutions, raise the following questions:

1. Is it lawful for the Board of Trustees of your Institution to purchase fire insurance policies covering loss or damage by fire or other casualty to property owned by the Commonwealth and under the custody and control of the Board?

2. Is it lawful for such Board to purchase insurance against loss or damage to such property arising from any cause other than fire or casualty?

3. Is it lawful for such Board to purchase ordinary boiler insurance policies?

4. Is the Board of Trustees of your Institution liable as such for injury to the person or loss or damage to the property of others when caused by the negligence of the agents, servants, or employes of the Institution?

5. Are the members of the Board personally liable to third persons for such injury or damage?

6. Are the agents, servants or employes of your Institution personally liable for such injury or damage?

Several of these questions have been specifically answered by this Department in opinions which have not as yet been officially printed and which have probably not been brought to your notice.

1. Is it lawful for the Board of Trustees of your Institution to purchase insurance policies covering loss or damage by fire or other casualty to property owned by the Commonwealth and under the custody and control of the Board?

The Act of May 14, 1915, P. L. 524, provided for the creation of a fund to be known as the "Insurance Fund," to be used 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." It provided that the amount of insurance carried at the time of the approval of the act should be reduced one-fifth each year until December 31, 1920, at which time all insurance policies, excepting permanent policies procured prior to 1915, should expire and the Insurance Fund alone be looked to for the repair or replacement of property so damaged. Section 7 of that Act specifically provides:

> . "That * * * it shall be unlawful for * * * any Board of Trustees * * * 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."

As will be pointed out below the property under the control of your Board of Trustees is "property owned by the Commonwealth," and it is, therefore, clearly unlawful for the Board to procure after December 31, 1920, any policy of insurance against loss or damage to such property arising from fire or other casualty.

2. Is it lawful for such Board to purchase insurance against loss or damage to such property arising from any cause other than fire or other casualty?

It was held by Deputy Attorney General Keller, (Attorney General's Opinions 1915-16, 268) that the prohibition of Section 7 of the Act of 1915, which I have quoted above, was limited to the kinds of insurance provided for by the fund which it created, that is to "fire or other casualty." He further held that a loss arising from any other cause, as for example from theft, which is not a "casualty," is not embraced within the terms of the Act, and policies of insurance against the risk of loss from such cause may be purchased.

Under this ruling the second question is answered in the affirmative.

3. Is it lawful for the Board of Trustes of your Institution to purchase ordinary boiler insurance policies?

I am advised that the ordinary boiler insurance policy combines the following features:

(a) Insurance against damage to the property of the insured, (b) insurance against damages for personal injuries suffered by the employes of the insured, (c) insurance in a limited amount against damages for injury to the persons or property of others, and (d) boiler inspection service.

(a) It was held by Deputy Attorney General Hargest in an opinion rendered August 5, 1918, and by Deputy Attorney General Collins in an opinion dated May 13, 1919, that a boiler explosion is a "casualty" and any loss or damage to property of the state arising from such cause is to be paid out of the Insurance Fund created by the Act of 1915. Accordingly the first mentioned feature of the ordinary boiler insurance policy, is a form of insurance which your Board of Trustees is forbidden to purchase.

(b) As to insurance against damages for personal injuries to employes of your institution, if such accidental injuries occur in the course of employment, they are covered by your insurance against workmen's compensation liability; if they occur otherwise the right of the employe to recover rests upon the same ground as that of third persons.

(c) As to liability to third persons for injury or damage resulting from the explosion of a boiler owned by the State, such liability could arise only from the negligent failure of the employes properly to inspect, maintain or operate the boiler. *Spencer vs. Campbell, 9 W. & S. 32; Kilbride vs. Carbon Dioxide and Magnesia Co., 201 Pa. 552; 36 Cyc. 1262.* This being the case, the State is not liable for such injury or damages. It was held in *Collins vs. Commonwealth, 262 Pa. 572*, that the Commonwealth is not liable for the torts of its officers and employes, in the absence of a general statute creating such liability.

It has been urged, however, that the Board of Trustees as a body corporate may be liable in such case although the Commonwealth is not. It is not necessary here to determine whether the principles of *Collins vs. Commonwealth, supra*, relieve the body corporate from such liability or not, for it is relieved upon other grounds which I shall indicate below.

It appears, therefore, that each form of insurance embraced within the ordinary boiler insurance policy is such as has been otherwise provided for or relates to a liability which does not rest upon the Commonwealth or upon your Board of Trustees. It would not be lawful for you to spend the money of the Commonwealth in the purchase of such insurance. (Deputy Attorney General Collins, Opinion dated December 3, 1919.)

(d) The boiler inspection service rendered to policy holders is a valuable feature of the policy. Such inspections are required, by law, to be made (Opinion of Dep. Atty. General Collins dated May 13, 1919), and I am advised that it is difficult to secure efficient inspection service in any other manner than through the insurance companies. This fact, however, would not justify the purchase of policies of insurance in order to secure efficient inspection service.

4. Is the Board of Trustees of your Institution liable as such for injury to the person or damage to the property of others, when caused by the negligence of the agents, servants or employes of the Institution?

Your Institution was originally incorporated as the Lackawanna Hospital of Scranton, by a special Act of Assembly approved May 18, 1871, P. L. 905. All of the property of that corporation was conveyed to the Commonwealth, and it was provided in Section 1 of the Act of July 18, 1901, P. L. 775, that "the Governor shall appoint a board of managers or trustees consisting of nine members, who shall be a body politic or corporate by the name and style of 'The Trustees of the State Hospital of the Northern Anthracite Coal Region of Pennsylvania'."

Its purposes are thus stated in Section 2 of that Act: "This Hospital shall be specially devoted to the reception, care and treatment of injured persons in the Northern Anthracite Coal Region * * * and in the order of admission this class shall have precedence over paying patients."

Your Board of Trustees, therefore, are a body corporate, whose purposes are purely charitable, and whose property is the property of the Commonwealth. Its members are appointed by the Governor, its management under the control and direction of the State, and its maintenance provided for by appropriations of State moneys, supplemented by donations. As such it is within the principle of *Fire Insurance Patrol vs. Boyd, 113 Pa. 269 and 120 Pa. 624*, and within the rules laid down in *Cooley on Torts, (3d Ed.) 207*:

> "A corporation organized and maintained for purely charitable purposes is not liable for the negligence or misfeasance of its agents or servants in the discharge of their duties. The same rule applies to institutions and societies created by the state for public purposes, although the same may be incorporated."

5. Are the members of the Board of Trustees personally liable to third persons for the negligence of servants and employes of the Institution?

The particular incident giving rise to this question was an automobile accident which, it is alleged, was caused by the negligence of the driver of the hospital ambulance while he was engaged in the course of his employment, and the opinion expressed upon this question is limited to this particular case.

I do not find that the question has ever been decided in the courts of this State. Deputy Attorney General Collins in a Department letter to Mr. Oscar L. Schwartz, Steward of the State Hospital for the Insane at Norristown, under date of December 8, 1920, expressed the opinion, in a similar case, that the Trustees of that Institution were not personally liable. I concur in this opinion. The duty to operate with care an automobile in the service of the hospital, is not a duty imposed upon the members of the Board of Trustees in their public capacity. The duty is merely the common law duty resting upon the operator of the car to exercise due care in its operation. Unless the individual member of the Board of Trustees contributed to the tort, he could be held liable for it only upon the principle *respondeat superior*. When it is remembered that the driver is the servant of the body corporate and not of the individual trustees, however, it is clear that that principle does not apply and they are not personally liable for his negligence.

6. Are the agents, servants and employes of your Institution personally liable for injuries resulting from their negligence while engaged in the service of the Institution?

This question likewise arose from the automobile accident mentioned. The driver of an automobile, whether he be engaged in his own business or pleasure, or in the service of an employer, owes to others the duty to operate the machine with due care. For a breach of this duty resulting in damage or injury to another, he is legally liable. The fact that under some circumstances his negligence may render his employer liable, does not relieve him. "A servant is liable to a third party injured by his negligence." *Cooley on Torts (3d Ed.) 1171.*

In cases of accidents occurring by reason of the negligent operation of an automobile used in the service of your hospital, the person driving is the only one to whom the injured party can look for damages. In view of this fact it would be advisable for you to insist that each driver protect himself against such liability by insurance. If such a requirement were made a condition precedent to the employment of every driver and you should experience any difficulty in securing drivers who would meet the condition, such difficulty could be obviated by a proper adjustment of the driver's compensation. All such policies of insurance should be delivered to you.

I, therefore, specifically advise you:

1. That it is not lawful for the Board of Trustees of your Institution to purchase insurance policies covering loss or damage by fire or other casualty to property owned by the Commonwealth, and under the custody and control of the Board.

2. It is lawful for such Board to purchase insurance against loss or damage to such property arising from any cause other than fire or other casualty.

3. It is not lawful for such Board to purchase ordinary boiler insurance policies.

4. The Board of Trustees of your Institution is not liable as a body corporate for injury to the person or damage to the property of others caused by the negligence of the agents, servants or employes of the Institution.

5. The members of the Board of Trustees are not personally liable to third persons for injury or damage resulting from the negligent operation of an automobile by an agent, servant or employe in the service of the Institution, unless the Trustee contributes to such negligence.

6. The agents, servants and employes of the Institution are personally liable for injury or damage resulting from the negligent operation of an automobile in the service of the Institution.

Yours very truly,

GEO. ROSS HULL,
Deputy Attorney General.

STATE INSTITUTION FOR FEEBLE-MINDED OF WESTERN PENNSYLVANIA.

Board of Trustees—Authority to pay one of its members a salary to act as Secretary to the Board—Act of June 3, 1893, P. L. 289.

The Board of Trustees of the State Institution for Feeble-minded of Western Pennsylvania, in the absence of express legal authority, may pay one of its members to act as Secretary to the Board.

Office of the Attorney General,
Harrisburg, Pa., March 22, 1921.

J. M. Murdoch, M. D., Superintendent State Institution for Feeble-minded of Western Pennsylvania, Polk, Pa.

Sir: This Department is in receipt of your communication of the 10th inst. asking to be advised whether it would be lawful for the Board of Trustees of your Institution to pay one of its members a salary to act as secretary to the Board.

Section 9 of the Act of June 3, 1893, P. L. 289, creating the State Institution for Feeble-minded of Western Pennsylvania, vests the management of the Institution in a Board of Trustees "who shall serve without compensation." No provision is made for the appointment of a secretary, but the need of such an official is so apparent that the authority of the Board to select one is to be implied. It may also, in its discretion, select one of its members for that position. This is in accord with

a ruling made in an opinion of this Department in the case of a Secretary of the Board of Managers of the State Industrial Home for Women, at Muncy, dated May 11, 1920.

The above quoted provision of the said Act of 1893, requiring the Trustees of the State Institution for Feeble-minded of Western Pennsylvania to serve without compensation, is to be given the widest possible intendment. They cannot receive any compensation, directly or indirectly, for the performance of any duty whatever with which they are charged as trustees, or for the performance of any work or thing incident to that duty or necessary to its proper discharge. The work of a secretary, however, is something independent of the duties of a trustee, and constitutes no necessary or incidental part thereof, and hence if performed by a trustee is so done in a capacity distinct from that of trustee. The place can properly be filled and its work done by one not a member of the Board. It would seem unreasonable to impose upon some one trustee its additional and special burdens without remuneration for such extra services and responsibilities. We can readily see that it might be more satisfactory and less expensive to have a member of the Board act as secretary than to employ some one outside of its membership, but if compensation could not be paid him no member might be found willing to accept the position. I can see no valid objection to his being paid, provided the compensation be clearly not beyond what it would be required to pay an outsider therefor. That it is not to be deemed as something inherently contrary to public policy for a member of a board charged with the administration of a State Institution to be paid for acting as secretary is evidenced by the Act of May 23, 1913, P. L. 328, relating to the Western Penitentiary, which makes it discretionary for its Board of Inspectors to select one of its members for secretary and pay him for his services as such, the Act thereby amended having expressly made it mandatory that the secretary should be a member of the Board and serve without compensation.

In accordance with the foregoing, you are advised that it would not be unlawful for the Board of Trustees of your Institution to pay one of its members to act as secretary to the Board.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

IN RE STATE EMPLOYES.

Gardner's Helper——Summer Months——Period of 25 Years——Service——Acts of 1915 and 1917.

One employed by a State Hospital as a gardener's helper during the Summer months for a period of 25 years is not such a State employe as comes within the State Employes' Retirement Act of June 14, 1915, P. L. 973, as amended by the Act of June 7, 1917, P. L. 559.

Office of the Attorney General,
Harrisburg, Pa., April 25, 1921.

Dr. J. Allen Jackson, Superintendent, The State Hospital for the Insane, Danville, Pa.

Sir: This Department is in receipt of your communication of the 5th inst. asking to be advised whether "an employe engaged" at your Institution "as a garden helper during the summer months only, covering a period of twenty-five years," comes within the State Employes' Retirement Act of 1915.

The Act of June 14, 1915, P. L. 973, as amended by the Act of June 7, 1917, P. L. 559, provides for the retirement, upon certain conditions, of a State employe who "*shall have served* in office as such a State employe *for twenty-five years or more*, or who shall have reached the age of sixty-five years and shall have served in office as such a State employe for twenty years or more."

By virtue of the amendment, as made by the said Act of 1917, its provisions apply to "employes in penitentiaries, reformatories and other institutions operated by the Commonwealth."

It may be noted that while the act as it stood originally required the service to be continuous, under the amendment, as made by the Act of 1917, the word "continuously" was stricken out. This, however, does not change the requirement as to the aggregate amount of service required to entitle one to retirement. That still must be either twenty-five or twenty years depending upon the age of the employe at the time of retirement.

In my opinion such a service as that to which your communication refers does not fulfill the requirements of the act. An employment limited only to certain months of the year, although regularly recurring and extending over a period of twenty-five years, does not constitute twenty-five years of employment. A service of the character here under consideration, restricted to some single season of each of twenty-five years, cannot fairly be construed to mean that the employe performing it has "*served * * * twenty-five years*," within the intendment of this term as used in the above quoted provision. If we were to hold otherwise, there would at once arise the further question as to what fraction

of the year would suffice; if a single season would be sufficient, why not a month? It must be obvious that such a construction would offend against the true spirit and intent of the act. Its object is to afford relief to the incapacitated servants of the State actually in its service for the designated time, not to those who may be occasionally or intermittently in its employment throughout that duration of time. The provision of Section 4 that the retirement allowance shall be paid "monthly" strengthens the conclusion here reached, as it plainly contemplates that the retired employe had a service of a nature other than that presented in this present case.

You are, therefore, advised that an employe is not entitled to the benefits of the Retirement Act of 1915, as amended, for such a service as that stated in your communication.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

STATE INDUSTRIAL HOME FOR WOMEN, MUNCY.

Period of detention limited to maximum term of imprisonment specified by law for the particular crime—Act of July 25, 1913, P. L. 1311, Sections 14, 15 and 20.

Where persons are transferred from prisons to the State Industrial Home for Women the period of detention in the home, including time spent on parole, is limited to the unserved portion of the sentence imposed by the Court. Persons sentenced by a court to the Industrial Home for Women may be detained in the Home, including the time spent on parole, for the period equal to the maximum term of imprisonment specified by law for the particular offense. Where an inmate in the Industrial Home for Women violates her parole there may be added to the unexpired portion of her maximum term of sentence in the Home the time spent on parole.

Office of the Attorney General,
Harrisburg, Pa., July 6, 1921.

Mr. Frank Smith, Secretary, Board of Managers State Industrial Home for Women, Muncy, Pa.

Sir: There was duly received your communication to the Attorney General of the 23d ult. requesting an opinion upon the question whether inmates of the State Industrial Home for Women, at Muncy, Pa., may be detained therein for a period longer than the maximum term of imprisonment specified by law for the crime for which such an inmate was sentenced to said Home.

The Act of July 25, 1913, P. L. 1311, establishing the State Industrial Home for Women, provides two methods by which persons may become inmates of that Institution, viz., by transfer from State or county prisons or by direct sentence thereto by the Court.

Section 14 of the Act provides for a transfer of convicts from any penitentiary or prison to the said State Industrial Home, and authorizes the Board of Managers of the Home to detain "*during the term of their sentence to the State prison such prisoners so transferred*" with commutation under the laws relative thereto. This plainly limits the duration of the detention in the Home of convicts transferred from a penitentiary to the portion of the sentence as imposed by the Court remaining unserved at the date of the transfer. The provision is obscure as to the period of detention of those transferred from a county prison, but the implication fairly arises that the intent is also to limit their detention to such portion of their sentence as remains unserved at the time of the transfer. We could not imply a power in the Board to lengthen a sentence as definitely fixed by the Court. It is unlikely that such transfers would be made where the remainder of the sentence is brief.

Section 15 of the Act reads as follows:

> "Any court of record in this Commonwealth, exercising criminal jurisdiction, may, in its discretion, sentence to the said Industrial Home any female between sixteen and thirty years of age, upon conviction for, or upon pleading guilty of, the commission of any criminal offense punishable under the laws of this State. Said sentence shall be merely a general one to the State Industrial Home for Women, and shall not fix or limit the duration thereof. *The duration of such imprisonment, including the time spent on parole, shall not exceed three years, except where the maximum term specified by law for the crime for which the prisoner was sentenced shall exceed that period, in which event said maximum term shall be the limit of detention under the provisions of this act.*"

The meaning of these provisions is clear. They permit a period of detention in the said Industrial Home, including the time spent on parole, of three years in every case where the inmate has been sentenced thereto by the Court, regardless of whether the maximum term of imprisonment specified by law for the offense for which the inmate is sentenced is less than three years, and in all cases where the maximum term of imprisonment provided by law for the offense exceeds three years the detention in the Home, including the time spent on parole, may be equal in duration to such term.

While the matter of the detention of an inmate of the Home who violates her parole was not expressly included in your question, it is so closely connected therewith that it may also properly be considered here. Section 20 of the Act provides relative thereto as follows:

> "Whenever any paroled inmate of the said Industrial Home shall violate her parole, and be returned to the institution, the time when she was on parole and the unexpired term of her possible maximum sentence may be added together and, in the discretion of the board of managers, she may be required to serve such full time or any part thereof."

"The unexpired term of her possible maximum sentence" undoubtedly means maximum under this Act, but it is not entirely clear whether the above provisions mean that the time spent on parole is to be added to the unexpired portion of such possible maximum as of the time that the parole began or of the time it was violated. In view of the express limitations in Sections 14 and 15 as to the duration of the detention and that time on parole is included in the term of detention, I am of the opinion that this provision is to be construed as intending that the inmate may be required to serve all her possible maximum without any allowance for the time spent on the parole, that is, to add such time to the maximum remaining when the violation was committed. The purpose of this provision is to provide a punishment for the violation of a parole, and the above conclusion seems the reasonable one when we consider that to hold the other way would result in penalizing more severely in a case where the parole had been long observed than in one immediately broken, thus subjecting a person showing the better disposition to the longer detention.

I take it that the inquiry submitted by you did not arise solely from doubt as to the meaning of the provisions of the Act prescribing the duration of the detention of inmates in the said Industrial Home, but also from the further and broader question as to the validity of an enactment authorizing a detention therein in certain cases for a certain class of persons for a longer period than the maximum term of imprisonment specifically prescribed by law for the offense for which they are sentenced thereto, and hence involving a possibly longer imprisonment therein than that allowable for them elsewhere under the law, and longer than that allowable for all other classes anywhere for the same offense. Taking into consideration the character of this Institution, the purpose it has in view, the rational basis of the classification of those who may be sentenced thereto, and that the law operates uniformly upon the class within its scope, I am of the opinion that such a provision is a valid exercise of the legislative power of the Commonwealth, and does not constitute a denial of that equal protection of the laws guaranteed to all persons. The general rule upon this point as to imprisonment for crime is stated in *Corpus Juris, Vol. 12, page 1187, Section 953*, as follows:

> "A statute is void as a denial of the equal protection of the laws which prescribes different punishments or different degrees of punishment for the same acts com-

> mitted under the same circumstances by persons in like situation. This does not prevent the legislature, however, from providing a special punishment for a special class * * * provided no discrimination is made between persons of the same class committing like offenses."

A New York statute providing that women between the ages of fifteen and thirty years convicted of certain offenses might be sentenced to a house of refuge for five years, being a longer period than provided by law for imprisonment in State or county prisons, was sustained by the Supreme Court of that State, it being said in the course of the opinion:

> "The relator also claims that the act in question violates the provisions of the fourteenth amendment to the federal constitution, which provides that 'no state shall make or enforce any law, nor deny to any persons within its jurisdiction the equal protection of its laws'; that the said statute imposes an imprisonment of five years on a certain class of females for a misdemeanor, while the punishment for all other females, except such class, for the same offense, is imprisonment for one year, or a fine, or both. The house of refuge which the act creates is rather a reformatory than a prison, and all females in the state, of the age stated, are subject to the provisions of the law. Every woman between 15 and 30, guilty of a misdemeanor, is liable to the punishment provided therein. I think it within the power of the legislature to provide a punishment for children and young women at a different place, and for a different period, than the imprisonment provided for persons of a different age for the same offense."
>
> *People vs. Coon, 22 N. Y. Supp. 865.*

A statute of South Carolina authorized the Courts to sentence minors convicted of certain crimes to an industrial home until they reached the age of twenty-one years. In upholding its constitutionality the Supreme Court of that State said:

> "There can be no doubt that the Legislature has the power, under the state and federal Constitutions, to classify crimes and criminals, and provide for differences in the extent or degree of punishment for crimes of the same class, according to the circumstances, and for differences in the treatment or punishment of criminals of different classes for the same crime, provided such classification be reasonable, and all offenders of the same class be subject to the same treatment.
>
> * * * * * * * * * * *
>
> "Classification may be based upon the nature of the offender as well as upon the nature of the offense.
>
> * * * * * * * * * * *
>
> "Society has learned from experience that preventive justice is preferable to punitive justice, and more effective for its protection. And so the chief end of punishment—

> especially of youthful offenders—has come to be reformation, which was the manifest purpose of the Legislature in founding the school to which these appellants were committed. Reformation requires time—more in some cases than in others. Therefore the Legislature, in its wisdom, left it to the managers of the school to determine when it has been accomplished, within the limit of time prescribed by the statute, with authority to discharge or parole those placed under their tuition, when, in their judgment, the purpose intended has been accomplished.
>
> * * * * * * * * * * * *
>
> "Statutes providing for indeterminate sentences of all classes of criminals, within reasonable limits, for the purpose of effecting their reformation, have been very generally sustained as within the power of the Legislature, and as violative of no constitutional right. 8 R. C. L. pp. 261, 267; Wood *v.* State, L. R. A. 1915F, 531, and note."
>
> *State vs. Cagle, 96 S. E. 291*

It was held by the Supreme Court of California that the fact that an offender may be detained in a reform school longer than if sent to the penitentiary or county prison for the same offense did not render the act providing therefor unconstitutional.

Ex parte Liddell, 29 Pac. 251.

The analogy between the foregoing cases and the one here under consideration is sufficiently close to make the principle there stated applicable here. Our State Industrial Home for Women is kindred in nature to the institutions to which those cases relate. This Commonwealth, in harmony with the spirit and trend of the age, in dealing with persons convicted of crime recognizes the need of special institutions for young offenders wherein by remedial treatment and training to correct their criminal tendencies and prepare them for useful careers. The aim of this Home is not punitive but correctional and educational. Its primary object is not to punish for past offenses but to strengthen against the commission of future ones. While the period of detention in some cases may be longer than that provided by law for imprisonment in a penitentiary or county prison for the same offense, it is not made longer to visit a heavier punishment, but to give ample opportunity to help the one so detained.

Since the Act does not restrict sentences to this Industrial Home for crimes punishable by imprisonment in a penitentiary, but includes those of lesser grades in which the period of the maximum term of imprisonment is short, it would be idle and demoralizing to the whole system of instruction and discipline at the Home to sentence those committing these minor offenses thereto if the maximum term specified by law for imprisonment in the county jail would be the limit of detention

in the Home. The time of detention would be insufficient for the treatment and instruction contemplated by the Act. Such a limitation would greatly narrow the field of usefulness of the Home and seriously cripple its work.

In accordance with the foregoing, you are advised as follows:

1. That where persons are transferred from State or county prisons to the said State Industrial Home for Women, under the provisions of Section 14 of the said Act, the period of their detention in the Home, including the time spent on parole, is limited to the portion of the sentence as imposed by the Court remaining unserved at the date of the transfer, with such commutation as is allowable by law.

2. That every person duly sentenced by a Court to the said Industrial Home for Women, pursuant to the provisions of Section 15 of said Act, may be detained in said Home, including the time spent on parole, for a period of three years, and if the maximum term of imprisonment specified by law for the offense for which such person is sentenced thereto exceeds three years then in such case the period of detention in the Home, including the time spent on parole, may equal such maximum term.

3. That where any inmate of the said Industrial Home for Women violates her parole, there may be added to the portion of her maximum term of sentence in the Home remaining unexpired at the time of such violation the time spent on parole.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

IN RE TAXES ON STATE PROPERTY.

Taxation——Property Owned by Commonwealth——Building Commission——Site for Hospital——Local Taxes.

Local authorities have no power to levy a tax upon property owned by the Commonwealth and situated within their jurisdiction, so that real estate bought by the State Building Commission as site for State hospital for the insane is not subject to local taxes.

Office of the Attorney General,
Harrisburg, Pa., July 21, 1921.

Mr. Charles T. Aikens, Chairman, Building Commission, Eastern State Hospital for the Insane, Selinsgrove, Pa.

Sir: This Department is in receipt of your recent communication stating that the local tax collector in Penn Township, Snyder County,

has demanded of you taxes for the past two years upon five hundred acres of farm land in said Township which were purchased by your Commission in pursuance to the provisions of the Act of July 25, 1917, P. L. 1206. These lands were conveyed to the Commonwealth by deeds delivered in February, 1919, and have since been held by it. A part or all of the land so held has been rented by the Commonwealth pending the time when it will be needed for the exclusive occupancy of the Institution to be erected there. The County Commissioners, being of the opinion that because the land is not actually occupied by the Institution and a revenue is being derived from it it is the subject of local taxation, have instructed the collector to levy upon the personal property on the premises, and this he threatens to do. You ask to be advised whether you should pay these taxes. I am of the opinion that you should not.

The power of taxation is an incident of sovereignty. For the administration of government the State has created sub-divisions which are local depositories of limited and prescribed political powers to be exercised within their respective boundaries. To enable these municipal corporations to exercise their powers the State has from time to time, conferred upon them the power to tax certain subjects. It would be tedious and is unnecessary here to trace the early history of this legislation. It will be found in Mr. Eastman's work on Taxation in Pennsylvania.

As early as 1818 it was held in *Piper vs. Singer, 4 S. & R. 354*, that a grant from the State to a borough "to assess, levy and collect a tax" did not confer the right to levy a tax on property which belonged to a county. To the same effect is *Directors of the Poor vs. School Directors, 42 Pa. 21 (1862)*, and it is clear that at least prior to 1873 there was no legislation which conferred upon local authorities the right to tax the property of other local subdivisions or of the State. *Chadwick vs. McGinnes, 94 Pa. 117 (1881)*; *County of Erie vs. City of Erie, 113 Pa. 360 (1886)*, see opinion of the Court below; *Philadelphia vs. Barber, 160 Pa. 123 (1894)*; *New Castle vs. County Treasurer, 2 Dist. Rep. 95 (1892)*; *Carlisle School District vs. Carlisle Borough, 11 Dist. Rep. 294 (1901)*.

The Act of April 8, 1873, P. L. 64, entitled—"An act to repeal all laws exempting real estate from taxation," provided:

> "That all real estate within this Commonwealth shall be liable to taxation for all such purposes as now is or hereafter may be provided by general laws, excepting only therefrom * * *."

Then follow the particular exemptions not repealed by the Act.

This Act was under consideration in *Northampton County vs. Lehigh Coal and Navigation Company, 75 Pa. 461 (1874)*. Mr. Justice Sharswood there said:

> "That its object was not to change the course of judicial decisions upon the construction of the general tax laws, but to repeal the large number of special acts upon the statute book exempting particular properties. These special laws had become a great evil."

That case held that the words "all real estate," as used in the Act of 1873, did not comprehend real estate owned by a railroad company as such company was considered a public agency.

The Legislature in enacting a tax law contemplates as its subjects only private property. "No exemption law is needed for any public property, held as such," *Directors of the Poor vs. School Directors, 42 Pa. 21 (1862)*. "While in the absence of any constitutional prohibition the State might tax its own property, it is presumed that no Legislature intends to lay taxes on the State's own property, and, therefore, such property, even when not exempted from taxation by constitutional or statutory provisions, is so exempted by necessary implication, unless unmistakably included in the tax laws," *37 Cyc. 872*. "Public property was before the adoption of the new constitution exempt from taxation, not by statutes or by constitutional provision, but from the reason and necessity of things * * * The exemption did not depend upon any statute," opinion of the Court below in *County of Erie vs. City of Erie, 113 Pa. 360 (1886)*. It is always to be assumed that the general language of statutes is made use of with reference to taxable subjects, and the property of municipalities is not in any proper sense taxable. It is, therefore, by clear implication excluded, *Cooley on Taxation, as quoted in 113 Pa. 360.*

The property of the Commonwealth, therefore, was not made taxable by the Act of 1873.

The Constitution of 1874, Article IX, Sections 1 and 2, provided:

> "The General Assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit and institutions of purely public charity.
>
> "All laws exempting property from taxation, other than the property above enumerated, shall be void."

The adoption of the Constitution was followed by the Act of May 14, 1874, P. L. 158, entitled—"An act to exempt from taxation public property used for public purposes," etc., which provided, inter alia:

> "That * * * all school houses * * * court houses and jails * * * are hereby exempted from all and every * * * tax: Provided that all property, real or personal, other than that which is in actual use and occupation for

> the purposes aforesaid, and from which any income or revenue is derived, shall be subject to taxation, except where exempted by law for state purposes, and nothing herein contained shall exempt same therefrom."

It was contended that the effect of these provisions was to repeal any existing statute exempting public property, and, by virtue of the proviso, to impose a tax on all such property not specifically exempted by the Act. The error in this contention was pointed out in *County of Erie vs. City of Erie, 113 Pa. 360 (1886)*. There was no prior statute exempting public property from taxation and, therefore, these provisions could not repeal any. Prior to 1874 it was the absence not the presence of law which made it non-taxable, and the Act of 1874 did not by its proviso comprehend public property. *New Castle vs. County Treasurer, 2 Dist. Rep. 95 (1892)*; *Carlisle School District vs. Carlisle Borough, 11 Dist. Rep. 294 (1901)*; *Directors of the Poor vs. School Directors, 42 Pa. 21 (1862)*.

Subsequent to the decision in *County of Erie vs. City of Erie, supra*, the proviso in the Act of 1874 was declared unconstitutional in so far as it attempted to render taxable any property which was not hitherto taxable, because the title gave notice only of *exemptions* from taxation, and not of new taxable subjects. *Sewickley Borough vs. Sholes, 118 Pa. 165 (1888)*. This case settled beyond question the effect of the proviso.

The Act of 1874 was supplemented by the Act of June 4, 1879, P. L. 90, and amended by Acts of May 29, 1901, P. L. 319, March 24, 1909, P. L. 54, and June 13, 1911, P. L. 898, all of which contained the proviso in the same or equivalent words. The Act of July 17, 1919, P. L. 1021, as amended by Act No. 70, approved April 9, 1921, repealed the Acts of 1874, 1901, 1909 and 1911, and supplied their provisions. Its title and one of its provisos are the same as those of the Act of 1874. The body of the Act differs from the Act of 1874, however, in including among the exempted property "and all other public property used for public purposes," which in the older Act appeared only in the title.

The Act of 1919 is the act under which the property in question would be taxable, if at all. Reading therein the exemption of "public property used for public purposes," followed by the proviso that all property not exempted shall be taxable, I am able to understand how the County Commissioners, if they have not traced the history of the legislation or read the decisions thereon, might reach the conclusion that the farms in question, because they are not now in actual use by the State for public purposes, are subject to local taxation.

An examination of the authorities cited, however, will make it clear: (1) that property of the State is free from taxation without any statutory exemption, (2) that the specific exemption of public property used for public purposes does not by implication subject other public property to taxation, (3) that the declaration contained in the proviso, that

all property other than that which is in use for the purposes mentioned, in the Acts of 1874 and 1919, does not render taxable the property of the State which is not so used, (4) that to subject State property to taxation would require the most clear and unequivocal affirmative expression of the Legislature, and (5) that the Legislature has not enacted any such statute.

The question you present has been ruled by this Department in the same way in *Official Opinions, 1905-1906, p. 176, 1909-1910, pp. 218 and 328*, without, however, citing the Pennsylvania authorities. In view of the determination of the local authorities to make a levy upon the property, it seemed advisable to discuss the question more fully.

I advise you that you should not pay the local taxes assessed against the property of the Commonwealth and demanded of you as one of its agents.

Very truly yours,

GEO. ROSS HULL,
Deputy Attorney General.

STATE HOSPITAL FOR CRIMINAL INSANE, FARVIEW.

Authority to engage in manufacturing and to distribute the products made by the inmates of this Institution, under the provision of the Act of May 28, 1907, P. L. 290, as amended by the Act of June 19, 1913, P. L. 530.

The State Hospital for the Criminal Insane, Farview, may lawfully sell or exchange such manufactures or products only to an institution, maintained wholly or in part by the State, wherein are confined the insane, feeble-minded or epileptic. It may not manufacture or furnish brick for the erection of additional buildings to the State Capitol. The clay on the land of said hospital mined by the labor of the inmates cannot be lawfully sold in the open market or the public generally, even though the receipts of such sale be turned into the State Treasury.

Office of the Attorney General,
Harrisburg, Pa., September 23, 1921.

Dr. W. M. Lynch, Superintendent State Hospital for the Criminal Insane, Farview, Waymart, Pa.

Sir: This Department is in receipt of your two communications of the 7th inst. asking to be advised upon the following questions which are so similar as to render proper their answer in a single opinion, viz.:

1. Can the State Hospital for the Criminal Insane at Farview lawfully manufacture and furnish brick for the erection of additional buildings to the State Capitol, the State to pay the actual cost of the manufacture and the freight on the brick from the Hospital to Harrisburg?

2. Can the said Hospital lawfully sell clay from deposits found on the land of the Institution, provided the receipts therefor be turned into the State Treasury? It appears that, in uncovering clay for the manufacture of brick at the Institution, clay of a quality suitable for pottery purposes has been found and it is such clay that is proposed to be sold, presumably in the open market or to the public generally.

Taking these questions up in the above stated order you are respectfully advised as follows:

The power of the said State Hospital to engage in any manufacturing operation is derived from the Act of May 28, 1907, P. L. 290, amended by the Act of June 19, 1913, P. L. 530, providing for the employment of insane, feeble-minded and epileptic persons confined in institutions maintained, in whole or in part, by the State, and the distribution of the products made by such persons in such institutions.

Section 1 of the Act provides that:

> "* * * 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 provides, in part, 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."

Section 4 of the Act makes it a penal offense for those charged with the management of an institution within its terms to permit its products "*to be sold or exchanged in any other way except as herein provided.*"

In an opinion rendered by Deputy Attorney General Hull to the Secretary of Agriculture, dated August 26, 1920, it was ruled that tile manufactured by the inmates of the said State Hospital for the Criminal Insane could not lawfully be sold to the public.

In an opinion rendered by the writer hereof to the Hon. H. F. Walton, President of the Board of Trustees of said Hospital, dated November 23, 1920, it was held that brick manufactured at said Institution could not be sold to a hospital which was supported by public contributions and also received State aid, but which did the general work of a hospital, upon the ground that it was the intent of the said Act of 1907 to limit the sale or exchange of the products manufactured in any institution to which it relates to other institutions of the same character.

The provisions of the Act taken as a whole admit of no other construction. The supplies, articles, goods and products made, manufactured or produced by the inmates of an institution for the insane, feeble-minded or epileptic maintained, in whole or in part, by the State can be sold or exchanged only to a like institution. These institutions can, in this respect, deal with each other and with no one else. This precludes the proposed furnishing of brick manufactured by the inmates of said Hospital for use in the erection of additional buildings to the State Capitol, upon the State paying the actual manufacturing cost, which in effect would amount to a sale of the article at the cost price.

I am also of the opinion that the same rule as that stated above obtains as to clay mined by the inmates of said Hospital and for the same reasons, and that it would consequently be a violation of the provisions of the Act of 1907 to sell such clay in the open market or to the public generally. Turning the proceeds arising from the sale into the State Treasury would not change the rule. Furthermore, as in the case of a manufacturing operation, the only authority possessed by this Hospital to carry on such an operation as mining the clay deposits found on its lands is that arising from the said Act of 1907.

In a well considered opinion rendered to the State Superintendent of Public Instruction, dated January 29, 1919, Deputy Attorney General Myers decided that a State-owned Normal School could not engage in mining and selling the coal on its lands, saying:

> "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."

The principle there applied also applies here. As above pointed out, the only authority of the said State Hospital to carry on such an industrial operation as manufacturing brick or mining clay is that pursuant to the said Act of 1907, and which operation is to be carried on by the labor of inmates, and the products thereof disposed of in the manner prescribed. Reference was made in your communication to a ruling of a former Attorney General relative to the sale of the "blighted chestnut" standing on the Hospital lands. Such a ruling simply covered an ex-

ceptional and extraordinary condition in order to salvage these stricken trees and save the State from their complete loss. It would have no general application.

The purpose of the Act of 1907, permitting the employment of the inmates of the institutions within its scope, was to promote the welfare of these unfortunate persons, and it may be that in order fully to effectuate that beneficient end the provisions of the statute in respect to the distribution of the products of the labor of these inmates are too narrow, and hence that it would be wise to widen the field of distribution to a domain analagous to that allowable to the products of penal institutions made under the former Prison Labor Commission, now Department of Public Welfare. If so, this must be accomplished by appropriate legislation; in the meantime, we must abide by the restrictions so clearly contained in the law.

Specifically answering your several questions, you are advised that the said State Hospital for the Criminal Insane can lawfully sell or exchange such manufactures or products as aforesaid only to an institution, maintained wholly or in part by the State, wherein are confined the insane, feeble-minded or epileptic, and it, therefore, follows:

(1) That the said Hospital can not manufacture or furnish brick for the erection of additional buildings to the State Capitol.

(2) That the clay on the land of the said Hospital mined by the labor of the inmates cannot lawfully be sold in the open market or to the public generally, provided the receipts of such sale be turned into the State Treasury.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

OPINION TO A HOSPITAL.

For the Year 1922.

STATE HOSPITAL FOR INSANE, DANVILLE.

Authority of Trustees to pay employes who are members of the National Guard for the time spent in a Training Camp.

Acts of May 17, 1921, P. L. 869, Section 68; June 2, 1915, P. L. 736, Sections 103 and 302; June 14, 1915, P. L. 973; June 7, 1917, P. L. 559; April 20, 1921, P. L. 197; June 7, 1917, P. L. 600.

The provisions of Section 68 of the Act of 1921, known as the "Pennsylvania National Guard Act," do not apply to the employes of a State Hospital for the Insane. Trustees of such hospital are not liable to pay their employes, who are members of the National Guard, for the time spent in a Training Camp, in addition to the time, with pay, allowed them for regular vacation.

Office of the Attorney General,
Harrisburg, Pa., January 4, 1922.

Dr. J. Allen Jackson, Superintendent, State Hospital for the Insane, Danville, Pa.

Sir: There was duly received your communication of the 20th ult. in regard to five employes of your Institution who as members of a certain unit of the National Guard spent fifteen days at a Training Camp this past summer. You state that these men "were granted leave of absence without pay, or with pay, charging time to their vacation period," presumably for the said period and the aforesaid purpose. You ask to be advised whether your Institution can be held responsible for the pay of these men for the period spent in said work, the precise question, as I understand, being whether it is incumbent upon an Institution such as yours to allow men who are members of the National Guard their usual vacation with pay, and in addition thereto the time spent in a training camp also with pay.

This question arises under Section 68 of Act approved the 17th day of May, 1921, P. L. 869 providing for the organization, etc. of the armed land forces of the Commonwealth, which reads as follows:

> "All officers and employes of the Commonwealth of Pennsylvania, members of the Pennsylvania National Guard, shall be entitled to leave of absence from their

> respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall, as members of the Pennsylvania National Guard, be engaged in the active service of the Commonwealth or in field training ordered or authorized under the provisons of this act."

The answer to your inquiry turns upon the point whether the employes of such Institution as yours are to be deemed "employes of the Commonwealth" within the meaning of that term as used in the above quoted provision. The question of the status of the employes of State Institutions as to whether they are or are not to be deemed State employes has been ruled upon by this Department in connection with various Acts.

In an opinion dated December 9, 1915, to the Chairman of the Workmen's Insurance Board, (Attorney General's Reports 1915-1916, page 194), First Deputy Attorney General Keller decided that under the provisions contained in Section 103 of the Workmen's Compensation Act of 1915, defining "employer" as used therein as embracing, inter alia, "*the Commonwealth and all governmental agencies created by it,*" and the kindred provision in Section 302 (a) of that Act reading—"*any employe of the State or of such governmental agency,*" the employes of State Institutions receiving separate appropriations with power on the part of their boards of trustees to employ and discharge employes were not employes of the Commonwealth within the meaning of the Act, but of such State agencies, and hence that an appropriation to pay compensation to employes of the Commonwealth was limited "to employes proper on the pay-roll of the Commonwealth," and did not cover employes of State Institutions who must carry their own compensation insurance. Commenting upon the above Sections of said Act it was said:

> "A clear distinction is recognized in this definition between the Commonwealth and governmental agencies created by the Commonwealth. The act treats such governmental agencies as separate employers not included in, or embraced under, the term, Commonwealth. The same distinction is maintained with regard to *employes* of governmental agencies of the "Commonwealth." * * * Thus recognizing the existence of employes of governmental agencies separate and distinct from employes of the Commonwealth itself, and of any county, city, borough, or township of the Commonwealth."

The Act of June 14, 1915, P. L. 973, providing a Retirement System for "State employes" was held in an opinion delivered by Deputy Attorney General Davis to the Governor, dated January 9, 1917, not to include employes of State Institutions. That Act was amended by that of June 7, 1917, P. L. 559, by adding thereto a definition of the term

"State employe" as used therein, which expressly includes within its meaning the employes of State Institutions. In the further amendment as made by Act approved April 20, 1921, P. L. 197, the term "State employe" is again expressly made to apply to such employes.

The Act of June 7, 1917, P. L. 600, providing that "any appointive officer or employe, regularly employed by the Commonwealth of Pennsylvania in its civil service, or by any department, bureau, commission, or office thereof" entering the military service of the United States in time of war should not during such service lose his place in the State service, and providing that a certain portion of his salary should be paid to his dependents, was held in an opinion of this Department rendered by the writer hereof to Thomas B. Foley, Secretary of the Western Penitentiary, dated November 28, 1917, not to apply to the employes of State Institutions.

Applying the principle followed in the foregoing opinions, from which I see no reason to depart, we must reach the conclusion that the term "employes of the Commonwealth," as used in the aforesaid Act relating to the armed land forces of the Commonwealth, does not include the employes of State Institutions, but only the direct employes of the Commonwealth itself in the strict sense. The Legislature unmistakably took note of the above mentioned construction of the Retirement Act as it was originally passed in 1915 when by the amendatory Acts of 1917 and 1921 it specifically defined "State employes," as used therein, to embrace employes of State-operated Institutions. This may fairly be taken as a clear legislative recognition and one prevailing at the same session of the Legislature that enacted the said law relating to the armed land forces of the Commonwealth that the general term "State employe" or "employe of the Commonwealth" does not of itself import an employe of a State institution. If the provisions of Section 68 of the Act organizing the armed land forces of the State had been intended to apply to such employes, that intendment would have been expressed in a definition to that effect.

The concern of State and Nation in an efficient National Guard is so great that any law promotive of that end should receive a liberal interpretation, but we can not impose the additional burden upon State Institutions which the aforesaid provision would entail without a clear statutory mandate. This can be done by an amendment to the Act.

A State Institution could by standing rule voluntarily allow an additional vacation with pay to its employes for time spent by them as members of the National Guard in a training camp, but it is not obliged to do so.

You are, therefore, advised that the provisions of Section 68 of the said Act, providing for the organization of the armed land forces of the Commonwealth, and known as the "Pennsylvania National Guard Act," do not apply to the employes of a State Hospital for the Insane, and consequently that your Institution is not liable thereunder to pay its said employes for their said attendance as members of the National Guard at a training camp for said period in addition to the time with pay allowed them as a regular vacation.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

OPINIONS TO THE SUPERINTENDENT OF PUBLIC PRINTING AND BINDING.

OPINIONS TO THE SUPERINTENDENT OF PUBLIC PRINTING AND BINDING.

For the Year 1922.

PUBLIC PRINTING.

Superintendent of Public Printing and Binding—Authority to sell as "waste paper," certain paper held in storage which was damaged by fire.

The Capitol City Junk Company has a contract with the Commonwealth under which it purchases from time to time waster paper. The Superintendent of Public Printing and Binding is not obliged to sell to this company as "waste paper" certain paper which was damaged by fire and is now held in storage.

Office of the Attorney General,
Harrisburg, Pa., May 23, 1922.

Honorable R. C. Miller, Superintendent, Department of Public Printing and Binding, Harrisburg, Pa.

Sir: The Attorney General's Department is in receipt of your inquiry of May eighteenth requesting a construction of your agreement for the sale of waste paper, with particular reference to the question as to whether or not you are required to sell to the Capital City Junk Company, which now has a contract to purchase waste paper from you, the paper which you held in storage and which was damaged recently by fire. I understand that the Capital City Junk Company have insisted that this damaged paper is waste paper and that as such you are obliged to sell it to them in accordance with your contract with them.

An examination of the law shows that you are not in any way bound by it to call this paper waste paper. Under these circumstances we must look to the contract between your Department and the Capital City Junk Company. We find that this consists of the proposal for the purchase of waste paper, dated December 19, 1921, signed by the Capital City Junk Company and accepted by you as binding upon both parties. This proposal consists merely of your invitation for proposals, instructions to bidders, a schedule upon which to fix prices and a final paragraph setting forth that the proposer accepts the condition as set forth therein. The invitation to submit proposals reads as follows:

"I hereby invite Sealed Proposals at net prices for the purchase of all Waste Paper to be disposed of by the Department of Public Printing and Binding during the year begining January 1, 1922 and ending December 31, 1922.

ROBERT C. MILLER,
Supt. of Public Printing and Binding."

You will observe that this does not define what shall be called waste paper, nor is it defined anywhere in the law. Within all reasonable limits you are the judge of what is, or is not, waste paper. At the end of the proposal for the purchase of waste paper we find the following:

"I CAPITAL CITY JUNK COMPANY, of the city of Harrisburg, County of Dauphin, State of Pennsylvania, hereby accept the conditions set forth in the foregoing proposal and schedule and offer the prices placed in the "Net Column" as my bid for the said items of Waste Paer.

CAPITAL CITY JUNK COMPANY,
Abe Freedman."

In our opinion it is quite clear that you are not obliged to sell paper which may be either slightly or considerably damaged by fire or through other unavoidable causes, and specifically we advise you that you are under no obligation to sell to the Capital City Junk Company the paper owned by you which was damaged recently by fire in their storage building.

Very truly yours,

STERLING G. McNEES,
Deputy Attorney General.

PUBLIC PRINTING.

Superintendent of Public Printing and Binding—Authority to print annual report of the Insurance Commissioner upon an order received from him—Acts of May 17, 1921, P.L. 682, Section 219, and July 23, 1919, P. L. 1128, Sections 9 and 10.

The Superintendent of Public Printing and Binding has no authority to authorize the printing of the annual report of the Insurance Commissioner, unless an order for such printing is received from the Governor, or unless the General Assembly, after having received the report of the Insurance Commissioner, shall by concurrent resolution direct the printing thereof.

Office of the Attorney General,
Harrisburg, Pa., July 19, 1922.

Mr. Robert C. Miller, Superintendent Public Printing and Binding, Harrisburg, Pa.

Sir: The Attorney General is in receipt of your communication of July 11th inquiring whether under Section 219 of the Insurance Department Act of 1921 you are obliged to print the annual report of the Insurance Commissioner upon an order received from him.

Section 9 of the Act of July 23, 1919, P. L. 1128 provides in part, as follows:

> "No part or parts of any reports of the several Heads of Departments shall be printed in pamphlet form, nor shall any book be published at the expense of the State * * * unless by virtue of express authority of law * * *"

Section 10 of the same Act provides in part, as follows:

> "The reports authorized to be made by law by the * * * Insurance Commissioner * * * shall be made out in typewritten form * * * and delivered to the Governor who shall cause the same to be delivered to the Superintendent of Public Printing and Binding, accompanied by an order from the Governor directing the Superintendent of Public Printing and Binding to print, stitch, trim and bind together the same in the form and manner provided for in this Act."

This Section points out the "express authority of law" under which the reports of this Department may be printed.

Section 219 of the Insurance Department Act of 1921 is as follows:

> "The Insurance Commissioner shall preserve, in a permanent form, a full record of his proceedings and a concise statement of the condition of each company, association, exchange, society, and order or agency visited or examined. He shall make a report annually, to be submitted to the General Assembly at its biennial ses-

> sions, showing the receipts and expenses of his department, the condition of companies, associations, exchanges, societies and orders doing business in this Commonwealth, and such other relevant information as will exhibit the affairs or activities of his department."

Although the Insurance Commissioner is required by this Section to preserve certain information "in a permanent form" and is directed to "make a report annually to be submitted to the General Assembly at its biennial sessions," there is nothing in this Section to indicate that this report shall be a printed one.

I am, therefore, of the opinion, and so advise you, that unless an order is received from the Governor in accordance with the Act above quoted, or unless the Legislature, after having received the report of the Insurance Commissioner, shall by concurrent resolution direct the printing thereof, you should not authorize the printing of the same.

Very truly yours,

GEO. ROSS HULL,
First Deputy Attorney General.

MISCELLANEOUS OPINIONS.

MISCELLANEOUS OPINIONS.

For the Year 1921.

IN RE SCHOOL PENSIONS.

Annexation of Districts——Retirement Fund——Commonwealth——Payment——Act of July 18, 1917, P. L. 1043.

Under the Public School Employes' Retirement Act of July 18, 1917, P. L. 1043, where a portion of a school district within which are located some of its schools, is annexed to another district, the district from which these schools are so detached is the one by whom the Commonwealth is to be paid, under the provisions of Section 9 of that Act, on account of the detached schools as to any period of their employment therein prior to the date of annexation.

Office of the Attorney General,
Harrisburg, Pa., January 25, 1921.

Mr. H. H. Baish, Secretary Retirement Board, Public Schools Employes' Retirement System, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 8th instant, in regard to the payment to be made by a school district under the public school employes' retirement Act of July 18, 1917, P. L. 1043, where a portion of a district is annexed to another district.

It appears that in July, 1920, a portion of a certain township was annexed to a city of the third class, and that there were two schools within the annexed territory, one of whose teachers for the school year 1919-1920 was a new entrant member of the Retirement Association, and the other a present employe member thereof. You ask to be advised which school district, that of the township or that of the city, should, pursuant to the requirements of the Act, pay the amount payable by an "employer" on account of the aforesaid teachers for the school year 1919-1920.

It may be said at the outset that the opinion hereby rendered is not intended to pass, or be construed as passing, upon the aforesaid matter in any way with respect to any adjustment by said districts of any indebtedness consequent upon the said annexation, as that is something outside the province of this Department. This ruling relates solely to the question as to whom the Commonwealth, in such a case as the foregoing, is to look for reimbursement on account of what is paid by it into the retirement system funds.

Section 8 of the Act provides, inter alia, that the Commonwealth shall at stated times, in the manner prescribed, pay certain amounts into what are known as the "contingent reserve fund," and the "State annuity reserve fund number two." It is provided in Section 9 that:

> "The Commonwealth of Pennsylvania shall be reimbursed to the extent of one-half of the amount paid by the Commonwealth into the contingent reserve fund and the State annuity reserve fund number two on account of employes of each other employer, by payments into its treasury made directly by such employer, or indirectly from moneys otherwise belonging to such employer."

It is further provided that the amount so due from any employer may be deducted from the state school appropriation to such employer.

The effect of the foregoing is, in my opinion, plain. The Commonwealth should collect from the district that was the actual employer of the employe on whose account payment is to be made into said funds. In this present case the said teachers were, for the school year of 1919-1920, (all of which was prior to the date of annexation), the employes of the township district; they were carried on its pay-rolls, and the deductions from their salaries on account of their membership in the retirement system were made by it. Paragraph 2 of Section 7 makes it the duty of every employer in September of each year to certify to the Retirement Board the names of all its employes to whom the Act applies. Presumably, therefore, for the school year of 1919-1920, the names of the said teachers stood on the records of the Board as the employes of the township district. That the district is not required to pay the Commonwealth on account of its said employes of that school year until in this present school year, and so subsequent to the time when part of it was annexed to another district, cannot be construed as shifting the duty of the Commonwealth to look to the annexing district for payment of the amount owing. The obligation imposed by the above quoted provision runs with the employment by any district of employes to whom the Retirement System applies, and the date when payment on account thereof is to be made is not material in determining who is the "employer" within the intent of the Act.

You are accordingly advised where a portion of a school district within which are located some of its schools, is annexed to another district, that the district from which these schools are so detached is the one by whom the Commonwealth is to be paid, under the provisions of Section 9 of the Act, on account of the employes in the detached schools as to any period of their employment therein prior to the date of such an-

nexation. It follows, therefore, that in the above stated case, the township district is the proper one to pay the Commonwealth on account of said teachers in said district for the school year 1919-1920.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

GENERAL GALUSHA PENNYPACKER MEMORIAL COMMISSION.

Appropriations—Lapse of unexpended balance—Act of July 18, 1919 (Appropriation Act No. 377A).

The unexpended balance of the appropriation made under said act to the General Galusha Pennypacker Memorial Commission will lapse May 31, 1921, unless a contract for the actual erection of the memorial is awarded before that date, even though a sculptor had been employed to make preliminary studies.

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

John F. Lewis, Esq., Acting Chairman, General Galusha Pennypacker Memorial Commission, Philadelphia, Pa.

Sir: This Department is in receipt of your communication of the 26th ult., inquiring whether the unexpended balance of the appropriation made by the Act of July 18, 1919 (Appropriation Acts No. 377A) will lapse on May 31, 1921. Section 1 of the Act provides as follows:

> "Be it enacted, etc., That the sum of fifteen thousand dollars ($15,000.00), or so much thereof as may be necessary, be, and the same is hereby, specifically appropriated out of any money in the treasury not otherwise appropriated for the erection, upon the Parkway in the city of Philadelphia, or elsewhere in the State of Pennsylvania, a suitable monument or memorial to commemorate the distinguished military services of General Galusha Pennypacker in behalf of the Union."

In an opinion to the Gettysburg Battlefield Memorial Commission, rendered by Deputy Attorney General Hargest, April 16, 1909, and reported in Attorney General's reports 1909-10, page 277, the rule as to appropriations for the erection of memorials is thus stated:

> "The said Act of 1907 does not expressly provide that the appropriation therein made shall be expended within any definite time. However, it is contrary to the policy of the Commonwealth that appropriations shall be kept open indefinitely and the moneys considered as set apart

for an unlimited period. Prompt and diligent action on the part of those entrusted with the expenditure of appropriations is contemplated by the Acts of Assembly making such appropriations. As a general proposition it has been the view of this Department that under appropriations similar to the one now in question, the sites for monuments should be selected and contracts for their erection awarded within the said fiscal period of two years, in order to prevent the merging of the appropriation into the general fund in the State Treasury.

"This principle is invoked for the purpose of preventing unreasonable delay and for the purpose of requiring that moneys thus specifically appropriated must be expended within a reasonable time for the accomplishment of the purpose for which such moneys are appropriated."

In an opinion rendered by Deputy Attorney General Cunningham, on May 8, 1913, Attorney General's Reports 1913-14, page 135, it was inter alia stated as follows:

"It has been consistently held by this Department for many years that Acts of Assembly making appropriations for the erection of buildings, monuments, etc., contemplate prompt and diligent action on the part of those entrusted with the expenditure of the appropriations, and that such appropriations should not be held to be valid for an indefinite period. It has accordingly been held that where an appropriation is made for the purchase of a site, and the erection of a building or monument thereon, the ground must be purchased and contracts awarded for the erection of the contemplated structure thereon within the usual appropriation period of two years. The precedents, therefore, seem to hold that although no time may be fixed by the Act making the appropriation within which it must be expended, the appropriation will be deemed to have lapsed into the general fund in the State Treasury at the end of the two fiscal years succeeding the making of the appropriation, unless contracts for its expenditure have been entered into prior to that time. This rule is at least applicable to appropriations which contemplate the erection of completed structures and to appropriations made for the maintenance of institutions."

An Act of May 15, 1903, appropriated certain moneys "for the purchase of ground and the erection of suitable monuments and memorial tablets to mark the position occupied in the line of entrenchments around the City of Vicksburg, Mississippi, by each of the commands of the Pennsylvania Volunteer soldiers which participated in the siege of that city during the Civil War." The question of whether this appropriation lapsed at the end of the second fiscal year was thus answered by Attorney General Carson, Attorney General's Reports 1903-4, page 296.

"The case falls under the general rule with reference to the unexpended balance of the appropriation. I have no hesitancy in declaring that such unexpended balance of the amount appropriated by the Legislature under the Act of May 15, 1903, will merge into the general fund in the State Treasury on June 1, 1905. Action must be taken therefore prior to that date, and in order to receive the benefit of the present appropriation, the Commission should enter into contracts for construction and consume the appropriation before the date already mentioned as otherwise it will be necessary to apply to the incoming Legislature for a new appropriation."

You state that your Commission has engaged a sculptor who has proceeded to make preliminary studies, but that the actual work of constructing the memorial has not been begun, "because the Commission found that the sum was not adequate for the purpose."

I am of the opinion that this reason is not sufficient to justify an inference that the Legislature intended your appropriation to be an exception to the general rule. You are accordingly specifically advised that the unexpended balance of the appropriation made by the Act of July 18, 1919, No. 377A, will merge into the general funds of the Commonwealth on May 31, 1921, unless a contract is awarded before that date for the erection of the memorial.

Very truly yours,

FRANK M. HUNTER,
Deputy Attorney General.

STATE BOARD OF CENSORS.

State Board of Censors—Authority to censor published advertisements of a film—Act of May 15, 1915, P. L. 534, Sections 21 and 27.

While ordinary newspaper advertising need not be first submitted to the Board before publication, nevertheless if such advertising matter is of a striking character, immoral and improper similar to a poster, the person who publishes it should be prosecuted under Section 27 of said act.

Office of the Attorney General,
Harrisburg, Pa., February 8, 1921.

Honorable Harry L. Knapp, Chairman State Board of Censors, 1025 Cherry St., Philadelphia, Pa.

Sir: Your communication of February 1, 1921, enclosing copy of an advertisement published of the film called "Body and Soul," and asking what action, if any, the State Board of Censors can take in this matter, duly received.

Section 21 of the Act of May 15, 1915, (Pamphlet Laws 534) provides that:

> "No banner, poster or other like advertising matter shall contain anything that is immoral or improper. A copy of such banner and poster shall be submitted to the Board."

While this section says that only a copy of such banner and poster shall be submitted to the Board, the previous sentence covers all like advertising matter, such as newspaper pictures, and if any advertising matter shall contain anything that is immoral or improper, it subjects the person publishing the same to the penalties provided by Section 27 of this Act, which says:

> "That any person who violates any of the provisions of this Act, and is convicted thereof summarily before any alderman, magistrate or justice of the peace, shall be sentenced to pay a fine of not less than twenty-five dollars or more than fifty dollars for the first offense."

Under Section 21 before recited, it does not seem to have been the intention of the Legislature that ordinary newspaper advertising matter must, before publication, be first submitted to the Board, but if such advertising matter is of a striking character, similar to a poster, is immoral and improper, it falls under the prohibition of the first portion of such section, and the person who publishes it, or is concerned in the publication thereof, could be prosecuted under section 27 of this Act of 1915.

Very truly yours,

WM. I. SWOOPE,
Deputy Attorney General.

IN RE MOTHERS' PENSIONS.

Grandmother——Orphan Children——Legal Adoption——Act of July 10, 1919, P.L. 893.

The grandmother of orphan children, cannot legally receive assistance from the Mothers' Assistance Fund created by the Act of July 10, 1919, P. L. 893. The fact that she would adopt the children legally would not make her their "mother" in the sense in which the word is used in this act.

Office of the Attorney General,
Harrisburg, Pa., February 8, 1921.

Miss Mary F. Bogue, Supervisor of the Mothers' Assistance Fund, Harrisburg, Pa.

Dear Madam: Your letter of the 1st inst., requesting an opinion from this Department as to whether a grandmother who has adopted

four orphan grandchildren is entitled to assistance from the Mothers' Assistance Fund, provided by the Act of the tenth of July 1919, P. L. 893, has been referred to me.

In reply would say, that this Act of July 10, 1919, P. L. 893, is an Act supplying the two previous Acts, the Act of April 29, 1913, P. L. 118, and the Act of June 18, 1915, P. L. 1038. While as yet I cannot find that this Act of the tenth of July, 1919, has been construed either by this Department or by the Courts, in ascertaining its meaning, we can refer to the opinions of this Department and the decisions of the Courts construing the two previous Acts dealing with the same subject. The title of this Act begins with these words, "Providing for assistance to certain *mothers*." Section 6 of the Act provides as follows:

> "It shall be the duty of the board of trustees to provide, from the funds made available under the provisions of this act, as aid in supporting their children in their own homes, assistance to poor and dependent mothers of proved character and ability, who have children under the age of sixteen years, and whose husbands are dead, or permanently confined in institutions for the insane."

Under this section there are three qualifications for the mothers who are to receive assistance from this fund. (1) They must be mothers who are supporting their children in their own homes, (2) They must be poor and dependent mothers of proved character and ability, who have children under the age of sixteen years. (3) They must be mothers whose husbands are dead, or permanently confined in institutions for the insane. Our Supreme Court in the following case strictly construed one of these qualifications for the mothers who are to receive assistance under the Act of June 18, 1915, P. L. 1038, in these words:

> "When the legislature made provision for women 'whose husbands are dead,' it is to be conclusively presumed that husbands actually dead, and not merely presumably so, were in the legislative mind. The whole matter was for legislative consideration, and the legislature might have extended the beneficent provisions of the Act of 1915 to women whose husbands are presumed by the law to be dead; but it did not do so, and, until it does, the act must be construed as it is written, and the word 'dead' given its popular, natural and ordinary meaning: Commonwealth *v.* Bell, 145 Pa. 374; Keller *v.* Scranton, 200 Pa. 130."
>
> *Com. ex rel., Mothers' A. Fund, v. Powell, Appel. 256 Pa., page 470.*

This Department in an opinion dated August 10, 1915, reported in 24 District Reports, page 953, held that under the previous Act of June 18, 1915, P. L. 1038, the beneficiaries of the Mothers' Assistance Fund are limited to the persons specifically named in the act.

> "It must be assumed, however, that there were good and sufficient reasons for making the limitation in the Act of 1915, and it is, of course, our duty to interpret legislative acts in accordance with the intention as expressed therein—in this case clearly expressed—and it is your duty to administer the law as so passed and interpreted.
>
> "In other words, the provisions of the Act of June 18, 1915, P. L. 1038, are limited in terms to 'women who have children under sixteen years of age, and whose husbands are dead or permanently confined in institutions for the insane, when such women are of good repute, but poor and dependent on their own efforts for support, as aid in supporting their children in their own homes,' and others may not lawfully be designated as beneficiaries thereunder."

Applying the principles of the above cited decisions to the question presented by your letter, would say, that the act limits the persons to receive assistance from the Mothers' Assistance Fund to "mothers" having children. The meaning of the word "mother" in Acts of Assembly has been settled by a long line of decisions. Bouvier's Law Dictionary defines a "mother" as a woman who has borne a child. It has been held that the word "mother" does not include the mother of an illegitimate child in the absence of a special statement. Landry *v.* American Creosote Works, 43 South, 1016. The very point raised by your query as to adopting motherless children has been decided in the following case where it was held that the right granted to the surviving father or mother to recover damages for the death of their son, is a right granted to the actual father or mother, and not to an adopting parent. Mount *v.* Tremont Lumber Co. 46 South. 103.15 Ann. Cases 148.

While the Act of Assembly in relation to adoption in Pennsylvania says that the adopting parent and the adopted child have the rights of parent and child, it cannot cover the case of a mother receiving aid from the Mothers' Assistance Fund. In Section 6 of the Act of 1919 quoted above, the three qualifications of a mother who are to receive assistance from this fund plainly show the intention of the Legislature to mean only that mothers of legitimate children, and who are the children of the mother receiving assistance are entitled to assistance from this fund.

You are, therefore, specifically advised that Mrs. Catharine Hall, the grandmother of the four orphan children, cannot in any case legally receive assistance from the Mothers' Assistance Fund created by the Act of 1919. The fact that she would adopt the children legally would not make her their "mother" in the sense in which the word is used in this Act of Assembly.

Yours respectfully,

WILLIAM I. SWOOPE,
Deputy Attorney General.

STATE BOARD OF CENSORS.

Pennsylvania State Board of Censors—Motion Pictures—Power to recall approval of a motion-picture film.

A picture which has been properly submitted to the board, examined and approved by them, and contracts and rights have been acquired subsequent to such approval, and based on the faith of such approval, cannot, under such circumstances, be recalled by the board for re-examination.

The approval by the Board of Censors of a motion-picture film cannot be recalled for re-examination after contracts and rights have been acquired, based on the faith of such approval.

Office of the Attorney General,
Harrisburg, Pa., February 8, 1921.

Mr. Henry Starr Richardson, Secretary, State Board of Censors, 1025 Cherry St., Philadelphia, Pa.

Sir: Your communication of February 5, 1921, requesting an opinion from this Department as to what authority the State Board of Censors has to recall, for re-examination, pictures which have been passed by a former Board, duly received.

In reply would say that under date of July 25, 1917, an opinion was rendered to the Board by this Department, reported in 27 Dist. Rep. page 442, in which it was said:

> "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.
>
> Specifically answering your inquiry, you are advised that your Board has the power to recall an approval of a film unless rights have been acquired or have intervened, which a recall would disturb."

In addition to the above, I would say that when an approval seal is issued, it is proof that the film has been censored as required by law and that the Board has officially, as a Board, approved it. This obviously

gives the applicant the right to act on the faith thereof. Until rights have accrued, or have been acquired, following such approval, the Board may, as you have already been advised, revise its opinion, but after rights have accrued or have been acquired, it is too late.

Any other view would keep the matter in a state of continued uncertainty and contracts for the exhibition of films entered into on the faith of the approval seal issued would have little value or stability.

The fact that the membership of the Board has changed, does not in any way alter the situation that has arisen after the Board has approved a film, and rights have accrued, subsequent to such approval.

You are, therefore, advised that a picture which has been properly submitted to the Board, examined and approved by them, and contracts and rights have been acquired subsequent to such approval and based on the faith of such approval, cannot, under such circumstances, be recalled by the Board for re-examination.

Very truly yours,

WILLIAM I. SWOOPE.
Deputy Attorney General.

IN RE MONUMENTS.

Contributions by State or County——State Art Commission——Powers——Act of May 1, 1919, P. L. 103.

If any money is contributed by the State or by a county for the erection of a monument, the design for the same should be submitted to and approved by the State Art Commission, created by the Act of May 1, 1919, P. L. 103, before the monument is erected; but, if no money is contributed by the State or county, the Art Commission has no jurisdiction over the matter. A monument erected upon postoffice grounds becomes the property of the United States.

Office of the Attorney General,
Harrisburg, Pa., April 7, 1921.

Mr. Donald M. Kirkpatrick, Curator, State Art Commission, 130 S. 15th Street, Philadelphia, Pa.

Sir: Your communication of March 31, 1921, asking for an opinion from this Department as to whether or not jurisdiction of the State Art Commission extends over the erection of a monument upon the post office grounds at Bristol, Pa., has just been received.

In reply would say that the Act of May 1, 1919, P. L. 103 creating a State Art Commission, in Section 5 provides as follows:

> "From and after the approval of this act, no public monument, memorial, building, or other structure shall become the property of the Commonwealth or any subdivision thereof, by purchase, gift, or otherwise, unless a design for the same, and the proposed location thereof, shall have first been submitted to, and approved by, the State Art Commission.
>
> "No construction or erection of any public monument, memorial, building, or other structure, which is to be paid for, either wholly or in part, by appropriation from the State Treasury, or from any subdivision of the State, for which the State or any subdivision is to furnish a site, shall be begun unless the design and proposed location thereof shall have been approved of by such commission."

A further Act was passed by the Legislature, namely, the Act of June 14, 1919, P. L. 374, which provided that when the county commissioners of any county shall appropriate money for the erection of monuments commemorating soldiers, sailors and marines, the site and character of such monuments or memorials shall be approved by the State Art Commission.

Under these two Acts of Assembly, if any money is to be appropriated, either by the State or by the County, for the erection of the monument upon the post office grounds at Bristol, Pa., the State Art Commission should approve the design thereof before said monument is erected. The monument after it is erected on the post office grounds will be under the control and jurisdiction of the United States. The Act of Congress of July 1, 1898, Chap. 546, Sec. 1, 30 Stat. 614, provides as follows:

> "That all court-houses, custom-houses, post-offices, appraiser's stores, barge offices, sub-treasuries, and other public buildings outside of the District of Columbia and outside of military reservations which have been heretofore purchased or erected, or are at present in course of construction, or which may hereafter be erected, or purchased out of any appropriation under the control of the Treasury Department, together with the site or sites thereof, are hereby expressly declared to be under the exclusive jurisdiction and control and in the custody of the Secretary of the Treasury, who shall have full power to take possession of and assign and reassign rooms therein to such Federal officials, clerks, and employees as in his judgment and discretion should be furnished with offices or rooms therein."

The Legislature of Pennsylvania has ceded to the United States the jurisdiction and control of all lands purchased by the United States for the purpose of erecting post offices, etc., by the Act of March 17, 1905, P. L. 45, Section 1, which reads as follows:

"That the jurisdiction of this State is hereby ceded to the United States of America over all such pieces or parcels of land, not exceeding ten acres in any one township, ward of city, or borough, within the limits of this State, as have been or shall hereafter be selected and acquired by the United States for the purpose of erecting postoffices, custom houses, or other structures, exclusively owned by the general government, and used for its purposes: Provided, That an accurate description and plan of such lands, so acquired, verified by the oath of some officer of the general government having knowledge of the facts shall be filed with the Secretary of the Commonwealth of this State, as soon as said United States shall have acquired possession of the same: And provided further, That this cession is upon the express condition that the State of Pennsylvania shall so far retain concurrent jurisdiction with the United States, in and over all lands acquired or hereafter acquired as aforesaid, that all civil and criminal process, issued by any court of competent jurisdiction or officers having authority of law to issue such process, and all orders made by such court, or judicial officers duly empowered to make such orders, and necessary to be served upon any person, may be executed upon said land and in the buildings that may be erected thereon, in the same way and manner as if jurisdiction had not been ceded as aforesaid."

Specifically advising you, therefore, in the matter of the erection of a monument on the post office grounds at Bristol, Pa., would say that if any money is contributed by the State or by the county for the erection of said monument, the design for the same should be submitted to and approved by the State Art Commission, before the monument is erected, but, if no money is to be contributed by the State or county for the erection of said monument, the State Art Commission has no jurisdiction over the matter. When the monument is erected upon the post office grounds, it will become the property of the United States.

Yours very truly,

WILLIAM I. SWOOPE,
Deputy Attorney General.

WATER SUPPLY COMMISSION.

Pymatuning Swamp, Crawford County—Establishment of a Reservoir to conserve the waters thereof—Forms of contracts, options, releases and conveyances from owners of land in the States of Ohio and Pennsylvania affected thereby.

Act of July 25, 1913, P. L. 1272, Section 4, as amended by Act of June 18, 1915 (Appropriation Acts, page 196).

The forms of all contracts, options and releases that the Water Supply Commission may secure shall be approved by the Attorney General. The Commonwealth of Pennsylvania should obtain deeds of general warranty for the properties taken in fee simple.

Office of the Attorney General,
Harrisburg, Pa., April 27, 1921.

Honorable Thomas J. Lynch, Secretary, Water Supply Commission, Harrisburg, Pa.

Sir: Your letter of the 25th inst., asking to be advised as to the construction of a clause in the amendment of Section 4 of the Act of July 25, 1913, P. L. 1272, by the Act of June 18, 1915, Appropriation Acts, page 196, and also submitting a form of option and contract for approval, duly received. In reply would say, that the Act of June 18, 1915, printed in Appropriation Acts, page 196, amends Section 4 of the Act of July 25, 1913, P. L. 1272, so that that section now reads as follows:

> "The Commission is hereby authorized to obtain from the owners of the lands which will be submerged or injured in the State of Ohio, by reason of the construction and operation of the said dam and reservoir, a release or releases of damages which shall result to said land by reason of the construction and operation of the said dam and reservoir, for which releases the commission is hereby authorized to pay such sums of money as it shall deem to be reasonable. All contracts, options and releases shall be in such form as shall be approved by the Attorney General. The Commission shall proceed to the acquisition of the lands necessary for the construction and operation of the said dam and reservoir within the State of Pennsylvania, either by purchase or condemnation, in the manner hereinbefore provided; which lands, in the State of Pennsylvania, may be acquired when, and as deemed advisable by, said commission; and the work of constructing said dam and reservoir may be started as soon as the commission shall deem advisable."

This act provides that all contracts, options and releases shall be in such form as shall be approved by the Attorney General. This clause undoubtedly relates to all the contracts, options and releases that the Water Supply Commission may secure both in Ohio and in Pennsylvania.

The use of the word "form" has been construed by this Department in other Acts of Assembly as meaning, that when the form of a contract, option and release shall have been approved by the Attorney General, the same form can be used in obtaining all the necessary contracts, options and releases.

I have examined the form of contract and option submitted by you and hereby approve the same. The important part of these contracts of purchase is the provision that the Commonwealth shall obtain a deed of general warranty for the property in fee simple. It is in all cases against the policy of the Commonwealth to accept titles where there are any conditions or restrictions in them, and if possible, to take titles free from all mineral reservations.

I herewith return to you the form of option and contract submitted by you.

Yours respectfully,

WILLIAM I. SWOOPE,
Deputy Attorney General.

STATE BOARD OF EXAMINERS OF ARCHITECTS.

Practice of architecture—Registration of an applicant who had been convicted of conspiracy to defraud his clients—Act of July 12, 1919, P. L. 933, Sections 6 and 7.

The State Board of Examiners of Architects is the only tribunal which may originally determine the question of the moral character of applicants for registration. This question must be determined from information as to the applicant's present character. Conviction of conspiracy to defraud clients raises grave doubt as to the applicant's moral character and should be overcome only by satisfactory evidence of reformation.

Office of the Attorney General,
Harrisburg, Pa., May 25, 1921.

Mr. M. I. Kast, Secretary, State Board of Examiners of Architects, Harrisburg, Pa.

Sir: This Department is in receipt of your inquiry as to whether or not registration should be refused by the State Board of Examiners of Architects to an applicant who has been convicted of conspiracy to defraud his clients, and who, in their opinion, has not reformed or changed his methods of dealing with clients.

Such matters are regulated by the Act of July 12, 1919, P. L. 933, under Section 6 of which we find the following:

> "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."

The qualifications therein referred to are amplified in Section 7 of the Act:

> "Any citizen of the United States, or any person who has declared his intention of becoming such citizen, or any citizen of another country complying with the requirements of this act for aliens, being at least twenty-five years of age and of good moral character, may apply for academic or technical examination or certificate and registration under this act, but, before being admitted to the technical examination, shall submit satisfactory evidence of having completed the course in a high school approved by the board of examiners, or the equivalent thereof, and having completed such courses in mathematics, history, and language as may be determined by the board of examiners, or shall pass a satisfactory examination in such branches. Examinations for the above academic requirements shall be held by the Board of Examiners."

The moral character test, as set forth in the foregoing section, is the same whether or not the applicant desires to take the academic or technical examination, or is asking for a certificate and registration under the Act. Further educational qualifications are set up for admission to the technical examination, but we are of the opinion that the moral character qualification applies to all classes of cases which come under the law.

There is but one tribunal which may originally determine the question of the moral character of applicants for registration, and that is the State Board of Examiners of Architects. It is its duty to decide whether or not the applicant has such a character as would warrant his registration. The question must be determined from the information which can be gathered as to the applicant's present character, rather than from what he may have been at sometime in the past. His conviction of conspiracy, however, does put the Board on notice, and due inquiry should be made the result of which must convince the Board of the present good moral character of the applicant, before he should be registered. Such a conviction raises an exceedingly grave question as to the applicant's moral character and should be overcome only by very satisfactory evidence of reformation.

Very truly yours,

STERLING G. McNEES,
Deputy Attorney General.

STATE BOARD OF EXAMINERS OF ARCHITECTS.

Practice of architecture—Right of one to practice under Act of July 12, 1919, P. L. 933, who began to practice before the present law was enacted.

An applicant who began to practice architecture in Pennsylvania in January, 1919, is in the same class as one who has never practiced in Pennsylvania, and cannot be admitted by virtue of experience. He must comply with the scholastic requirements as laid down by the Act and the rules and regulations of the State Board.

Office of the Attorney General,
Harrisburg, Pa., May 25, 1921.

Mr. M. I. Kast, Secretary, State Board of Examiners of Architects, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of April 29, 1921, inquiring how an applicant who began the practice of architecture in Pennsylvania in January, 1919, may obtain the right to practice under the present law, provided he neither has sufficient scholastic training nor a sufficient number of years experience in an architect's office.

The law regulating the practice of architecture in Pennsylvania was approved and became operative on July 12, 1919. As the applicant in question began to practice in January, 1919, it appears that he had been so engaged for about six months at the time of the passage of the Act of July 12, 1919, P. L. 933.

Section 6 of the said Act provides as follows:

> "* * * Any properly qualified persons 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 person shall not be styled or known as a registered architect."

It is evident from the foregoing that the applicant may not be registered by virtue of having practiced architecture in Pennsylvania, as his term of practice was not of sufficient length to comply with the law.

He is not permitted to use the initials "R. A.," meaning Registered Architect, or any other words carrying that meaning. Under the latter part of the section just quoted he may not practice architecture at all, because he is unable to file the required affidavit setting forth that he has practiced for one year prior to the approval of the act.

In order to become entitled to use the words "Registered Architect" he must secure a certificate of qualification and be registered. In setting up the conditions required for registration the law apparently took no account of any practice as an architect for a period shorter than one year. While even this amount of practice must necessarily be of advantage to an applicant, yet there must be a definite limit fixed and we may not read into the law more than was intended by the Legislature.

> "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 substract 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.*

It appears, therefore, that this applicant is in the same class as one who has never practiced in Pennsylvania. He cannot be admitted by virtue of experience, and the only other course is to meet the scholastic requirements as laid down by the law and the rules and regulations of the State Board of Examiners of Architects.

Very truly yours,

STERLING G. McNEES,
Deputy Attorney General.

REGISTRATION OF PHARMACISTS.

Pharmacists—Registration—Qualifications.

The Pennsylvania Board of Pharmacy has no authority to require that all candidates for examination and registration as pharmacists shall be citizens of the United States of America.

Office of the Attorney General,
Harrisburg, Pa., June 8, 1921.

Mr. Lucius L. Walton, Secretary, The Pennsylvania Board of Pharmacy, Williamsport, Pa.

Sir: There has been received at this Department your request to be advised whether the Pennsylvania Board of Pharmacy may require

that all candidates for registration as pharmacists in the State of Pennsylvania shall be citizens of the United States of America.

Section 3 of the Act approved May 17, A. D. 1917, P. L. 208, entitled:

> "An act to regulate the practices of pharmacy and sale of poisons and drugs, and providing penalties for the violation thereof"; etc.

provides:

> "That the Pennsylvania Board of Pharmacy shall meet at least four times a year in the city of Harrisburg, or such other place in Pennsylvania as they may deem expedient, and examine all persons in the science of pharmacy and its allied branches who shall make application for registration as pharmacists or assistant pharmacists * * *."

Section 4 provides as follows:

> "That every person applying to the Pennsylvania Board of Pharmacy for examination and registration as a pharmacist shall be not less than twenty-one years of age and of good moral character; and must produce satisfactory evidence of having had not less than four years' practical experience in a pharmacy, under the personal supervision of a pharmacist, at least two years of which experience must have been acquired within the United States, in the business of retailing, compounding, or dispensing of drugs, chemicals, and poisons, and of compounding of physicians' prescriptions; or, in the case of an applicant having acquired experience in the drug dispensary of a regular public hospital, which dispensary was conducted under the constant supervision of a registered pharmacist, two years of such experience shall be allowed in lieu of two years required in a pharmacy and of being a graduate of some reputable and properly chartered college of pharmacy—so recognized by the Pennsylvania Board of Pharmacy—of this or some other State, or any foreign country, whose pharmacy licensing board or other authority recognizes the graduates of the reputable and properly chartered colleges of pharmacy of this State and admits the graduates of all such colleges to its pharmacy licensure examinations. And every person applying for registration as qualified assistant shall be not less than eighteen years of age, and of good moral character; and must produce satisfactory evidence of having had not less than two years' practical experience, as defined and provided in this section."

Sections 5 and 6 of the same Act relate to the payment of fees for examination, registration, etc.

You will note that Section 3 provides that the Board shall "examine all persons," and Section 4 sets forth the qualifications for every person applying for examination and registration either as a pharmacist ro

assistant pharmacist. There is nothing anywhere in these sections, setting forth the qualifications for examination, providing that the applicants for examination shall be citizens of the United States of America. Section 3 distinctly says that the Board shall examine all persons. In my opinion, this means all persons who fulfil the qualifications set forth in Sections 4, 5 and 6.

You are, therefore, advised that the Pennsylvania Board of Pharmacy has no authority to require that all candidates for examination and registration as pharmacists shall be citizens of the United States of America.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General.

BUREAU OF MEDICAL EDUCATION AND LICENSURE.

License to practice medicine—Revocation of, on account of conviction of crime—Effect of pardon of licensee.

The pardon of a physician convicted for the violation of the Narcotic Act removes the disabilities entailed by such conviction, but does not automatically reinstate the person so convicted, nor is it incumbent upon the Bureau to take any action looking towards the reinstatement of such person.

Office of the Attorney General,
Harrisburg, Pa., June 28, 1921.

Dr. J. M. Baldy, President, Bureau of Medical Education and Licensure, Philadelphia, Pa.

Sir: There has been received at this Department your request for an opinion as to whether a license to practice medicine, which was revoked by the Bureau of Medical Education and Licensure on account of a conviction of a crime, is automatically reinstated by reason of the licensee having been pardoned of the crime for which his license was revoked.

On August 14, 1919, in an opinion from this Department you were advised that the Bureau of Medical Education and Licensure has no authority to re-establish a license to practice medicine once revoked. In my opinion, the law as therein set forth applies to your present proposition. The reason for the revocation of the license to practice medicine was the conviction for a violation of the Narcotic Act, and the subsequent pardon of the person convicted would not automatically set aside the revocation nor would it authorize the Bureau of Medical Education and Licensure to set aside such revocation.

As set forth in the opinion of August 14, 1919, above cited, 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 an Act of Assembly 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. While the pardon of the physician convicted of the violation of the Narcotic Act removes any disabilities entailed by that conviction, you are advised that it does not automatically reinstate the person so convicted, nor is it necessary or incumbent upon the Bureau of Medical Education and Licensure to take any action looking towards the reinstatement of such persons.

Very truly yours,

BERNARD J. MYERS,
Deputy Attorney General.

PUBLIC SCHOOL EMPLOYES' RETIREMENT BOARD.

Expenses of School Employes' Retirement Board for the month of June, 1921—How payable—Act of July 18, 1917, P. L. 1043, Sections 8 and 10; Act of July 18, 1919, No. 400-A (Appropriation Acts, 1919, page 242); Act of March 2, 1921, No. 1-A, and Act of May 27, 1921, No. 411-A.

The expenses of the Public School Employes' Retirement Board for the month of June, 1921, must be paid out of the appropriation to the "expense fund" provided by the Act of May 27, 1921, being the regular appropriation to carry out the provisions of the Retirement System Law, and not out of the appropriation to the "expense fund" as made by the Deficiency Appropriation Act, approved March 2, 1921.

Office of the Attorney General,
Harrisburg, Pa., June 29, 1921.

Mr. H. H. Baish, Secretary, School Employes' Retirement Board, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 24th instant to the Attorney General, asking to be advised whether the expense of the School Employes' Retirement Board for the month of June, 1921, shall be paid out of the deficiency appropriation as made by the hereinafter mentioned Deficiency Appropriation Act, or out of the regular current appropriation made to carry out the School Employes' Retirement System, as made by the hereinafter mentioned act.

The Act of July 18, 1917, P. L. 1043, establishing a Public School Employes' Retirement System, by Section 8, creates certain funds, one of which is known as the "expense fund," out of which are defrayed the expenses of the administration of the Act.

Section 10 of the Act provides, inter alia, as follows:

> "The retirement board shall prepare, and submit to the Legislature, on or before the thirty-first day of January in each odd-numbered year, an itemized estimate of the amounts necessary to be appropriated by the Commonwealth to the various funds to complete the payment of the said obligations of said Commonwealth accruing during the biennium beginning July first of the same year; and it shall be the duty of said Legislature to make an appropriation sufficient to provide for such obligations of the Commonwealth; and the amounts so appropriated shall be included in the general appropriation bill, and shall be paid by the Treasurer of the Commonwealth into the various funds created by this act."

The Legislature, at the 1919 Session, by Act No. 400-A, approved July 18, 1919 (Appropriation Acts 1919, page 242), made a separate appropriation to carry out the provisions of said retirement system law. This contained an item of $26,000 for the said "expense fund" for the "two fiscal years beginning June first, one thousand nine hundred and nineteen." This proved insufficient for this purpose, and in Act No. 1-A, approved March 2, 1921, making a deficiency appropriation "for the payment of the deficiencies in certain appropriations made to, and for other minor expenses, incurred or to be incurred, to May thirty-first, one thousand nine hundred and twenty-one, by" certain Departments of the State Government, there was included an item of $47,000 to the School Employes' Retirement Board for "deficiency in expense fund."

Act No. 411-A, approved May 27, 1921, and being the regular appropriation to carry out the provisions of the retirement system law, appropriates, inter alia, the sum of $80,000 for the said "expense fund" for the "two fiscal years beginning June first, one thousand nine hundred and twenty-one."

In answer to your question, you are advised that all the expenses of the said Retirement Board for the month of June, 1921, must be paid out of the appropriation to the "expense fund" as made by the said Act No. 411-A, approved May 27, 1921, and being the regular appropriation to carry out the provisions of the retirement system law, and not out of the appropriation to the "expense fund" as made by the said Deficiency Appropriation Act No. 1-A, approved March 2, 1921. The said deficiency appropriation was expressly made to cover deficiencies to May 31, 1921. The appropriation made to the said "expense fund" by said Act No. 411-A, approved May 27, 1921, expressly runs from June 1, 1921.

The above cited provisions of the Act of 1917, creating the Retirement System, do not operate to change the effect of the specific terms of the aforesaid appropriation acts as to the period to which the appropriations as thereby made are applicable. The Legislature may, from time to time, make appropriations to the "expense fund" created under the Retirement System in such manner as it may deem best, and cannot be bound in its action by any prior legislation. *Endlich on Interpretation of Statutes, 173.*

In accordance with the foregoing, you are, therefore, advised that the expenses of the said Retirement Board for the month of June, 1921, must be paid out of the appropriation for the "expense fund" as made by Appropriation Act No. 411-A, approved May 27, 1921, and cannot be paid out of the aforesaid appropriation "for deficiency in expense fund."

This opinion relates solely to appropriations to the "expense fund" and not to any made to the several other funds created by said Act of 1917.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

STATE ART COMMISSION AND PHILADELPHIA ART JURY.

Authority to require their approval, singly or jointly, of the design and location of the Delaware River Bridge connecting Philadelphia, Pennsylvania, and Camden, New Jersey. Acts of May 25, 1907, P.L. 249, Section 2; July 24, 1913, P. L. 1000; May 1, 1919, P.L. 103, Sections 5 and 8; July 9, 1919, P. L. 814, Section 4; and Constitution of Pennsylvania, Article II, Section 1, and Article III, Section 7.

The Act of July 9, 1919, creating the Bridge Commission and prescribing its functions, is supreme and the Commission is not subject to the Acts of May 1, 1919, or May 25, 1907, as amended by the Act of July 24, 1913, requiring approval of the bridge design or location, or any part or portion thereof, either by the State Art Commission or the Philadelphia Art Jury or jointly.

Office of the Attorney General,
Harrisburg, Pa., October 19, 1921.

Mr. D. M. Kirkpatrick, Curator, State Art Commission, Philadelphia, Pa.

Sir: Opinion of this Department has been requested as to the authority of the State Art Commission to require its approval of the design and location of the Delaware River Bridge to be erected between Philadelphia and Camden, New Jersey; (a) as to that portion of the

bridge to be constructed over the Delaware River beyond the bulkhead line to the middle of the river within the jurisdiction of the State of Pennsylvania, and (b) with respect to the authority of the Philadelphia Art Jury to require its approval as to that portion of the bridge to be located inside the bulkhead line within the City of Philadelphia, and (c) the authority of the State Art Commission, acting jointly with the Philadelphia Art Jury, to require joint approval of the design and location of the bridge within the jurisdiction of the State of Pennsylvania, as aforesaid.

The Act of Assembly approved May 1, 1919, P. L. 103, creating the State Art Commission, and defining its powers, provides in Section 5 thereof as follows:

> "No construction or erection of any public monument, memorial, building, or other structure, which is to be paid for, either wholly or in part, by appropriation from the State Treasury or from any subdivision of the State, or for which the State or any subdivision is to furnish a site, shall be begun unless the design and proposed location thereof shall have been approved by such commission.
>
> "No monument, memorial, building, or other structure, belonging to any person or corporation, shall be erected upon or extend over any highway, stream, lake, square, park, or other public place, within any subdivision of this State, except the design for and the location thereof shall have been approved by such commission."

Section 8 of the Act also provides:

> "The provisions of this act do not apply to a city of the first or second class."

The Act of Assembly approved July 24, 1913, P. L. 1000, supplementing the Act of Assembly of May 25, 1907, P. L. 249, creating art juries in cities of the first class, provides in Section 2 thereof as follows:

> "No construction or erection, in a city of the first class, of any building, bridge or its approaches, arch, gate, fence, or other structure or fixture, which is to be paid for, either wholly or in part, by appropriation from the city treasury, or other public funds, or for which the city, or any other public authority, is to furnish a site, shall be begun, unless the design and proposed location thereof shall have been submitted to the jury, at least sixty days before the final approval thereof, by the officer or other person having authority to contract therefor. The approval of the jury shall also be required in respect to all structures or fixtures belonging to any person or corporation, which shall be erected upon, or extend over, any highway, stream, lake, square, park or other public place, within the city, except as provided in section six of this act. In deeds for land, made by any city of the first class, restrictions may

be imposed requiring that the design and location of structures to be altered or erected thereon shall be first approved by the art jury of such city. Nothing requiring the approval of the jury shall be erected, or changed in design or location, without its approval. If the jury fails to act upon any matter submitted to it within sixty days after such submission its approval of the matter submitted shall be presumed."

The Act of Assembly approved July 9, 1919, P. L. 814, provides for the erection and construction of a bridge over the Delaware River connecting the City of Philadelphia, Pennsylvania, with the City of Camden, New Jersey, by a special commission acting for the Commonwealth of Pennsylvania, termed the "Pennsylvania Commission," in conjunction with a similar commission created by the State of New Jersey, said commissions together constituting a "Joint Commission," with authority to erect the bridge and its approaches from moneys appropriated proportionately, as provided in the Act, by the Commonwealth of Pennsylvania, the City of Philadelphia, and the State of New Jersey.

Section 4 of this Act provides, inter alia, as follows:

"That the said joint commission is hereby authorized and empowered, and it shall be its duty, to have prepared the necessary and proper plans and specifications for the construction of the bridge, to select the location for the same, determine the size, type, and method of construction thereof, to plan and fix its boundaries and approaches, to make all necessary estimates of the probable cost of its construction and the acquisition of the ground for its site and approaches, to proceed to acquire the ground for the sites of the abutments and the approaches to the bridge in the manner hereinafter provided, to enter into the necessary contracts to build and equip the entire bridge and the approaches thereto, to build the substructure and superstructure thereof, to obtain such consent as may be necessary of the Government of the United States and the approval of the Secretary of War, and to cause a survey and map to be made of all lands, structures, rights of way, franchises, easements, or other interests in lands lying within the Commonwealth, including lands under water and riparian rights, owned by any person, corporation or municipality, the acquisition of which may be deemed necessary for the construction of such bridge, and to cause such map and survey to be filed in its office. The members of said joint commission or the members of the Pennsylvania commission acting independently, its or their agents and employes, may enter upon such lands, structures, and lands under water, notwithstanding any interests in such lands or other interests, for the purpose of making such survey and map. There shall be annexed to the survey and map a certificate issued by the

> joint commission stating what lands, structures, lands under water, and other interests described in such survey and map are necessary for the construction of said bridge; and said joint commission is hereby authorized and empowered, and it shall be its duty, to do and perform all acts and things whatsoever necessary for the carrying out of the provisions of this act. * * *"

An examination of these Acts of Assembly reveals an apparent inconsistency or repugnancy in the powers and authority vested respectively in the Bridge Commission, which is specially authorized and directed by the Act of July 9, 1919,—

> "to have prepared the necessary and proper plans and specifications for the construction of the bridge, to select the location for the same, determine the size, type, and method of construction thereof, to plan and fix its boundaries and approaches," etc.,

and the State Art Commission, concerning which the Act of May 1, 1919, P. L. 103, stipulates that—

> "No construction * * * of any public * * * structure, which is to be paid for, * * * from the State Treasury or from any subdivision of the State, * * * shall be begun *unless the design and proposed location thereof shall have been approved by such commission*,"

and further provides that—

> "No * * * structure, belonging to any person or corporation, shall be erected upon or extend over any highway, stream * * * except the design for and the location thereof shall have been approved by such commission";

and the Philadelphia Art Jury, as to which the Act of July 24, 1913, P. L. 1000, amending the Act of May 25, 1907, P. L. 249, provides that—

> "No construction or erection, in a city of the first class, of any * * * bridge or its approaches * * * which is to be paid for, either wholly or in part * * * from the city treasury * * * shall be begun, unless the design and proposed location thereof shall have been submitted to the jury, at least sixty days before the final approval thereof * * *. Nothing requiring the approval of the jury shall be erected, or changed in design or location, without its approval. * * *"

How is this apparent repugnancy between these Acts of Assembly to be reconciled; and which Act shall prevail if they cannot conveniently and consistently operate together?

The plain answer to these queries is that the special Act of Assembly creating the Delaware River Bridge Commission for the particular purpose of erecting the bridge across the river in accordance with the provisions

thereof, and the procedure therein specified, must prevail over any general Acts of Assembly passed prior to the creating of the Bridge Commission, or, indeed, any such Acts adopted subsequent to the creation of the Bridge Commission, unless it is expressly stipulated to the contrary.

The special Act of July 9, 1919, creating the Bridge Commission and prescribing its functions, nowhere subjects the Commission to the provisions of the general statutes of May 1, 1919, or May 25, 1907, as amended by the Act of July 24, 1913, requiring approval of the bridge design or location by the State Art Commission or the Philadelphia Art Jury.

If the special Act creating and defining the duties of the Bridge Commission had been *first* enacted, and the general Acts creating and defining the functions of art juries subsequently enacted, the preponderance of legal authority is that the repugnant or inconsistent provisions of the general statutes would not abrogate or repeal the conflicting provisions of the general statute unless otherwise stipulated by the Legislature.

This conflict of statutes has been exhaustively considered in the opinion of Judge McConnell of the Court of Common Pleas of Westmoreland County, approved by the Superior Court of Pennsylvania, in the case of *Commonwealth ex. rel. vs. Brown, 25 Supre. Ct. 269*, where it was held that a local or special Act relating to contracts by county commissioners in *certain* counties was not repealed by a subsequent general Act to regulate county buildings.

In his opinion Judge McConnell said (p. 272):

> "Where the prior law is local and particular, and the latter law is general, there is no presumption of an intention to repeal the prior law by the later one. On the contrary there is a very strong presumption that no such intent exists. 'A general law will not repeal an earlier special act by mere implication': 23 Am. and Eng. Ency. of Law, 422. In Seward *v.* Vera Cruz, L. R. 10 Appeal Cases, 59, Selborne, L. C. said: 'If anything be certain it is this, that where there are general words in a later act capable of reasonable and sensible application without extending them to a subject specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from, merely by force of such general words, without any indication of the particulr intention to do so.'
>
> " 'A general statute, without negative words, does not repeal a particular statute, inconsistent therewith': Brown *v.* County Commissioners, 21 Pa. 37; O'Hara *v.* Johnson, 2 Walker, 115; Murdock's Petition, 149 Pa. 341.

" 'A mere general law without negative words cannot repeal a previous special statute, although the provisions of the two acts are different': Com. *v.* P. & E. R. R. Co., 164 Pa. 252.

" 'Later statutes, which are general, do not repeal an earlier one, which is particular': Bounty Acc'ts, 70 Pa. 92.

"There is also a presumption against an intent to repeal, by a general law, the provisions of a local law."

The Court further remarked on page 273:

"As between general statutes, irreconcilable inconsistencies between an earlier and a later statute on the same subject-matter, of themselves import an intention, on the part of the legislature, to effect a repeal, to the extent, at least, of the irreconcilable inconsistencies, but mere inconsistencies, of themselves, import no such intention, where the earlier statute is local and particular, and the later one is a general, affirmative statute. It is said in the opinion of the court in Westfield Borough *v.* Tioga Co., 150 Pa. 152, that where there is such irreconcilable conflict between two general laws upon the same subject that they cannot be harmonized with each other and thus be made to stand together and both be concurrently enforced, the latter necessarily implies the intended repeal of the earlier one, without any express negation of it: Bank *v.* Com., 10 Pa. 442; Egypt Street, 2 Grant, 455. But when the conflict is between a local and a general law, the rule of construction is different, and generally the former will not be repealed by the latter, unless there be some clear expression of a negative intent. * * * The general statute is read as silently excluding from its operation the cases which have been provided for by the special one; for, as was said of the relation of a general act to a local one applying to a single county of the state, 'it is against reason to suppose that the legislature, in framing a general system for the state, intended to repeal a special act which the local circumstances of one county had made necessary. The fact that the general act contains a clause repealing acts inconsistent with it does not diminish the force of this rule of construction.' * * * A local statute enacted for a particular municipality, for reasons satisfactory to the legislature, is intended to be exceptional and for the benefit of such municipality. It has been said that it is against reason to suppose that the legislature in framing a general system for the state intended to repeal a special act which the local circumstances made necessary: Brown *v.* Commissioners, 21 Pa. 37. The legislature, not the courts, judge of the necessity. Rarely, if ever, does a case arise, where it can be justly held that a general statute repeals a local statute by mere implication'."

Quoting from the case of *Bell v. Allegheny Co., 149 Pa. 381*, the Judge further remarked (p. 279):

> "It is a rule of interpretation as old as the common law and followed in an unbroken line of decisions in the state, that a general affirmative statute will not repeal a particular statute upon the same subject, though the provisions of the former be different from those of the latter."

The foregoing is a resume of the law applying to general statutes affecting prior special statutes. *A fortiori*, the same principles of law apply to special statutes enacted after the passage of general statutes where the same are inconsistent or repugnant.

Section 1 of Article II of the Constitution of Pennsylvania provides that—

> "The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives,"

and Section 7 of Article III provides that—

> "The General Assembly shall not pass any local or special law * * * relating to * * * bridges, * * * *except for the erection of bridges crossing streams which form boundaries between this and any other State.*"

It will, therefore, appear that the special Act of Assembly creating and defining the functions of the Bridge Commission is within the exceptions specially provided for by the Constitution of the Commonwealth, and the particular enactment of the General Assembly on that subject is, therefore, supreme, and the provisions of any other general statute inconsistent therewith or repugnant thereto not particularly reserved and excepted in the special Act subsequently passed, or repealed specially by the general Act, as subsequently passed, must yield and give way to the provisions of the special Act.

We are, therefore, of the opinion that neither the State Art Commission nor the Philadelphia Art Jury have any authority or jurisdiction to require approval of the design and location of the Delaware River Bridge or any part or portion thereof, by either the said Art Commission or the said Art Jury under the Acts of Assembly respectively creating and defining the functions of said bodies.

Any other conclusion manifestly might lead to conflict and confusion, and results which would be impracticable if not impossible of accomplishment, and which might defeat the particular intention of the Legislature with reference to its enactments.

The Delaware River Bridge is to be erected according to plans and designs prepared and locations selected by a "Joint Commission" consisting of representatives from the State of Pennsylvania and the State of New Jersey. It would lead to incongruous difficulties if the Philadelphia Art Jury should force approval of one set of plans and designs for the approaches to the bridge and the portions thereof within the

City of Philadelphia extending to the bulkhead or river line, and the State Art Commission should then require another set of plans or designs for that portion of the bridge extending from the bulkhead line where the title of the Commonwealth begins to the middle of the river, with still another plan or design for the other portion of the bridge on the New Jersey side.

If such power or authority were conceded to these art supervising bodies under their general authority in contravention of special authority and duty imposed upon the Bridge Commission, it might result in a dead-lock which would defeat entirely the purpose of the Legislature to have a bridge built across the Delaware River; and so it would be if the same Art Commission or Art Jury could force a determination by its approval or non-approval of the location of the site of the bridge on the Pennsylvania side of the river, while the Joint Bridge Commission could otherwise act alone in fixing the location on the New Jersey side. Surely there could be no such legislative intent when the special Act of July 9, 1919, was enacted creating the Bridge Commission, and requiring it to prepare plans and designs, select a location, and build the bridge.

The fact that the Delaware River Bridge is, from the foregoing opinion, excepted from the general provisions of the Acts of Assembly creating the Art Commission and the Philadelphia Art Jury in no way otherwise affects their general powers under these Acts, but as they cannot be enforced consistently together and in unison with the provisions of the special Act creating the Bridge Commission, the latter Act must prevail, and the plans, designs and location of the bridge need not, therefore, be submitted to or approved by the State Art Commission or the Philadelphia Art Jury.

Very truly yours,

FRED TAYLOR PUSEY,
Deputy Attorney General.

MOTHERS' ASSISTANCE FUND.

Marriage—Legality—Marriage of uncle and niece—Acts of March 13, 1815, and July 10, 1919, P. L. 893.

1. A marriage of an uncle and niece, although valid in the state where it was celebrated, is repugnant to the laws of Pennsylvania, and is invalid in this State. Where, however, the husband is dead, the unlawfulness of such marriage cannot, under the Act of March 13, 1815, 6 Sm. Laws, 286, be inquired into.

2. A widow is eligible for assistance from the Mothers' Assistance Fund, although her husband, to whom she was married in another state, was her uncle.

Office of the Attorney General,
Harrisburg, Pa., December 18, 1921.

Miss Mary F. Bogue, State Supervisor, Mothers' Assistance Fund, Harrisburg, Pa.

My dear Miss Bogue: This Department is in receipt of your communication of the 28th ult. relative to the eligibility of a certain mother mentioned in your communication for relief under the Mothers' Assistance Fund Law. It appears that in 1907 she and her uncle were married in another State, that he has recently died, and that she is the mother of five children and in needy circumstances. The precise question submitted by you for the opinion of this Department is—"Was her marriage to her uncle valid"?

This question arises under Section 6 of the Act of July 10, 1919, P. L. 893, known as the Mothers' Assistance Fund Law, which limits the assistance provided for thereunder to "poor and dependent mothers of proved character and ability, who have children under the age of sixteen years, *and whose husbands are dead*, or permanently confined in institutions for the insane."

A marriage of uncle and niece is unlawful in this Commonwealth, and by Section 39 of the Penal Code of 1860 is made a crime and declared void. It is needless to inquire whether the marriage in such a case as this was lawful in the state or country where contracted for the reason that while the general rule is that a marriage valid in the place where celebrated is valid in any state or country where the parties may subsequently reside, and exception prevails to this general rule in the case of marriages so repugnant to the laws of the domicile as that of uncle and niece.

Cyclopedia of Law, Vol. 26, pages 829-30.

In *United States vs. The International Navigation Co., 10 District Reports, 480*, Judge McPherson, in the United States District Court, in

holding that although a marriage between uncle and niece was lawful in the country where it was contracted (in that case Russia), it was nevertheless invalid in Pennsylvania, said in the course of his opinion:

> "Where the ceremony took place, it has been satisfactorily proved that a marriage between uncle and niece is lawful; and, being valid there, the general rule undoubtedly is, that such a marriage would be regarded everywhere as valid. But there is this exception, at least, to the rule; if the relation thus entered into elsewhere, although lawful in the foreign country, is stigmatized as incestuous by the law of Pennsylvania, no rule of comity requires a court sitting in this State to recognize the foreign marriage as valid."

The case here under consideration, however, is not one as there where both parties to the marriage were living, but where one of them is dead. Section 5 of the Act of March 13, 1815, 6 Smith's Laws 286, provides:

> "That all marriages within the degrees of consanguinity or affinity, according to the table established by law, are hereby declared void to all intents and purposes; * * * but when any of the said marriages shall not have been dissolved during the lifetime of the parties, the unlawfulness of the same shall not be inquired into after the death of either the husband or wife."

In *Parker's Appeal, 44 Pa. 309*, it was held that under that Act where there had been a marriage of an uncle and niece "all inquiry into its unlawfulness was closed" upon his death, and that she was entitled to letters of administration as his widow.

To the same effect is the case of *Walter's Appeal, 70 Pa. 392*, in which it was decided that the validity of a marriage between a man and his son's widow could not be questioned after his death in the distribution of his estate.

The rule laid down in the last two cited cases is applicable here. It follows that in determing whether the said mother is eligible for assistance under the Mothers' Assistance Fund Law the validity of her said marriage can not be questioned.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

IN RE PUBLIC ACCOUNTANTS.

Certificate From Another State—Examinations—Fictitious Firm Name—Acts of 1899 and 1921.

No public accountant holding C. P. A. certificate from another State can open an office in Pennsylvania and legally use the title "Certified Public Accountant" or the intitials "C. P. A." without first having received a qualifying certificate from the State Board of Examiners of Public Accountants.

The Act of May 24, 1921, P. L. 1073, must be read in connection with the Act of March 29, 1899, P. L. 21.

Whether or not a Certified Accountant can practice under a firm name without registering would be a matter to be decided by the courts under the provisions of the Fictitious Name Act of June 28, 1917, P. L. 645.

Office of the Attorney General,
Harrisburg, Pa., December 14, 1921.

Honorable Horace P. Griffith, President, Pennsylvania State Board of Examiners of Public Accountants, Philadelphia, Pa.

Sir: Your letter of the 25th ult. asking for an opinion from this Department on the questions hereinafter set forth duly received.

(1) May a public accountant holding a C. P. A. certificate from another State open an office in Pennsylvania and legally use the title "Certified Public Accountant" or the initials "C. P. A." without having received the qualifying certificate from the State of Pennsylvania?

This question is answered by the latest Act of Assembly on this question, which is Act No. 396 of the Acts of 1921, not yet printed, which provides that—

> "Certified public accountants of other States of the United States who have been certified for at least one year may be recommended for certification at the discretion of the said board for certificates without any examination."

This Act is to be read in connection with the provisions of the Act of March 29, 1899, P. L. 21, which provides in Section 5 that no person shall assume to practice as a Certified Public Accountant, or use the initials C. P. A., without having first received such certificate.

It, therefore, follows that no person from another State can practice as a Public Accountant in Pennsylvania and use the initials specified in this Act unless he has received a certificate from your Board, which, however, he may receive without an examination under the provisions of the Act of 1921 above quoted.

(2) May a certified public accountant from another State legally use the title "certified public accountant" or "C. P. A." in Pennsylvania by placing the state name or initials thereafter, (for example, N. Y.) as indicated above?

This question is answered in the reply to your first question. The fact that he would place the State name or initials thereafter would not alter the liability incurred by him if he assumed to practice without having a certificate from your Board.

(3) The answer to your second question eliminates the third.

(4) May, on the other hand, an individual holder of the Pennsylvania C. P. A. certificate practice under a firm name such as the following, if he is the only person in the "firm"—

Henry W. Jamison & Co.
Certified Public Accountants
Harrisburg, Pa.

This question need not be considered by your Board. Whether or not the business of public accountant is such as to come under the Fictitious Name Act of June 28, 1917, P. L. 645, is, under this law, a question of criminal liability, and will be decided by a Criminal Court if a prosecution be brought for a violation of said Act.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

ARCHITECTURE.

Foreign citizen—Right to practice architecture in Pennsylvania—Act of July 12, 1919, P. L. 933, Sections 6 and 7.

A foreign citizen who has not signified his intention to become a citizen of the United States and who practiced architecture in Pennsylvania in August, 1917, may file the affidavit provided for in Section 6 of said Act at any time within five years after the passage of the Act, and thereupon he shall be entitled to practice architecture under the title of "architect," but may not use the title "registered architect."

Office of the Attorney General,
Harrisburg, Pa., December 15, 1921.

Mr. M. I. Kast, Secretary, State Board of Examiners of Architects, Harrisburg, Pa.

Sir: The Attorney's General's Office has received your letter in which you make the following inquiry:

> "A foreign citizen, who has not signified his intention to become a citizen of the United States, claims to have

> started the practice of architecture in Pennsylvania in August, 1917, and claims the right to file an affidavit.
>
> "* * * Will you therefore advise us as to the status and the privilege which may or may not be granted to a foreign citizen under conditions above named"?

We are assuming that the affidavit to which you refer is the one provided for in the last sentence of Section 6 of the Act of July 12, 1919, P. L. 933, which sentence reads as follows:

> "* * * 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 person shall not be styled or known as a registered architect."

We believe this part of Section 6 refers to persons who had been practicing architecture in the Commonwealth of Pennsylvania for one year prior to the passage of the Act whether such persons were citizens or not. This is the part of the law which provides for the affidavit. Prior to the Act in question, any person, whether a citizen or not, had the right to practice here, and this Section concerns all such persons. It will be observed that they are not to be qualified as registered architects, neither are they to be deprived of the title of "architect," under which they may have worked for many years. We also note that the Act provides that persons who have so practiced "may continue so to do without a certificate or registration." These words are additional evidence that the persons affected are all who have been previously practicing in this State.

The question you have asked would doubtless not have arisen were it not for a provision under Section 7, paragraph 6, of the same Act, which reads as follows:

> "Any architect who is a citizen of a foreign country, and who seeks to practice within this State, and who has lawfully practiced architecture for a period of more than ten years, shall be required to take a practical examination as determined by the board of examiners, or, if in practice for a period of less than ten years, shall obtain a certificate and registration by satisfactorily passing academic and technical examinations or by presentation of certificates or diplomas from recognized schools, showing achievement by applicant satisfactory to the board of examiners."

Section 7, within which we find this requirement as to citizens of foreign countries, begins "Any citizen of the United States, or any person who has declared his intention of becoming such citizen, or any

citizen of another country complying with the requirements of this act for aliens, being at least twenty-five years of age," etc., may proceed to be recorded as a "registered architect." We are of the opinion that the third paragraph of subdivision C of Section 7 refers only to citizens of foreign countries who were not practicing in this Commonwealth at the time of the passage of the Act. This position is strengthened by the words of the Section which refer to such a citizen of a foreign country "who seeks to practice within this State." We have construed this paragraph to be applicable only to foreign citizens who had not been engaged in the practice of architecture in Pennsylvania for a period of one year prior to the passage of the Act of 1919, and who desire now to become registered architects.

We see no legal objection to permitting the applicant in the case before us to file an affidavit at any time within five years after the passage of the Act of 1919, as provided for in the last sentence of Section 6 thereof.

You are accordingly advised that the applicant you have inquired about may file such affidavit, and that thereupon he should be entitled to practice architecture in Pennsylvania under the title of "architect," but he may not use the title "registered architect."

Very truly yours,

STERLING G. McNEES,
Deputy Attorney General.

BLAIR COUNTY JUDICIAL ELECTION.

1. The Attorney-General will refuse to recommend the Governor the allowance of an election contest for a county judgeship based on the failure of the commissioners to provide guard-rails and so arrange the voting-places that none but authorized persons could come within six feet of the ballot-box, where there is no averment of fraud, and it is sought to discard the vote of twenty-eight districts, all of which were carried by the candidate returned as elected, without reference to other districts in which the same conditions admittedly prevailed.

2. The results of a failure of the commissioners to make proper arrangements at the polling-places cannot be corrected by throwing out only the districts carried by one candidate.

3. The candidate returned is not obliged, where such a petition is filed, to set forth in his answer the conditions of the districts carried by his opponent. The petition must be self-sustaining.

4. Where such a petition is presented to the Attorney-General, his duties are not merely ministerial. He must proceed by inquiry and satisfy himself of the facts before he makes any recommendation to the Governor.

Petition of electors of Blair County for contest of election of President Judge of the Court of Common Pleas. Before the Attorney-General.

IN RE PETITION OF ELECTORS OF NORTHUMBERLAND COUNTY FOR CONTEST OF ELECTION OF JUDGE OF COURT OF COMMON PLEAS. } Before the Attorney General.

This is a petition to the Attorney General asking that process may issue as provided by Act of Assembly, to decide whether Albert Lloyd, Esq. or Hon. Herbert W. Cummings, was elected Judge of the Court of Common Pleas of Northumberland County, at the election held the eighth of November, 1921.

The grounds of contest relate not only to the failure of the County Commissioners to arrange and equip the polling places as prescribed by law, but include charges of certain votes fraudulently cast and counted for Mr. Lloyd by persons who were not lawful voters and in number more than sufficient to change the result of the election. While the charges of fraudulent voting do not give the names of the persons thus voting, the averment of the number of votes so cast and the particular districts wherein they were cast is probably sufficient for the purpose of this petition.

Counsel for Mr. Lloyd have asked leave to file an answer, stating their belief than an answer can only be filed at this time, not after the summoning of a tribunal by the Governor. I think it could be filed later, but no harm can come of its being filed now and it has been received.

Counsel for Mr. Lloyd called attention to the fact that the petition was verified before Samuel Gubin, Notary Public, who is also one of the petitioners. Thereupon a petition of Mr. Gubin was presented, wherein he "asks leave to and does hereby withdraw his name as a petitioner," stating that he took the affidavit before signing as a petitioner and when there were seventy-four signers on the petition, and that he signed as a petitioner inadvertently. Assuming his statements to be true, and they are sworn to and not contradicted, it would not seem right to reject the petition because Mr. Gubin took the affidavit. However, I do not think I have any power to make any order with reference to his withdrawal from the petition. I will attach his petition to the original petition and the parties may make such future use of the matter as they find expedient.

I do not think the petition is defective in not giving the vote of candidates other than Judge Cummings and Mr. Lloyd in the districts involved. I think the petition sufficiently shows that the matters complained of would not affect the standing of any of the other candidates.

The only objection which seems serious to me is the objection to the form of the affidavit to the petition. I have some doubt whether the affidavit is sufficient. However, the law does not seem to be very clear and I would not feel justified in rejecting the petition upon a purely technical objection unless the question appeared to be free from doubt. When the trial Court has been convened this question can be raised again and the Court may see proper to dispose of it *in limine.*

The petition will be certified to the Governor as provided by law.

GEO. E. ALTER,
Attorney General.

December 28, 1921.

MISCELLANEOUS OPINIONS.

For the Year 1922.

PENNSYLVANIA STATE PARK AND HARBOR COMMISSION OF ERIE.

Act of May 27, 1921, P. L. 1180, Section 12.

An appropriation of $75,000 made to the Pennsylvania State Park and Harbor Commission of Erie upon condition that the City of Erie and others interested shall first provide "a like sum of $75,000," to be expended on the construction of roads, was vetoed by the Governor, and the amount appropriated reduced from $75,000 to $50,000.

While the Governor has the constitutional power to reduce a State appropriation, in every other particular, his power is limited to the approval or disapproval of the Act. He has no power to reduce the required contribution of $75,000 from the City of Erie and others interested.

Office of the Attorney General,
Harrisburg, Pa., January 11, 1922.

Mr. M. Liebel, Jr. President, Pennsylvania State Park and Harbor Commission of Erie, Erie, Pa.

Sir: I am advised that you desire a formal opinion upon the following question:

The Act approved May 27th, 1921, P. L. 1180, creating your Commission, provides for certain park and harbor improvements and concludes with the following section:

> "Section 12. The sum of seventy-five thousand dollars ($75,000) is hereby appropriated to the Pennsylvania State Park and Harbor Commission of Erie for the carrying out of the provisions of this act. Said appropriation is made, however, upon the condition that the city of Erie, the county of Erie, and citizens of Pennsylvania, or others interested, shall first have provided in the aggregate a like sum of seventy-five thousand dollars ($75,000), to be expended on the construction of a road or roads leading to and through this property. Proof that such sum has been paid or secured to be paid to the commission to be furnished to the Auditor General of Pennsylvania."

The Governor's approval is as follows:

> "Approved—The 27th day of May, A. D. 1921, in the sum of $50,000. I withhold my approval from the remainder of said appropriation because of insufficient State revenue."

The question is whether the reduction of the State appropriation from $75,000 to $50,000 causes a like reduction in the amount to be contributed from other sources.

In a letter hastily written to the Auditor General last July one of the Deputies of this Department expressed the opinion that the amount required to be contributed was reduced from $75,000 to $50,000. This was by reason of the description of the required contribution of $75,000 as "a like sum" with reference to the amount appropriated. Upon reflection, however, he is entirely in accord with the conclusion herein stated.

The amount to be contributed by the County and City of Erie and others for the purpose of road building was fixed by the Legislature at $75,000, and as that was likewise the amount of the appropriation the sum to be contributed was described as "a like sum." Nevertheless, it was the specific sum of $75,000.

There would be no apparent reason why the decrease in the appropriation for the improvement of the park and harbor should decrease the cost of roads leading to or through it, but, aside from that, there is a very plain reason why the required contribution must remain at $75,000. The Governor has the constitutional power to reduce a State appropriation. In every other particular his power is limited to the approval or disapproval of the Act submitted to him. In no other respect can he make any change. It follows, therefore, that the Governor did not reduce the required contribution of $75,000, because he had no power to do so. The appropriation of $50,000 by the Commonwealth will not become available until it has been proven to the Auditor General that provision has been made for the sum of $75,000 to be expended for road construction as provided in the Act.

Very truly yours,

GEO. E. ALTER,
Attorney General.

BATTLE MONUMENTS IN FRANCE.

Constitutional law—Constitution of United States, art. i, sect. 10, par. 3—Agreements between state and foreign country—Consent of Congress—Act of May 27, 1921—Soldiers' monuments.

1. Under the Act of May 27, 1921, P. L. 1173, the Commission created by the act has not authority to take title to lands in Belgium and France, but can only make agreements with those nations to secure permission for the State of Pennsylvania later to purchase suitable land at the places designated by the Commission for the erection of monuments.

2. Such agreements may be made without the consent of the Congress of the United States.

3. If the Commission should proceed further and undertake anything which might in any way affect the political influence or standing of the Commonwealth of Pennsylvania in its relation to the National Government, it will be necessary to have the consent of Congress.

Office of the Attorney General,
Harrisburg, Pa., January 13, 1922.

David J. Davis, Secretary, Commission to Investigate the Battlefields of France and Belgium and to Select Points for Monuments, etc., Scranton, Pa.

Sir: The Attorney General's Department is in receipt of your request for advice as to the extent of the authority of the Commission to Investigate the Battlefields of France and Belgium and to Select Points for Monuments, etc. as created by Act No. 432, 1921, with especial reference as to how title should be taken to any sites which you may select in France or Belgium for the erection of monuments and markers to commemorate the achievements of Pennsylvania Soldiers during the World War.

The main question divides itself into two parts: first, what sort of agreements did the Legislature authorize the Commission to make, and, second, will such agreements conflict with any prohibition in the Constitution of the United States.

In determining the questions in their order we should first consider the title to the Act, which reads as follows: "An Act constituting a commission to make an investigation of the battlefields of France and Belgium, and to select points for the erection of monuments and markers of appropriate design to commemorate the achievements of Pennsylvania soldiers during the World War; defining the powers and duties of the commission; and making an appropriation."

There is no intimation here that the Act might contain authority to purchase land in France or Belgium. According to the title the Com-

mission is authorized to select points for the erection of monuments, but any right to purchase which may be discovered in the body of the Act is not referred to in the title.

The first section of the Act under discussion reads as follows:

> "That in order to commemorate heroic achievements of the citizens of Pennsylvania who served on the battlefields of France and Belgium, and to perpetuate the memories of those who fell in the war against Germany and her allies, there shall be erected, at such points in France and Belgium as the commissioners hereinafter provided for shall designate, monuments and markers of suitable design and with proper inscription thereon to carry out the spirit and intent of this purpose."

This gives the Commission no authority to erect any monuments. It is apparent that their determination of the location is final but some other agency may be created for the actual construction.

Section 2 of the Act provides for the appointment of a Commission and Section 3 proceeds to set out its duties and powers. After directing the entire membership to proceed to the battle fields of France and Belgium and to ascertain the points where Pennsylvania Troops were engaged during the World War, the Commission is directed to determine the points where monuments and markers shall hereafter be erected. Following this is the paragraph which contains whatever authority there may be for the actual purchase of sites, which reads as follows:

> "The commission shall have power to enter into such agreements with the Governments of France and Belgium, either directly or through the Government of the United States, as may be necessary to secure permission for the erection of the monuments and markers at the points selected by the Commission."

By this paragraph the Commission may enter into such agreements as may be necessary to secure permission for the erection of the monuments. Any such agreement, however, should not involve the payment of money nor should it attempt to bind the Commonwealth to accept the sites agreed upon. It was the intention to be sure that the sites selected could be secured if they were later desired, and to that end the Commission should enter into agreements so that there could be no question about permission to erect monuments.

The last paragraph of Section 3 reads as follows:

> "The Commission shall make a complete report of its proceedings to the General Assembly of one thousand nine nine hundred and twenty-three, not later than the first

> Monday of February of that year, and, in such report, shall state the amount of money required to prepare the monuments and markers agreed upon by the commission and to provide for their erection at the points selected."

It is very noticeable that the Commission is not directed to report anything as to the cost of sites, but so far as cost is concerned, they are only to set forth "the amount of money required to prepare the monuments * * * and to provide for their erection at the point selected."

From a consideration of the whole act and the title, we have concluded that your Commission does not have power to take title to lands in France or Belgium and it is limited in the agreements it may make with those nations to such as secure permission for the Commonwealth to later purchase or otherwise acquire suitable land at the places designated by your Commission for the erection of monuments and markers.

The second question involves a construction of Article I, Section 10, paragraph 3, of the Constitution of the United States. This paragraph reads as follows:

> "No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

The Act creating your Commission provides in Section 3, paragraph 2, that "The Commission shall have power to enter into such agreements with the Governments of France and Belgium" as we have above discussed.

Are the agreements which you are herein authorized to make with the governments of France and Belgium, either directly or through the government of the United States, such agreements or compacts as are prohibited by the Constitution of the United States?

The language of the Constitution is very broad and inclusive. A literal interpretation of it would require the consent of Congress before any valid agreement or compact could be entered into by the Commonwealth of Pennsylvania with any other State of the Union or with any foreign country. The object of this prohibitory clause of the Constitution was to prevent a State from entering into agreements or compacts with other States or foreign powers which might be in conflict with some agreement which the United States had made (*Watson on the Constitution, 848*), or that would lead to the increase of the political power or influence of the States, or in any manner encroach upon the full and free exercise of federal authority in its relationship with other governments.

It is conceded that there is no valid legal objection to your Commismission carrying out the purposes of the Act creating it if the consent of Congress is secured. May you do so without this consent of Congress? We believe that, under the decisions of the Supreme Court of the United States, such agreements or compacts as you are authorized to make will not require the consent of Congress.

> "* * * The terms 'agreement' or 'compact' taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control.
>
> "There are many matters upon which different states may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter State might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that state to obtain the consent of Congress before it could contract with New York for the transportation of the exhibit through that state in that way. * * * If, then, the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?
>
> "We can only reply by looking at the object of the constitutional provison and construing the terms 'agreement' and 'compact' by reference to it. * * *
>
> "Looking at the clause in which the terms 'Compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States. * * *
>
> "Compacts or agreements—and we do not perceive any difference in the meaning except that the word 'compact' is generally used with reference to more formal and serious

> engagements than is usually implied in the term 'agreement'—cover all stipulations affecting the conduct or claims of the parties. * * * The compact or agreement will then be within the prohibition of the Constitution or without it, according as the establishment of the boundary line may lead or not to the increase of the political power or influence of the states affected, and thus encroach or not upon the full and free exercise of Federal authority. If the boundary established is so run as to cut off an importtant and valuable portion of a state, the political power of the state enlarged would be affected by the settlement of the boundary; and to an agreement for the running of such a boundary or rather for its adoption afterwards, the consent of Congress may well be required. * * *."
>
> *State of Virginia vs. State of Tennessee, 148 U. S. 542.*

It is not a new thing for Pennsylvania to enact laws providing for the erection of memorial tablets outside of its boundaries.

The Act of April 14, 1903, P. L. 174, provided for the erection of memorial tablets or monuments to mark the position, on the field of Antietam, of certain Pennsylvania commands. Part of this Act reads as follows:

> "That the Governor shall appoint three commissioners whose duty it shall be to act in conjunction with the representatives or committee from each of said commands for the purchase of ground when found necessary to do so, and in the selection of the site, design, material and inscription for the monument or tablet to mark the position of each command on the battlefield; that it shall be the further duty of the said commissioners to contract for the erection of each monument or tablet."

In construing this Act Attorney General Carson said:

> "It is apparent from this language that the Commissioners appointed by the Governor are clothed with the necessary power to make contracts for the purchase and erection of these monuments, and that the Survivors' Association is recognized only for the purpose of consultation on the design, place or location and other preliminary matter."

While it is true that the direct question here involved was not decided in that opinion, yet it could scarcely have been overlooked when the question was being considered.

By an Act of 1903, P. L. 415, $15,000 was appropriated "for the purchase of ground and erection of suitable monuments and memorial tablets to mark the position occupied in the line of entrenchments around the City of Vicksburg," etc. This Act also was interpreted by Attorney General Carson in determining whether or not the Commission might place one large monument or several small ones.

We have come to a conclusion that a reasonable exercise of the duties developing upon you as herein suggested will not be in conflict with Article I, Section 10, paragraph 3, of the Constitution of the United States. Were you to proceed beyond that point, however, and to undertake anything which could in any way affect the political influence or standing of the Commonwealth of Pennsylvania in its relation to the other States or the National Government, it would be necessary to have the consent of Congress.

Very truly yours,

STERLING G. McNEES,
Deputy Attorney General.

IN RE TAXES.

Land Sold to Commonwealth——Approval of Title——Delivery of Warrant——Deed to Commonwealth——Liability of Owner.

Where land was sold to the State and the title was approved in September, 1921, and requisition promptly made for the consideration, but the warrant was not received until the latter part of January, 1922, the owner was liable for any taxes assessed against the property for the year 1922. The owner of land sold to the State is liable for all taxes assessed against it up to the date of the actual delivery of the deed to the Commonwealth.

Office of the Attorney General,
Harrisburg, Pa., March 7, 1922.

Thomas J. Lynch, Esquire, Secretary of the Water Supply Commission, Harrisburg, Pa.

Sir: I received your letter of the 24th instant, asking for an opinion from this Department, when the title of a tract of land was approved by this Department in September, 1921, and requisition promptly made for the consideration, but the warrant was not received until the latter part of January, 1922, whether the vendor, in this case one Homer T. Bush, or the vendee, the Commonwealth of Pennsylvania, is liable for the taxes assessed for the year 1922.

The option agreement used in all the titles acquired by the Water Supply Commission contains this clause:

> "All taxes which may be levied upon the above described property up to the time of actual conveyance to the Commonwealth shall be paid by the vendor."

In this case, as in the other Pymatuning Reservoir purchases, the deed was delivered in escrow to the Merchants National Bank of Meadville, Pennsylvania, and in the receipt given by the Bank, it is expressly stated that "the said deed of conveyance and receipted voucher (are) to be held in escrow and delivered to the representative of the Commonwealth of Pennsylvania on payment of Twelve Thousand, two hundred and fifty dollars ($12,250.) consideration called for in said deed."

Under the above option and agreement, the question you ask depends upon the time of the actual conveyance, or delivery of the deed. Our Supreme Court has decided this question in the following case, where it was held:

> "When the future delivery depends upon the payment of money, or the performance of some other condition, it will be deemed in escrow, and in such case it will not be deemed the deed of the grantor until the second delivery." *Langdon vs. Brown, 160 Pa. 538.*

In accordance with the foregoing, you are therefore advised that the vendor, Homer T. Bush, is liable for all taxes that may be assessed on this land up and to the date of the actual delivery of his deed to the Commonwealth of Pennsylvania.

Very truly yours,

WILLIAM I. SWOOPE,
Deputy Attorney General.

INTERSTATE LIQUOR TRANSPORTATION.

Liquor laws—Transportation of liquor into State—Woner Act of May 5, 1921—Reed Amendment.

1. Under the Act of May 5, 1921, P. L. 407, Pennsylvania is a state "the laws of which prohibit the manufacture or sale therein of intoxicating liquor for beverage purposes" within the meaning of the Reed Amendment of the Volstead Act of Congress (U. S. Stat. vol. 39, page 1059).

2. A person moving his residence into this State, and attempting to bring liquor with him for beverage purposes, violates the laws of Pennsylvania.

Office of the Attorney General,
Harrisburg, Pa., May 1, 1922.

Rev. J. T. Davis, Federal Prohibition Director, Philadelphia, Pa.

Sir: I have received your letter of April 11, 1922, inquiring "whether the construction of the Pennsylvania State Law is such as to come

within the scope of the Reed Amendment (U. S. Stat. Vol. 39, p. 1069) and so as to prohibit the importation of liquor for beverage use, upon the permanent change of residence of the owner."

Attached to your inquiry is a copy of the Pro. Minn. No. 224, entitled "Issuance of Permits Form 14108 for Transportation in Interstate Commerce of Intoxicating Liquor for Beverage Use," which states that permits may be granted under Federal regulations for transportation of liquor for personal use into any state or territory excepting those states which come within the Reed Amendment.

The Reed Amendment provides, inter alia, as follows;

> "Whoever shall order, purchase or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacremental, medicinal, and mechanical purposes, into any State or Territory the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes, shall be punished as aforesaid."

The Woner Prohibition Enforcement Act of Pennsylvania (Act of May 5, 1921, P. L. 407) provides in Section 20 as follows:

> "That from and after the passage of this act, any person who shall manufacture, sell, offer for sale, furnish, transport, import, export, or possess any intoxicating liquor, within the State, for beverage purposes, except as hereinafter provided, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not less than one hundred dollars nor more than five thousand dollars, or undergo an imprisonment of not more than three years, or both, at the discretion of the court."

The phrase "except as hereinafter provided," as used in the above section, has reference only to the provisions of Section 22, which are as follows:

> "It shall not be unlawful to possess intoxicating liquor in one's private dwelling provided such liquor is for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein, which entertainment shall not be deemed an unlawful furnishing. The term 'private dwelling' shall be construed, not only in its ordinary sense, but also to include the room or rooms used and occupied, not transiently, but solely, as a residence, in an apartment house, hotel or boarding house."

These sections make it clear that Pennsylvania is a State, "the laws of which * * * prohibit the manufacture or sale therein of intoxicat-

ing liquor for beverage purposes," and which, therefore, falls squarely within the language of the Reed Amendment. The Woner Act thus operates with the Reed Amendment to prevent the importation of intoxicating liquor into this State for beverage purposes.

Whether the Reed Amendment will operate differently in States where the prohibition laws permit the transportation of liquor for personal use upon a permanent change of the owner's residence, is a question which depends upon the construction of that amendment and not of the State law, and as such is solely within the province of the Federal authorities. But this question cannot arise in relation to Pennsylvania for the Woner Act does not permit such transportation.

I accordingly advise you:

1. That Pennsylvania is a State "the laws of which * * * prohibit the manufacture or sale therein of intoxicating liquor for beverage purposes" within the language of the Reed Amendment.

2. There is no provision in the Woner Prohibition Enforcement Act of Pennsylvania permitting the transportation of liquor into the State for personal use upon the owner's change of residence. It is quite clear that any one moving his residence into the State and attempting to bring liquor with him, for beverage purposes, would be guilty of a violation of the law of the State.

Very truly yours,

GEO. E. ALTER,
Attorney General.

PUBLIC OFFICES AND OFFICERS.

Pennsylvania State College—Retirement of Employes—Acts of July 18, 1917, P. L. 1043, and May 24, 1923, P. L. 436.

The employes of Pennsylvania State College do not fall within the provisions of the Teachers' Retirement Act of 1917, but are State employes, and as such are subject to retirement under the provisions of the Act of 1923.

Office of the Attorney General,
Harrisburg, Pa., June 7, 1922.

Dr. John M. Thomas, President, State College, State College, Pa.

Sir: I have your inquiry as to whether or not the employes of State College come within the provisions of the Teachers' Retirement Act or the State Employes' Retirement Act.

We cannot construe State College as it now functions as a public school, nor indeed as a part of the public school system. For that reason we must exclude its employes from the benefits of the Teachers' Retirement Act. The law providing for retirement of the State employes does, however, include employes of all State-operated institutions.

> "The term 'State employe' as used in this act, shall mean all officers and employes of the executive and legislative branches of the State Government, including officers and employes of the Department of Public Instruction who at the time of retirement are not contributors to the State Teachers' Retirement Fund and entitled to retirement in accordance therewith. The term shall also apply to all officers and employes in penitentiaries, reformatories, and other institutions operated by the Commonwealth."

In view of the foregoing law I advise you that teachers and other employes at State College are eligible for retirement in the same manner as other State employes.

Very truly yours,

STERLING G. McNEES,
Deputy Attorney General.

IN RE MEDICAL ADVERTISING.

icense——Revoking——Plea of Guilty——Suspended Sentence——Conviction——Moral Turpitude——Act of 1919, P. L. 1084.

The State Bureau of Medical Education and Licensure exceeded its authority when it revoked the license of a practicing physician on the ground of illegal advertising under the Act of 1919, P. L. 1084, where the physician entered a plea of guilty but was never sentenced, sentence having been suspended; and further, as this Act relates merely to an offense mala prohibita and not mala per se does not involve moral turpitude.

Office of the Attorney General,
Harrisburg, Pa., June 26, 1922.

Dr. I. D. Metzger, President, Bureau of Medical Education and Licensure, 322 Aiken Avenue, Pittsburgh, Pa.

Sir: I have examined the papers which you have submitted in the case of Dr. W. H. Theel of Philadelphia, whose license was revoked on the grounds of his conviction of illegal advertising under the Act of 1919, P. L. 1064. Dr. Theel has raised the question as to your authority to revoke his license under the Act of 1911.

Examining the facts I find that Dr. William H. Theel plead guilty in the Court of Quarter Sessions of Philadelphia County to a charge of illegal advertising. He was never sentenced, however, and now raises the question that his plea of guilty was not such a conviction as would support your action unless completed by a sentence of the Court. He also maintains that a violation of the Advertising Act of 1919, P. L. 1084 is not an offense involving moral turpitude. In support of his first claim there are many authorities to the effect that a verdict of guilty by a jury which is popularly known as a conviction is not such a conviction as is contemplated by the law in this case.

> "With respect to some purposes and consequence the words 'convicted' and 'conviction' when used in a statute mean no more than the judicial ascertainment of guilt by verdict or plea. But 'no conviction' is complete until sentence is passed and recorded. County *v.* Holcomb, 36 Pa. 349, Lowrie, C. J. *'Therefore, when conviction is made the ground of some disability or special penalty a final and adjudication by judgment is essential.'* "
>
> *Commonwealth vs. Miller, 16 Penna. Superior Court 35.*

No sentence was ever imposed in the case under discussion. The record merely shows that sentence was suspended but does not show what the sentence actually was.

> "The word 'conviction' has a popular and a legal meaning. In common parlance, a verdit of guilty is said to be a conviction; Smith *v.* Commonwealth 14 S. & R. 69; Wilmoth *v.* Hensel, 131 Pa. 200; and this popular meaning has been given to it *when rights other than those of the one who has been found guilty have been before the courts* but not otherwise."
>
> *Commonwealth vs. McDermott, 224 Pa. 363.*

> "When the law speaks of conviction, it means judgment, and not merely a verdict, which, in common parlance, is called a conviction; Tilghman, C. J. in Smith *v.* Com., 14 S. & R. 69. 'When a conviction is made the ground of some disability or special penalty, a final adjudication by judgment is essential:' *Com. v. Miller, 6 Pa. Superior Ct. 35.*"

All penal statutes are to be strictly construed and particularly where a special penalty is prescribed.

> "*When Shields was sentenced* May 11, 1912 on the indictments charging him with embezzlement and perjury *he then became convicted* of this offense. *The returns of guilty by the jury did not convict him* in the legal sense of that term, but judgments on the verdicts did; Commonwealth *v.* Minnich, 250 Pa. 365; Commonwealth *v.* Vitale 250 Pa.

548. He thus came under the ban of the constitution, and during the period for which he is claiming salary he was incapable of holding any office of trust or profit in this Commonwealth."

Shields vs. Westmoreland County, 253 Pa. 271.

"A verdict of a jury without more is but the expression of the collective opinion of twelve men which concludes nothing, except as it is followed by a judgment; and then it is the judgment and not the verdict that marks the conclusion of the issue and gives it efficiency."

Commonwealth vs. Minnich, 250 *Pa. 362.*

There are other authorities holding that a person is not technically convicted until sentence is pronounced upon him which amounts to a judgment on the verdict of the jury. It has been held in People *v.* Fabian, 102 N. Y. 443—18 L. R. A. N. S. 684, that where a sentence is suspended and the direct consequences of fine and imprisonment are suspended or postponed temporarily or indefinitely, so also are the indirect consequences likewise postponed. In view of the fact that there was no sentence in this case I do not believe there was such a conviction as would sustain a revocation of a license to practice medicine.

I am very doubtful also if the misdemeanor of which Dr. Theel was convicted is one involving moral turpitude. It was made a misdemeanor by the Act of 1919 and does not appear to come within that class of cases which involve "anything done contrary to justice, honesty, principle or good morals." Violating any law may be said to be contrary to good morals, but generally speaking offenses merely mala prohibita and not mala per se do not involve moral turpitude.

Therefore, I am of the opinion, that the conviction of Dr. Theel was not such a legal conviction as would sustain a revocation his license and also that there is very grave doubt as to whether or not the crime itself of which he is alleged to have been convicted involved moral turpitude. Under all the circumstances it would seem that the Bureau has exceeded its authority in revoking this license. If such is the case it would appear to be just and proper that its action be stricken from the records at as early a date as possible as Dr. Theel is dependent upon his profession for a livelihood.

Very truly yours,

STERLING G. McNEES,
Deputy Attorney General

STATE INDUSTRIAL HOME FOR WOMEN, MUNCY.

The State Industrial Home for Women at Muncy cannot rent, for a monthly rental, farms adjacent to its property which are needed in the operation of the Home, and pay the rental therefor out of the appropriation made to it for "maintenance."

Office of the Attorney General,
Harrisburg, Pa., September 13, 1921.

Honorable Charles W. Sones, President, Board of Managers State Industrial Home for Women, Muncy, Pa.

Sir: This Department is in receipt of your communication of August 31, 1921, relative to the renting of certain farms adjacent to the property of the State Industrial Home for Women at Muncy. It appears that there are located on these farms, which contain about 115 acres, two houses and two barns, and that the Home is very much in need of one of these houses and one of these barns. It appears also that these farms can be rented for $125.00 a month.

You ask to be advised whether the Home can rent these farms with their said improvements and pay the rental therefor out of the appropriation made to it for "maintenance." After a very careful consideration of this matter by this Department the conclusion has been reached that this can not lawfully be done.

In an opinion rendered by Attorney General Hensel, and reported in 15 C. C. Reports 83, it was said:

> "There is nothing in the ordinary course of legislation on this subject, nor in the definition of terms by the lexicographers to expand the term 'maintenance' into enlargement, addition, improvement or construction. A fair and liberal construction of appropriations for maintenance would be to supply dilapidation, to arrest, prevent or remedy decay, to maintain or restore, to erect where destruction has taken place; * * * but * * * *original acquirement and improvement of real estate are not * * *comprehended within an appropriation for 'maintenance'.*"

The proposed leasing in this present case is not as I understand it, for the purpose of supplying some part of the property of the Home temporarily out of use or for the replacing of something outworn. It is obvious, therefore, that to thus acquire this property would result in an actual and substantial enlargement of and addition to the existing plant of the Institution during the term of the lease, and involving additional furnishing and upkeep. Under the rule as laid down in the above cited opinion this can not be done out of an appropriation for maintenance. We must presume that the Legislature in making the

appropriation to the Industrial Home for Women for the purpose of maintenance did so with the intent that it is to be used for the maintenance of the existing Institution. However advantageous this property in question would be for the Home, or favorable the terms upon which it may be obtained, any enlargement of the plant can only be effected through an appropriation expressly directed to such end.

You are, therefore, advised that the Industrial Home for Women can not rent the aforesaid property and pay the rental therefor out of the appropriation made to it for "maintenance."

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

DELAWARE RIVER BRIDGE JOINT COMMISSION.

Acts of May 27, 1921, No. 425A, and July 9, 1919, P. L. 814, Sections 1, 2 and 4.

The Commission may approve expenditures under the heading "superstructure" of the bridge for items entering into the construction of piers or abutments or otherwise included in the subdivision or term "substructure," in connection with the construction of the Delaware River Joint Bridge and in accordance with the provisions of the Acts referred to.

The Commission may properly approve vouchers for expenditures for office rent, furniture, supplies and technical engineering equipment necessarily employed in and about the work of the Commission in the construction of the bridge, and the acquisition and condemnation of property in connection therewith.

Office of the Attorney General,
Harrisburg, Pa., November 14, 1922.

Honorable Samuel S. Lewis, Auditor General, Harrisburg, Pa.

Sir: I beg to acknowledge receipt of your communication under date of October 31, 1922, requesting an opinion from the Attorney General in reference to certain incongruities appearing in the Act of Assembly, approved July 9, 1919, P. L. 814, creating the Delaware River Bridge Joint Commission and providing for the construction of a bridge over the Delaware River connecting the City of Philadelphia, in the State of Pennsylvania, and the City of Camden in the State of New Jersey.

In regard to your approval of expenditures incurred for work and materials furnished in connection with the so-called "substructure" of the Delaware River bridge, I beg to advise you as follows:

The Act of Assembly above referred to is described in its title as

> "An Act providing for the erection and construction * * * of a bridge over the Delaware River * * *, and providing for a Joint Commission for that purpose, etc."

Section 1 of the Act provides:

> "That the Commonwealth of Pennsylvania agrees to join therein on condition that the City of Philadelphia will bear one-half of the cost of the land and approaches on the Pennsylvania side and share equally with the Commonwealth of Pennsylvania in the one-half cost of the *superstructure* of said bridge, it being the intention of this act that the Commonwealth of Pennsylvania and the City of Philadelphia shall contribute as their share of said bridge the cost of the land and approaches on the Pennsylvania side and one-half of the cost of the *superstructure* of the bridge."

Section 2 of the Act proceeds to define the terms "bridge," "approaches," "superstructure" and "substructure" as follows:

> "The word 'bridge' whenever used in this act, shall include the actual bridge between the shore lines of the river and the approaches thereto, including the substructures and superstructures of both. The word 'approaches,' whenever used in this act, shall be construed to mean all that portion of the bridge extending from the beginning of the approach to the furthermost abutment of the bridge on the same side of the river, but not to include such abutment. *The word 'superstructure,' whenever used in this act, shall be construed to mean all that portion of the bridge between the approaches.* The term 'substructure,' whenever used in this act, shall include all that portion of the bridge not included within the meaning of the definition of superstructure or the approaches, and shall include the piers and abutments."

For the purpose of defining the method of sharing the cost of the acquisition of property for the approaches to the bridge, and the construction thereof, (Section 1 of the Act) the whole bridge structure is divided into two main sub-divisions, viz: "The land and approaches" and the "superstructure." No other sub-divisions are indicated in Section 1 of the Act as a basis of providing for the sharing in the cost of construction of the bridge between the States of New Jersey and Pennsylvania, and the City of Philadelphia.

In Section 2 the "approaches" are defined in effect to include all that portion of the bridge on the landward side of the "abutments," but not to include such abutments; and the *superstructure* * * * shall be construed to mean *all that portion of the bridge between the approaches.*"

It would, therefore, appear that it was the legislative intent to employ the terms "approaches" and "superstructure" in an inclusive and comprehensive way as descriptive of the whole bridge structure, irrespective of any further divisions or sub-divisions otherwise described or referred to in this Act, such as "substructure," "piers" or "abutments."

The legislative intent is further indicated in Section 4 of the act on page 817, where it is provided that

> "Such Joint Commission shall not proceed to exercise or carry out any authority or power herein or hereby given until the State of New Jersey, by appropriate legislation shall first have vested like powers herewith in said Joint commission, and beyond the extent to which the State of New Jersey shall have appropriated or made available to the said joint commission the moneys hereinbefore stipulated as the share of that State for providing the cost of acquiring the land for the approaches to and for the erection and construction of the approaches and the *superstructure* of said bridge."

If this were not the palpable legislative intent no bridge whatever could be built under the provisions of the act referred to. The fact that the act, in Section 2 thereof, separately defines the term "substructure (to) include that portion of the bridge not included within the meaning of the definition of superstructure and approaches," and that same "shall include the piers and abutments,"—presents incongruities in the wording of the act which require us to examine and consider the context of the whole act, as well as its title, and to analyze its purpose, in order to ascertain the palpable intent of the legislature in regard to the building of the bridge and providing for the cost thereof.

The title provides for the "erection and construction" of a bridge, and creates a commission for that purpose. Section 4 describes in general terms the very broad and comprehensive powers vested in the commission to enable it to construct a bridge, and after enumerating its general powers, further provides:

> "and said joint commission is hereby authorized and empowered, and it shall be its duty, to do and perform all acts and things whatsoever necessary for the carrying out of the provisions of this act."

The sub-division or term "substructure" including "piers and abutments," is nowhere used in the act as a separate basis for computing the share of the cost of construction between the States of Pennsylvania and New Jersey and the City of Philadelphia. Only the terms "land and approaches" and "superstructure" are used in this connection.

We are, therefore, of the opinion that the term "substructure" may be regarded as a mere descriptive expression, subordinate to and included in the major division of the bridge designated as the "superstructure."

Certain well established principles of law employed in the interpretation of statutes are here applicable. Some of these principles supported by innumerable authorities are briefly enumerated in Vale's Pennsylvania Digest, Col. 24, 831, et seq., as follows: Statutes are to be so construed as to best effectuate the intention of the legislature, though such construction may be arbitrary to the letter.

Where the language of the statute is ambiguous, that is, susceptible of two interpretations, the courts will place that interpretation upon the statute as will effectuate the intention of the Legislature.

The Legislative intent should be ascertained by construing a statute or act as a whole, that is, by reading the different parts of the act together.

A statute should be construed so as to harmonize all of its parts, if possible. Incongruities must be so construed as to harmonize the general intent of the whole act.

The construction will not be based upon any part of the act or section standing alone.

A technical interpretation of a single part will not be allowed to affect a simple construction of the whole act.

In a doubtful case a word or phrase will be construed to agree with the subject matter, the intent and the meaning of the act, its broadest meaning being thus curtailed, or its otherwise absurd interpretation being thus avoided.

Where a plain clerical error presents a palpable absurdity the court may correct the error if it can do so without doing violence to the clear intent of the Legislature.

Where possible to do so, the court will so construe an act that it will not be impossible or unreasonable. It is the presumption that the legislature intended that the statute, and the entire statute should be effective and certain, and where possible, such a construction should be given as will carry out this purpose.

Under the Constitution of 1874 the title is an important guide in the construction and interpretation of a statute.

A grant of power implies everything to make it effective.

It would, therefore, appear by application of the foregoing rules of construction that it would be proper for you to approve expenditures under the heading "superstructure" of the bridge for items entering into the construction of the piers or abutments or otherwise included in the sub-division or term "substructure," in connection with the con-

struction of the Delaware River Bridge, in the manner and according to the proportions provided by the Act of Assembly above referred to, and the subsequent act No. 425A, approved May 27, 1921, making an appropriation therefor, it being palpable that the legislature intended that the term "superstructure" should include and comprehend all that portion of the whole bridge structure, exclusive of the "approaches" as defined by the Act of Assembly.

2. In regard to your further inquiry as to whether under the Act of Assembly above referred to you may properly approve vouchers for expenditures for such items as office rent, furniture, supplies and technical engineering equipment necessarily employed in and about the carrying on the work of the Delaware River Bridge Joint Commission in the construction of the bridge, and the acquisition and condemnation of property in connection therewith, I beg to advise you that in my opinion it is lawful and proper for you to approve such expenditures. Section 4 of the act above referred to creating the Delaware River Bridge Joint Commission and defining its duties and powers, provides, inter alia,

> "That the said joint commission is hereby authorized and empowered, and it shall be its duty, to do and perform all acts and things whatsoever necessary for the carrying out of this act."

To authorize the employment of clerks and stenographers without providing stationery, desks or typewriters, and without providing places in which to work would not be carrying out the purposes and provisions of the act; and so would it be in the employment of draftsmen, engineers, etc., without providing them with technical equipment necessary to perform their duties. All such items are "necessary for the carrying out of the provisions of the act," authorizing and directing the building of the bridge, and such expenditures when duly and properly authorized by the Delaware River Bridge Joint Commission should be approved by you as Auditor General.

Very truly yours,

FRED TAYLOR PUSEY,
Deputy Attorney General.

PENNSYLVANIA VILLAGE FOR FEEBLE-MINDED WOMEN, AT LAURELTON.

Rate of compensation for architect who has prepared plans for the storehouse building connected with that institution—Act of July 16, 1919, Appropriation Acts, p. 106.

The architect who prepared plans for the construction of a laundry, sewage disposal plant and storehouse was to receive as compensation, under his contract, "three per cent of the amount of the construction contracts as the same are executed and delivered, and the remaining two per cent. when the buildings are completed and ready for occupancy." The laundry and sewage disposal plant were erected and completed, but owing to lack of funds available from the appropriation the storehouse was not erected. Plans and specifications were prepared, bids advertised for, but no contract let for the latter.

The Board of Trustees of that institution should determine what the architect is fairly entitled to for the services actually rendered in connection with the plans prepared for the storehouse, and payment should be made accordingly.

Office of the Attorney General,
Harrisburg, Pa., November 29, 1922.

Philip B. Linn, Esq., Treasurer, Pennsylvania Village for Feeble-minded Women, Lewisburg, Pa.

Sir: There was duly received your communication of the 22d inst., to the Attorney General, relative to the claim of Mr. George S. Idell for compensation as Architect in the case hereinafter stated.

The Appropriation Act (No. 61-A) of July 16, 1919, Appropriation Acts of 1919, page 106, appropriated, inter alia, to the Pennsylvania Village for Feeble-minded Women, at Laurelton, Pa., the sum of $80,000, or so much thereof as may be necessary "for the construction of a power-house, laundry, store-house, cottage, and sewage disposal plant, and for the purchase and installation of furnishings and equipment." Pursuant thereto the said Institution under a contract in writing, dated November 14, 1919, employed the said George S. Idell as Architect to prepare plans for, and supervise the construction of, the buildings to be erected out of the appropriation as made by the above mentioned Act. This contract stipulated that the said Architect was to receive as compensation for his services—

> "The sum of five per cent. (5%) of the total cost of said buildings and fixtures, as follows:
>
> "Three per cent. (3%) of the amount of the construction contracts as the same are executed and delivered, and the remaining two per cent. (2%) when the buildings are completed and ready for occupancy."

The Architect prepared plans for a laundry, a sewage disposal plant and a storehouse. The laundry and sewage disposal plant were con-

tracted for and erected, but, owing to lack of funds available from said appropriation, the storehouse was not erected, the lowest bid, as I understand, therefor, being $8,927. The Architect claims that he is entitled to compensation for the preparation of the plans for the storehouse building at the rate of three per cent. on the lowest bid for the same.

A similar case was ruled upon by this Department in an opinion rendered by Deputy Attorney General (now Judge) Hargest to the Superintendent of the State Institution at Pennhurst, dated October 29, 1918, Attorney General's Reports 1917-1918, page 669. In that case the Architect was to receive—

> "One per cent. on the estimated cost of the work involved by preliminary drawings, when such drawings have been approved by said party of the first part; two per cent. on the amount of each contract when awarded; and the balance, two per cent., to be paid upon the estimated value of the work shown in certificates made to the contractor during the progress of the work when and as the same are made to the said contractor."

Plans and specifications were prepared, bids advertised for, but no contract let. It was plain that the Architect there was entitled to the one per cent. under the terms of the contract, the question being whether he should receive an additional two per cent. It was ruled that inasmuch as the letting of the contract was within the control of the Board and it had not been let, he was not entitled to the specific sum of two per cent. on the amount of the lowest bid. It was further held, however that he—

> "Performed much more work than was intended to be covered by the 1% already paid to him. For this additional work he should be compensated upon a *quantum meruit*. Having performed his part of the contract as far as he was permitted to go, and having been prevented from completing it by the act of the Board of Trustees, he is entitled to be paid a reasonable compensation for the work done."

It was further ruled that the Board should determine what, in its opinion, would be fair compensation for the work performed and the Architect so paid.

The principle there stated and followed applies here. While under the literal terms of the contract the Architect was to be paid three per cent. "of the amount of the construction contracts as the same are executed and delivered," and no such contracts were made in the case of the storehouse, it would be unconscionable not to pay the Architect

for what he actually did. As said in the above cited opinion, three per cent. of the amount of the lowest bid might be reasonable compensation. It is for the Board, however, to ascertain and determine what the Architect is fairly entitled to for the services actually rendered in connection with the plans for the storehouse, and payment should be made accordingly.

Very truly yours,

EMERSON COLLINS,
Deputy Attorney General.

SEAL ON TOWNSHIP BONDS.

Townships—Issue of bonds—Seal—Legality of issue.

1. Townships are quasi-municipal corporations, and as such must act in a corporate way.

2. Bonds issued by township supervisors must be under the seal of the township.

3. Where a department of the State has agreed to purchase township bonds as an investment for funds in its hands, and has notice that the seal of the township had not been affixed to the bonds, it should require the seal to be affixed before accepting the bonds.

Office of the Attorney General,
Harrisburg, Pa., December 5, 1922.

Mr. H. H. Baish, Secretary to the State Retirement Board, Harrisburg, Pa.

Sir: Your letter of November 23rd, relative to the purchase of $15,000 of Pike Township, Clearfield County, Pennsylvania, road bonds, the said bonds having no seal attached to them, has been received. Townships, while not strictly corporations, are quasi corporations. The statutes confer upon them all the powers they possess, prescribe all the duties, and impose all liabilities to which they are subject, being such quasi municipal corporations they must act in a corporate way. *Shronk vs. Penn Township, 3 Rawle 347*; *Union Township vs. Gibboney, 94 Pa. 534.*

One of the powers of the Township Supervisors, under the Acts of Assembly, is to issue interest bearing bonds, but this must be done by the Supervisors in their official capacity, and all requirements must be complied with in order to make their act legal and binding. Is, therefore an issue of bonds by Township Supervisors without the seal of the Township attached to the bonds a legal issue?

> "Its (the seal) adoption and use by corporations, however, arose out of their nature and constitution being invisible, intangible bodies composed of an aggregation of individuals, who must speak at least in weighty matters, through a common seal. It was accordingly held that the affixing of the seal and that alone united the several assents of the individuals who composed the corporation and gave expression to the act as the assent of the whole, and that a corporation could enter into no contract of importance except under seal." *Garret vs. Bellmont Land Co. 29 Southwestern 726.*
>
> "One of the incidents of a corporation which and tacitly annexed at the time of its creation is to have and use a seal." *7 American and English Enc. of Law 690.*
>
> "The term 'bond' ex vi termini imports a sealed instrument, and as a general rule, independent of any statute providing otherwise, sealing is necessary to constitute a perfect bond." *5 Cyc. of Law and Procedure 736.*

Dillon on municipal corporations Vol. 2, 5th Ed. Section 889, page 1375 states:

> "The word 'bond' imports a seal, and the word, when used in a statute authorizing the issue by a municipal corporation of written obligations negotiable in character means specialties or writings under seal. But the absence of a seal will not affect the validity of the instruments if they were intended by the officers to be bonds and the statute so denominates the securities to be issued."

In support of this the author cites *Rondot vs. Rogers Township, 99 Federal 202*; *Draper vs. town of Springport, 104 U. S. 501*; and *Bernards Township vs. Stebbins, 109 U. S. 341.* All these cases, however, are where bonds or the coupons from them have come into the possession of innocent holders and the corporation issuing said bonds have resisted payment and consequently suit has been brought to enforce the obligation.

These cases present a state of facts entirely different from buying bonds without a seal, knowing at the time of buying, that the seal was not affixed. The seal is that which makes an instrument a deed or specialty and gives the authority to those signing, and it is by the use of the seal that artificial bodies speak and evidence their acts.

In view of the fact that the State School Employes' Retirement Board has only agreed to purchase bonds and is informed that the seal of the Township has not been affixed to the bonds, I am of the opinion, that

the Supervisors of Pike Township should be required to procure a seal and with it seal the bonds in order that no question can be raised as to their legality. This would be a simple and inexpensive matter to attend to.

Very truly yours,

J. W. BROWN,
Deputy Attorney General.

STATE BOARD FOR REGISTRATION OF PROFESSIONAL ENGINEERS AND OF LAND SURVEYORS.

Board of Commissioners of Public Grounds and Buildings—Authority to supply furniture and office equipment for use of the Board for Registration of Professional Engineers and of Land Surveyors, and to advertise for bids for equipment for the last mentioned Board and to award contracts therefor—From what funds payable.

Act of May 25, 1921, P. L. 1131, Sections 10 and 12.

The Board of Public Grounds and Buildings may not purchase or furnish furniture and office equipment for the use of the State Board for Registration of Professional Engineers and of Land Surveyors and pay for same out of the "Engineers' Fund."

The Board may not furnish or purchase the quarters, furniture and supplies classified in Section 10 of the Act and pay for the same out of the "Engineers' Fund."

The State Board for Registration of Professional Engineers and of Land Surveyors may incur expense for its secretary and clerical or other assistants, and other items necessary for the use and proper functioning of the Board, to be paid from the "Engineers' Fund" on proper voucher; excepting, however, the items which are to be furnished by the Board of Commissioners of Public Grounds and Buildings.

Office of the Attorney General,
Harrisburg, Pa., December 27, 1922.

Mr. Richard L. Humphrey, Chairman, State Board for Registration of Professional Engineers and of Land Surveyors, 805 Harrison Building, Philadelphia, Pa.

Sir: Receipt is acknowledged of your communication of December 16th., inquiring—

First,—Whether the Board of Commissioners of Public Grounds and Buildings has authority to make purchases of furniture and office equipment for use of the Board for Registration of Professional Engineers and of Land Surveyors, paying for same out of the "Engineers' Fund" by warrant of the Auditor General upon the State Treasurer, upon itemized voucher approved by the Chairman and attested by the Secretary of said Board?

Second,—Is it lawful for the Board of Commissioners of Public Grounds and Buildings to advertise for bids for equipment for the Board for Registration of Professional Engineers and of Land Surveyors, and and to award a contract therefor and pay for same out of the "Engineers' Fund"?

Section 10 of the Act of Assembly approved May 25, 1921, P. L. 1131, creating and defining the duties and powers of the Board for Registration of Professional Engineers and of Land Surveyors, provides in Section 10 thereof, as follows:

> "The Board of Commissioners of Public Grounds and Buildings shall furnish the board with suitable quarters in the city of Harrisburg, and shall also furnish to said board, upon requisition, all furniture, books, papers, supplies, et cetera, which may be necessary for the transaction of its business. All printing required by the board shall be furnished by the State Printer, upon requisitions of the chairman of the board upon the Superintendent of Public Printing and Binding."

Section 12 of the Act provides:

> "The secretary of the board shall receive and account for all moneys derived under the provisions of this act, and shall pay the same monthly to the State Treasurer, who shall keep such moneys in a separate fund, to be known as the 'Engineers' Fund.' Such fund shall be kept separate and apart from all other moneys in the treasury, and shall be paid out only by warrant of the Auditor General upon the State Treasurer, upon itemized vouchers approved by the chairman and attested by the secretary of the board. All moneys in the 'Engineers' Fund' from time to time are hereby specifically appropriated for the use of the board. The secretary of the board shall give a surety bond to this Commonwealth in such sum as the board may determine. The premium on said bond shall be regarded as a proper and necessary expense of the board, and shall be paid out of the 'Engineers' Fund.' The secretary of the board shall receive such salary as the board shall determine. The board may employ such clerical or other assistants as are necessary for the proper performance of its work."

The language of Section 10 imposes certain specific duties upon the Board of Commissioners of Public Grounds and Buildings, which includes the duty to furnish quarters, furniture and supplies to your Board. This specific provision of the Act, therefore, precludes the idea that your Board may disregard the requirements of the Act and make purchases of furniture and office equipment and provide quarters for your Board, paying for same out of the "Engineers' Fund," upon warrant of the Auditor General upon the State Treasurer, upon vouchers submitted by your Board in the manner prescribed in Section 12.

It is a general rule of statutory construction that specific provisions relating to a particular subject in an Act govern as against general provisions in the same act. *Kolb vs. Church, 18 Super. Ct. 477.*

And the specific enumeration of one thing or person of a class excludes from consideration others in the same class. *Vale's Digest, Vol. VIII, Column 24852,* and cases cited.

I am of the opinion that the specific enumeration of things which the Board of Commissioners of Public Grounds and Buildings are to do and furnish, as provided in Section 10 of the Act, excludes from consideration the idea that your Board may purchase or furnish the items mentioned in Section 10 under the general provisions in Section 12, and pay for same out of the "Engineers' Fund."

With respect to your second query, I beg to advise you that in my opinion the Board of Commissioners of Public Grounds and Buildings may not furnish or purchase the quarters, furniture and supplies, etc. classified in Section 10 of the Act, and provide for payment thereof from the "Engineers' Fund."

While the Act imposes upon the Board of Commissioners of Public Grounds and Buildings the duty of furnishing the quarters, furniture and supplies mentioned, it does not direct or authorize payment therefor by your Board, or otherwise, to be made from the "Engineers' Fund." The Board of Commissioners of Public Grounds and Buildings receives appropriations from the Legislature for the purpose of carrying out the contracts and obligations and making the purchases imposed upon it by law.

Although Section 12 of the Act specifically appropriates the "Engineers' Fund," for the use of the Board (Registration of Professional Engineers and of Land Surveyors), it cannot by these general words avoid the specific provision in Section 10 that the "Board of Commissioners of Public Grounds and Buildings shall furnish * * * quarters * * * furniture * * * supplies, etc.," which may be necessary for the transaction of the business of your Board.

I am of the opinion that your Board may incur expense for its secretary and clerical or other assistants, and other items necessary for the use and proper functioning of your Board, to be paid from the "Engineers' Fund" on proper voucher—but excepting, however, those items specifically mentioned as above, which are to be furnished by the Board of Commissioners of Public Grounds and Buildings.

Very truly yours,

FRED TAYLOR PUSEY,
Deputy Attorney General.

STATE BOARD FOR REGISTRATION OF PROFESSIONAL ENGINEERS AND LAND SURVEYORS.

Seals required for use of registrants—Form therof—By whom furnished—Act of May 25, 1921, P. L. 1131, Sections 17 and 27.

The Board is not required to provide seals. They must be provided by the registrant, and the design thereof may be submitted to and approved by the Board.

Where the Board shall have issued a certificate of registration to a registrant duly qualified as a Professional Engineer and Land Surveyor, such registrant may obtain for his use as such a single seal of a design authorized by the Board, with the legend "Registered Professional Engineer and Land Surveyor." It is unnecessary for the registrant to obtain two separate seals.

Office of the Attorney General,
Harrisburg, Pa., December 27, 1922.

Mr. Richard L. Humphrey, Chairman, State Board for Registration of Professional Engineers and of Land Surveyors, 805 Harrison Building, Philadelphia, Pa.

Sir: Receipt is acknowledged of your communication of December 9, 1922, inquiring, first,—whether your Board must furnish the "seals" required for use of registrants as Professional Engineers or Land Surveyors registered by your Board, and second,—whether or not it would be proper for your Board to authorize a seal as a "Registered Professional Engineer and Land Surveyor," where your Board has duly issued a certificate of registration to the same person, qualifying him to act both as a Professional Engineer and as a Land Surveyor.

Section 17 of the Act of May 25, 1921, P. L. 1131, creating your Board, provides:

> "The board, upon application on the form prescribed by it, and upon the payment of a fee of twenty dollars, except where the applicant applies for a certificate to practice both as a professional engineer and as a land surveyor, when the fee shall be thirty dollars, and except as hereinafter provided, shall issue a certificate of registration to act as a professional engineer or as a land surveyor, or as both, to the following person, to wit: * * *"

Section 27 of the Act provides:

> "The issuance of a certificate of registration by the board shall be evidence that the person named therein is entitled to all the rights and privileges of a registered professional engineer or registered land surveyor while the said certificate remains unrevoked or unexpired.
>
> "Each registrant hereunder shall, upon registration, obtain a seal of the design authorized by the board, bearing the registrant's name and the legend 'Registered Professional Engineer' or 'Registered Land Surveyor'."

It will be noted that the registrant shall upon registration obtain a seal of the design authorized by the Board, but nowhere in the Act is the authority extended to, or imposed upon your Board to obtain or provide these seals.

Therefore, in answer to your first query, I beg to advise you that your Board is not required to provide the seals, but the registrant is to "obtain" the same, and this may be done in substantially the same manner as a notary public now obtains his official seal, that is, by procuring it from some manufacturer or dealer in seals of this character, who can readily have the design thereof submitted to and approved by your Board.

Secondly,—As to your second query,—the Act of Assembly evidently contemplates that you may register the same person, if duly qualified, as a "Professional Engineer *and* Land Surveyor," as indicated in the language used in Section 17, and for such dual registration a single certificate may be issued, for which a single fee is charged.

The Act also provides that each registrant shall obtain a seal bearing the registrant's name and the legend,—"Registered Professional Engineer," or "Registered Land Surveyor." The question may then be asked can the word "or" be interpreted in this instance to mean or include "and"?

In an opinion of Honorable William H. Keller, Deputy Attorney General, dated October 27, 1915 (Opinions of Attorney General, 1915-1916, page 349), the use and interpretation of the word "or" in a statute was discussed, and Judge Keller held it might be interpreted as meaning "and" to make the legislative intent in the statute in question, clear and understandable.

In *Sutherland on Statutory Construction, Sec. 252*, it is said:

> "The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context."

The word "or" has been read "and" in the following cases:

Foster vs. The Commonwealth, 8 W. & S. 77;
Gibson vs. Tyson, 5 Watts, 34;
Murry vs. Keyes, 35 Pa. 384;
Shoffstall vs. Powell, 1 Grant, 19;
Toomey vs. Hughes, 25 W. N. C. 66.

I am, therefore, of the opinion that in the present instance the word "or" may be interpreted to include "and," and that where you have duly issued a certificate of registration to a registrant duly qualified as a Professional Engineer and Land Surveyor, such registrant may obtain for his use as such, a seal of a design authorized by your Board, with the legend—"Registered Professional Engineer and Land Surveyor," and that it is unnecessary for such registrant to obtain two separate seals, one bearing the legend—"Registered Professional Engineer" and the other "Registered Land Surveyor."

Very truly yours,

FRED TAYLOR PUSEY,

Deputy Attorney General.

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